

117 FERC ¶ 61, 027  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

ACN Utility Services, Inc.	Docket Nos. ER03-965-000
El Cap II, LLC	ER03-985-000
Illumina Energy Solutions, Inc.	ER03-876-000
NDR Energy Group, LLC	ER03-866-000
	EL06-107-000

ORDER INSTITUTING SECTION 206 PROCEEDING FOR NON-COMPLIANCE  
WITH CONDITIONS OF MARKET-BASED RATE AUTHORITY AND  
ESTABLISHING REFUND EFFECTIVE DATE

(Issued October 6, 2006)

1. In this order, the Commission directs the above-captioned market-based rate sellers, which have failed to comply with the conditions under which the Commission granted them market-based rate authority, namely, the requirement to submit an updated market power analysis, to file their updated market power analyses within 60 days from the issuance of this order, or provide satisfactory support for why they should not be required to do so. For the protection of customers, we will establish a refund effective date pursuant to the provisions of section 206 of the Federal Power Act (FPA).<sup>1</sup> This order notifies these market-based rate sellers that their market-based rate authorizations will be revoked, unless they timely comply with the Commission's requirements.

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<sup>1</sup> 16 U.S.C. § 824e (2000).

## **Discussion**

### **Failure to Submit Updated Market Power Analyses**

2. As a condition of receiving market-based rate authority, the Commission requires market-based rate sellers to submit an updated market power analysis every three years<sup>2</sup> to allow the Commission to evaluate the reasonableness of their charges and to provide for ongoing monitoring of their ability to exercise market power. In the absence of an updated market power analysis, the Commission cannot exercise its statutory duty to ensure that market-based rates are just and reasonable, and that market-based rate sellers continue to lack the potential to exercise market power so that market forces are in fact determining the price.

3. The above-captioned market-based rate sellers have failed to submit timely updated market power analyses as directed in the Commission's orders granting them market-based rate authority.<sup>3</sup> Accordingly, consistent with the Commission's order announcing its policy on non-compliance with conditions of market-based rate authority,<sup>4</sup> we hereby notify the above-captioned entities that their market-based rate authority will be revoked, unless they submit their updated market power analyses within 60 days of the issuance of this order or provide satisfactory support for why they should not be required to do so.

### **Institution of Section 206 Proceeding in Docket No. EL06-107-000**

4. In addition, we will institute a section 206 proceeding in Docket No. EL06-107-000 to determine whether the rates charged by the above-captioned market-based rate sellers remain just and reasonable. In cases where, as here, the Commission institutes a section 206 investigation on its own motion, section 206(b) requires that the Commission establish a refund effective date that is no earlier than the date of the publication of the notice of the initiation of the Commission's investigation in the *Federal Register*, and no later than five months after the publication date. In order to

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<sup>2</sup> See, e.g., *W. Res., Inc.*, 94 FERC ¶ 61,050, at 61,247 (2001); *Entergy Serv., Inc.*, 58 FERC ¶ 61,234, at 61,760 (1992); *PSI Energy, Inc.*, 51 FERC ¶ 61,367, at 62,209 (1990).

<sup>3</sup> *ACN Utility Services, Inc.*, Docket No. ER03-965-000 (July 17, 2003) (unpublished letter order); *El Cap II, LLC*, Docket No. ER03-985-000 (July 28, 2003) (unpublished letter order); *Illumina Energy Solutions, Inc.*, Docket No. ER03-876-000 (Aug. 21, 2003) (unpublished letter order); *NDR Energy Group, LLC*, Docket No. ER03-866-000 (June 18, 2003) (unpublished letter order).

<sup>4</sup> *3E Technologies, Inc.*, 111 FERC ¶ 61,295 (2005).

give maximum protection to customers, and consistent with our precedent,<sup>5</sup> we will establish a refund effective date at the earliest date allowed. This date will be the date on which notice of the initiation of the investigation in Docket No. EL06-107-000 is published in the *Federal Register*.

5. If any of the above-captioned market-based rate sellers wishes to relinquish its market-based rate authority, it may file a notice of cancellation with the Commission pursuant to section 205 of the FPA, 16 U.S.C. § 824e, to cancel its market-based rate tariff and relieve it of its obligation to submit an updated market power analysis.

The Commission orders:

(A) The above-captioned market-based rate sellers are directed to file within 60 days of the date of this order, an updated market power analysis, as discussed in the body of this order. If a market-based rate seller fails to make this filing, the Commission will issue a subsequent order and revoke its authority to sell power at market-based rates and terminate its electric market-based rate tariff.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), the Commission hereby institutes a proceeding in Docket No. EL06-107-000 concerning the justness and reasonableness of the market-based rates of the above-captioned sellers, as discussed in the body of this order.

(C) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of the proceeding under section 206 of the FPA in Docket No. EL06-107-000.

(D) The refund effective date established pursuant to section 206(b) of the FPA will be the date of the publication in the *Federal Register* of the notice discussed in Ordering Paragraph (C) above.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.

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<sup>5</sup> See, e.g., *Canal Elec. Co.*, 46 FERC ¶ 61,153, *reh'g denied*, 47 FERC ¶ 61,275 (1989).