

127 FERC ¶ 61,067  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Duquesne Light Company	Docket Nos. ER98-4159-011 ER98-4159-013 ER98-4159-014 ER98-4159-002
Duquesne Power, LLC	ER04-268-008 ER04-268-010 ER04-268-011
Duquesne Keystone LLC	ER06-398-005 ER06-398-007 ER06-398-008
Duquesne Conemaugh LLC	ER06-399-005 ER06-399-007 ER06-399-008
Macquarie Cook Power Inc.	ER07-157-003

ORDER ACCEPTING UPDATED MARKET POWER ANALYSIS, ORDER NO. 697  
COMPLIANCE FILING AND NOTICES OF CHANGE IN STATUS

(Issued April 22, 2009)

1. In this order, the Commission accepts an updated market power analysis filed by Duquesne Light Company, Duquesne Power, LLC (Duquesne Power), Duquesne Keystone LLC (Duquesne Keystone), and Duquesne Conemaugh LLC (Duquesne Conemaugh), (collectively, Duquesne Companies) and Macquarie Cook Power Inc. (Macquarie Cook) (Duquesne Companies and Macquarie Cook collectively referred to as Applicants). As discussed below, the Commission concludes that Applicants satisfy the Commission's standards for market-based rate authority. Also, the Commission accepts notices of change in status filed by the Duquesne Companies as well as proposed

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2. Additionally, as discussed below, Applicants are designated as Category 2 sellers. Applicants' next updated market power analyses must be filed according to the regional schedule adopted in Order No. 697<sup>2</sup> and in accordance with our direction herein.

## **I. Background**

### **A. Updated Market Power Analysis**

3. On January 11, 2008, as amended on June 11, 2008 and January 8, 2009,<sup>3</sup> Applicants filed an updated market analysis in accordance with the regional reporting schedule adopted in Order No. 697.<sup>4</sup> Applicants also filed proposed revisions to their market-based rate tariffs.

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<sup>1</sup> *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 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 and clarification*, 124 FERC ¶ 61,055 (2008), *order on reh'g and clarification*, Order No. 697-B, 73 Fed. Reg. 79,610 (Dec. 30, 2008), FERC Stats. & Regs. ¶ 31,285 (2008).

<sup>2</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 882-93, App. D; Order Clarifying Final Rule, 121 FERC ¶ 61,260 at P 9, 10, App. D-1.

<sup>3</sup> On October 2, 2001, Duquesne Light Company filed an updated market power analysis and a notice of change in status. It informed the Commission that it completed divestiture of its generation assets and also that it has an affiliate, Monmouth Energy, Inc. that owns a 10 MW generation facility. This information is reflected in Applicants' January 11, 2008 updated market power analysis and thus the earlier filing is superseded by the January 11, 2008 updated market power analysis.

<sup>4</sup> 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. Applicants state that the Duquesne Companies own transmission and generation facilities in PJM Interconnection, L.L.C. (PJM) and they own generation facilities in ISO-New England, Inc. (ISO-NE).<sup>5</sup> The Duquesne Companies own or control approximately 559 megawatts (MW) of installed capacity in the PJM-East submarket<sup>6</sup> and 959 MW of installed capacity in the PJM market, outside of PJM-East (thus, the Duquesne Companies have 1,518 MW of installed capacity for the entire PJM footprint). The Duquesne Companies have submitted a market power analysis for the PJM market and PJM-East submarket.<sup>7</sup> The Duquesne Companies have acquired 739 MW installed capacity in ISO-NE and have submitted a market power analysis for the ISO-NE market.

5. Duquesne Light Company is engaged in the purchase, transmission, and distribution of electric energy but does not own generation. Duquesne Keystone and Duquesne Conemaugh, on the other hand, own interests in generating facilities.

