

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Sunbury Generation, LLC and Duquesne Power, L.P.	Docket Nos. EC04-36-000
Duquesne Power, L.P.	ER04-268-000 ER04-268-001
Duquesne Light Company	ER98-4159-003 ER98-4159-004
Monmouth Energy, Inc.	ER99-1293-002 ER99-1293-003
Metro Energy, L.L.C.	ER01-2317-002 ER01-2317-003
NM Colton Genco, L.L.C.	ER03-320-003 ER03-320-005
NM Mid-Valley Genco, L.L.C.	ER03-321-003 ER03-321-005
NM Milliken Genco, L.L.C.	ER03-322-003 ER03-322-005

ORDER AUTHORIZING DISPOSITION OF JURISDICTIONAL FACILITIES
AND ACCEPTING MARKET-BASED RATE TARIFF

(Issued August 6, 2004)

I. Introduction

1. In this order, the Commission authorizes a transfer under section 203 of the Federal Power Act (FPA)¹ from Sunbury Generation, LLC (Sunbury) to Duquesne Power, L.P. (Duquesne Power) (collectively Applicants) of: (1) the jurisdictional transmission facilities associated with the Sunbury station, an approximately 436 MW generating facility located in Snyder County, Pennsylvania, and (2) Sunbury's jurisdictional Rate Schedule FERC No. 2.

¹ 16 U.S.C. §824b (2000).

2. In addition, this order accepts a proposed market-based rate tariff submitted by Duquesne Power, an amended Reactive Power Tariff, and a notice of change in status for Duquesne Light Company (DLC), Monmouth Energy, Inc. (Monmouth), Metro Energy, L.L.C. (Metro), NM Colton Genco, L.L.C., NM Mid-Valley Genco, L.L.C. and NM Milliken Genco, L.L.C. We grant certain blanket waivers and authorizations under the Commission's regulations consistent with those granted to other entities with market-based rate authorization. This order benefits customers by encouraging competition in wholesale markets.

II. Background

Docket No. EC04-36-000

3. On December 8, 2003, Sunbury and Duquesne Power filed an application requesting all necessary authorizations under section 203 to transfer from Sunbury to Duquesne Power: (1) the jurisdictional transmission facilities associated with the Sunbury station, an approximately 436 MW generating facility located in Snyder County, Pennsylvania, and (2) Sunbury's jurisdictional Rate Schedule FERC No. 2 (the Transfer).

4. Duquesne Power is a Delaware limited partnership. DLC holds a 99 percent limited partnership in Duquesne Power. DLC is a public utility that is the principal subsidiary of Duquesne Light Holdings, Inc. (DL Holdings). DLC owns Duquesne Power, Inc., the holder of a one percent general partnership interest in Duquesne Power. DLC divested all of its electric generation in 2000 and presently owns no generation assets. DLC has the authority to sell power at market-based rates and serves approximately 580,000 customers in its distribution service territory. DL Holdings is an exempt public utility holding company under the Public Utility Holding Company Act of 1935 (PUHCA).² DL Holdings has five indirect subsidiaries that have market-based rate authority. Applicants state that only one of those subsidiaries, Monmouth, has electric generation assets in the eastern interconnection. Monmouth controls approximately 10 MWs of generation.

5. Sunbury, which owns and operates the Sunbury Station, is a wholly-owned subsidiary of Sunbury Holdings, LLC (Sunbury Holdings). Sunbury has market-based rate authority and is also authorized to sell reactive power to PJM Interconnection, LLC (PJM) under a cost-based rate schedule. Sunbury Holdings is a wholly-owned subsidiary of WPS Power Development Inc. (WPS-PDI). Sunbury Holdings also owns WPS Westwood Generation, LLC which owns a 30 MW electric generation facility in

² 15 U.S.C. § 79c(a)(1) (2000).

Pennsylvania. WPS-PDI and its subsidiaries, which own generation in Wisconsin, Pennsylvania, New York, Maine and New Brunswick, Canada, are authorized to sell power at market-based rates. WPS-PDI is a wholly-owned subsidiary of WPS Resources, Inc., an exempt public utility holding company under PUHCA.

Docket No. ER04-268-000, et al.

