

134 FERC ¶ 61,243  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
John R. Norris, and Cheryl A. LaFleur.

Integrys Energy Services, Inc.

v.

Docket Nos. EL09-32-001  
EL09-32-002

New Brunswick Power Generation Corporation

New Brunswick Power Generation Corporation

ER08-1439-001  
ER08-1439-002

ORDER ACCEPTING COMPLIANCE FILING, DENYING REHEARING,  
TERMINATING COMPLAINT PROCEEDING, AND DIRECTING FURTHER  
FILINGS

(Issued March 29, 2011)

1. In this order, the Commission accepts a horizontal market power study submitted by New Brunswick Power Generation Corporation (NBP Generation) in compliance with a Commission order issued on June 10, 2009 and directs further compliance filings.<sup>1</sup> In addressing Integrys Energy Services, Inc.'s (Integrys) February 2, 2009 complaint against NBP Generation (Complaint), the Commission in the June 10 Order directed NBP Generation to submit a horizontal market power study for the New Brunswick System Operator (NBSO) balancing authority area. In the instant order, the Commission denies NBP Generation's request for rehearing and clarification of the June 10 Order. As discussed below, the Commission concludes that NBP Generation satisfies the Commission's standards for market-based rate authority in the NBSO balancing authority area. Accordingly, the Complaint filed in Docket No. EL09-32-000 is hereby dismissed and the proceeding is terminated. Finally, based upon its representations, we find that

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<sup>1</sup> *Integrys Energy Services, Inc. v. New Brunswick Power Generation Corp.*, 127 FERC ¶ 61,232 (2009) (June 10 Order).

NBP Generation meets the criteria for a Category 2 seller in the Northeast region and is so designated.<sup>2</sup>

### **I. Background, Notice of Filings, and Responsive Pleadings**

2. NBP Generation is a Canadian corporation wholly owned by the New Brunswick Power Holding Corporation, which is owned by the New Brunswick Electric Finance Corporation, an agent of the crown. NBP Generation and its affiliate NB Power Nuclear Corporation own 16 generating facilities with an installed capacity of 3,879 MW in the NBSO balancing authority area. NBP Generation's affiliate, NB Power Transmission Corporation (NBP Transmission), owns transmission lines in New Brunswick, Canada, which are directly interconnected with ISO New England Inc. (ISO New England) and northern Maine. NBP Generation is also affiliated with NB Power Distribution and Customer Service Corporation (NBP Distribution).<sup>3</sup>

3. NBP Transmission's lines are administered by the NBSO, a non-profit crown corporation that operates independently from NBP Generation and its affiliates (including NBP Transmission).<sup>4</sup> The NBSO is responsible for, among other things, the independent administration of the NBSO balancing authority area and the NBSO Open Access Transmission Tariff (OATT).<sup>5</sup> NBP Generation states that as is the case with

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<sup>2</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 848-50, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010).

<sup>3</sup> Pursuant to the New Brunswick Electricity Act S.N.B. 2003, as amended, the former New Brunswick Power Corporation was reorganized into a holding company with four subsidiary operating companies (NBP Generation, NB Power Nuclear Corporation, NB Power Transmission Corporation, and NBP Distribution).

<sup>4</sup> NBP Generation's Application for Market-Based Rate Authority, Docket No. ER08-1439-000, at 5 (filed August 22, 2008).

<sup>5</sup> The NBSO is responsible for maintaining the reliability of the NBSO-controlled grid; facilitating the operation of a competitive electricity market; procuring and providing ancillary services; working with responsible authorities outside New Brunswick to coordinate NBSO activities; and controlling the transmission interfaces between New Brunswick and ISO New England. *Id.*

Independent System Operators and Regional Transmission Organizations in the United States, the NBSO is required by law to provide non-discriminatory, open access to the transmission grid in New Brunswick and the New Brunswick- ISO New England interface. NBP Generation states that the NBSO accomplishes this through the administration of a single system tariff, the NBSO OATT. The NBSO has an independent board of directors and is regulated by the New Brunswick Energy and Utilities Board (New Brunswick Regulatory Board). NBP Generation represents that the NBSO is not an affiliate of either NBP Generation or NBP Transmission as the term is used in the market-based rates context. Although all three entities are New Brunswick crown entities, the NBSO has no board members in common with NBP Generation or its affiliates and, by law, the NBSO is required to operate independently of NBP Generation and its affiliates.<sup>6</sup>

4. When NBP Generation applied for market-based rate authorization in Docket No. ER08-1439-000 on August 22, 2008, it submitted a horizontal market power analysis, including the pivotal supplier and wholesale market share indicative screens, for the ISO New England market, to demonstrate that it does not possess market power in that market.<sup>7</sup> NBP Generation also submitted a copy of the NBSO OATT.

