

126 FERC ¶ 61,031
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.

Exelon Generation Company, LLC	Docket Nos. ER00-3251-015
	ER00-3251-017
AmerGen Energy Company, LLC	ER99-754-016
	ER99-754-017
Commonwealth Edison Company	ER98-1734-014
	ER98-1734-016
Exelon Energy Company	ER01-1919-011
	ER01-1919-013
PECO Energy Company	ER01-1147-006
	ER01-1147-007
Exelon West Medway, LLC	ER01-513-021
Exelon Wyman, LLC	ER01-513-022
Exelon New Boston, LLC	
Exelon Framingham, LLC	
Exelon New England Power Marketing, L.P.	ER99-2404-011
	ER99-2404-012

ORDER ACCEPTING UPDATED MARKET POWER ANALYSIS

(Issued January 15, 2009)

1. In this order, the Commission accepts an updated market power analysis filed by Exelon Generation Company, LLC (Exelon Generation), AmerGen Energy Company, LLC (AmerGen), Commonwealth Edison Company (ComEd), Exelon Energy Company (Exelon Energy), PECO Energy Company (PECO), Exelon West Medway, LLC (West Medway), Exelon Wyman, LLC (Wyman), Exelon New Boston, LLC (New Boston), Exelon Framingham, LLC (Framingham), and Exelon New England Power Marketing, L.P. (New England Power) (collectively, Exelon). As discussed below, the Commission concludes that Exelon satisfies the Commission's standards for market-based rate authority. The Commission also accepts Exelon's proposed market-based rate tariff revisions made to incorporate provisions as adopted in Order No. 697 and the tariff

revisions made by AmerGen, PECO, West Medway, Wyman, New Boston, Framingham, and New England Power made to incorporate provisions as adopted in Order No. 697-A.¹

2. Additionally, as discussed below, Exelon meets the criteria for a Category 2 seller in the Central, Northeast, and Southwest Power Pool regions and a Category 1 seller in the Southeast, Southwest, and Northwest regions and is so designated. For those regions where Exelon has been designated a Category 2 seller, Exelon's next updated market power analysis must be filed according to the regional schedule adopted in Order No. 697.²

I. Background

3. On January 14, 2008, as supplemented on February 20, 2008, Exelon filed an updated market analysis in accordance with the regional reporting schedule adopted in Order No. 697.³ Exelon also submitted revised tariff sheets to incorporate the required provisions adopted by the Commission in Order No. 697.⁴

4. On April 4, 2008, the Director, Division of Tariffs and Market Development – West, acting under delegated authority, requested additional information in relation to the updated market power analyses filed by numerous filers within PJM (PJM RTO Filers). Specifically, the request noted that the identified PJM RTO Filers had failed to provide a Simultaneous Import Limitation (SIL) study with their updated market power analyses as

¹ *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, at P 914-918, *clarified*, 121 FERC ¶ 61,260 (2007) (Order Clarifying Final Rule), *order on reh'g*, Order No. 697-A, 73 Fed. Reg. 25,832 (May 7, 2008), FERC Stats. & Regs. ¶ 31,268 (2008); *order on reh'g*, Order No. 697-B, 73 Fed. Reg. 79,610 (Dec. 30, 2008), FERC Stats. & Regs. ¶ 31,285 (2008).

² Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 882-893, App. D; Order Clarifying Final Rule, 121 FERC ¶ 61,260 at P 9, 10, App. D-1.

³ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 882. The Commission stated that “both the Commission and market participants will benefit from greater data consistency that will result from regional examination of updated market power analyses and a methodical study of all sellers in the same region. This will give the Commission a more complete view of market forces in each region and the opportunity to reconcile conflicting submissions, enhancing our ability to ensure that sellers’ rates remain just and reasonable.” *See also* Order Clarifying Final Rule, 121 FERC ¶ 61,260 at P 13.

⁴ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 914-18.

required by the Commission in Order No. 697. The April 4, 2008 request for information directed the PJM RTO Filers to provide a SIL study consistent with the requirements of Order No. 697, or in the alternative to provide a SIL study done by PJM that adequately addresses the Order No. 697 principles for how to measure transmission import capability.

