

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Duke Energy Trading and Marketing, L.L.C.

Docket Nos. ER99-2774-005  
ER99-2774-006  
ER99-2774-008  
EL05-111-000  
EL05-111-001

ORDER ACCEPTING UPDATED MARKET POWER ANALYSIS, REVISED  
MARKET-BASED RATE TARIFF, AND DISMISSING REQUEST FOR  
REHEARING

(Issued January 20, 2006)

1. In this order, the Commission accepts for filing the market-based rate tariff revisions and the updated market power analysis submitted by Duke Energy Trading and Marketing, L.L.C. (Duke Trading). As discussed below, we conclude that Duke Trading satisfies the Commission's standards for market-based rate authority. We also dismiss Duke Trading's request for rehearing of the order issued on May 31, 2005.<sup>1</sup>

**Background**

2. On June 29, 2005, Duke Trading submitted revisions to its market-based rate tariff to include the Commission's change in status reporting requirement.<sup>2</sup> On August 1, 2005, Duke Trading filed an updated market power analysis in response to the Commission's May 31 Order, in which the Commission directed Duke Trading to file an updated market power analysis or to provide satisfactory support for why it should not be required to do so.

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<sup>1</sup> *3E Technologies, Inc., et al.*, 111 FERC ¶ 61,295 (2005) (May 31 Order).

<sup>2</sup> *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). Duke's change in status reporting requirement was effective March 21, 2005.

3. On June 30, 2005, Duke Trading filed a request for rehearing of the May 31 Order, stating that the Commission gave it the option to report changes in the characteristics relied on by the Commission in approving its market-based rates on an on-going basis in lieu of filing an updated market power analysis every three years.

4. Duke Trading is indirectly owned by Duke Energy Corporation (Duke Energy) and ExxonMobil Corporation. Through Duke Energy, Duke Trading is affiliated with Duke Power which operates a franchised utility business in North Carolina and South Carolina. Duke Trading is affiliated with a number of entities that own generation in different control areas, as discussed below.

### **Notice and Responsive Pleadings**

5. Notice of Duke Trading's filing was published in the *Federal Register*, 70 Fed. Reg. 48,117 (2005), with protests and interventions due on or before August 22, 2005. None was filed.

### **Discussion**

#### **Market-Based Rate Authorization**

6. 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. The Commission also considers whether there is evidence of affiliate abuse or reciprocal dealing.<sup>3</sup> As discussed below, the Commission concludes that Duke Trading satisfies the Commission's standards for market-based rate authority.

#### **Generation Market Power**

7. On April 14, 2004, the Commission adopted two indicative screens for assessing generation market power, the pivotal supplier screen and the wholesale market share screen.<sup>4</sup> While Duke Trading does not own generation facilities, certain of its affiliates

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<sup>3</sup> 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).

<sup>4</sup> *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

do. Duke Trading states that in certain relevant geographic markets,<sup>5</sup> all of its affiliates' generation facilities were constructed after July 9, 1996. With regard to these facilities, Duke Trading asserts that these affiliates lack generation market power in those areas, pursuant to section 35.27(a) of the Commission's regulations, which provides that applicants shall not be required to demonstrate any lack of market power in generation with respect to sales from capacity constructed after July 9, 1996.<sup>6</sup>

8. In addition, certain of Duke Trading's affiliates own generation facilities in the Northwest Energy, Southern Company, Entergy, and California Independent System Operator Corporation (CAISO) geographic markets.<sup>7</sup> With regard to the Northwest Energy control area, Duke Trading states that all of the output of its affiliate's facility is sold under a long-term power purchase agreement. Duke Trading has provided generation market power screens for the Entergy and CAISO geographic markets. For the Southern Company geographic market, Duke Trading relies on the order accepting the updated market power analysis of its affiliate, Duke Power, in which the Commission found that Duke Power and its affiliates satisfied its generation market power standard for the markets other than the Duke Power control areas.<sup>8</sup> The Commission has reviewed Duke Trading's generation market power screens and has determined that Duke Trading passes the screens in the Entergy and CAISO geographic markets. Moreover, based on Duke Trading's representations, the Commission finds that Duke Trading also satisfies the Commission's generation market power standard in the Northwest Energy and Southern Company geographic markets.

9. In the instant filing, Duke Trading states that it has not performed a separate analysis of the Duke Power control area. Duke Trading states that it will not sell power at wholesale in this control area unless the Commission authorizes Duke Power to sell power at market-based rates in the Duke Power control area or Duke Trading, in the future, obtains Commission authorization for sales in such a market.

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<sup>5</sup> Specifically, the ISO New England, Inc. (490 MW), PJM Interconnection, L.L.C. (3,120 MW), Midwest Independent Transmission System Operator, Inc. (778 MW), Associated Electric Cooperative, Inc. (494 MW), Western Area Power Administration (300 MW), Arizona Public Service Company/Salt River Irrigation District (570 MW), and PacifiCorp East (107 MW) relative geographic markets.

