

122 FERC ¶ 61,033
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.

Boralex Livermore Falls LP	Docket Nos. ER01-2569-005
Boralex Stratton Energy LP	ER98-4652-005
Boralex Ft. Fairfield LP	ER02-1175-004
Boralex Ashland LP	ER01-2568-004

ORDER ACCEPTING UPDATED MARKET POWER ANALYSIS

(Issued January 17, 2008)

1. In this order, the Commission accepts the updated market power analysis filed by Boralex Industries Inc. (Boralex) on behalf of four of its affiliates, Boralex Livermore Falls LP, Boralex Stratton Energy LP, Boralex Ft. Fairfield LP, and Boralex Ashland LP (collectively, Boralex Entities). As discussed below, we find that the Boralex Entities satisfy the Commission's standards for market-based rate authority.¹

Background

2. On June 29, 2007, Boralex filed an updated market power analysis pursuant to the Commission's orders granting four of its affiliates, the Boralex Entities, authority to sell

¹ We note that the Commission has recently revised and codified in the Commission's regulations the standards pertaining to market-based rates. *See Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 72 Fed. Reg. 39,904 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252 (2007). Given that Boralex filed its updated market power analysis prior to the effective date of Order No. 697, the Commission will examine the filing based on the market-based rate analysis in effect at that time. However, Boralex is reminded that it is subject to the requirements of Order No. 697 as of the effective date of Order No. 697. *See, e.g., Progress Power Marketing, Inc.*, 76 FERC ¶ 61,155, at 61,919 (1996); *Northwest Power Marketing Co., L.L.C.*, 75 FERC ¶ 61,281, at 61,899 (1996); *accord Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223, at 62,062-63 (1994).

electric energy and capacity at market-based rates.² The Boralex Entities are biomass-fueled qualifying small power production facilities (QFs) with generation capacities in excess of 20 MW.³

3. Boralex states that it is a Delaware corporation and the parent company of several project level companies, limited liability companies and partnerships that own QFs. Boralex is a wholly owned subsidiary of Boralex US Holdings Inc., which in turn is wholly owned by Boralex Inc., a publicly traded Canadian corporation. Cascades Inc., which is a Quebec corporation that manufactures paper products, owns a controlling share of Boralex Inc. Boralex Inc. owns twenty-three percent of Boralex Power Income Fund, which owns two hydroelectric QFs located in New York. Boralex US Holdings Inc. also indirectly owns a QF with generation capacity less than 20 MW.⁴ Boralex states that none of these QFs constitutes an electric utility or holding company or is an affiliate or subsidiary of an electric utility or holding company. Boralex asserts that, other than ownership interests in QFs or foreign utilities and power plants, no entities in the corporate family are engaged in the generation or sale of electric power, or have ownership or operating interests in any electric facilities. In addition, Boralex Ft. Fairfield holds rights to transmit power from its facility located in Ft. Fairfield, Maine over the New Brunswick Power transmission system to its interconnection with the Maine Electric Power Company.

4. The Boralex Entities operate in two different control areas. The Boralex Stratton and Boralex Livermore Falls plants are located in Southern Maine within the New England Power Pool and the New England Independent System Operator (ISO-NE) market. The Boralex Ft. Fairfield and Boralex Ashland plants are located within the Northern Maine Independent System Administrator (Northern Maine ISA) area,⁵ which is

² *Boralex Livermore Falls LP*, Docket No. ER01-2569-005 (Aug. 22, 2001), *Boralex Stratton Energy LP*, Docket No. ER98-4652-005 (Dec. 1, 1998), *Boralex Ft. Fairfield LP*, Docket No. ER02-1175-004 (Apr. 1, 2002), *Boralex Ashland LP*, Docket No. ER01-2568-003 (Aug. 22, 2001) (unpublished letter orders).

³ These QFs are not exempt from Federal Power Act section 205. *See* 18 C.F.R. § 292.601 (2007). Thus, the Boralex Entities are subject to the Commission's standards pertaining to market-based rates.

⁴ Boralex affiliates also own and operate power plants in Canada and France.

⁵ The Boralex Sherman plant is also located within the Northern Maine area.

an integrated part of the Northeast Power Coordinating Council's Maritimes Control Area.⁶ Boralex owns a third generating unit in Northern Maine, the Sherman plant, which is currently retired (shuttered plant).