5. On April 30, 2008, the PJM RTO Filers submitted a partial response to the April 4, 2008 request for information stating that PJM was submitting a SIL study for the PJM market at the request of the PJM RTO Filers and requested an extension of time to file their individual responses to the April 4, 2008 request for information.

6. On April 30, 2008, PJM Interconnection, LLC (PJM) filed a motion to intervene out-of-time in the above-captioned dockets and a SIL study for the entire PJM region (PJM SIL Study). On June 2, 2008, as amended on July 14, 2008, PJM filed a SIL study for the PJM-East submarket (PJM-East SIL Study). On August 6, 2008, the Commission found in *PSEG Energy Resources & Trade LLC*, 124 FERC ¶ 61,147 (2008) (PJM SIL Order),⁵ that the PJM SIL Study and PJM-East SIL Study meet the Commission's requirements for SIL studies as discussed in Appendix E of the April 14 Order⁶ and Order No. 697. In the PJM SIL Order, the Commission gave the PJM RTO Filers the following three options: (1) choose to rely on the PJM SIL Study and the PJM-East SIL Study; (2) conduct sensitivity studies on the PJM SIL Study and the PJM-East SIL Study, which they would submit along with the PJM SIL Study or PJM-East SIL Study; or (3) perform their own SIL studies.⁷

7. On August 15, 2008, Exelon submitted revised pivotal supplier and market share screen analyses. Applicants state that they use SIL values from the PJM and PJM-East SIL Studies in their revised analysis.

8. Exelon Corporation holds all the interests in Exelon Generation and is also the ultimate parent of PECO and ComEd. AmerGen, West Medway, Wyman, New Boston and Framingham are all subsidiaries of Exelon Generation.

9. Exelon owns a total of 19,843 megawatts (MWs) of generating capacity in the PJM market. Exelon's generating capacity in the PJM-East submarket totals 6,954 MWs.

⁵ The entire history and findings relating to the PJM SIL Study and the PJM-East SIL Study are detailed in the PJM SIL Order and are not repeated here.

⁶ *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g* 108 FERC ¶ 61,026 (2004).

⁷ PJM SIL Order, 124 FERC ¶ 61,147 at P 22.

Additionally, Exelon owns a total of 531 MWs of generating capacity in the ISO New England Inc. (ISO-NE) market.

II. Notices and Responsive Pleadings

10. Notice of the January 14, 2008 filing was published in the *Federal Register*, 73 Fed. Reg. 5,540 (2008), with interventions or protests due on or before March 14, 2008. The Illinois Commerce Commission (Illinois Commission) filed a notice of intervention, comments and petition for declaratory order. PJM Industrial Customer Coalition (PJM Industrial Customers) filed a timely motion to intervene and protest. The PPL Companies filed a timely motion to intervene. Exelon filed an answer on March 27, 2008.

11. Notice of the August 15, 2008 filing was published in the *Federal Register*, 73 Fed. Reg. 50,805 (2008), with interventions or protests due on or before September 5, 2008. On September 16, 2008, the PJM Market Steel & Cement Manufacturers (PMSCM) filed a motion for leave to intervene out of time. On September 18, 2008, Exelon filed comments on PMSCM's motion stating that PMSCM offers no basis for any Commission action.

III. Discussion

A. Procedural Matters

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the Illinois Commission's notice of intervention, and the timely, unopposed motions to intervene of PJM Industrial Customers and the PPL Companies timely serve to make them a party to this proceeding.

13. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2008), the Commission will grant PMSCM's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.⁸

14. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept Exelon's answer because it has provided information that assisted us in our decision-making process.

⁸ PMSCM states that it will present data that show screen failures, but no such data was included in its filing. As noted above, PJM filed a motion to intervene out of time in the above captioned dockets. The Commission granted PJM's late-filed motion to intervene in the PJM SIL Order. *Id.* P 11.

B. Market-Based Rate Authorization

15. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, horizontal and vertical market power.⁹ As discussed below, the Commission concludes that Exelon satisfies the Commission's standards for market-based rate authority.