6. Applicants state that Macquarie Cook is a public utility power marketer that does not own or control generation or transmission. Macquarie Cook is wholly owned by Macquarie Energy North America Trading Inc. (Macquarie Energy). Macquarie Energy is owned by Macquarie Bank Limited, which is owned by Macquarie B.H. Pty Ltd., which is owned by Macquarie Group Limited (Macquarie Group). Macquarie Group is one of the ultimate parent companies of the Duquesne Companies.

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<sup>5</sup> Although Applicants state that Duquesne Light Company filed a petition with the Commission to withdraw from PJM with the intent to become a member of the Midwest Independent Transmission System Operator, Inc. (Midwest ISO), we note that it is no longer pursuing this objective. *See* Duquesne Light Company's December 10, 2008 filing in Docket No. ER08-194-000.

<sup>6</sup> The PJM-East submarket is the part of PJM that is east of the Eastern Interface, when that interface is constrained or nearly constrained. *Atlantic City Electric Company*, 86 FERC ¶ 61,248, at 61,896 (1999).

<sup>7</sup> Applicants submitted a letter of concurrence by Duquesne Keystone and Duquesne Conemaugh, which jointly own the Keystone Electric Generating Station and the Conemaugh Electric Generating Station and their associated jurisdictional facilities which are located in the PJM market, setting forth each owners' respective understanding of, and concurrence with, the level of control exercised by each of the owners. Applicants also submitted a letter of concurrence by RPL Holdings, Inc. (RPL) confirming RPL's control of a 65 MW gas-fired cogeneration facility located in Elmwood, New Jersey that it owns and for which Macquarie Cook is the energy manager. Applicants state that Macquarie Cook does not have discretion to control this facility, which is offered into the PJM daily market.

7. Applicants state that Duquesne Light Holdings, Inc. (DL Holdings) is an exempt public utility holding company that owns various regulated and unregulated subsidiaries, including the Duquesne Companies. In their January 11, 2008 updated market power analysis, Applicants state that DL Holdings is owned by a consortium of investors including IFM (International Infrastructure) Wholesale Trust (IFM Trust), acting through its trustee Industry Funds Management (Nominees) Limited (IFM Nominees). IFM Trust has an approximately 23 percent interest in DQE Holdings, LLC (DQE Holdings), the parent company of DL Holdings. As clarified in their January 8, 2009 filing, Applicants state that DL Holdings' remaining shareholders are DUET Investment Holdings Limited (DUET)<sup>8</sup> (29 percent), CLH Holdings GP (22 percent), Macquarie FSS Infrastructure Trust (MFIT), GIF2A and G1F2B (together, GIF-MFIT)<sup>9</sup> (13 percent), Motor Trades Association of Australia Superannuation Fund Pty Limited (Motor Trades) (7 percent) and Access Capital Advisers (State Super) (6 percent). Applicants state that as minority shareholders, neither Codan, Motor Trades nor State Super possess operational control over DL Holdings or its public utility subsidiaries.

8. In their updated market power analysis, Applicants state that, on October 26, 2007, Puget Energy announced that it had signed a definitive merger agreement with a consortium of investors which includes affiliates of Applicants. The transaction closed on February 6, 2009.<sup>10</sup>

#### **B. Change in Status Filings**

9. On June 9, 2008, the Duquesne Companies submitted a notice of change in status regarding the acquisition of equity interests in certain generation facilities.<sup>11</sup>

10. On July 23, 2008, the Duquesne Companies informed the Commission of two transactions: (1) the acquisition by IFM Nominees, as trustee of IFM Trust, of indirect

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<sup>8</sup> DUET's manager is a joint venture in which Macquarie Group Limited indirectly owns 50 percent.

<sup>9</sup> Macquarie Holdings Limited indirectly controls the manager of CLH Holdings and GIF-MFIT.

<sup>10</sup> See Puget Energy, Inc., Docket No. EC08-40-000, Notice of Consummation (filed February 13, 2009).