6. In addition, on December 8, 2003 in Docket No. ER04-268-000, *et al.* (December 8 Filing), Duquesne Power filed, under section 205 of the FPA,³ an application requesting that the Commission: (1) accept for filing its proposed market-based rate tariff; (2) grant blanket authorization to sell power at market-based rates; (3) grant associated waivers and authorizations; (4) grant authorization to sell ancillary services at market-based rates; (5) approve an amended rate schedule for the sale of reactive power it is acquiring from Sunbury; and (6) accept a notice of change in status of DLC, Monmouth, Metro, NM Colton Genco, NM Mid-Valley Genco, and NM Milliken Genco. Duquesne Power requested an effective date of March 31, 2004.

7. In its section 205 filing, Duquesne Power requested blanket authorization to sell power at market-based rates. Duquesne Power states that it is acquiring the Sunbury facility in support of its plans to provide power to its franchised utility affiliate, DLC. Duquesne Power proposes to provide power to DLC under a Power Purchase Agreement (PPA) when DLC's current supply contract expires at the end of 2004.⁴ In addition, Duquesne Power seeks waiver of the Commission's prohibition of affiliate sales and code of conduct requirement. Duquesne Power states that DLC's customers would not be harmed by purchase power transactions between Duquesne Power and DLC because DLC has no wholesale customers except those served under fixed rates, and DLC's retail customers have access to retail choice. Duquesne Power also seeks authorization to sell ancillary services at market-based rates.

8. Duquesne Power requests that the Commission waive certain of its filing requirements and grant blanket authorizations that it claims have been authorized in previous orders involving sellers of power at market-based rates. Specifically, it requests waiver of the accounting and other requirements of Parts 41, 101 and 141 of the Commission's regulations; authority to make abbreviated filings with respect to interlocking directorates under Part 45; waiver of the reporting requirements of Subparts B and C of Part 35, except sections 35.12(a), 35.13(b) and 25.16; and blanket

³ 16 U.S.C. § 824d (2000).

⁴ We note that Duquesne Power has not to date submitted such a PPA to the Commission for review.

authorization under Part 34 of all future issuances of securities and assumption of liability.

9. In addition, Duquesne Power requests approval to amend a rate schedule it is acquiring from Sunbury (the Reactive Power Tariff) under which reactive power is sold to PJM from the Sunbury facility. The Reactive Power tariff is a cost-based rate schedule for sales to PJM consistent with Schedule 2 of the PJM open access transmission tariff (OATT). Duquesne Power contends that it is not proposing any changes to the rates under the Reactive Power Tariff and that the changes involved are intended only to update the information required by Order No. 614⁵ to reflect that Duquesne Power is the new service provider.

10. DLC, Monmouth, Metro, NM Colton Genco, NM Mid-Valley Genco, and NM Milliken Genco, the only affiliates of Duquesne Power with market-based rate authority, also report the transfer of the Sunbury facility as a change in status.

Docket No. ER04-268-001 as amended

11. In an order issued on November 20, 2001,⁶ the Commission announced a new generation market power test, the Supply Margin Assessment (SMA), to be applied to market-based rate applications on an interim basis pending a generic review of new methods for analyzing market power. It also established mitigation measures applicable to entities that fail the interim generation market power test.

12. In an order issued on April 14, 2004, the Commission granted rehearing of the SMA Order to the extent that it replaced the SMA generation market power test with two “indicative screens” for assessing generation market power and modified the mitigation announced in the SMA Order.⁷ Concurrently with the April 14 Order, the Commission issued a notice establishing a generic rulemaking docket to initiate a comprehensive review of the appropriate analysis for granting market-based rate authority, in particular, the analysis of generation market power, transmission market power, other barriers to

⁵ 90 FERC ¶ 61,352 (2000).

⁶ AEP Power Marketing, Inc., *et al.*, 97 FERC ¶ 61,219 (2001) (SMA Order).

⁷ AEP Power Marketing, Inc., *et al.*, 107 FERC ¶ 61,018 (2004) (April 14 Order), *order on reh'g* 108 FERC ¶ 61,026 (2004) (July 8 Order).

entry, and affiliate abuse and reciprocal dealing.⁸ In the interim, the Commission indicated that the policies it was adopting in the April 14 Order (which deal with the generation market power part of the analysis) would apply to all pending and future market-based rate applications, including the application submitted by Duquesne Power, pending the completion of the market-based rate rulemaking.