1. Horizontal Market Power

16. The Commission adopted two indicative screens for assessing horizontal market power, the pivotal supplier screen and the wholesale market share screen.¹⁰

17. Exelon has prepared the pivotal supplier and wholesale market share screens for the PJM, PJM-East, and ISO-NE markets, consistent with the requirements of Order No. 697.¹¹

a. PJM

18. Exelon did not submit a SIL study for the PJM market. Instead it relied upon a study that PJM submitted and that the Commission found meets its requirements.¹²

19. The Commission has reviewed Exelon's pivotal supplier screen and wholesale market share screen for the PJM market and has determined that Exelon passes the pivotal supplier screen and the wholesale market share screen in PJM with market shares ranging by season from 4.5 to 8.7 percent.

20. Accordingly, the Commission finds that Exelon satisfies the Commission's requirements for market-based rates regarding horizontal market power in the PJM market.

⁹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 62, 399, 408, 440.

¹⁰ *Id.* P 62.

¹¹ *Id.* P 235-36.

¹² PJM SIL Order, 124 FERC ¶ 61,147 (2008). In addition, Exelon also submitted a set of screens examining the sensitivity of the results to SIL data that has been adjusted to reflect existing transmission reservations. Exelon continues to pass the screens even under this sensitivity analysis.

b. PJM-East

21. Exelon did not submit a SIL study for the PJM-East submarket. Instead it relied upon a study that PJM submitted by PJM and that the Commission found met its requirements.¹³ The Commission accepted the definition of PJM-East as “the part of the PJM control area that is east of the Eastern Interface, when that interface is constrained or nearly constrained.”¹⁴

22. The Commission has reviewed Exelon’s pivotal supplier screen and wholesale market share screen for the PJM-East submarket and has determined that Exelon passes the pivotal supplier screen and the wholesale market share screen in PJM-East with market shares ranging by season from 2.2 to 7.4 percent.

23. Accordingly, the Commission finds that Exelon satisfies the Commission’s requirements for market-based rates regarding horizontal market power in the PJM-East submarket.

c. ISO-NE

24. Exelon did not submit a SIL study for the ISO-NE market, but instead based its import analysis on the ISO-NE 2006 Regional System Plan.¹⁵ Using the Regional System Plan as a reasonable approximation of simultaneous import capability that would have been available to suppliers in surrounding first-tier markets during each seasonal peak, Exelon passes the pivotal supplier screen and the wholesale market share screen in ISO-NE with market shares ranging by season from 3.5 to 4.4 percent.¹⁶ However, Exelon would continue to pass the pivotal supplier screen and the wholesale market share screen even if no non-affiliate uncommitted capacity imports were included in the analysis.

25. Accordingly, the Commission finds that Exelon satisfies the Commission’s requirements for market-based rates regarding horizontal market power in the ISO-NE market.

¹³ *Id.*

¹⁴ *Atlantic City Electric Co., et al.*, 86 FERC ¶ 61,248, at 61,896 (1999).

¹⁵ The Commission found that use of the ISO-NE 2006 Regional System Plan as a reasonable approximation of simultaneous import capability meets the Commission’s requirements for these purposes. *See, e.g., Niagara Mohawk Power Corporation*, 123 FERC ¶ 61,175, at P 20 (2008).

¹⁶ Exelon January 14, 2008 filing, Exhibit EXE-6.

2. Vertical Market Power

26. In cases where a public utility, or any of its affiliates, owns, operates, or controls transmission facilities, the Commission requires that there be a Commission-approved Open Access Transmission Tariff (OATT) on file before granting a seller market-based rate authorization.¹⁷

27. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.¹⁸ The Commission requires a seller to provide a description of its ownership or control of, or affiliation with an entity that owns or controls, intrastate natural gas transportation, storage or distribution facilities; sites for generation capacity development; and sources of coal supplies and equipment for the transportation of coal supplies such as barges and rail cars (collectively, inputs to electric power production).¹⁹ The Commission also requires sellers to make an affirmative statement that they have not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.²⁰

28. Exelon states that its transmission assets located in PJM are under the functional control of PJM, which is a Commission-approved RTO with an OATT on file with the Commission.²¹

29. Further, Exelon states that it does not own or control inputs to electric power production, and Exelon affirmatively states that it has not erected barriers to entry and will not erect barriers to entry in the relevant markets.

30. Based on Exelon's representations, Exelon satisfies the Commission's requirements for market-based rates regarding vertical market power.

¹⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 408.

¹⁸ *Id.* P 440.

