

UNITED STATES OF AMERICA 79 FERC 61,152
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Elizabeth Anne Moler, Chair;
Vicky A. Bailey, James J. Hoecker,
William L. Massey, and Donald F.

Santa, Jr.

H.Q. Energy Services (U.S.) Inc.) Docket No. ER97-851-000

ORDER DIRECTING FURTHER INFORMATION AND ANALYSIS AND
DEFERRING ACTION ON MARKET-BASED RATES

(Issued May 9, 1997)

(H.Q. In this proceeding H.Q. Energy Services (U.S.) Inc.
Energy), a wholly-owned subsidiary of Hydro-Quebec, applied
to the Commission for market-based rate authority. As
discussed below, the Commission does not have sufficient information
to complete its analysis of H.Q. Energy's request. We find
that H.Q. Energy has satisfied all but one of the Commission's
requirements for market-based rates. However, we are unable
to conclude at this time that H.Q. Energy has demonstrated that
Hydro-Quebec, its Canadian utility affiliate, lacks
generation market power. Accordingly, we will defer action on H.Q.
Energy's request for market-based rates and direct H.Q. Energy to
provide further information and analysis concerning generation
market power consistent with the Commission's guidance in New York
State

Electric & Gas Corporation, 78 FERC 61,309 (1997) (NYSEG), which was issued after H.Q. Energy completed its application.

Background

On December 18, 1996, as amended on December 19, H.Q. Energy filed an application (December Application) to sell power at market-based rates. On March 11, 1997, H.Q. Energy filed a supplemental petition (March Supplement), which substantially amends its December Application in response to the Commission's decision in British Columbia Power Exchange Corporation, 78 FERC 61,024 (1997) (Powerex).

According to its application, H.Q. Energy is a wholly-owned subsidiary, incorporated in the State of Delaware, of Hydro-Quebec, the utility for the Canadian province of Quebec. After Commission approval of its application for market-based rates, H.Q. Energy intends to engage in various wholesale power marketing activities in the United States. H.Q. Energy does not own any electric generation or transmission facilities, and none of its affiliates owns any generation or transmission facilities that are located in the United States. H.Q. Energy's application includes a proposed code of conduct that H.Q. Energy suggests is

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consistent with the standards established by the Commission in the OASIS Rule. 1/

H.Q. Energy's March Supplement includes revised transmission tariffs for Hydro-Quebec and its affiliate Cedar Rapids Transmission Company Ltd. (Cedar Rapids). 2/ H.Q. Energy also discusses changes in the Quebec regulatory regime. In legislation entitled An Act respecting the Regie de l'energie (Regie Act), the Province of Quebec created a new regulatory body, the Regie, with functions, powers and procedures similar to those of this Commission.

Other salient aspects of H.Q. Energy's application, including the transmission tariffs proposed for its transmission-owning utility affiliate, its generation market power study and its proposed code of conduct, are described in further detail below.

Notices of H.Q. Energy's filings were published in the Federal Register, 3/ with comments, protests and motions to intervene due on or before March 27, 1997.

In response to H.Q. Energy's December Application, Enron Power Marketing, Inc. (Enron) filed a timely motion to intervene and protest on January 3, 1997, raising no substantive issues.

On January 15, 1997, the following entities timely filed the following pleadings: Niagara Mohawk Power Company (Niagara

1/ Open Access Same-Time Information System (formerly Real-Time Information Networks) and Standards of Conduct, Order No. 889, 61 Fed. Reg. 21,737 (1996), FERC Stats. & Regs. 31,035 (1996), order on reh'g, Order No. 889-A, 62 Fed. Reg. 12,484 (1997), FERC Stats. & Regs. 31,049 (1997), reh'g pending (OASIS Rule).

2/ H.Q. Energy explains that Cedar Rapids owns and operates transmission facilities in Quebec and in the

Province of Ontario. For convenience of reference, we generally will refer to Cedar Rapids and Hydro-Quebec collectively as Hydro-Quebec when discussing the transmission tariffs and transmission market power issues.