13. On May 13, 2004, the Commission issued an order addressing the implementation process for pending applications for initial market-based rate authority.⁹ The Commission ordered all utilities with applications for initial market-based rate authority pending before the Commission to revise their filings within 60 days from the date of issuance of that order to reflect the new interim generation market power screens. Duquesne Power submitted its revised application for market-based rate authorization on June 2, 2004.

14. In its revised filing, Duquesne Power provided an analysis of its position in both the PJM market and the DLC Control Area. It claims that this analysis reveals a lack of generation dominance or other competitive issues of concern. In addition, Duquesne Power claims that it easily passes both interim generation market power screens using conservative assumptions. In its amended filing, Duquesne Power requests an August 1, 2004 effective date.

III. Notice and Responsive Pleadings

15. Notice of Duquesne Power's section 203 filing was published in the *Federal Register*, 68 Fed. Reg. 74,231 (2003), with comments, protests, and interventions due on or before December 29, 2003. None was filed.

16. Notice of Duquesne Power's section 205 filing and amended filing were published in the *Federal Register*, 68 Fed. Reg. 74,233 (2003) and 69 Fed. Reg. 34,149 (2004), respectively, with comments, protests, and interventions due on or before June 23, 2004. Reliant Resources, Inc. (Reliant), Calpine Corporation (Calpine), and Citizens Power, Inc. (Citizens Power) filed motions to intervene out of time and protests in Docket No. ER04-268-000, *et al.* Duquesne Power filed answers to each of these protests. Citizens Power filed a protest to Duquesne Power's revised application in Docket No. ER04-268-001. Duquesne Power filed an answer to the protest. The protests challenge Duquesne

⁸ See Initiation of Rulemaking Proceeding on Market-Based Rates and Notice of Technical Conference, 107 FERC ¶ 61,109 (2004).

⁹ Acadia Power Partners, LLC, *et al.*, 107 FERC ¶ 61,168 at P 16 (2004).

Power's request for waiver of the prohibitions of affiliate sales and the code of conduct requirement.

IV. Discussion

A. Procedural Matters

17. We will grant Reliant's, Calpine's, and Citizens Power's motions to intervene out-of-time given their interest in this proceeding, the early stage of the proceeding, and the absence of any undue prejudice or delay. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2003), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Duquesne Power's answers because they have provided information that assisted us in our decision-making process.

B. Docket No. EC04-36-000

18. Applicants state that Sunbury proposes to sell the Sunbury Station to Duquesne Power pursuant to an Asset Sale Agreement described in Appendix I of the application. The jurisdictional facilities associated with the Transfer are: (1) interconnection facilities (*e.g.* generator leads, step-up transformers, air break switches, circuit breakers, and physical tie-in lines) appurtenant to the Sunbury Station; and (2) the Reactive Power Tariff.

19. Applicants state that the primary purpose for the Transfer is so that DLC can meet its "provider of last resort" (POLR) requirements for residential and small commercial customers. Applicants state that Duquesne Power will enter into a power purchase agreement to supply DLC with its full requirements for those customers. Applicants state that Duquesne Power will be a member of PJM by the time the transfer is completed (DLC proposes to join PJM by December 31, 2004) and has sought any necessary approvals from the Pennsylvania Commission.

20. Section 203(a) of the FPA provides that the Commission must approve a disposition of facilities if it finds that the disposition "will be consistent with the public interest." The Commission's analysis under the Merger Policy Statement of whether a disposition is consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on

regulation. As discussed below, we will approve the proposed disposition of jurisdictional facilities as consistent with the public interest.¹⁰

21. Applicants state that the Transfer will not adversely affect competition. They argue that the amount of generation is *de minimis* in the 73,000 MW PJM market, so the application is exempt from the Commission's Competitive Analysis Screen under Appendix A of the Merger Policy Statement. Applicants further state that the Transfer does not raise any vertical market power issues because no Duquesne Power affiliates control significant inputs into electricity products and because the *de minimis* generation exemption applies to vertical market power as well as horizontal market power.

22. Applicants state the Transfer will not affect the rates for wholesale electric service. They state that all of the real power from the facility will be sold at market-based rates and that Duquesne Power will sell reactive power from the Sunbury facility to PJM under an existing cost-based rate schedule, pursuant to Schedule 2 of the PJM OATT. Because the reactive power is provided from the Sunbury station, Duquesne Power will succeed Sunbury in providing reactive power to PJM. Applicants state that the Duquesne Power is not proposing any changes to the rates as a result of the Transfer.