¹⁹ *Id.* P 447. In Order No. 697-A, the Commission revised the definition of inputs to electric power production to include "physical coal supply sources and ownership of or control over who may access transportation of coal supplies." Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 176.

²⁰ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447.

²¹ *Pennsylvania-New Jersey-Maryland Interconnection*, 81 FERC ¶ 61,257 (1997).

3. Other Matters

a. Protests and Answers

31. The PJM Industrial Customers repeat arguments they raised on rehearing of Order No. 697 that the Commission fails to answer a threshold question of whether the PJM market rules and structure result in a competitive market for electric energy and capacity. The PJM Industrial Customers thus assert that Order No. 697 is unlawful and, therefore, the approval or continuation of a seller's market-based rate authority is unlawful. They further assert that unless and until the Commission identifies the characteristics of a competitive market and finds that such a market actually exists, the Commission cannot approve the instant request for authorization to continue making sales at market-based rates.

32. Exelon states in its answer that these arguments are a challenge to Order No. 697 and the Commission's rules, and they do not challenge whether Exelon complied with the requirements of Order No. 697 or performed the analysis correctly. Exelon states that the challenge to Order No. 697 is an impermissible collateral attack on Order No. 697.²²

b. Commission Determination

33. We agree with Exelon that the PJM Industrial Customers' arguments are improper in this proceeding. The Commission recently addressed the PJM Industrial Customers' arguments on rehearing of Order No. 697. Specifically, in Order No. 697-A, the Commission rejected the argument that Order No. 697 does not reflect reasoned decision-making because the Commission did not find the existence of a competitive market before relying on market-based rate authority.²³ Thus, we reject the PJM Industrial Customers' arguments here.

C. Affiliate Power Sales

34. Exelon requests a finding that it "continue[s] to satisfy the Commission's guidelines in relation to previously granted waivers of the affiliate power sales restrictions and other affiliate restrictions now codified in 18 C.F.R. Part 35".²⁴ Exelon maintains that under prior Commission determinations and applicable state law, neither ComEd nor PECO serve captive retail or wholesale customers in Illinois or Pennsylvania

²² Exelon March 27, 2008 Answer at 11-12.

²³ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 407-12.

²⁴ See Application at 6.

respectively, and its affiliates with market-based rates therefore continue to qualify for previously granted waivers of the code of conduct and affiliate sale restrictions.

1. Protest

35. The Illinois Commission argues that the Commission's otherwise applicable inter-affiliate power sales conditions and inter-affiliate code of conduct requirements should no longer be waived with respect to Exelon.²⁵ The Illinois Commission argues that the Commission's grant of these waivers is based on elements that are no longer valid because circumstances have changed.²⁶ Specifically, the Illinois Commission states that in Illinois the retail rate freeze which was in effect during the initial authorization in 2000 has ended.²⁷ The Illinois Commission also argues that Illinois has moved to alternative methods for utility procurement of power on behalf of retail customers who either have not switched, or cannot effectively switch, to alternative retail electric providers.

36. Lastly, the Illinois Commission requests that if the Commission does not apply the otherwise applicable inter-affiliate power sales conditions and inter-affiliate code of conduct requirements then it should deem ComEd's residential customers "captive" pursuant to the provisions of Order No. 707.²⁸ The Illinois Commission states that the Commission clarified in that order that "if a state regulatory authority in a retail choice state does not believe retail customers are sufficiently protected and that our affiliate restrictions should apply to the local franchised public utility, it may file a petition for declaratory order to deem its retail customers to be captive for the purposes of applying the affiliate restrictions."²⁹

37. The Illinois Commission states that while Illinois is a retail access state, residential customers are still effectively captive to the incumbent utility. It further states that in the residential customer segment, actual customer switching is non-existent and that in the ComEd service territory, no residential customer has yet switched to an alternative retail

²⁵ Illinois Commission Protest at 3.

²⁶ *Id.* at 5-6.

²⁷ *Id.* at 5.

²⁸ *Id.* at 14; *Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, 73 FR 11013 (Feb. 29, 2008), FERC Stats. & Regs. ¶ 31,264 at P 45, *order on rehearing*, Order No. 707-A, 73 FR 43072 (July 24, 2008), FERC Stats. & Regs. ¶ 31,272 (2008).