<sup>11</sup> Macquarie Cook was not included in the change in status filings. We note that Applicants' January 8, 2009 filing supplements the change in status filings, in addition to the January 11, 2008 updated market power analysis filing.

equity interests in Newington Energy LLC on June 23, 2008; and (2) closing of an IFM Nominees' reorganization on July 3, 2008 resulting in a change in the upstream ownership of the Duquesne Companies.

## **II. Notices and Responsive Pleadings**

11. Notice of Applicants' January 11, 2008 filing, as amended June 11, 2008 and January 8, 2009, was published in the *Federal Register*,<sup>12</sup> with interventions or protests due on or before January 29, 2009. Exelon Corporation filed a motion to intervene.

12. Notice of Duquesne Companies' June 9, 2008 filing was published in the *Federal Register*,<sup>13</sup> with interventions or protests due on or before June 30, 2008. None was filed.

13. Notice of Duquesne Companies' July 23, 2008 filing was published in the *Federal Register*,<sup>14</sup> with interventions or protests due on or before August 13, 2008. None was filed.

## **III. Discussion**

### **A. Procedural Matters**

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), Exelon's timely, unopposed motion to intervene serves to make it a party to this proceeding.

### **B. Analysis**

#### **1. Updated Market Power Analysis**

##### **a. 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

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<sup>12</sup> 73 Fed. Reg. 5541 (2008); 73 Fed. Reg. 35,683 (2008); 74 Fed. Reg. 4422 (2009).

<sup>13</sup> 73 Fed. Reg. 34,923 (2008).

<sup>14</sup> 73 Fed. Reg. 44,715 (2008).

power.<sup>15</sup> As discussed below, the Commission concludes that Applicants satisfy the Commission's standards for market-based rate authority.

**i. 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.<sup>16</sup> As noted above, Duquesne Companies provide pivotal supplier and wholesale market share screens for the PJM market, PJM-East submarket, and ISO-NE market.<sup>17</sup>

17. We have reviewed the pivotal supplier and wholesale market share screens and determined that Applicants pass the pivotal supplier screen and the wholesale market share screen in the PJM market with market shares ranging by season to no higher than one percent. Additionally, Duquesne Companies pass the screens in the PJM-East submarket with market shares ranging by season from 3.7 percent to 4.9 percent<sup>18</sup> and in the ISO-NE market with market shares ranging by season from 6.2 percent to 8.5 percent.

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<sup>15</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 62, 399, 408, 440.

<sup>16</sup> *Id.* P 62.

<sup>17</sup> The acquisition of Monmouth, as discussed in the October 2, 2001 filing is reflected in the updated market power analysis.

<sup>18</sup> On August 6, 2008, in *PSEG Energy Resources & Trade LLC*, 124 FERC ¶ 61,147 (2008) (August 6, 2008 Order), the Commission issued an order finding that the SIL studies submitted by PJM on April 30, 2008 and June 2, 2008, as amended July 14, 2008, for the PJM market and PJM-East submarket meet the Commission's requirements for a SIL study. Duquesne Companies filed their June 9, 2008 notice of change in status prior to the PJM July 14, 2008 filing amending the PJM-East SIL values. The Duquesne Companies used only one SIL value for all of the screens for the PJM market and the PJM-East submarket in their June 9, 2008 change of status filing, and that single SIL value represented competing imports in the PJM-East submarket. However, PJM's July 14, 2008 filing lowered the SIL values for the PJM-East submarket and therefore the value Duquesne Companies used in their filing for the pivotal supplier screen in the PJM-East submarket is higher than the value in the study that the Commission acted on in the August 6, 2008 Order. However, we have determined that Duquesne Companies pass both screens for the PJM-East submarket when using the lower SIL value submitted by PJM in the amendment to the PJM-East SIL study for the Duquesne Companies' pivotal supplier screen.

18. Accordingly, the Commission finds that Applicants satisfy the Commission's requirements for market-based rates regarding horizontal market power.