5. Regarding its generation market power, Boralex describes the Commission's wholesale market share screen and pivotal supplier screen and asserts that the Boralex Entities pass the two screens. Boralex explains that it provides the screen calculations for the plants in Northern Maine using the Maritimes Control Area as the relevant geographic market. Boralex performed a sensitivity analysis considering Northern Maine on a stand-alone basis, but it asserts that Northern Maine should not be the relevant geographic market according to the criteria adopted by the Commission in *AEP Power Marketing, Inc.* (April 14 Order).⁷ According to Boralex, all of the capacity and energy of the Ft. Fairfield and Ashland plants are sold to a third party on a long-term basis; only the uncommitted capacity from the shuttered Sherman plant, which is included as a conservative assumption, is represented in the market power screens. Boralex states that, given the small amount of uncommitted capacity controlled by Boralex, its Northern Maine affiliates pass both market power screens under both scenarios (i.e., using the Maritimes Control Area as the geographic market or the smaller Northern Maine area as the geographic market). With respect to the Stratton and Livermore Falls plants, Boralex states that, even assuming all of their capacity is uncommitted, the combined capacity is a small fraction of the ISO-NE market, and they easily pass both screens.

6. Boralex submits that the Boralex Entities also do not possess market power in transmission, cannot engage in anticompetitive practices through transactions with their affiliates, and cannot otherwise erect barriers to entry. Thus, Boralex asserts that the Boralex Entities continue to satisfy the requirements for market-based rate authority.

Notice of Filing and Responsive Pleadings

7. Notice of Boralex's June 29 filing was published in the *Federal Register*, 72 Fed. Reg. 38,074 (2007), with interventions and protests due on or before July 20, 2007. The Maine Public Utilities Commission (Maine Commission) filed a notice of intervention

⁶ The Maritime Control Area includes Northern Maine, New Brunswick, Nova Scotia, and Prince Edward Island. The New Brunswick System Operator performs certain transmission operation functions within the Maritime Control Area. Transmission facilities in Northern Maine are administered by the Northern Maine ISA, a Commission-approved independent system administrator.

⁷ Boralex June 29, 2007 Filing at 5-6 (citing April 14 Order, 107 FERC ¶ 61,018 at P 74, *order on reh'g*, 108 FERC ¶ 61,026 (2004)).

and protest. On August 6, 2007, Boralex filed a motion for leave to answer and answer to the Maine Commission's protest. On August 7, 2007, Integrys Energy Services, Inc. (WPS/Integrys) filed a motion to intervene out-of-time and answer.

8. Among other things, the Maine Commission requested that the Commission convene a technical conference to address issues raised in its protest. The Commission held a technical conference on August 29, 2007, and invited all parties and interested persons to attend.⁸ The Commission specified that the conference would address the following issues: (1) what is the relevant geographic market for Boralex's market power analysis; (2) whether Boralex should be allowed to deduct long-term firm non-requirements capacity in its market power analysis; (3) whether uncommitted capacity from Boralex's remote generation in the ISO-NE market should be considered in its market power analysis; (4) how transmission import capacity into Northern Maine should be allocated; and (5) why the Boralex Sherman plant is currently mothballed. Representatives of Boralex, the Maine Commission, WPS/Integrys, and the Northern Maine ISA attended the conference.

9. Following the technical conference, the Maine Commission filed supplemental comments. Northern Maine ISA subsequently filed a motion to intervene out of time and reply comments. Boralex also filed reply comments. The Maine Commission filed a further response.

Summary of Comments

10. The Maine Commission asserts that there are unique structural issues in Northern Maine that should be taken into account when determining the relevant geographic market for Boralex's continued market-based rate authority. It states that: (1) Northern Maine is "small and electrically isolated" and that only 215 MW (115 MW firm) can be imported into Northern Maine through New Brunswick; (2) there is no spot market in Northern Maine; (3) the market in Northern Maine is a duopoly;⁹ and (4) only one bidder (WPS/Integrys) submitted bids in a recent Standard Offer Service request for proposals. Thus, the Maine Commission contends that the relevant geographic market is Northern Maine, and it argues that Boralex's filing "without further examination, does not contain sufficient information for the Commission to make findings that would support an order" reauthorizing market-based rate authorization.¹⁰

⁸ Notice of the technical conference was published in the *Federal Register*, 72 Fed. Reg. 45,807 and 49,278 (2007).