²⁹ Illinois Commission Protest at 13.

supplier.³⁰ Additionally, the Illinois Commission argues that the State of Illinois' options for controlling wholesale market affiliate abuse are not adequate or effective.³¹

38. Specifically, the Illinois Commission maintains that using after-the-fact state prudence review as the Commission advocated in Order No. 697 is inferior to requiring companies to file reasonable affiliate transaction reports before-the-fact, as well as applying reasonable code of conduct requirements to transactions between franchised public utilities and their market-based rate affiliates. The Illinois Commission claims that the filed rate doctrine undercuts its ability to address and remedy wholesale market affiliate abuse by requiring it to permit retail rates to reflect the wholesale rates the Commission authorizes. The Illinois Commission acknowledges that while it will have some authority to assess the prudence of ComEd's decisions regarding wholesale acquisition of power and non-power goods and services, proving imprudence is difficult. According to the Illinois Commission, relying exclusively on state commissions in retail access states to remedy wholesale market affiliate abuse problems after the fact is inadequate here.³²

2. Exelon's Answer

39. Exelon responds that ComEd and PECO continue to lack any captive customers, and they argue that under Order No. 697 they continue to qualify for previously granted waivers of the code of conduct and affiliate sales restrictions now codified in the Commission's regulations.³³

40. Exelon also argues that the Illinois Commission has failed to establish why the Commission should revoke the code of conduct and affiliate sales waivers which have been previously granted. Exelon states that the Illinois Commission has not demonstrated that adequate rate payer protections do not exist in Illinois, and it argues that the revocation of waiver is thus not necessary.³⁴

41. Exelon notes that the only fact that the Illinois Commission has presented to support its argument that ComEd's customers are captive under existing market conditions is that no residential customer has yet exercised its legal right to switch to an

³⁰ *Id.* at 14.

³¹ *Id.* at 18-20.

³² *Id.*

³³ Exelon March 27, 2008 Answer at 2-3.

³⁴ *Id.* at 5.

alternative retail supplier. Exelon thus argues that this fact on its own should not lead the Commission to a determination that ComEd's residential customers are captive.³⁵ It states that a competitive retail market in ComEd's service territory has been developing rapidly and the switching statistics for other classes of customers are already very robust. Exelon notes that four competitive suppliers have been certificated to provide electric service to residential customers.

42. Additionally, Exelon states that the revocation on these waivers is not necessary to prevent affiliate abuse. Exelon notes that there are still a number of restrictions in place to protect those customers in Exelon's territories from abuse. Exelon mentions that it is still subject to the Standards of Conduct for Transmission Providers, as well as the Illinois Commission's Standards of Conduct and Functional Separation.³⁶ Exelon states that the Illinois General Assembly passed legislation to create the Illinois Power Agency, which is empowered to develop procurement plans on behalf of the State's largest utilities and to implement a competitive procurement process beginning in 2009.³⁷ Further, Exelon states that there are Illinois Commission-approved rules on affiliate pricing, with which ComEd fully complies.³⁸

3. Commission Determination

43. Section 35.36(a)(6) of the Commission's regulations defines "captive customers" as "any wholesale or retail electric energy customers served by a franchised public utility under cost-based regulation."³⁹ The Commission stated in Order No. 697 that any sellers that have previously demonstrated and been found not to have captive customers, and therefore have received a waiver of the market-based rate code of conduct requirement in whole or in part, will not be required to request another waiver of the associated affiliate restrictions. But they will be required to demonstrate that they continue to lack captive customers in order to support a continued waiver of the affiliate restrictions in the regulations, and they will also need to explain why any wholesale customers are not captive.⁴⁰ The Commission clarified in Order No. 697-A that if sellers have wholesale

³⁵ *Id.* at 6.

³⁶ *Id.* at 8-9.

³⁷ *Id.* at 9.

³⁸ *Id.* at 10.

³⁹ 18 CFR 35.36(a)(6).