23. Applicants state the Transfer will not affect the regulation of any of the Applicants. They state that sales from the Sunbury Station will continue to be subject to the jurisdiction of the Commission with respect to wholesale electricity rates and transmission rates. Applicants state that DL Holdings is exempt from regulation under PUHCA and the Transfer will not create a new registered holding company system and thus will not cause a transfer of regulatory authority from the Commission to the Securities Exchange Commission. We note that no state commission has intervened in the proceeding.

24. After consideration, we conclude that the Transfer will not adversely affect competition, rates, or regulation. Therefore, the Transfer is consistent with the public interest and is authorized.

¹⁰ Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement, Order No. 592, 61 Fed. Reg. 68,595 (1996), FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 62 Fed. Reg. 33,341 (1997), 79 FERC ¶ 61,321 (1997) (Merger Policy Statement); *see also* Revised Filing Requirements Under Part 33 of the Commission's Regulations, Order No. 642, 65 Fed. Reg. 70,983 (2000), FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 66 Fed. Reg. 16,121 (2001), 94 FERC ¶ 61,289 (2001).

C. Docket No. ER04-268-000 et al.

25. The Commission allows 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. For an affiliate of a transmission-owning public utility to demonstrate the absence or mitigation of market power, the public utility must have on file with the Commission an OATT for the provision of comparable services. The Commission also considers whether there is evidence of affiliate abuse or reciprocal dealing.¹¹ As discussed below, we find that Duquesne Power's proposed market-based rate tariff meets these standards, subject to the modifications discussed below. Accordingly, we will accept the proposed tariff for filing, as modified below, without suspension or hearing, to become effective on August 1, 2004.

Generation Market Power

26. In the April 14 Order, the Commission adopted new, interim generation market power screens to be applied to market-based rate applications, a pivotal supplier analysis and a market share analysis.

27. In its revised filing, Duquesne Power provides two indicative screens in both the PJM market and the DLC control area. Duquesne Power states it passes both screens in both the PJM market and the DLC control area. Duquesne Power states that it did not conduct a detailed engineering analysis of its simultaneous transmission import capability but used DLC-FirstEnergy's total transfer capacity (TTC) as a proxy for its pivotal supplier test and wholesale market share test in the DLC control area.

28. As discussed in the April 14 and July 8 Orders, we replaced the use of TTC with simultaneous transmission import capability as the appropriate measure of the transmission capability available for imports. The Commission reiterates that using TTC as a proxy for transmission import capability is insufficient because it assumes an unrealistically high degree of transmission access for competitors. Nevertheless, the generating facilities in the proposed Transfer are located within the PJM market. According to the April 14 Order, the relevant geographic markets under both screens will

¹¹ See, e.g., *Progress Power Marketing, Inc.*, 76 FERC ¶61,155 at 61,919 (1996), Letter Order Approving Settlement, 79 FERC ¶61,149 (1997); *Northwest Power Marketing Co., L.L.C.*, 75 FERC ¶61,281 at 61,899 (1996); *accord*, *Heartland Energy Services, Inc., et al.*, 68 FERC ¶61,223 at 62,062-63 (1994).

be the control area where the applicant is physically located. We have reviewed Duquesne Power's generation market power screens for the PJM control area, and find that it passes the generation market power screens without considering imports.

Transmission Market Power

29. When an affiliate of a transmission-owning public utility seeks market-based rate authority, the Commission has required the public utility to have an OATT on file before granting such authorization. Duquesne Power states that it will not own, control or operate any transmission facilities other than the limited facilities necessary to connect Duquesne Power's generation to the PJM grid. Duquesne Power states DLC owns transmission facilities, and service over these facilities is provided under a Commission-approved OATT on file with the Commission. Accordingly, we find that Duquesne Power satisfies the Commission's transmission market power standards for approval of market-based rates.

Other Barriers to Entry

30. Duquesne Power states that it does not and, as a result of the Transfer, will not own or control any key input to power plant construction, generation or transportation. We are satisfied that neither Duquesne Power nor its affiliates can erect barriers to entry. However, should Duquesne Power or any of its affiliates deny, delay or require unreasonable terms, conditions or rates for natural gas service to a potential electric competitor in bulk power markets, that electric competitor may file a complaint with the Commission that could result in the suspension of Duquesne Power's authority to sell power at market-based rates.¹²

Affiliate Abuse

31. Duquesne Power seeks waiver of the code of conduct requirement and the Commission's prohibition on affiliate sales. It states that its affiliate, DLC, has no wholesale customers except those that pay fixed rates that cannot be affected by prices that DLC pays for purchased power or non-power goods and services. Duquesne Power contends that the Commission has, in the past, waived the code of conduct requirement in cases where there are no captive wholesale or retail customers.¹³ Duquesne Power also states that the Commission has waived the code of conduct requirement and approved market-based sales to a franchised utility affiliate in a case in which the affiliate operated

¹² See, e.g., Louisville Gas & Electric Co., 62 FERC ¶ 61,016 (1993).