Comments, / 62 Fed. Reg. 1112, 62 Fed. Reg. 13,605 (1997).
1997. As protests and motions to intervene in response to H.Q. Energy's December Application were due January 15, that noted below, several intervenors filed pleadings after responses date but before March 27, 1997, the deadline for pleadings to the March Supplement. As a result, all such are timely filed.

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intervene; Mohawk), motion to intervene and protest; Plum Street Energy Marketing, Inc. (Plum Street), motion to intervene; New York State Electric & Gas Corporation (NYSEG), motion to intervene; Newfoundland and Labrador Hydro (Newfoundland Hydro), motion to intervene; Electric Clearinghouse, Inc., motion to intervene and protest; and Enron, protest. Those interventions of Plum Street, NYSEG and Newfoundland Hydro raise no substantive issues.

following Also in response to the December Application, the following entities filed the following pleadings on the specified dates: 4/ the Grand Council of Crees and the New England Coalition for Energy Efficiency and the Environment (collectively, the Crees), motion for extension of time to file comments and

intervention,
Authority filed January 21, 1997; Vermont Public Power Supply
22, (Vermont Public Power), motion to intervene, filed January
1997; TransCanada Energy Limited, motion to intervene, filed
filed January 24, 1997; Indeck Capital, Inc. and Indeck Energy
1997; Services, Inc. (collectively, Indeck), motion to intervene,
1997; January 30, 1997; Central Vermont Public Service Corporation
1997; (Central Vermont), motion to intervene, filed January 31,
and The Utility-Trade Corp. (Utility-Trade), motion to
intervene,
5/ filed February 4, 1997. Those interventions of Indeck,
Central Vermont and Utility-Trade raise no substantive
issues. 6/

Some of the issues raised by intervenors in their
responses
to the December Application were rendered moot by
modifications
included in the March Supplement. We will not address such
connection issues or further describe intervenors arguments in
therewith.

4/ See supra note 2 regarding the timeliness of these
pleadings.

5/ Utility-Trade styled its pleading a notice of
intervention.
Under the Commission s Rules of Practice and Procedure,
however, only the Secretary of Energy and state
commissions
are permitted to file notices of intervention to
achieve
intervenor status. See 18 C.F.R. 385.214(a) (1996).
Accordingly, we will regard Utility-Trade s pleading as
a
motion to intervene.

6/ In a letter filed January 17, 1997, H.Q. Energy
requested
that the Commission defer action on the December
Application, pending the anticipated legislative action
in
the Province of Quebec and possible amendment of the
application. In addition to the above-listed

pleadings, the
filing
December
the
Crees filed, on February 24, 1997, a motion to delay
additional pleadings until H.Q. Energy amended the
Application. The new comment period established after
March Supplement renders the Crees motion moot.

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following
specified
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1997;
issues,
In response to H.Q. Energy s March Supplement, the
entities timely filed the following pleadings on the
dates: the Crees, motion to file additional pleadings and
comments, filed March 21, 1997; Mouvement Au Courant, motion
intervene, filed March 26, 1997; Niagara Mohawk,
protest, filed March 27, 1997; Newfoundland Hydro, extension
time to file protest, 7/ filed March 27, 1997; Burlington
Electric Department, motion to intervene, filed March 27,
and Indeck, motion to intervene, raising no substantive
filed March 27, 1997.

dates:
as
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substantive
filed
(ConEd),
Also in response to the March Supplement, the following
entities filed the following pleadings on the specified
the Crees, comments and intervention, filed March 28, 1997,
corrected April 1, 1997; CNG Energy Services Corporation
Energy), motion to intervene out of time, raising no
issues, filed April 9, 1997; Newfoundland Hydro, comments,
April 10, 1997; Consolidated Edison Company of New York

1997; motion to intervene out of time in support of H.Q. Energy's application, raising no substantive issues, filed April 17, and Mouvement Au Courant, supplement to motion to intervene, filed April 30, 1997.

On April 11, 1997, H.Q. Energy filed a response to various motions to intervene and protests. In addition to addressing substantive issues raised by intervenors, H.Q. Energy opposes the motions to intervene of the Crees and of Mouvement Au Courant, on the alleged grounds that their interests relate exclusively to matters of Quebec policy and law. On April 28, 1997, H.Q. Energy filed a response to Newfoundland Hydro's comments.