**ii. Vertical Market Power**

19. The Commission requires in cases where a public utility, or any of its affiliates, owns, operates, or controls transmission facilities that there be a Commission-approved Open Access Transmission Tariff (OATT) on file before granting a seller market-based rate authorization.<sup>19</sup>

20. Applicants state that the transmission assets they or their affiliates own are all under the control of PJM and subject to the terms and conditions of the PJM OATT, which is on file with the Commission.<sup>20</sup>

21. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.<sup>21</sup> 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).<sup>22</sup> 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.<sup>23</sup>

22. Applicants state that Macquarie Energy, which wholly owns Macquarie Cook, is the sole shareholder in a limited liability company that has exercised its option to acquire a site in California to potentially develop a 600 MW gas-fired generator.<sup>24</sup> Upon closing

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<sup>19</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 408.

<sup>20</sup> *Pennsylvania-New Jersey-Maryland Interconnection*, 81 FERC ¶ 61,257 (1997).

<sup>21</sup> *Id.* P 440.

<sup>22</sup> *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.

<sup>23</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447.

<sup>24</sup> The company also owns renewable energy credits and has requested a California

on the site transaction, Applicants state that they will be affiliated with an entity that owns and controls a site for generation capacity development. On August 27, 2008, Applicants notified the Commission in an informational filing that the transaction closed on August 25, 2008.

23. As clarified in their January 8, 2009 filing, Applicants state that Macquarie Cook Energy LLC (Macquarie Cook Energy), an affiliate of Macquarie Holdings Limited, owns electricity or natural gas related assets in the United States. Macquarie Cook Energy is a natural gas trading and marketing company servicing North America's natural gas producers, utilities, industrial users, and other large wholesale energy sector participants. Applicants state that it holds capacity rights on various interstate pipelines and at various interstate storage facilities throughout North America and that it currently is party to two one-year contracts (that have been renewed annually) for storage at intrastate storage facilities in southern California and in the Pacific Northwest. Additionally, from time to time, Macquarie Cook Energy engages in transactions for monthly and daily storage and hub services at interstate and intrastate storage facilities.

24. Applicants also state Macquarie Holdings Limited is affiliated with The Gas Company, LLC, a regulated retail gas distribution company serving consumers in Hawaii.

25. Applicants clarify in their January 8, 2009 filing that Duquesne Companies' upstream owner also indirectly owns Pacific Hydro Limited (Pacific Hydro), an Australian renewable energy company. Pacific Hydro has executed a joint venture with Western Wind to invest directly in Western Wind's projects in Canada, Arizona and California.<sup>25</sup>

26. The Commission adopted a rebuttable presumption that the ownership or control of, or affiliation with any entity that owns or controls, inputs to electric power production does not allow a seller to raise entry barriers, but will allow intervenors to demonstrate otherwise.<sup>26</sup>

27. Applicants affirmatively state that they have not erected barriers to entry in the relevant market and will not erect barriers to entry in the relevant market in the future.<sup>27</sup>

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Independent System Operator interconnection feasibility study.

<sup>25</sup> Applicants' January 8, 2009 Filing at 6.

<sup>26</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 446.

<sup>27</sup> See Applicants' January 11, 2008 Filing at 5; Duquesne Companies' July 23, 2008 Filing at 4-5; Duquesne Companies' June 9, 2008 Filing at 5; Applicants'

(continued)

28. Based on Applicants' representations, we find that Applicants' submittal satisfies the Commission's requirements for market-based rates regarding vertical market power.