⁴⁰ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 551.

customers, instead of explaining why those customers are not captive, the sellers should explain why those customers are adequately protected against affiliate abuse.⁴¹

44. Exelon states that neither ComEd nor PECO serve captive wholesale customers in Illinois or Pennsylvania respectively.⁴² Consistent with Order Nos. 697 and 697-A, based on Exelon's representations we find that its wholesale customers are adequately protected from affiliate abuse.⁴³

45. With respect to retail customers, the Commission explained in Order No. 707 and Order No. 697-A that "if a state regulatory authority in a retail choice state does not believe retail customers are sufficiently protected and that our affiliate restrictions should apply to the local franchised public utility," it could file a petition for declaratory order to deem its retail customers to be captive customers for the purposes of applying the affiliate restrictions.⁴⁴ Exelon states that neither ComEd nor PECO serve captive retail customers. In the instant case, the Illinois Commission asks that the Commission deem ComEd's retail customers captive. However, the Illinois Commission has failed to explain why ComEd's retail customers are not "sufficiently protected" such that the Commission's affiliate restrictions should apply to ComEd.

⁴¹ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 201.

⁴² In addition, in an order issued March 4, 2008, the Commission noted that ComEd and an affiliate explain that ComEd no longer has any wholesale customers as of December 31, 2007. *Commonwealth Edison Co. and Exelon Generation Co. LLC*, 122 FERC ¶ 61,200 (2008).

⁴³ See Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 480; Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 201.

⁴⁴ Order No. 707, FERC Stats. & Regs. ¶ 31,272 at P 45; Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 203. We note that the Illinois Commission's notice of intervention and comments includes a petition for declaratory order deeming ComEd's residential customers to be captive. The Commission stated in Order No. 697-A that a state regulatory authority may petition the Commission for a declaratory order deeming a franchised public utility's customers to be captive for purposes of applying the affiliate restrictions or raise such an argument as part of its comments in a market-based rate proceeding. *Id.* P 203. We are treating the Illinois Commission's filing in terms of the latter alternative. We note that this approach is consistent with the Commission's long-standing rule that a request for declaratory order cannot be included as part of an intervention. *Louisville Gas and Electric Company*, 62 FERC ¶ 61,016, at 61,151-52 (1993); *Consumers Power Company*, 58 FERC ¶ 61,323, at 62,046 (1992).

46. However, even if ComEd's retail customers met the definition of captive customers under the Commission's regulations, we would find that affiliate abuse is not a concern in this case, and therefore that the affiliate restrictions in section 35.39 should not apply. We note that Illinois has a state-mandated competitive procurement process that includes an independent evaluator and that is subject to the oversight of the state commission. A recently enacted Illinois law created the Illinois Power Agency to develop procurement plans on behalf of the state's largest utilities and to implement a competitive procurement process for power purchases by those utilities on behalf of residential and small commercial customers beginning in June 2009, subject to the oversight and approval of the Illinois Commission.⁴⁵ In the interim, the law directed the utilities to develop power procurement plans and the Illinois Commission to approve those plans.⁴⁶ The Illinois Commission now has and will continue to have the ability to ensure a properly developed request for proposals and to oversee a fair administration of such a request for proposals in order to protect retail customers.

47. Thus, even if ComEd's retail customers met the definition of captive customers under the Commission's regulations, in light of the competitive procurement process in place under Illinois law, and the protections available under that process, we would conclude that there is no need to apply the Commission's affiliate restrictions to ComEd.⁴⁷

48. In addition, the Illinois Commission's filed rate doctrine argument is misplaced here. While a state may not disallow a pass-through of purchased power costs in retail rates because it disagrees that the wholesale rate approved by the Commission is reasonable, nothing in this order limits the Illinois Commission's ability to review the prudence of purchase decisions under the circumstances presented or to undertake such

⁴⁵ 220 Ill. Comp. Stat. 5/16-111.5 (2008).

⁴⁶ As the Illinois Commission has explained, "[i]n keeping with requirements of law, the [Illinois] Commission approved ComEd's plan to issue a Request for Proposals (RFP). An independent procurement administrator, NERA, supervised the bid process for ComEd and a procurement monitor, hired by the [Illinois] Commission, reviewed the RFP process, bid benchmarks, and reported back to the [Illinois] Commission. The [Illinois] Commission determined that all benchmarks were met and approved the contracts." Illinois Commission News Release, ICC Announces Winning Bidders in ComEd Energy Purchase (March 12, 2008).