To the extent that intervenors or H.Q. Energy's responses raises issues that require resolution in this order, their arguments are described below.

Discussion

A. Procedural Matters

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 8/ the timely, unopposed motions to intervene serve to make the movants parties to this proceeding. Additionally, given the early stage of this proceeding and the absence of undue prejudice or delay, we will grant the unopposed motions for late intervention of CNG Energy and ConEd. We also

7/ We will treat Newfoundland Hydro's pleading as a motion to file out of time.

8/ 18 C.F.R. 385.214 (1996).

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will accept the late-filed comments of Newfoundland Hydro, filing of which H.Q. Energy does not oppose. Moreover, notwithstanding the opposition of H.Q. Energy, we will grant intervenor status to the Crees and to Mouvement Au Courant will accept their respective late-filed pleadings, as we find that their interests may not be adequately represented by other parties to this proceeding. We will also accept H.Q. Energy's responses. Given the unusual nature and complexity of the case, involving Canadian affiliates, and the evolving regulatory regime in Quebec, these pleadings have aided us in understanding the issues.

B. Market-Based Rates

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We generally have allowed power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. In order to demonstrate the absence or mitigation of market power, a transmission-owning public utility must have on file with the Commission an open-access transmission tariff for the provision of comparable services. The Commission also considers whether there is evidence of affiliate abuse or reciprocal dealing. 9/

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power

As we discuss below, we find that H.Q. Energy meets one of the criteria for granting market-based rates. However, H.Q. Energy in preparing its generation market power analysis did not have the benefit of the guidance set forth

in
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United
rates,
NYSEG, we cannot conclude on the basis of the information
analysis before us that H.Q. Energy has demonstrated that
affiliate Hydro-Quebec lacks generation market power in
States markets. Accordingly, we will direct H.Q. Energy to
submit additional information and analysis, consistent with
NYSEG, on generation market power. In the meantime, we will
defer action on H.Q. Energy's request for market-based
pending receipt of such additional information and analysis.

1. Transmission Market Power

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tariff
In the case of a power marketer that is affiliated
transmission-owning United States utility, mitigating
transmission market power requires the transmission-owning
utility affiliate to have on file with the Commission an
access transmission tariff that conforms to the pro forma

at
L.L.C., 75
Energy
9/ E.g., Progress Power Marketing, Inc., 76 FERC 61,155
61,919 (1996); Northwest Power Marketing Company,
FERC 61,281 at 61,889 (1996). Accord, Heartland
Services, Inc., 68 FERC 61,223 at 62,060-63 (1994)
(Heartland).

rehearing). 10/
In this case, the transmission-owning utility affiliate is
Canadian.

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In prior market-based rate cases involving power affiliates of Canadian utilities, the Commission has applied same general standards that we use for reviewing requests market-based rates by power marketers affiliated with United States utilities. 11/ In Energy Alliance, for example, we stated that the marketer must be able to show that its owning utility affiliate offers non-discriminatory access to its transmission system that can be used by competitors of the marketer to reach the United States. We added, however, that we would consider a variety of approaches when dealing with the market power of foreign utility affiliates of United States marketers. 12/ In Powerex, although we rejected the application for failure to demonstrate mitigation of market power, we emphasized that the Commission, while wishing to assure reciprocal service into and out of Canada when Canadian entities seek access to United States markets, does not intend to open intra-Canadian electric markets by imposing open access tariffs for transactions wholly within Canada. Moreover, the Commission stated that it would determine on a case-by-case basis what tariffs, other than the Open Access Rule pro forma tariff, would satisfy our concerns, i.e., be consistent with our comparability principles. 13/

Open

In this case, H.Q. Energy has submitted proposed transmission tariffs under which Hydro-Quebec will provide transmission service that are virtually identical to the

Non-Utilities and

10/ See Promoting Wholesale Competition Through Open Access Discriminatory Transmission Services by Public Recovery of Stranded Costs by Public Utilities and

21,540 Transmitting Utilities, Order No. 888, 61 Fed. Reg.
 reh g, (1996), FERC Stats. & Regs. 31,036 (1996), order on
 Stats. & Order No. 888-A, 62 Fed. Reg. 12,274 (1997), FERC
 Regs. 31,048 (1997), reh g pending (Open Access Rule).