¹³ Application at 3, citing Exelon Generation Co., 93 FERC ¶ 61,140 (2000).

under Pennsylvania's retail access program.¹⁴ Duquesne Power states that for these reasons, it also has not included a prohibition on affiliate sales in its proposed market-based tariff.

32. In its protest, Calpine states that it is concerned that the code of conduct waiver sought by Duquesne Power is intended to eliminate review of the affiliate power purchase agreement to be entered into between Duquesne Power and DLC under the proposed market-based rate tariff. Calpine contends that the Commission should use the standard articulated in *Boston Edison Company Re: Edgar Electric Energy Company*¹⁵ to evaluate future PPAs between Duquesne Power and DLC. According to Calpine, the *Edgar* standards are designed to protect against two kinds of discrimination: (1) discrimination against customers, and (2) harm to wholesale competition through discrimination against potential nonaffiliated power suppliers.¹⁶ It claims that Duquesne Power has not shown that there is no potential harm to wholesale markets and wholesale competition through discrimination against potential nonaffiliated power suppliers. It claims that without a code of conduct, there would be insufficient protection against affiliate abuse and discrimination in the Duquesne Power/DLC transactions.

33. Reliant also protests the request for waiver of the code of conduct. It contends that the code of conduct is intended to protect all market participants, including other generators. It states that once DLC joins PJM, it will have access to proprietary customer information and other information related to reliability that is not available in the public domain and may confer an advantage to wholesale suppliers, including Duquesne Power, over other market participants who do not have access to such data.

34. In its answer to Calpine's protest,¹⁷ Duquesne Power contends that there are no affiliate abuse concerns. It claims that DLC considered a number of wholesale options for supplying its POLR load and determined that purchasing a generation asset from a third party was the most efficient course. It states that the Sunbury facility has been purchased to fulfill its POLR requirements and that DLC has chosen to place this asset within Duquesne Power rather than DLC and that the effect on competition will be no

¹⁴ *Id.* at 14, *citing* Green Power Partners I, LLC, 88 FERC ¶ 61,005 (1999).

¹⁵ 55 FERC ¶ 61,382 (1991) (*Edgar*).

¹⁶ *Edgar*, 55 FERC ¶ 61,382 at 62,167, n.56.

¹⁷ In its answer to Reliant's protest, Duquesne Power states that Reliant's protest is indistinguishable from that of Calpine and contends that for the reasons set forth in the answer to Calpine's protest Reliant's protest should also be denied.

different than if DLC had acquired the asset itself. It claims that the affiliate sale protested by Calpine is not actually a sale but a corporate structure designed to insulate ratepayers from the risks undertaken by Duquesne Power.

35. In addition, Duquesne Power contends that the Commission has previously held that the affiliate restrictions are unnecessary when customers cannot be harmed by affiliate transactions. Duquesne Power states that DLC's retail customers have full retail choice under Pennsylvania's open access program and DLC has no wholesale customers except those under fixed rates, that cannot be affected by the rates DLC pays for purchased power. Therefore, Duquesne Power contends that no safeguards against affiliate abuse are required.

36. In its protest, Citizens Power requests that the Commission grant Duquesne Power's request for market-based rate authority only on the condition that all sales between Duquesne Power and DLC be made at cost-based rates. It claims that in testimony before the Pennsylvania Public Utilities Commission (Pennsylvania Commission), DLC's witnesses testified that the market for necessary long-term purchases is not viable. Citizens Power claims that this testimony establishes that competitive markets may not be relied upon as a check for the exercise of market power through DLC's affiliates. Citizens Power also states that, according to the Commission's decision in *Southern California Edison Company on behalf of Mountainview Power Company, LLC*,¹⁸ affiliated power supply agreements must be supported by the test articulated in *Edgar* and that the application does not meet this test.