⁴⁷ To the extent the Illinois Commission wants to place its own affiliate restrictions on retail purchases, it may do so.

reviews “up-front” as opposed to at the time the utility seeks to flow power purchase costs through retail rates.⁴⁸

D. Order No. 697 Compliance Filing

49. In Order No. 697, the Commission adopted two standard required provisions that each seller must include in its market-based rate tariff: (i) a provision requiring compliance with the Commission’s regulations; and, (ii) a provision identifying any limitations and exemptions regarding the seller’s market-based rate authority.⁴⁹ In addition to the required tariff provisions, the Commission adopted a set of standard provisions that must be included in a seller’s market-based rate tariff to the extent that they are applicable.⁵⁰ In Order No. 697-A, the Commission also required that each seller include in its market-based rate tariff a provision identifying which category of seller it qualifies as in each region.⁵¹

⁴⁸ See *Pike County Light & Power Co. v. Pennsylvania Public Utility Comm'n*, 77 Pa. Commw. 268, 465 A.2d 735, 737-38 (1983); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 at 965-67, 106 S. Ct. 2349, 90 L. Ed. 2d 943; *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 at 369, 108 S. Ct. 2428, 101 L. Ed. 2d 322 (1988); *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Comm'n*, 837 F.2d 600, 609 (3d Cir.) *cert. denied*, 488 U.S. 941, 109 S. Ct. 365, 102 L. Ed. 2d 355 (1988)

⁴⁹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 914.

⁵⁰ *Id.* P 917.

⁵¹ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 391-93.

50. Exelon's revised market-based rate tariffs⁵² include the Commission's two required provisions and a set of standard provisions regarding sales of certain ancillary services in various markets, as well as sales of ancillary services as a third-party provider. These provisions satisfy the requirements of Order No. 697. Additionally, the tariffs of AmerGen, PECO, West Medway, Wyman, New Boston, Framingham, and New England Power include the required provision concerning seller categories and therefore satisfy the requirements of Order No 697-A.⁵³

⁵² Exelon Generation Company, LLC, FERC Electric Tariff, First Revised Volume No. 1, First Revised Sheet Nos. 1, 6, 7 and 8 (supersedes Original Sheet Nos. 1, 6, 7 and 8); Exelon Generation Company, LLC, FERC Electric Tariff, Original Volume No. 2, First Revised Sheet No. 1 (supersedes Original Sheet No. 1); AmerGen Energy Company, LLC, FERC Electric Tariff, Original Volume No. 1, First Revised Sheet Nos. 4, 5, 9 and Substitute Second Revised Sheet No. 10 (supersedes Original Sheet Nos. 4, 5, 9 and First Revised Sheet No. 10); Commonwealth Edison Company, FERC Electric Tariff, First Revised Volume No. 6, Second Revised Sheet No. 1 and Third Revised Sheet No. 2 (supersedes First Revised Sheet No. 1 and Second Revised Sheet No. 2); Exelon Energy Company, FERC Electric Tariff, First Revised Volume No. 1, Third Revised Sheet No. 1 (supersedes Second Revised Sheet No. 1); PECO Energy Company, FERC Electric Tariff, Second Revised Volume No. 1, Second Revised Sheet Nos. 1, 6 and 8, Substitute Third Revised Sheet Nos. 2 and 12, and Substitute Second Revised Sheet No. 7 (supersedes First Revised Sheet Nos. 1, 6, 7, 8 and Second Revised Sheet Nos. 2 and 12); Exelon West Medway LLC, Eight Revised FERC Electric Tariff No. 1, Substitute Third Revised Sheet No. 1 and Substitute First Revised Sheet No. 6 (supersedes Second Revised Sheet No. 1 and Original Sheet No. 6); Exelon Wyman LLC, Eight Revised FERC Electric Tariff No. 1, Substitute Third Revised Sheet No. 1 and Substitute First Revised Sheet No. 6 (supersedes Second Revised Sheet No. 1 and Original Sheet No. 6); Exelon New Boston LLC, Eight Revised FERC Electric Tariff No. 1, Substitute Third Revised Sheet No. 1 and Substitute First Revised Sheet No. 6 (supersedes Second Revised Sheet No. 1 and Original Sheet No. 6); Exelon Framingham LLC, Eight Revised FERC Electric Tariff No. 1, Substitute Third Revised Sheet No. 1 and Substitute First Revised Sheet No. 6 (supersedes Second Revised Sheet No. 1 and Original Sheet No. 6); Exelon New England Power Marketing, L.P., FERC Electric Rate Schedule No. 3, Substitute Third Revised Sheet No. 1 and Substitute First Revised Sheet No. 2 (supersedes Second Revised Sheet No. 1 and Original Sheet No. 2).