<sup>6</sup> 18 C.F.R. § 35.27(a) (2005). The Commission notes that it intends to address as part of the generic rulemaking proceeding in Docket No. RM04-7-000 whether to retain or modify section 35.27(a) of its regulations.

<sup>7</sup> Specifically, 57 MW in the Northwest Energy control area, 12 MW in the Southern Company control area, 506 MW in the Entergy control area, and 4,162 MW in the CAISO.

<sup>8</sup> *Duke Power*, 109 FERC ¶ 61,270 (2004).

10. Based on Duke Trading's representations, the Commission finds that Duke Trading satisfies the Commission's generation market power standard for the grant of market-based rate authority. In addition, we direct Duke Trading to file within 15 days of the date of issuance of this order revisions to its market-based rate tariff to reflect its commitment to not make sales at market-based rates in the Duke Power control area, unless and until it has received Commission authorization to do so.

### **Transmission Market Power**

11. When a transmission-owning public utility seeks market-based rate authority, the Commission has required the public utility to have an open access transmission tariff (OATT) on file before granting such authorization. Duke Trading states that its transmission-owning affiliate, Duke Power, has an OATT on file with the Commission.<sup>9</sup> Further, no intervenors have raised transmission market power concerns. Based on Duke Trading's representation, the Commission finds that Duke Trading satisfies the Commission's transmission market power standard for the grant of market-based rate authority.

### **Other Barriers to Entry**

12. Duke Trading states that neither it nor its affiliates have the ability to erect barriers to entry. Duke Trading notes that certain of its affiliates own natural gas pipelines, but that these pipelines are subject to the Commission's open access requirements. In addition, no intervenors have raised barrier to entry concerns. Based on Duke Trading's representations, the Commission is satisfied that Duke Trading cannot erect barriers to entry.

### **Affiliate Abuse**

13. Duke Trading states that its market-based rate tariff prohibits sales to an affiliate of Duke with a franchised service territory. In addition, Duke Trading states that its market-based rate tariff contains a code of conduct. In addition, no intervenors have raised affiliate abuse concerns. Based on Duke Trading's representations, the Commission finds that Duke Trading satisfies the Commission's concerns with regard to affiliate abuse.

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<sup>9</sup> *Baltimore Gas & Electric Co.*, Docket No. OA97-654-000 (Feb. 24, 1999) (unpublished letter order).

### **Reporting Requirements**

14. 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.<sup>10</sup> Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.<sup>11</sup>

15. Duke Trading is directed to file an updated market power analysis within the time period established for Duke Power and its affiliates.<sup>12</sup> The Commission also reserves the right to require such an analysis at any intervening time.

### **Revised Market-Based Rate Tariff**

16. Duke Trading also filed a revised market-based rate tariff, which includes the Commission's change in status reporting requirement.<sup>13</sup> We accept Duke Trading's revised market-based rate tariff effective March 21, 2005.

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<sup>10</sup> *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. 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>.

<sup>11</sup> The exact dates for these reports are prescribed in 18 C.F.R. § 35.10b (2005). 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.

<sup>12</sup> *Duke Power*, 111 FERC ¶ 61,506 at P 67 (2005).

<sup>13</sup> *Reporting Requirements for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175 (2005).

**Request for Rehearing and Section 206 Proceeding**

17. We find that Duke Trading's updated market power analysis filing satisfies the Commission's directive in the May 31 Order. We will therefore terminate the section 206 proceeding instituted in Docket No. EL05-111-000 with regard to Duke Trading.

18. In addition, as noted above, Duke Trading has filed a request for rehearing of the Commission's May 31 Order. Duke Trading states that the Commission did not require it to file updated market power analyses every three years. In its rehearing request, Duke Trading also states that it will submit an updated market power analysis to comply with the Commission's directive in the May 31 Order. Duke Trading lastly states that it will not contest the Commission's authority to modify the conditions of its market-based rate authority by imposing the updated market power analysis requirement.

19. Acceptance of Duke Trading's updated market power analysis and termination of the section 206 proceeding instituted in Docket No. EL05-111-000 obviates the need to act on its rehearing request. We therefore dismiss Duke Trading's request for rehearing.

The Commission orders:

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

(B) Duke Trading's next updated market power analysis is due at the same time Duke Power's updated market power analysis is due.

(C) Duke Trading's request for rehearing is dismissed, as discussed in the body of this order.

(D) Duke Trading's revised market-based rate tariff is accepted for filing, as discussed in the body of this order.

(E) The section 206 proceeding instituted in Docket No. EL05-111-000 with regard to Duke Trading is hereby terminated.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.