37. In its answer to Citizens Power, Duquesne Power reiterates its contentions that there are no affiliate abuse concerns. In addition, it states that the *Edgar* analysis is concerned with the exercise of market power by a monopoly franchise and states that DLC does not have a monopoly franchise. In addition, Duquesne Power states that Citizens Power cannot rely on *Mountainview* because *Mountainview* addressed the appropriate standard of review for cost-based affiliate transactions. In addition, it claims that the standard articulated in *Mountainview* was made prospective only and does not apply to applications, such as the one in the instant proceeding, which were filed prior to the date of the *Mountainview* order.

Commission Determination

38. Sales between a traditional public utility with market-based rate authority and its affiliates are prohibited without first receiving approval of those transactions pursuant to

¹⁸ 106 FERC ¶ 61,183 (2004) (*Mountainview*).

a separate filing with the Commission under section 205 of the FPA.¹⁹ The Commission requires a code of conduct be filed when an affiliate, such as an affiliate power marketer or power producer, of a traditional public utility seeks market-based rate authority. The code of conduct is intended to govern the relationship between the utility and its affiliate.

39. The Commission has allowed sales between affiliates at market-based rates so long as it is satisfied that there are no affiliate abuse concerns. The Commission has stated that affiliate abuse takes place when the traditional public utility and its affiliate transact in ways that result in a transfer of benefits from the traditional public utility (and its captive customers) to the affiliate (and its shareholders).²⁰ The Commission has allowed sales by a power marketer or power producer to its affiliated public utility where there are no captive wholesale customers and where retail ratepayers are protected by a rate freeze or the availability of retail choice.²¹ The Commission has waived the code of conduct requirement when applicants made a showing there are no captive customers, or when the Commission is satisfied that the public utility's captive wholesale and retail customers are adequately protected against affiliate abuse.²²

40. As noted above, DLC's wholesale customers are all served under fixed rate contracts, and DLC's retail customers are subject to retail choice under Pennsylvania's open access program. We further note that DLC divested all of its generation in 2000. The only generation that will be owned by Duquesne Power and its affiliates is the 436 MW demonstrated capacity Sunbury Station and the 10 MW Monmouth Facility, both of which are located in PJM.²³ On this basis, because wholesale and retail customers of DLC are protected against affiliate abuse, Duquesne satisfies the standard that the

¹⁹ See *Aquila, Inc.*, 101 FERC ¶ 61,331 at P 12 (2002) (*Aquila*).

²⁰ See, e.g., *Heartland Energy Services Inc.*, 68 FERC ¶ 61,223 at 62,062 (1994).

²¹ See, e.g., *Illinova Power Marketing, Inc., et al.*, 88 FERC ¶ 61,189 at 61,649; *AmerGen Energy Co.*, 90 FERC ¶ 61,080 at 61,282 (2000).

²² See, e.g., *Green Power Partners I LLC, et al.*, 88 FERC ¶ 61,005 at 61,010-11 (1999) (no captive wholesale customers and retail customers are subject to rate freeze); *AmerGen Vermont, LLC, et al.*, 90 FERC ¶ 61,307 at 61,995, *reh'g denied*, *Baltimore Gas & Electric Co., et al.*, 91 FERC ¶ 61,270 at 61,922-23 (2000) (no wholesale requirements customers; retail customers subject to rate freeze and retail customer choice).

²³ Application at 9.

Commission has applied in past cases for waiver of the code of conduct requirement and the affiliate sales prohibition.

41. However, the Commission has become increasingly concerned about the potential adverse impact affiliate transactions may have not only on customers, but also on wholesale competition.²⁴ The protesters have raised similar concerns as to the need for the Commission to examine affiliate transactions to ensure that they do not adversely impact either customers or wholesale competition.²⁵ We appreciate the protesters' concerns in this regard and believe that it may be appropriate for the Commission to reexamine its affiliate sales and code of conduct policy, including the standard for allowing waivers. However, given the number of waivers that have been granted to utilities in past cases, we believe that this issue is more appropriately addressed in the context of the comprehensive, generic market-based rate rulemaking proceeding that the Commission has initiated in Docket No. RM04-7-000 to ensure that all interested parties have adequate notice and opportunity to comment and that any changes to Commission policy are applied equally to all affected utilities on a prospective basis. The rulemaking proceeding will address, among other things, whether the Commission should retain or modify its existing four-prong test for market-based rate authority and whether the Commission should adopt different approaches to affiliate transactions than it currently does.²⁶

42. We caution that should Duquesne Power or DLC obtain captive customers in the future, they are directed to notify us and we reserve the right to re-impose the code of conduct requirement and the affiliate sales prohibition. In any event, our action here does not constitute a waiver of the separate standards of conduct requirements contained in 18 C.F.R. Part 37 (2004), nor does it constitute a waiver of the FPA requirement that all rates be just and reasonable and not unduly discriminatory or preferential.