⁹ A duopoly is a market containing only two suppliers.

¹⁰ Maine Commission July 20, 2007 Protest at 13.

11. The Maine Commission asserts that, regarding relative market prices, low cost fuel in Northern Maine makes it uneconomic for suppliers elsewhere in ISO-NE to sell in Northern Maine. Thus, Boralex and WPS/Integrays are the only wholesale suppliers in Northern Maine, and WPS/Integrays was the only bidder in the Maine Commission's standard offer solicitation. In addition to being geographically and electrically isolated, the Maine Commission states that Northern Maine has no direct connection to a liquid market. The Maine Commission highlights the distinctions between the Maritimes Control Area and Northern Maine (e.g., different market rules, separate control and dispatch, separate demand and energy forecasts) and alleges that capacity in New Brunswick will be unavailable for 18 months while a nuclear plant is refurbished, which in turn will reduce the available uncommitted capacity for Northern Maine. The Maine Commission asserts these circumstances give the sellers, particularly Boralex, market power, and that the Boralex Entities should not retain market-based rate authority in Northern Maine.

12. The Maine Commission notes that in Order No. 697, the Commission held that it may disallow deductions of long-term sales based on extraordinary circumstances.¹¹ The Maine Commission contends that the unique structural issues in Northern Maine and incidents it relates from recent state proceedings¹² result in "extraordinary circumstances" and argues that capacity from the two plants operating in the Maritimes Control Area that is committed under long-term contracts until February 2009 should be included in any indicative screens as the long-term commitment is for a relatively short period of time (one and one-half years). Under this scenario, the Maine Commission calculates that the Boralex Entities are not pivotal suppliers, but they fail the market share screen with a market share of 32.6 percent for all seasons (20 percent being the threshold for failing).¹³ In addition, the Maine Commission argues that Boralex's generation from ISO-NE should be included when Northern Maine is the relevant geographic market, and transmission import capability adjusted accordingly, because it interprets Order No. 697 (at P 38) to direct sellers to include in their total uncommitted capacity amounts the uncommitted capacity from their remote generation (generation located in an adjoining control area).¹⁴ Given these conditions, the Maine Commission computes that the Boralex Entities' market share is 52.5 percent for all seasons and that they are pivotal suppliers.

¹¹See Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 38 n.18.

¹² The Maine Commission refers to its experiences with a Standard Offer Service Request for Proposals and Boralex's comments submitted in a proceeding addressing competitive issues in Northern Maine.

¹³ Maine Commission July 20, 2007 Protest at 21.

¹⁴ *Id.* at 21-23.

13. In its supplemental comments, the Maine Commission stresses that Northern Maine and New Brunswick control and operate their systems separately and have separate market rules. It concludes that the separate market, separate dispatch and separate demand and energy forecasts argue in favor of considering Northern Maine the relevant geographic market for this proceeding. In addition, the Maine Commission warns that New Brunswick Power Company will not have supply available for import into Northern Maine during the planned 18-month refurbishment of a nuclear power plant due to start in April 2008. According to the Maine Commission, this outage will cause a capacity deficiency for the New Brunswick area, further diminishing competition in Northern Maine.

14. Finally, the Maine Commission takes the position that it need not demonstrate that there is a transmission constraint that limits access to generation resources outside the Northern Maine area. It contends that such a demonstration should not be required in this case because the existence of a constraint does not answer the question of whether there are competitive supply options outside of Northern Maine. According to the Maine Commission, there are only two sellers in Northern Maine and supply from New Brunswick (specifically from the New Brunswick Power Corporation), to the extent it is available to serve Northern Maine load, is not available on terms similar to which it is available to New Brunswick load. Thus, the Maine Commission argues that, even in the absence of a transmission constraint, Northern Maine should be the geographic market.¹⁵

15. Boralex asserts that the Maine Commission's arguments about the "unique structural issues in Maine" are vague and insufficient to overcome the Commission's presumption that the Maritimes Control Area is the relevant geographic market for the market power screens. Boralex states that, nonetheless, consistent with Commission precedent, it performed a "sensitivity analysis" which considered Northern Maine on a stand-alone basis. Boralex states it clearly passes the market power screens for both the Maritimes Control Area and Northern Maine on a stand-alone basis.

