

115 FERC ¶ 61,306  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Nora Mead Brownell, and Suedeen G. Kelly.

Deseret Generation & Transmission  
Co-operative, Inc.

Docket No. ER06-861-000

ORDER ON PROPOSED TARIFF FILING

(Issued June 9, 2006)

1. In this order, the Commission accepts, in part, and rejects, in part, proposed market-based rate tariff revisions filed by Deseret Generation & Transmission Co-operative, Inc. (Deseret).<sup>1</sup> Specifically, Deseret's proposed revisions include adding to its market-based rate tariff Wholesale Rate Schedule "C" (Schedule C) which provides specific terms and conditions upon which Deseret states that it will engage in certain market-based rate sales with its six member cooperatives (members),<sup>2</sup> and removing the market behavior rules from its tariff.<sup>3</sup> For the reasons discussed below, the Commission

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<sup>1</sup> Deseret received market based rate authority on May 27, 1999, with its latest updated market power analysis accepted February 6, 2006. See *MEP Investments, LLC*, 87 FERC ¶ 61,209 (1999), and *Deseret Generation & Transmission Co-operative, Inc.*, Docket No. ER99-2506-003, (unpublished letter order).

<sup>2</sup> Deseret's member cooperatives are Bridger Valley Electric Association, Dixie-Escalante Rural Electric Association, Inc., Flowell Electric Association, Inc., Garkane Energy, Moon Lake Electric Association, and Mt. Wheeler Power, Inc.

<sup>3</sup> On February 16, 2006, the Commission issued an order rescinding market behavior rules 2 and 6, effective February 27, 2006 following the promulgation of new regulations prohibiting the employment of manipulative or deceptive devices or contrivances in wholesale electric and natural gas transactions. *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 114 FERC ¶ 61,165, *reh'g denied*, 115 FERC ¶ 61,053 (2006). Also on February 16, 2006, the Commission adopted a final rule codifying market behavior rules 1, 3, 4 and 5 in the Commission's regulations, effective February 27, 2006. *Conditions for Public Utility Market-Based Rate Authorization Holders*, Order No. 674, 71 Fed. Reg. 9,695 (Feb. 27, 2006), FERC Stats. & Regs. ¶ 31,208 (2006).

accepts Deseret's revision that proposes removing the market behavior rules from its market-based rate tariff but rejects the proposal to add Schedule C to the tariff.<sup>4</sup>

### **Background**

2. On April 12, 2006, Deseret filed proposed amendments to its market-based rate tariff. Deseret states that the proposed amendments (tariff revisions) remove the market behavior rules from the tariff and would establish Schedule C. Schedule C, included as pages in the market-based rate tariff, would specifically state the rates, terms and conditions under which Deseret will engage in certain market-based rate sales to its members that, in turn, serve specific industrial load with peak demand of more than 2.5 MW. Deseret states that the proposed tariff revisions do not implicate or impair its ability to continue to satisfy the Commission's test for market-based rate authority.

### **Notice of Filing and Responsive Pleadings**

3. Notice of Deseret's April 12, 2006, filing was published in the *Federal Register*, 71 Fed. Reg. 24,847 (2006), with interventions and protests due on or before May 3, 2006. On April 21, 2006, Chevron U.S.A Inc. (Chevron) filed a motion to intervene and an initial protest. On April 27, 2006, Chevron filed a motion for extension of time for the filing of interventions, protests, and comments, and a motion to enforce Commission regulations. On May 5, 2006, Deseret filed an answer to Chevron's motions and protest.

4. Chevron's motion for extension of time was granted by the Commission, with extension of time for the filing of interventions and protests granted until May 12, 2006. On May 5, 2006, Deseret filed an answer to Chevron's initial protest and motions. On May 12, 2006, ConocoPhillips Company (ConocoPhillips) filed a motion to intervene and protest; Shell Exploration and Production Co. (Shell) filed a motion to intervene and protest; Questar Pipeline Company, Questar Gas Company, Questar Gas Management Company, and Questar Exploration and Production Company (collectively, Questar Group) filed a motion to intervene; El Paso E&P Company, L.P., El Paso Production Oil & Gas Gathering, L.P., El Paso Field Operating Company, and El Paso Field Services, L.P. (collectively, El Paso) filed a motion to intervene and an initial protest; and Chevron filed a supplemental protest. On May 22, 2006, El Paso filed a supplemental protest. Chevron, ConocoPhillips, Shell, Questar Group and El Paso will be referred to

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<sup>4</sup> FERC Electric Tariff, First Revised Volume No. 3, First Revised Sheet Nos. 2-3. (supersedes Original Sheet Nos. 2-3).

collectively as intervenors. We note that the intervenors state that they are industrial retail customers of the members that would be served under Schedule C. On May 30, 2006, Deseret filed an answer opposing the motions to intervene and protests that were filed on May 12, 2006. On June 6, 2006, intervenors filed an answer to Deseret's May 30, 2006 answer.