11/ The cases include: Energy Alliance Partnership, 73
 FERC 61,019 (1995) (Energy Alliance); TransAlta
 Enterprises Corporation, 75 FERC 61,268 (1996)
 (TransAlta); Powerex; and Ontario Hydro Interconnected
 Markets Inc., 78 FERC 61,369 (1997), reh g pending
 (Ontario Hydro).

12/ 73 FERC at 61,030-31. Accord, TransAlta, 75 FERC at
 61,875-76.

13/ See Powerex, 78 FERC at 61,100.

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while Access Rule pro forma tariff. The main difference is that
 applicable the pro forma tariff refers to the Commission as the
 of the regulatory agency, these tariffs refer to the Regie. 14/
 standard Similarly, the proposed tariffs substitute Canadian law for
 customers United States law -- e.g., Canadian commercial law in lieu
 transmission Uniform Commercial Code. H.Q. Energy states that the
 charge. transmission rates were developed using the Commission s
 average cost, rolled-in methods. While there are separate
 tariffs and charges for Hydro-Quebec and Cedar Rapids,
 using both services will pay only the Hydro-Quebec

are The Crees argue that the proposed transmission tariffs

they not equivalent to the Commission's pro forma tariff because
rather will be subject to the regulatory oversight of the Regie
an than this Commission. They complain that the Regie is not
appointed by adequate substitute for the Commission because it is
with the same government that owns Hydro-Quebec and because its
the decisions are not subject to judicial review. We disagree
in the Cree's assumption that a foreign entity must submit to
power the Commission's jurisdiction for transmission services provided
those sales in the United States. As a condition of approving
jurisdiction sales, the Commission simply evaluates the transmission
terms of Canadian governments and regulatory agencies) against the
standards that the Commission requires for open access
transmission services under our jurisdiction. Here, the
and conditions of transmission service are identical to the
Commission's pro forma tariff in all material respects.

The Cree's also object to the use of a postage stamp
rate in the proposed transmission tariffs. They argue that a
postage stamp rate is discriminatory when the transmission grid
extends over a large area. The Cree's suggest that lower rates for
would be shorter distances, or rates reflecting a zonal approach,
rate more appropriate. The Cree's also argue that use of the firm
as the ceiling for the nonfirm rate is unreasonable. We
disagree. The rates at issue here reflect rate designs
previously approved by the Commission for jurisdictional
transmission services, including in the Open Access Rule pro

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on a
14/ The Regie Act provides that the Regie will operate as
independent commission to regulate transmission rates
traditional cost of service basis, establish terms and
conditions of service and address service complaints.

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will
sales
forma tariffs. 15/ Moreover, Hydro-Quebec and Cedar Rapids
obtain transmission service for their own wholesale power
under the proposed tariffs.

based
We conclude, therefore, notwithstanding the Crees
arguments, that Hydro-Quebec has mitigated its transmission
market power adequately to support authorization of market-
rates for H.Q. Energy s United States wholesale sales.

2. Generation Market Power

that
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however,
The Commission's generation dominance analysis assumes
the seller, and its affiliates owning, operating or
transmission facilities, have satisfactory open access
transmission available. As discussed above, H.Q. Energy has
demonstrated compliance with that requirement. We find,
as discussed below, that it has not provided sufficient
information to demonstrate that its utility affiliate lacks
generation market power.

defines
Quebec
compute
While H.Q. Energy in its generation market analysis
the relevant markets as those utilities with which Hydro-
and Cedar Rapids are directly interconnected, it does not
generation market shares using the Commission s hub-and-

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method, which is the method that the Commission usually
in market-based rate cases. 16/ Instead, H.Q. Energy
the amount of customer load that could be served by each
interconnected utility (including Hydro-Quebec), using the
of each customer s interconnections with potential suppliers
proxy for load. H.Q. Energy contends that its analysis
market shares below 20 percent, which do not exceed levels
the Commission previously has found acceptable. 17/

prior
an
interconnection

As noted above, H.Q. Energy completed its application
to the issuance of NYSEG. Thus H.Q. Energy prepared its
generation market power analysis without the benefit of our
discussion in NYSEG of why a similar approach to analyzing
generation market power is insufficient for purposes of our
market-based rate requirements. We explained in NYSEG that
analysis designed around the single factor of

15/ See Open Access Rule, FERC Stats. & Regs. 31,036 at
31,650, 31,668.