**b. Affiliate Restrictions**

29. Applicants state that the waiver of the affiliate restrictions granted by the Commission<sup>28</sup> continues to apply to the Duquesne Companies. They state that Duquesne Light Company, the only company in the corporate family with a franchised service territory, has no wholesale customers, and none of the Duquesne Companies sell power to wholesale customers at cost-based rates. They state that, although Duquesne Light Company continues to serve retail customers as a provider of last resort under Pennsylvania's retail restructuring program, those customers have the freedom to choose alternative suppliers under Pennsylvania's retail choice statute. They further state that, because none of the Duquesne Companies are franchised utilities with captive customers and none of the Duquesne Companies have any wholesale customers served under cost based regulation, the Duquesne Companies' wholesale customers are adequately protected against affiliate abuse.<sup>29</sup> Based on Applicants representations, we find that the previously granted waiver of the affiliate restrictions continues to apply.

**c. Order No. 697 Compliance Filing**

30. In Order No. 697, the Commission adopted two standard required provisions that each seller must include in its market-based rate tariff: a provision requiring compliance with the Commission's regulations and a provision identifying any limitations and exemptions regarding the seller's market-based rate authority.<sup>30</sup> 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.<sup>31</sup>

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January 8, 2009 Filing at 7.

<sup>28</sup> Applicants' January 8, 2009 Filing at 2, *citing Sunbury Generation, LLC*, 108 FERC ¶ 61,160 (2004); *Duquesne Keystone, LLC*, Docket No. ER06-398-000 (Mar. 2, 2006) (unpublished letter order).

<sup>29</sup> Applicants' January 8, 2009 Filing at 1-2.

<sup>30</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 914.

<sup>31</sup> *Id.* P 917.

31. Macquarie Cook's revised market-based rate tariff includes the provision requiring compliance with the Commission's regulations and, thus, satisfies the requirements of Order No. 697.

32. Macquarie Cook's revised tariff includes a set of standard provisions with regard to sales of certain ancillary services. These provisions satisfy the requirements of Order No. 697.

33. Applicants include an asset appendix, as required by Order No. 697,<sup>32</sup> that identifies generation and transmission assets owned and controlled by Applicants.

34. Accordingly, we find that Macquarie Cook's revised market-based rate tariff satisfies the Commission's requirements set forth in Order No. 697. Accordingly, we will accept Macquarie Cook's revised market-based rate tariffs, effective September 18, 2007, as requested.<sup>33</sup>

35. The Duquesne Companies filed market-based rate tariff sheets, in compliance with Order No. 697, on November 21, 2007, as amended January 16, 2008.<sup>34</sup> Applicants' January 8, 2009 filing includes further revisions to the tariff sheets of the Duquesne Companies to reflect the applicability of the affiliate waiver in view of certain upstream ownership changes. We will accept these revised tariff sheets, effective September 18, 2007, as requested.<sup>35</sup>

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<sup>32</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 894.

<sup>33</sup> Rate Schedule FERC No. 1, First Revised Original Sheet No. 1, (Superseding Original Sheet No. 1).

<sup>34</sup> These sheets were accepted in Docket No. ER08-259-000 (Feb. 20, 2008) (unpublished letter order).

<sup>35</sup> Duquesne Light Company, FERC Electric Tariff, Original Volume No. 3, Second Revised Sheet No. 1 (Superseding First Revised Sheet No. 1); Duquesne Power, LLC, Rate Schedule FERC No. 1, Second Revised Sheet No. 2 (Superseding Sub. First Revised Sheet No. 2); Duquesne Conemaugh, LLC, FERC Electric Tariff Volume No. 1, Second Revised Sheet No. 4 (Superseding First Revised Sheet No. 4); Duquesne Keystone, LLC, FERC Electric Tariff Volume No. 1, Second Revised Sheet No. 4 (Superseding First Revised Sheet No. 4).