Sale of Ancillary Services

43. Duquesne Power requests authority to engage in the sale of certain ancillary services (listed in the proposed tariff) at market-based rates into the markets administered by the ISO-NE, PJM, NYISO, and CAISO. Consistent with Commission precedent

²⁴ See *Entergy Services, Inc. and EWO Marketing LP*, 103 FERC ¶ 61,256 (2003); *Ameren Energy Marketing Company*, 99 FERC ¶ 61,226 (2002).

²⁵ *Edgar*, 55 FERC at 62,127-28; *Mountainview*, 106 FERC ¶ 61,183 at P 58-59 (2004), *reh'g pending*.

²⁶ See 107 FERC ¶ 61,109 at P 3.

granting blanket authority to sellers to engage in such transactions in those markets, the Commission will grant Duquesne Power's request.²⁷

44. Duquesne Power's proposed tariff also includes a provision governing reassignment of transmission capacity. We find this provision to be consistent with the Commission's standards.²⁸

Other Waivers, Authorizations and Reporting Requirements

45. Duquesne Power requests the following waivers and authorizations: (1) waiver of Subparts B and C Part 35 of the Commission's regulations requiring the filing of cost-of-service information, except as to Sections 35.12(a), 35.13(b), 35.15 and 35.16; (2) waiver of Parts 41, 101 and 141 of the Commission's accounting and periodic reporting requirements; (3) abbreviated filings with respect to interlocking directorates under Part 45 of the Commission's regulations; and (4) blanket authorization under Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability.

46. We will grant the requested waivers and authorizations consistent with those granted other entities with market-based rate authorizations.²⁹ Notwithstanding the waiver of the accounting and reporting requirements here, we expect Duquesne Power to keep its accounting records in accordance with generally accepted accounting principles.

²⁷ See, e.g., *New England Power Pool*, 85 FERC ¶ 61,379 (1998), *reh'g denied*, 95 FERC ¶ 61,074 (2001); *Atlantic City Electric Company, et al.*, 86 FERC ¶ 61,248, clarified, 86 FERC ¶ 61,310 (1999); *Central Hudson Gas & Electric Corporation, et al.*, 86 FERC ¶ 61,062, *order on reh'g*, 88 FERC ¶ 61,138 (1999); *AES Redondo Beach, L.L.C., et al.*, 85 FERC ¶ 61,123 (1998), *order on reh'g*, 87 FERC P 61,208 (1999), *order on reh'g and clarification*, 90 FERC P 61,036 (2000).

²⁸ See *Reliant Energy, Inc., et al.*, 91 FERC ¶ 61,073 at 61,258 (2000); *Select Energy, Inc.*, 85 FERC ¶ 61,290 at 62,182 (1998); *Enron Power Marketing, Inc.*, 81 FERC ¶ 61,277 (1997).

²⁹ It should be noted that the Commission is examining the issue of continued applicability of the waivers of its accounting and reporting requirements (18 C.F.R. Parts 41, 101 and 141) as well as continued applicability of the blanket authorization for the issuance of securities and the assumption of obligations and liabilities, (18 C.F.R. Part 34). See *Accounting and Reporting of Financial Instruments, Comprehensive Income, Derivatives and Hedging Activities*, Order No. 627, 67 Fed. Reg. 67,691 at P 23 and P 24 (October 10, 2002), FERC Stats. & Regs. ¶ 32,558 (2002).

47. Consistent with the procedures the Commission adopted in Order No. 2001, an entity with market-based rates must file electronically with the Commission an Electric Quarterly Report containing: (1) a summary of the contractual terms and conditions in every effective service agreement for market-based power sales; and (2) transaction information for effective short-term (less than one year) and long-term (one year or greater) market-based power sales during the most recent calendar quarter.³⁰ Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.³¹ Accordingly, Duquesne Power must file its first Electronic Quarterly Report no later than 30 days after the first quarter NMS' rate schedule is in effect.