16. Boralex also objects to the Maine Commission's position that the capacity from long-term firm non-requirements contracts with WPS/Integrays should be included in the indicative screens, citing precedent that a seller's uncommitted capacity, minus long-term firm non-requirement sales, is the proper indicator of its ability to exercise market power, and that the screens should be performed using the most recent twelve months' unadjusted historical data.¹⁶ In addition, Boralex contends that the Maine Commission did not explain how the capacity of the Boralex plants can be used to dominate the short-run markets in Northern Maine.

¹⁵ Maine Commission October 15, 2007 Reply at 8-10.

¹⁶ Boralex August 6, 2007 Answer (citing April 14 Order, 107 FERC ¶ 61,018 at P 89 and 118).

17. Regarding the inclusion of remote generation from the plants in ISO-NE, Boralex responds that ISO-NE is not a first-tier control area to Northern Maine; hence, its uncommitted capacity in ISO-NE is not considered under the Commission's analysis. If, on the other hand, the Maritimes Control Area is the relevant geographic market, Boralex asserts that transmission import capability would not be allocated first to Boralex's uncommitted capacity in ISO-NE.

18. In response to the Maine Commission's contention that Boralex's filing is inadequate without further examination, Boralex notes that the Maine Commission does not specify what information is missing or requires further scrutiny. Finally, Boralex argues that the Maine Commission has not provided any additional evidence that rebuts the presumption that Boralex lacks generation market power in Northern Maine.

19. WPS/Integrays asserts that the Maine Commission's comments extend to issues beyond the scope of Boralex's filing, including WPS/Integrays' participation in Northern Maine markets and matters involving retail markets which are outside the Commission's jurisdiction. WPS/Integrays urges the Commission to reject all portions of the Maine Commission's comments that do not address issues pertinent to Boralex's filing. WPS/Integrays also contends that the Maine Commission's comments contain factual misstatements concerning purchase obligations from Boralex's plants, descriptions of the transmission into Northern Maine, Northern Maine retail supply, and characterizations of communications among the parties and events surrounding the Maine Commission's standard offer solicitation.

20. Neither Northern Maine ISA nor WPS/Integrays takes a position on the question of what should be the relevant geographic market for purposes of Boralex's market power analysis.

Discussion

Procedural Matters

21. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), the Maine Commission's notice of intervention serves to make it a party to this proceeding. Given WPS/Integrays' and Northern Maine ISA's interests in this proceeding, the early stage of the proceeding, and the absence of any undue prejudice or delay, we find good cause to grant their motions to intervene out-of-time.

22. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2007), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept Boralex's August 6 Answer, Integrays' August 7 Answer, and the Maine Commission's October 15 Answer because they have provided information that assisted us in our decision-making process.

Market-Based Rate Authorization

23. 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.

24. As discussed below, the Commission concludes that the Boralex Entities satisfy the Commission's standards for market-based rate authority.

Generation Market Power

25. The Commission adopted two indicative screens for assessing generation market power, the pivotal supplier screen and the wholesale market share screen.¹⁷ The Commission has also defined the default relevant geographic markets for both screens to be the control area¹⁸ market where the seller is physically located and the markets directly interconnected to the control area market.¹⁹ The Commission stated that it would allow parties to provide evidence that a relevant market is broader or smaller than a particular control area. Boralex has prepared both the pivotal supplier and the wholesale market share screens for the Maritimes Control Area, Northern Maine, and ISO-NE.

26. Boralex states that a control area is defined as an electrical power system or combination of systems to which a common automatic generation control scheme is applied in order to: (1) match, at all times, generation and outside purchases with area load; (2) maintain scheduled interchanges with other control areas; (3) maintain frequency of the electric power systems; and (4) provide sufficient capacity to maintain operating reserves.²⁰ According to Boralex, the Northern Maine ISA relies upon the New Brunswick System Operator to provide all reserve and load balancing functions within Northern Maine and the balance of the Maritimes Control Area. Boralex states that, judging from the given criteria, the Maritimes Control Area represents the appropriate control area for the plants located within the Northern Maine area.

¹⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 45, 62 (summarizing the Commission's market power analysis).

¹⁸ In Order No. 697, the Commission adopted the use of the term "balancing authority area" instead of "control area." See FERC Stats. & Regs. ¶ 31,252 at P 250. Because this proceeding was initiated before the effective date of Order No. 697, in order to avoid any confusion, we will continue to use "control area" in this order.

¹⁹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 232.