5. Chevron requests that the Commission dismiss Deseret's Schedule C. It argues that the filing is defective because: 1) the Commission does not have subject matter jurisdiction over retail sales; 2) Schedule C does not propose a viable cost-of-service recourse rate; 3) Schedule C violates the Commission's policy on creditworthiness standards; and 4) Schedule C aggregates the load of retail customers without offering pooling to third party suppliers. Chevron also states that Schedule C would force retail electric customers off their cost-of-service rate schedules.<sup>5</sup>

6. In the protests of ConocoPhillips and Shell, each party states that Deseret has failed to show that Schedule C is just, reasonable, and not unduly preferential or discriminatory. Both state that Deseret: 1) failed to include provisions precluding market-based rate sales to affiliates without first receiving Commission authorization; 2) failed to perform the market power analyses required by the Commission in *AEP Power Marketing*; and 3) failed to justify the billing, payment and creditworthiness provisions. Both ConocoPhillips and Shell further state that Deseret's Schedule C denies cost-based sales services to a subset of native load customers. ConocoPhillips and Shell request that the Commission dismiss Deseret's filing or, alternatively: 1) require Deseret to file a complete market power analysis; 2) require Deseret to file appropriate codes of conduct to protect market participants; 3) require Deseret to substantiate its proposed

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<sup>5</sup> Chevron further states that none of the retail customers affected by the tariff revision was served by Deseret pursuant to the Commission's waiver of prior notice requirement in section 35.11 of the Commission's regulations, and therefore, was deprived of adequate notice and opportunity to defend their rights under the Federal Power Act (FPA), 16 U.S.C. § 824d (2000). In its supplemental protest, Chevron raises the following additional arguments: 1) Deseret's Schedule C is an unsupported allocation of wholesale purchased power costs to certain customer classes and requires cost-of-service and cost allocation studies; 2) Deseret's Schedule C violates the Commission's market-based rate policy set forth in *AEP Power Marketing*, 107 FERC ¶ 61,018, *order on reh'g*, 108 FERC ¶ 61,026 (2004), and the Commission's negotiated ratemaking policy; and 3) Deseret's Schedule C provisions on creditworthiness are onerous and unsupported in the filing. Chevron again requests that Deseret's filing be dismissed.

tariff provisions for billing, payment and creditworthiness; and 4) require Deseret to justify, in a hearing, its proposal to withdraw the option of providing energy at cost-based rates for a subset of native load customers.

7. El Paso submits that because Deseret's members are its owners, the Commission's scrutiny of their transactions should be heightened. El Paso states that Deseret, through Schedule C, is mandating a market-based pricing mechanism that its member owners will charge to potentially captive customers. El Paso states that while the members can negotiate a different rate, there is no incentive for them to negotiate a lower rate than the default rate proposed under Schedule C. El Paso states that given that the Deseret members own and control Deseret, they cannot be expected to protect the interests of their own rate payers. El Paso states that it questions whether Deseret is justified in charging market-based rates for loads within the service territories of its members, whose sales in turn would be to captive customers. El Paso further states that it questions the extent of state jurisdiction over the members, and the right or ability of the members to pass-through these rates to their retail customers.<sup>6</sup>

## **Discussion**

### **Procedural Matters**

8. Notwithstanding Deseret's opposition to the interventions filed on May 12, 2006, we find that good cause exists to grant the motions to intervene of Chevron, ConocoPhillips, Shell, Questar Group, and El Paso. Chevron, ConocoPhillips, Shell, Questar Group, and El Paso have fully complied with the Commission's regulations concerning intervention by each demonstrating a sufficient interest in the outcome of this proceeding, pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005).

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<sup>6</sup> In its supplemental protest, El Paso argues that Deseret should not be allowed to implement Schedule C. El Paso filed a supplemental protest out-of-time that reiterates the claims it made in its initial protest. El Paso further states that it is the Commission's policy to allow affiliate sales at market-based rates only when the utility's captive customers are protected. El Paso states that Deseret is seeking authority to charge market-based rates to its affiliated member cooperatives that have franchised service territories, and who will pass the rates through to industrial customers. El Paso states that Deseret has not proposed any pricing safeguards that would protect the member's captive customers, and that in fact the default rate proposed provides Deseret with considerable discretion to charge above-market rates.

9. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2005), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We are not persuaded to allow Deseret's answers to the protests or the intervenors' answer to Deseret's answer and therefore will reject them.

### **Tariff Revisions**

10. For the reasons discussed below, we will reject Schedule C and accept Deseret's revision that proposes removing the market behavior rules from its market-based rate tariff, effective February 27, 2006.

11. Deseret argues that Schedule C would provide specific terms and conditions under which Deseret will engage in certain market-based rate sales to its members that, in turn, serve specific industrial load with peak demand of more than 2.5 MW. Deseret states that it seeks to have such terms and conditions as part of its market-based rate tariff for the sake of clarity to its members, and to ensure that the Commission is fully apprised of Deseret's transactions with its members. Deseret states that the terms of Schedule C in essence provide a formulaic, market-based rate pricing mechanism for potential transactions to serve industrial loads. Deseret further states that specific pricing terms for an energy and demand rate, as well as commercial terms and conditions such as billing and metering requirements, and security and performance requirements are contained in Schedule C. Deseret states that the rates, terms and conditions of Schedule C are backstop rates for service to certain industrial loads that can be applied in the absence of a longer-term, negotiated contract. Deseret also claims that its current authorization to sell at market-based rates permits such sales as are included in Schedule C.

12. We will reject Deseret's proposal to amend its market-based rate tariff to include Schedule C. We find Schedule C to be unnecessary. Deseret, by its own declaration, claims it does not need to file Schedule C to transact with its members at market-based rates. Moreover, under the Commission's regulations, "any market-based rate agreement pursuant to a tariff shall not be filed with the Commission."<sup>7</sup>

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<sup>7</sup> 18 C.F.R. § 35.1 (g) (2005). Order No. 2001, which implemented 18 C.F.R. § 35.1(g) (2005), obviates the need to file with the Commission service agreements under market-based rate power sales tariffs, and requires, among other things, that public utilities with market-based rate authority electronically file Electric Quarterly Reports, which include a summary of the contractual terms and conditions in every effective service agreement for market-based power sales. *Public Utility Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31,043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002).

13. In any event, it appears that Schedule C includes cost-based tariff elements. We find that elements of Schedule C that include calculated rates with “cost adders” and several other provisions appear similar to provisions seen in a cost-based power sales tariff. Regarding this issue, we note that Commission policy does not permit a cost-based tariff be included as a part of a market-based rate tariff.<sup>8</sup> Thus, while we reject the inclusion of Schedule C as part of Deseret’s market-based rate tariff, this determination is without prejudice to Deseret making a separate filing under section 205 of the FPA in support of a cost-based power sales tariff.

14. Moreover, the Commission has stated that, in cases where affiliates are entering into market-based rate sales agreements, it is essential that ratepayers be protected and that transactions be above suspicion in order to ensure that the market is not distorted.<sup>9</sup> However, the Commission has found that affiliate abuse is not a concern for cooperatives owned by other cooperatives, where the cooperative’s ratepayers are its members.<sup>10</sup> Accordingly, wholesale power sales to its members by Deseret, a cooperative whose customers are its member cooperatives, do not raise issues of affiliate abuse and do not require prior approval from the Commission as suggested by the protestors.

15. Accordingly, for the reasons stated above, we will reject Deseret’s proposed Schedule C. We note that the protests in this proceeding relate to Deseret’s proposal to include Schedule C as part of its market-based rate tariff. Because we are rejecting Schedule C, we see no need to further address the intervenors’ remaining concerns here.

16. We will accept Deseret’s tariff revisions that remove the market behavior rules from its market-based rate tariff, effective February 27, 2006. We grant waiver of section 35.3 of the Commission’s regulations, 18 C.F.R. § 35.3 (2005), to allow this effective date.

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<sup>8</sup> See *Northern States Power Co.*, 83 FERC ¶ 61,293 (1998).

<sup>9</sup> See *Boston Edison Co. Re: Edgar Electric Energy Co.*, 55 FERC ¶ 61,382 at 62,167 (1991).

<sup>10</sup> See, e.g., *People’s Electric Corp.*, 84 FERC ¶ 61,215 at 62,042 (1998) (application raised no issues of affiliate abuse because the applicant was operated by a cooperative whose ratepayers were also its owners); *Old Dominion Elec. Coop.*, 81 FERC ¶ 61,044 at 61,236 (1997) (applicant is a cooperative whose ratepayers are its owners, therefore, any profits earned by the applicant will inure to the benefit of its ratepayers).

The Commission orders:

Deseret's revision that proposes removing the market behavior rules from its market-based rate tariff is hereby accepted, effective February 27, 2006, and Deseret's Schedule C is hereby rejected, as discussed in the body of this order.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.