16/ See NYSEG, 78 FERC at 62,237-38 & n.5.

17/ See, e.g., Southwestern Public Service Company, 72 FERC
61,208 at 61,966-67 (1995), reh g pending; Louisville
Gas and Electric Company, 62 FERC 61,016 at 61,146
(1993) (Louisville).

basis

capacity is so selective and incomplete as to provide no

upon which to draw conclusions about market power. 18/ The Commission also stated that interconnection capacity is not irrelevant to market power issues and it is one of the factors that will be considered in the market screen analysis now being used for mergers. The Commission directed that any proposed substitute to the traditional hub-and-spoke analysis must fully address all the competition factors considered under the market power analysis in the [Commission s] merger policy statement. 19/

Accordingly, we will defer action on H.Q. Energy s market-based rate application until such time as H.Q. Energy provides further information and analysis concerning generation market power consistent with the discussion above and with our discussion in NYSEG. 20/

3. Other Barriers to Entry/Reciprocal Dealing

Intervenors raise a number of issues regarding barriers to entry and affiliate abuse. Even though we are deferring action on H.Q. Energy s market-based rate application at this time, we nonetheless will address these matters here in order to give supplements guidance to the parties in the event that H.Q. Energy analysis, its application with a revised generation market power as this order permits.

With regard to potential barriers to entry and reciprocal dealing concerns, we note that Hydro-Quebec wholly owns Green Mountain Energy Partners, an energy service company that intends to sell electricity and natural gas at retail to United States customers. Additionally, Hydro-Quebec holds a substantial interest in Noverco, Inc., which in turn holds interests in the

in a main natural gas distributor in the Province of Quebec and
natural gas distributor in Vermont.

market Were we to accept H.Q. Energy s application for market-
based rates after submission of the additional generation

18/ See 78 FERC at 62,328-29.

Commission s 19/ Id. at 62,329 n.7. See Inquiry Concerning the
592, 61 Merger Policy Under the Federal Power Act, Order No
economic Fed. Reg. 68,595 (1996), FERC Stats. & Regs. 31,044
and (1996). H.Q. Energy must address both physical and
limitations on the definitions of the relevant product
and geographic markets.

on 20/ We will provide notice and an opportunity for comments
the supplement.

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conditions power information and thereafter should any of H.Q. Energy s
affiliates deny, delay or require unreasonable terms,
Commission or rates for natural gas service to a potential electric
592, 61 competitor of H.Q. Energy in bulk power markets, then that
economic electric competitor could file a complaint with the
and that could result in the suspension of H.Q. Energy s
on authority to sell power at market-based rates. 21/ With that safeguard,
we are satisfied that other barriers to entry and reciprocal
dealing considerations are not of concern here.

4. Affiliate Abuse

H.Q. We find that, with the modification discussed below to
Energy's proposed code of conduct, H.Q. Energy satisfies the
Commission's requirements designed to prevent affiliate
abuse in market-based rate applications by power marketers that are
of affiliated with utilities. 22/ H.Q. Energy's proposed code
conduct is virtually identical to those required of power
except marketers affiliated with United States public utilities,
information that there is no prohibition on the sharing of market
the beyond that imposed under the OASIS Rule. Consistent with
Commission's action in other cases involving power marketer
affiliates of Canadian utilities, H.Q. Energy also does not
absent a include a prohibition on affiliate sales to Hydro-Quebec
such filing under section 205 of the Federal Power Act, because
sales are not subject to the Commission's jurisdiction. 23/

The Crees argue that the Commission should extend the
prohibition on affiliate sales to those that do not serve
captive customers because American ratepayers who have chosen to
become [H.Q. Energy's] retail customers deserve and require the
same protections as those who have had no choice. We disagree.
The Crees' argument misapprehends the purpose of the restriction
of imposed on jurisdictional affiliate sales. It is the lack
are choice that creates the concern -- customers with no options
captive and cannot protect themselves by turning to other
suppliers. Those who are not captive can protect themselves
by exercising their power of choice.