²⁰ Boralex September 26, 2007 Reply Comments at 2 (citing April 14 Order, 107 FERC ¶ 61,018 at P 74).

27. Boralex presents two sets of indicative screens for its Ft. Fairfield and Ashland plants, one set using the Maritimes Control Area as the relevant geographic market and another set using Northern Maine as the relevant geographic market. Boralex claims that in WPS/Integrus' most recent updated market power analysis the Commission accepted the Maritimes Control Area as the relevant geographic market.²¹

28. Consistent with Commission policy, when using the Maritimes Control Area as the relevant geographic market, Boralex excluded the capacity from the two operating plants located in the Maritimes Control Area since their output is committed under long-term contracts.²² In addition, as a conservative assumption, Boralex included the capacity from the shuttered Sherman plant as though the capacity is uncommitted, thus, increasing Boralex's uncommitted capacity and raising its market shares. Under this first scenario, Boralex Entities are not a pivotal supplier and their market share is 0.6 percent for all seasons. In a second more conservative scenario, where the output of all five Boralex plants is included as uncommitted capacity, Boralex Entities are not a pivotal supplier and their market share is 3.5 percent for all seasons.²³

29. When using the smaller Northern Maine area as the relevant geographic market, Boralex again excluded the capacity from the two operating plants in the Northern Maine area since their output is committed under long-term contracts. When analyzing Northern Maine, Boralex excluded the capacity from the ISO-NE plants as ISO-NE is not considered a first-tier market because of the lack of a direct interconnection. In addition, as a conservative assumption, Boralex included the capacity from the shuttered Sherman plant in its analysis. Under this scenario, Boralex Entities are not a pivotal supplier and their market share is 11.6 percent for all seasons.

30. Because the Boralex Livermore and Boralex Stratton plants are located within ISO-NE, Boralex states that ISO-NE is the relevant geographic market for those plants. Boralex's filing indicates that the two plants control approximately 91 MW (nameplate) within ISO-NE. According to Boralex's analysis, these plants easily pass both indicative screens using ISO-NE as the relevant geographic market, with market shares of 0.2 and 0.3 percent.²⁴

²¹ Boralex August 6, 2007 Answer at 5-6 (citing *Wisconsin Pub. Serv. Corp.*, 110 FERC ¶ 61,353, at P 20 (2005)).

²² As mentioned above, generation from the two plants is committed under long-term non-requirements contracts that will expire in February 2009.

²³ Boralex June 29, 2007 Filing at Attachment 2.

²⁴ *Id.*

Maine Commission's Position

31. As described above, the Maine Commission questions Boralex Entities' lack of generation market power in Northern Maine. The Maine Commission argues that Northern Maine, rather than the Maritimes Control Area, is the relevant geographic market for several reasons, including the Maine Commission's contention that Northern Maine is small and electrically isolated and because Northern Maine suffers from a lack of competition with only two sellers in the generation business and limited transmission connections. According to the Maine Commission, the Commission should disregard Boralex Entities' long-term contracts with WPS/Integritys because they will expire in February 2009. The Maine Commission also argues that Boralex's generation capacity in ISO-NE should be included in the market analysis using Northern Maine as the relevant geographic market because that generation could be imported into Northern Maine through New Brunswick. In sum, the Maine Commission asserts that, when including the ISO-NE generation and the capacity under the long-term contracts as uncommitted and using Northern Maine as the relevant geographic market, Boralex fails both screens.

Commission Determination

32. The Commission's default relevant geographic market under both indicative screens is first, the control area where the seller is physically located, and second, the markets directly interconnected to the seller's control area (first-tier balancing authority area markets).²⁵ However, the Commission allows sellers and intervenors to present evidence on a case-by-case basis to show that some other geographic market should be considered as the relevant market in a particular case. In the instant filing, the Maritimes Control Area is the control area for the Northern Maine area, and the New Brunswick System Operator is the Balancing Authority for several entities in the Maritimes Control Area, including the Northern Maine ISA.²⁶ Thus, under our precedent, we find that the Maritimes Control Area is the default relevant geographic market and, as discussed below, the Maine Commission has failed to provide sufficient evidence that some other geographic market should be considered as the relevant market.

33. While the Commission considers arguments for a broader or smaller market definition, consistent with our policy in Order No. 697, any proposal to use an alternative

²⁵ See Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 15. In Order No. 697, the Commission did not change its existing approach for determining the default relevant geographic market.