48. Additionally, we will direct Duquesne Power to inform the Commission promptly of any change in status that would reflect a departure from the characteristics the Commission has relied upon in approving market-based pricing. These characteristics include, but are not limited to: (1) ownership of generating or transmission facilities or inputs to electric power production other than fuel supplies; or (2) affiliation with any entity not disclosed in the filing that owns generation or transmission facilities or inputs to electric power production, or affiliation with any entity that has a franchised service area.³² Alternatively, Duquesne Power may elect to report such changes in the updated market analysis it will be required to file every three years.³³

Amendment to Reactive Power Tariff

49. Duquesne Power states that it is not proposing any changes to the rates under the Reactive Power Tariff. Instead, the amendments to the Reactive Power Tariff are intended to update the information required by Order No. 614. We will accept the proposed amendments to the Reactive Power Tariff.

³⁰ Revised Public Utility Filing Requirements, Order No. 2001, 67 Fed. Reg. 31,043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002). Required data sets for contractual and transaction information are described in Attachments B and C of Order No. 2001.

³¹ The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b.

³² *See, e.g.*, Morgan Stanley Capital Group, Inc., 69 FERC ¶ 61,175, 61,695 (1994), *order on reh'g*, 72 FERC ¶ 61,082 (1995); InterCoast Power Marketing Co., 68 FERC ¶ 61,248 at 62,134 (1994), *order clarified*, 68 FERC ¶ 61,324 (1994).

³³ The Commission reserves the right to require such an analysis at any time.

Notice of Change in Status

50. The notice of change in status of DLC, Monmouth, Metro, NM Colton Genco, NM Mid-Valley Genco, and NM Milliken Genco, is accepted for filing, effective August 1, 2004.

The Commission orders:

(A) The disposition of jurisdictional facilities is authorized, as described herein, upon the terms and conditions and for the purposes set forth in the application.

(B) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates, or determinations of cost, or any other matter whatsoever now pending or which may come before the Commission.

(C) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted.

(D) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate.

(E) Applicants shall notify the Commission within 10 days of the date that the transaction has been consummated.

(F) Duquesne Power's market-based rate schedule is hereby accepted for filing, as discussed in the body of this order, effective August 1, 2004.

(G) Requests for waiver of the affiliate sales prohibitions and code of conduct requirement are granted, as discussed in the body of this order.

(H) Duquesne Power's request for waiver of Parts 41, 101 and 141 of the Commission's regulations is hereby granted, with the exception of 18 C.F.R. §§ 141.14, 141.15 (2003) (providing for the filing both of the Form No. 80 and of the Annual Conveyance Report).

(I) Until further order of this Commission, the requirements of Part 45 of the Commission's regulations, except as noted below, are hereby waived with respect to any person now holding or who may hold an otherwise proscribed interlocking directorate involving Duquesne Power. Any such person, instead, shall file a sworn application providing the following information: (1) his or her full name and business address; and

(2) all jurisdictional interlocks, identifying the affected companies and the positions held by that person.

(J) The Commission reserves the right to modify this order to require a further showing that neither the public nor private interests will be adversely affected by continued Commission approval of Duquesne Power's issuances of securities or assumptions of liabilities, or by the continued holding of any affected interlocks.

(K) Duquesne Power's request for waiver of the provisions of Subparts B and C of Part 35 of the Commission's regulations, with the exception of Sections 35.12(a), 35.13(b), 35.15, and 35.16, is hereby granted.

(L) Consistent with the procedures the Commission adopted in Order No. 2001, Duquesne Power must file electronically with the Commission Electric Quarterly Reports no later than 30 days after the end of the reporting quarter. Duquesne Power must file its first Electronic Quarterly Report no later than 30 days after the end of the fourth quarter of calendar year 2004 and it should include all data back to the effective date of Duquesne Power's market-based rate tariff.

(M) Duquesne Power is hereby directed to file an updated market analysis within three years of the date of this order and every three years thereafter.

(N) Duquesne Power is hereby directed to inform the Commission of any change in status that would reflect a departure from the characteristics the Commission has relied upon in approving market-based pricing.

(O) The notices of change in status of DLC, Monmouth, Metro, NM Colton Genco, NM Mid-Valley Genco, NM Milliken Genco, are hereby accepted for filing.

(P) The amendments to the Reactive Power tariff are hereby accepted for filing, effective August 1, 2004.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.