**d. Reporting Requirements**

36. Consistent with the procedures the Commission adopted in Order No. 2001, an entity with market-based rate authority must file electronically with the Commission an Electric Quarterly Report (EQR) 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.<sup>36</sup> Public utilities must file EQRs no later than 30 days after the end of the reporting quarter.<sup>37</sup>

37. Applicants 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.<sup>38</sup>

38. In Order No. 697, the Commission created two categories of sellers.<sup>39</sup> 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

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<sup>36</sup> *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 EQRs 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>37</sup> The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2007). Failure to file an EQR (without an appropriate request for extension), or failure to report an agreement in an EQR, 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>38</sup> *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.

<sup>39</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 848.

connect individual generation facilities to the transmission grid (or have been granted waiver of the requirements of Order No. 888<sup>40</sup>); 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.<sup>41</sup> Sellers that do not fall into Category 1 are designated as Category 2 and are required to file regularly scheduled updated market power analyses.<sup>42</sup>

39. Applicants, in their January 11, 2008 filing, request exemption from Category 2 status. In the June 9, 2008 filing, Duquesne Companies withdraw their request. Based on Applicants' representations, we find that they meet the criteria for a Category 2 seller and are so designated.<sup>43</sup> Thus, Applicants must file updated market power analyses in compliance with the regional reporting schedule adopted in Order No. 697.<sup>44</sup> The Commission also reserves the right to require such an analysis at any intervening time.

40. We find that Applicants have complied with the Commission's requirements and we will accept the updated market power analyses.

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<sup>40</sup> *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

<sup>41</sup> 18 C.F.R. § 35.36(a)(2).

<sup>42</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 850.

<sup>43</sup> Macquarie Cook was not included in the June 9, 2008 change in status filing. However, we note that on April 15, 2009, Applicants submitted a filing in Docket No. ER98-4159-017, which includes revised tariff sheets specifying that they (including Macquarie Cook) are Category 2 sellers. The April 15, 2009 filing will be acted on in a subsequent order.

<sup>44</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 882.

## 2. Notices of Change in Status

### a. June 9, 2008 filing

41. In the June 9, 2008 filing, Duquesne Companies state that, on April 4, 2008, the Commission authorized North American Energy Alliance, LLC to acquire Consolidated Edison Development, Inc.'s and CED/SCS Newington, LLC's direct and indirect ownership interests in Newington Energy, L.L.C. (Newington), Consolidated Edison Energy Massachusetts, Inc., Lakewood Cogeneration, L.P. (Lakewood), Ocean Peaking Power, L.L.C. (Ocean Peaking), and CED Rock Springs, Inc. (CED Rock Springs) (collectively, the Project Companies).<sup>45</sup> Duquesne Companies state that, for purposes of the Commission's market power analysis, North American Energy and the Project Companies are affiliates of Duquesne Companies. They state that the Commission authorized North American Energy Alliance to acquire the interests in the Project Companies through two separate purchase and sale agreements: (1) the first agreement for North American Energy Alliance to acquire 100 percent of Consolidated Edison Development's direct or indirect ownership interests in Consolidated Edison Energy Massachusetts, Lakewood, Ocean Peaking and CED Rock Springs; and (2) the second agreement for North American Energy Alliance to acquire CED/SCS Newington's interest in Newington. They state that the first of the two agreements closed on May 8, 2008.

42. Duquesne Companies state that IFM Nominees as trustee for IFM Trust holds 100 percent of the member interest in North American Energy Alliance Holdings, LLC, the immediate parent holding company of North American Energy Alliance. Duquesne Companies state that North American Energy Alliance has no subsidiaries and does not own any interest in, operate or control, any assets used for the generation, sale, distribution or transmission of electric energy, or for the production, gathering, storage, liquefaction, sale, transmission or distribution of natural gas or other inputs to electric generation in the United States.

43. In the June 9, 2008 filing, Duquesne Companies state that, after the acquisition of the Project Companies, Duquesne Companies continue to lack horizontal and vertical market power, and the June 9, 2008 change in status filing reflects Duquesne Companies' affiliation with all the Project Companies. That filing includes pivotal supplier and market share screens for the Duquesne Companies and the Project Companies in the relevant markets (PJM, PJM-East, and ISO-NE). Duquesne Companies state that the

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<sup>45</sup> *Consolidated Edison Development, Inc.*, 123 FERC ¶ 61,022 (2008) (*Consolidated Edison Development*).

analyses show that they continue to pass the pivotal supplier and wholesale market share screens with *de minimis* market shares in the relevant markets.