²⁶ See NERC Reliability Coordinator/Balancing Authority/Transmission Operator Readiness Audit Report, New Brunswick System Operator at 2, available at ftp://www.nerc.com/pub/sys/all_updl/rap/audits/NBSO_Readiness_Audit_Final_Report.pdf (2006).

geographic market must include “a demonstration regarding whether there are frequently binding transmission constraints during historical seasonal peaks examined in the screens and at other competitively significant times that prevent competing supply from reaching customers within the proposed alternative geographic market.”²⁷ The requirement to address transmission constraints was found to be a “necessary condition” for those advocating adoption of an alternative geographic market.²⁸

34. Although the Maine Commission argues for an alternative geographic market, i.e., Northern Maine, it fails to meet our requirements for defining such a market because it has presented no data showing the existence of binding transmission constraints.²⁹ Indeed, the Maine Commission even concedes that there are no transmission constraints between Northern Maine and the remainder of the Maritimes Control Area.³⁰ Instead of attempting to make the requisite demonstration, the Maine Commission argues that it need not make such a demonstration because it claims that the existence of a constraint does not answer the question of whether there are competitive supply options outside of

²⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 268. Although the discussion in Order No. 697 generally refers to an expanded market (i.e., arguing that two or more default geographic markets constitute a single market), the same guidance is applicable for arguing that the market is smaller than the default geographic market. *Id.* n.244.

²⁸ *Id.* P 268.

²⁹ The Commission has found a smaller geographic market appropriate in the face of an acknowledged load pocket. *See Pinnacle West Capital Corp.*, 120 FERC ¶ 61,153, at P 18 (2007). As a general matter, during periods when transmission becomes so constrained that no additional imports from outside a load pocket are possible and generators located inside the load pocket are the only suppliers that can sell inside the load pocket, the load pocket should be defined as a separate relevant geographic market. *Id.* P 28; *Wisvest-Connecticut, LLC*, 96 FERC ¶ 61,101, at 61,401 (2001). The Commission noted in Order No. 642 that transmission allocation is a key issue in defining relevant geographic markets in the analysis of constrained markets. *Revised Filing Requirements Under Part 33 of the Commission’s Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh’g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001).

³⁰ Maine Commission October 15, 2007 Reply at 4, 8-10. Indeed, Boralex provided congestion data which shows that there were only two hours during which transmission was constrained between Northern Maine and New Brunswick over the past three years (2004-2006) (Boralex September 26, 2007 Answer at 7), which is not sufficient to support a finding that transmission constraints are frequently binding. The Maine Commission did not dispute this evidence.

Northern Maine. Specifically, the Maine Commission argues that unique structural issues in Northern Maine (i.e., Northern Maine being small and electrically isolated, no spot market, a limited number of wholesale and retail suppliers, and one entity (WPS/Integrus) holding much of the transmission capacity into the area) demonstrate that Northern Maine is the relevant geographic market.

35. Because the Maine Commission has failed to provide sufficient evidence that some other geographic market should be considered as the relevant market we need not consider these arguments.³¹ However, in the interest of providing additional guidance, we will do so.

36. We reject the Maine Commission's request that we define Northern Maine as the relevant geographic market. First, regarding the Maine Commission's claim that Northern Maine is a small market, even if it is true that the load in Northern Maine is small, this in no way proves that suppliers outside of Northern Maine cannot compete in that area.

37. Second, regarding the Maine Commission's claim that Northern Maine is electrically isolated, it has presented no evidence indicating that there is an insufficient amount of transmission capability connecting Northern Maine to the rest of Maritimes Control Area and, as noted above, the Maine Commission has already conceded that the transmission that does exist is not constrained. Indeed, the Maine Commission's claim that Northern Maine is geographically and electrically isolated is undermined by the fact that it also asserts that Boralex's remote generation located in ISO-NE should be regarded as able to compete in Northern Maine and thus included in a screen analysis of the Northern Maine market. In other words, the Maine Commission's claim that Boralex's generation in ISO-NE can access Northern Maine is contrary to the Maine Commission's claim that this market is electrically isolated. Moreover the Maine Commission has not provided historical sales data to support its claim that buyers in Northern Maine are limited to purchasing only from sellers also located in Northern Maine, or that supply within the Maritimes Control Area but outside of Northern Maine is priced too high to compete with supply inside Northern Maine. In any event, our screens consider whether there are sufficient supplies and transmission capacity available in determining whether the seller has market power.