⁵³ Exelon Generation, ComEd, and Exelon Energy have submitted tariff revisions which among other things comply with Order No. 697-A in a separate proceeding. *See Exelon Generation Company, LLC*, Docket No. ER00-3251-016 (September 12, 2008) (unpublished letter order).

51. Exelon also includes in its filing a list of assets, as required by Order No. 697.⁵⁴ While the filing identifies generation assets, transmission assets, natural gas intrastate pipelines, and gas storage facilities owned or controlled by Exelon and their affiliates, it is not in the form the Commission specified in Order No. 697.⁵⁵ The Commission clarified the requirements for this asset appendix in Order No. 697-A.⁵⁶ Applicants are directed to file an asset appendix in compliance with Order No. 697 and Order No. 697-A, within 30 days of the date of this order.

52. Exelon's revised market-based rate tariffs therefore satisfy the Commission's requirements set forth in Order No. 697 and Order No. 697-A. Accordingly, we will accept Exelon's revised market-based rate tariffs, effective September 18, 2007, as requested.

E. Reporting Requirements

53. 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 longer) market-based power sales during the most recent calendar quarter.⁵⁷ Public utilities must file Electric Quarterly Reports no later than 30 days after the end of the reporting quarter.⁵⁸

⁵⁴ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 894-95.

⁵⁵ *Id.* P 894-96.

⁵⁶ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at 379-81.

⁵⁷ *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). Attachments B and C of Order No. 2001 describe the required data sets for contractual and transaction information. Public utilities must submit Electric Quarterly Reports 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>.

⁵⁸ The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2008). 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 continued...

54. Exelon 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.⁵⁹

55. Additionally, in Order No. 697, the Commission created two categories of sellers.⁶⁰ Category 1 sellers are not required to file regularly scheduled updated market power analyses. Category 1 sellers are wholesale power marketers and wholesale power producers that own or control 500 MW or less of generation in aggregate per region; that do not own, operate, or control transmission facilities other than limited equipment necessary to connect individual generation facilities to the transmission grid (or have been granted waiver of the requirements of Order No. 888); that are not affiliated with anyone that owns, operates or controls transmission facilities in the same region as the seller's generation assets; that are not affiliated with a franchised public utility in the same region as the seller's generation assets; and that do not raise other vertical market power issues.⁶¹ Sellers that do not fall into Category 1 are designated as Category 2 and are required to file regularly scheduled updated market power analyses.⁶²

56. Exelon states that it does not own or control greater than 500 MW of generation in the Southeast, Southwest, and Northwest regions. Exelon also states that it does not own, operate or control transmission facilities in the Southeast, Southwest, and Northwest regions nor do they own or control any other assets in those regions which might raise vertical market power concerns.

57. Based on Exelon's representations, we find that Exelon meets the criteria for a Category 2 seller in the Central, Northeast, and Southwest Power Pool regions and is so designated. Additionally, Exelon meets the criteria for a Category 1 seller in the Southeast, Southwest, and Northwest regions and is so designated. Exelon thus must file an updated market power analysis in compliance with the regional reporting schedule

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.

⁵⁹ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005); 18 C.F.R. § 35.42.

⁶⁰ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 848.

⁶¹ 18 C.F.R. § 35.36(a)(2).

⁶² Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 850.

adopted in Order No. 697 for those regions in which it is designated a Category 2 seller.⁶³ The Commission reserves the right to require such an analysis at any intervening time.

The Commission orders:

- (A) Exelon's updated market power analysis is hereby accepted for filing.
- (B) Exelon is hereby directed to submit a compliance filing within 30 days of the date of this order, as discussed in the body of this order.
- (C) Exelon's revisions to its market-based rate tariff sheets are hereby accepted for filing, effective September 18, 2007, as requested, as discussed in the body of this order.
- (D) Exelon is hereby directed to file an updated market analysis for those regions where it is designated a Category 2 seller according to the regional reporting schedule adopted in Order No. 697.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁶³ *Id.* P 882.