44. Duquesne Companies state that none of the circumstances upon which the Commission relied to grant Duquesne Companies waiver of the code of conduct requirements have changed. They state that Duquesne Light Company continues to have no captive wholesale customers and its retail customers continue to have retail choice under the Pennsylvania retail restructuring program.

45. Duquesne Companies state that they have not erected barriers to entry into the relevant markets and will not erect barriers to entry into the relevant markets. Finally, because of their affiliation with the Project Companies, Duquesne Companies withdraw their request for exemption from Category 2 that they submitted in their January 11, 2008 filing.<sup>46</sup>

**b. July 23, 2008 filing**

46. In the July 23, 2008 filing, the Duquesne Companies inform the Commission of two transactions: (1) the acquisition by IFM Nominees, as trustee of IFM Trust, of indirect equity interests in Newington Energy LLC on June 23, 2008, thereby completing the transaction approved by the Commission in *Consolidated Edison Development*, and (2) closing of an IFM Nominees' reorganization on July 3, 2008 resulting in a change in the upstream ownership of the Duquesne Companies.

47. With respect to the change in upstream ownership, Duquesne Companies state that on June 12, 2008, the Commission authorized the indirect disposition of jurisdictional facilities that resulted from the reorganization of IFM Nominees' interest in DQE Holdings.<sup>47</sup> IFM Nominees proposed to transfer units in IFM Trust to Codan Trust Company (Cayman) Limited (Codan), acting as the trustee of IFM Global Infrastructure (Cayman) Fund (IFM Cayman Trust), and to transfer subsequently IFM Trust's assets, including its interest in DQE Holdings, to Cayman Trust. Codan has appointed Industry Funds Management Pty Ltd, an affiliate of IFM Nominees, to provide advisory and administrative services to Codan with respect to all aspects of the management of the Cayman Trust. Duquesne Companies state that Codan is not affiliated with IFM

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<sup>46</sup> In Order No. 697, the Commission created two categories of sellers. Category 2 Sellers, described in greater detail below, are required to file regularly scheduled updated market power analyses.

<sup>47</sup> *Industry Funds Management (Nominees) Limited*, 123 FERC ¶ 62,219 (2008).

Nominees or any of IFM Nominees' affiliates. Duquesne Companies state that the parties consummated the transaction on July 3, 2008.

48. Duquesne Companies state that after the consummation of the IFM Nominees' reorganization, the Duquesne Companies continue to lack horizontal and vertical market power. The North American Energy Alliance and DQE Holdings interests, now held by Codan on behalf of IFM Cayman Trust, are under the administration of Industry Funds Management Pty Ltd. As clarified in the January 8, 2009 filing, Applicants state that as a minority shareholder, Codan does not possess operational control over DL Holdings or its public utility subsidiaries.

49. Applicants state that they have not erected barriers to entry into the relevant markets and will not erect barriers to entry into the relevant markets.<sup>48</sup>

50. Based on Duquesne Companies' representations, we will accept the June 9, 2008 and July 23, 2008 change in status filings, as supplemented January 8, 2009.

The Commission orders:

(A) Applicants' updated market power analysis is hereby accepted for filing.

(B) Duquesne Companies' notices of change in status are hereby accepted for filing.

(C) Applicants' revisions to their market-based rate tariffs are hereby accepted for filing, effective September 18, 2007, as requested, as discussed in the body of this order.

(D) Applicants are hereby directed to file updated market analyses according to the regional reporting schedule adopted in Order No. 697.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>48</sup> See *infra* n.27.