The Crees also complain that H.Q. Energy's proposed
code of conduct cannot be relied upon because the affiliates are
Canadian entities that will be regulated by Canadian bodies and that

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code does not appear to extend to affiliates doing business
the United States. Neither of these allegations causes us

21/ See, e.g., Louisville, 62 FERC at 61,148.

22/ See, e.g., Heartland, 68 FERC at 62,060-63.

23/ See, e.g., TransAlta, 75 FERC at 61,876.

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H.Q. concern. The code of conduct will be included as part of
Energy's rate schedule on file with this Commission, and any
violations of the code can be reported to the Commission.
Also, the code of conduct applies to all affiliates of Hydro-
Quebec, without limitation. It does not exclude affiliates doing
business in the United States, as the Crees mistakenly
allege.

above, Finally, while the proposed code of conduct, as noted
OASIS does not prohibit sharing market information beyond the
Mohawk's Rule requirements, H.Q. Energy, in response to Niagara
regard. protest, agreed to revise the code of conduct in that
the With this modification, which should be submitted along with
Commission's previously-discussed additional generation market power
information, H.Q. Energy's code of conduct meets the
requirements. In these circumstances, we are satisfied that
there are no concerns of affiliate abuse here.

C. Waivers and Authorizations

waivers H.Q. Energy, in its application, requests the same
and blanket authorizations as those afforded to other power
address marketers. Because we are deferring action on H.Q. Energy's
application for market-based rates, there is no need to
the requested waivers and authorizations at this time.

D. Other Issues

recognizes, for The Crees complain that, while the Regie Act
the first time, a market for wholesale energy competition in
Quebec, Canadian wholesale purchasers must seek government
approval prior to making purchases from suppliers other than
Hydro-Quebec, and the Regie Act does not expressly recognize
the authority of any utility other than Hydro-Quebec to act as a
power marketer in Quebec. The Crees are concerned,
therefore, that the Regie Act in practice may not lead to a competitive
market. The Crees ask the Commission to condition approval
of H.Q. Energy's application on amendments to Canadian laws to
remove the requirement for Canadian government approval to
obtain new suppliers and to recognize power marketers within Quebec
on terms similar to those imposed by the Commission. To the
extent the Crees seek our interference with trade that takes place
wholly within Canada, we cannot do so. The market for power
sales that take place wholly within Canada is beyond the
scope both of this proceeding and of our jurisdiction.

service We note that in Ontario Hydro, 78 FERC at 62,529, the
Commission stated that it seeks to assure reciprocal
into and out of Canada when Canadian entities seek access to
United States markets. We believe that United States
sellers should be able to sell to wholesale purchasers within
Canada.

at However, we also believe the Crees concerns are premature
this time.

Conclusion

power, We note that with the exception of generation market
based H.Q. Energy has satisfied all our requirements for market-
resolution of rates. While we express no opinion on the ultimate
and, the generation market power issue, we note that H.Q. Energy,
reciprocity for that matter, Hydro-Quebec, can utilize the open access
an tariffs of United States public utilities since the
adequate showing can be made in its supplemental filing on
generation market power, H.Q. Energy will be able to sell at
market-based rates. Until that time, it would be able to
purchased transact at cost-based rates for the resale of power
either from Hydro-Quebec or from non-affiliates.

The Commission orders:

and (A) The motions for late intervention of CNG Energy
ConEd are hereby granted.

(B) The late-filed comments of Newfoundland Hydro are
hereby accepted.

Mouvement Au (C) The motions to intervene of the Crees and
Courant are hereby granted, and their respective late-filed
pleadings are hereby accepted.

(D) H.Q. Energy s responses are hereby accepted.

based (E) Action on H.Q. Energy s application for market-

market rates, and related waivers and authorizations, is hereby deferred, and H.Q. Energy is hereby directed to provide additional information and analysis concerning generation power and to amend its proposed code of conduct, as discussed in the body of this order.

later. By the Commission. Commissioners Bailey and Santa concurred with separate statements to be issued

(S E A L)

Jr.,

Linwood A. Watson,
Acting Secretary.