38. Third, the Maine Commission has failed to adequately explain why the absence of a spot market in the Maritimes Control Area somehow requires that we find that Northern Maine is the relevant geographic market, even though Northern Maine also does not have a spot market. Although the Commission has considered the existence of a spot market under certain circumstances as relevant in determining whether trading within an ISO/RTO is sufficient to justify use of that ISO/RTO as the default geographic market,

³¹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 268.

the Commission has never used the *absence* of a spot market in a *non-ISO/RTO market* (which circumstance is common) to justify adoption of a smaller geographic market than the default control area market.

39. We note that the Maine Commission acknowledges that a new transmission line between ISO-NE and New Brunswick is coming on-line soon which will increase the amount of available capacity,³² presumably making it easier for suppliers in ISO-NE to sell in Northern Maine. Despite the Maine Commission's concern about a capacity deficiency due to New Brunswick Power's nuclear plant outage, the Maine Commission concedes that a new wind facility has entered the market,³³ and data in its protest demonstrate the availability of 189 MW of uncommitted generation capacity in Northern Maine.

40. We also find unpersuasive the Maine Commission's arguments that Northern Maine and New Brunswick control and operate their systems separately and have separate market rules. The New Brunswick System Operator is the Balancing Authority regardless and has the responsibilities assigned to Balancing Authorities in the NERC Reliability Standards, which include integrating resource plans ahead of time, maintaining load-interchange-generation balance, and supporting interconnection frequency.³⁴

41. On this basis, we do not agree that "unique structural issues" exist that warrant Northern Maine being considered as a separate geographic market. Accordingly, we conclude that the Maritimes Control Area is the relevant geographic market for purposes of this proceeding. However, we also note that even if we were to define Northern Maine as the relevant geographic market, Boralex still would pass our screens because it would still not be pivotal and its market share would only be 11.6 percent.

42. With regard to the Maine Commission's claims regarding events that occurred in retail rate proceedings, including the results of its request for proposals for Standard Offer Supply Service, we are not persuaded that these circumstances show Boralex to have market power for wholesale sales in the Maritimes Control Area. The fact that only

³² Maine Commission July 20, 2007 Protest at 5.

³³ *Id.* at 6 (including UPC's Mars Hill facility in its list of generation in Northern Maine).

³⁴ See NERC Glossary of Terms Used in Reliability Standards, available at ftp://www.nerc.com/pub/sys/all_updl/standards/rs/Glossary_02May07.pdf (2007).

one seller chose to bid in the request for proposals, if true, does not mean that other suppliers could not have bid as well and will not do so in response to future competitive opportunities.³⁵

43. We also reject the Maine Commission's assertion that the Commission should include the capacity from Boralex Entities' long-term contracts with WPS/Integrysts in the screen analyses as uncommitted capacity. The Commission has stated that historical data have been proven to be more objective, readily available, and less subject to manipulation than future projections; thus, future changes to capacity would not be considered in the screens.³⁶ Although the Maine Commission correctly notes that the policies set forth in Order No. 697 allow the Commission to include generation currently under long-term contract in extraordinary circumstances,³⁷ even if we were to adopt the Maine Commission's proposal in this regard, Boralex's analysis including the output of all five plants as uncommitted capacity demonstrates that it still passes both screens in the Maritimes Control Area relevant geographic market.³⁸

44. We also reject the Maine Commission's assertion that the uncommitted generation capacity in ISO-NE owned by Boralex should be included in the market power analysis using Northern Maine as the relevant geographic market. As we discuss earlier, the Maritimes Control Area is the relevant geographic market. Boralex demonstrates in its study that even if its ISO-NE generation is included with the Maritimes Control Area as the relevant geographic market, it easily passes both screens. Nevertheless, even if Northern Maine were used as the relevant geographic market, consistent with long-standing Commission policy, generation in ISO-NE would not be included as a seller's uncommitted generation capacity. ISO-NE is not directly interconnected with NMISA. ISO-NE is directly interconnected to the Maritimes Control Area. Therefore, using Northern Maine as the relevant geographic market, ISO-NE would be considered a

³⁵ WPS/Integrysts states that a second bid was submitted in response to the Maine Commission's request for proposals, but it was rejected as non-compliant. WPS/Integrysts August 7, 2007 Answer at 8. WPS/Integrysts also notes that another retail supplier served customers in Northern Maine from 2000-2004. *Id.* at 8-9.

³⁶ See Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 299 (describing the Commission's existing practice with respect to historical data).

³⁷ Maine Commission July 20, 2007 Protest at 19 (citing Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 38 n.18).

³⁸ Given these parameters, Boralex Entities are not a pivotal supplier, and their market share is 3.5 percent for all seasons.

second-tier market, and only capacity in first-tier markets is considered for the indicative screens.³⁹ Hence, the ISO-NE capacity would not be included in the screen analyses because ISO-NE is not directly interconnected with Northern Maine.

45. Regarding Boralex's plants in Northern Maine, the Commission has reviewed Boralex's market study using the Maritimes Control Area as the relevant geographic market and has determined that Boralex passes both generation market power screens. Boralex's market share of uncommitted capacity is 0.6 percent for all seasons, and Boralex is not a pivotal supplier. Regarding Boralex's plants in ISO-NE, the Commission has determined that Boralex passes both generation market power screens. Boralex's market share ranges from 0.2 to 0.3 percent, depending on the season, and it is not a pivotal supplier. Thus, the Commission finds that the Boralex Entities pass the generation market power screens in the Maritimes Control Area and the ISO-NE markets. Accordingly, the Commission finds that the Boralex Entities satisfy the Commission's generation market power standard for the grant of market-based rate authority.

Transmission Market Power

46. Boralex states that, except for interconnection facilities, such as generator leads or step-up transformers, none of the Boralex Entities own transmission. No intervenors have raised transmission market power concerns. Based on these representations, the Commission finds that the Boralex Entities satisfy the Commission's transmission market power standard for the grant of market-based rate authority.

Other Barriers to Entry

47. Boralex states that none of the Boralex Entities owns any natural gas transportation or distribution facilities in the United States, or provides natural gas transportation service to electric generating units in the United States. Further, none of the Boralex Entities owns or controls essential building sites, resources or inputs that could be used to restrict market entry by competing power suppliers in any relevant power or transmission market. In addition, no intervenors have raised barriers to entry concerns. Based on Boralex's representations, the Commission is satisfied that the Boralex Entities cannot erect barriers to entry.

Affiliate Abuse

48. According to Boralex, the Boralex Entities have no affiliated franchised public utilities. In addition, no intervenors have raised affiliate abuse concerns. Based on these

³⁹ Order No. 697 at P 232.

representations, we find that the Boralex Entities satisfy the Commission's concerns with regard to affiliate abuse.⁴⁰

Reporting Requirements

49. 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.⁴¹ Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.⁴²

50. Boralex Entities must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.⁴³

⁴⁰ The Commission has codified several affiliate restrictions in its regulations. *See* Order No. 697, FERC Stats. & Regs. ¶ 61,252 at P 23, 467 (to be codified at 18 C.F.R. § 35.39). These affiliate restrictions must be satisfied on an ongoing basis as a condition of retaining market-based rate authority.

⁴¹ *Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127, *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reh'g denied*, Order No. 2001-B, 100 FERC ¶ 61,342, *order directing filing*, Order No. 2001-C, 101 FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001-D, 102 FERC ¶ 61,334 (2003). Required data sets for contractual and transaction information are described in Attachments B and C of Order No. 2001. The Electric Quarterly Report must be submitted to the Commission using the EQR Submission System Software, which may be downloaded from the Commission's website at <http://www.ferc.gov/docs-filing/eqr.asp>.

⁴² The exact dates for these reports are prescribed in 18 C.F.R. § 35.10b (2004). Failure to file an Electric Quarterly Report (without an appropriate request for extension), or failure to report an agreement in an Electric Quarterly Report, may result in forfeiture of market-based rate authority, requiring filing of a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

⁴³ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005). *See also* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 1009-1046; 18 C.F.R. § 35.42.

51. Boralex Entities are directed to file an updated market power analysis, or a letter explaining why they believe they are exempt from such filings, consistent with Order No. 697, in accordance with the schedule in Appendix D to Order No. 697.

The Commission orders:

(A) Boralex's updated market power analysis is hereby accepted for filing, as discussed in the body of this order.

(B) Boralex's next updated market power analysis, or justification for exemption from the reporting requirement, is due as provided in Order No. 697.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.