5. In its Complaint, Integrys asserted that when NBP Generation filed its August 22, 2008 request for market-based rate authorization it failed to submit a horizontal market power analysis for the NBSO balancing authority area, despite it owning generation in that balancing authority area.<sup>8</sup> The NBSO balancing authority area is partially in Canada and partially in Maine in the United States. Specifically, the NBSO balancing authority area includes the Canadian Provinces of New Brunswick and Prince Edward Island, as well as a portion of Maine, whose transmission system is administered by the Northern Maine Independent System Administrator, Inc. (Northern Maine ISA).<sup>9</sup>

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<sup>6</sup> *Id.* at 5 n.13.

<sup>7</sup> The ISO New England market is a first-tier market to the NBSO balancing authority area.

<sup>8</sup> NBP Generation received market-based rate authorization on October 6, 2008. *New Brunswick Power Generation Corp.*, Docket No. ER08-1439-000 (Oct. 6, 2008) (delegated letter order) (October 6, 2008 Order).

<sup>9</sup> See June 10 Order, 127 FERC ¶ 61,232 at 4; North American Electric Reliability Council 2006 Reliability Readiness Audit Report, *available at* [http://www.nerc.com/docs/rap/audits/NBSO\\_Readiness\\_Audit\\_Final\\_Report.pdf](http://www.nerc.com/docs/rap/audits/NBSO_Readiness_Audit_Final_Report.pdf). The Northern Maine ISA is an independent system administrator and regional transmission group that encompasses the transmission systems of utilities in the northern-most part of

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6. In its Complaint, Integrys argued that, until NBP Generation submits the appropriate information showing that it does not possess market power in the NBSO balancing authority area,<sup>10</sup> NBP Generation must be deemed to have horizontal market power and should not be authorized to engage in market-based rate transactions. Integrys requested that the Commission order NBP Generation to cease any sales in that portion of Maine where the Northern Maine ISA administers transmission systems and electric power markets until it obtains explicit Commission authorization to do so. Integrys also raised allegations of vertical market power.

7. In the June 10 Order, the Commission agreed with Integrys that, pursuant to Order No. 697, NBP Generation was required to provide a horizontal market power analysis for the NBSO balancing authority area.<sup>11</sup> As the Commission explained in the June 10 Order, while NBP Generation owns generation only in the Canadian portion of the NBSO balancing authority area, for purposes of market-based rate authorization, the NBSO balancing authority area is a relevant geographic market.<sup>12</sup> Accordingly, the Commission granted the Complaint in part and directed NBP Generation to submit such an analysis.<sup>13</sup>

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Maine. Northern Maine includes portions of Aroostook, Washington and Penobscot Counties in Maine.

<sup>10</sup> We note that the pleadings in this proceeding often refer to the Maritimes control area. At one time, the entire Maritimes region was in a single control area but, after the North American Electric Reliability Corporation (NERC) reorganized reliability functions, the region was split into two balancing authority areas (the NBSO balancing authority area and the Nova Scotia balancing authority area). The NBSO provides balancing control for the NBSO balancing authority area and separate balancing occurs in Nova Scotia. *See* Integrys' September 9, 2009 Protest, Morris Affidavit at 10. Therefore, we clarify that our analysis does not focus on the Maritimes control area.

<sup>11</sup> Order No. 679, FERC Stats. & Regs. ¶ 31,252 at P 278.

<sup>12</sup> June 10 Order, 127 FERC ¶ 61,232 at P 23.

<sup>13</sup> To the extent that Integrys, in its Complaint, challenged NBP Generation's authority to make retail sales in northern Maine, the Commission dismissed the Complaint as beyond the Commission's jurisdiction. The Commission noted that, pursuant to section 201(a) of the FPA, it has jurisdiction over the "transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce." 16 U.S.C. § 824(a) (2006). *See* June 10 Order, 127 FERC ¶ 61,232 at P 21 & n.23.

8. On July 10, 2009, NBP Generation filed a request for rehearing of the June 10 Order, which is summarized below.
9. On August 10, 2009, NBP Generation submitted a horizontal market power study for the NBSO balancing authority area in compliance with the June 10 Order.<sup>14</sup> NBP Generation's horizontal market power study included the pivotal supplier and market share indicative screens and a Delivered Price Test (DPT) study, which used Simultaneous Transmission Import Limit (SIL)<sup>15</sup> study values.
10. Notice of NBP Generation's August 10, 2009 compliance filing was published in the *Federal Register*,<sup>16</sup> with interventions or protests due on or before September 9, 2009. The Northern Maine ISA filed a timely motion to intervene in Docket No. ER08-1439-002.
11. On September 9, 2009, Integrys filed a protest arguing that NBP Generation possesses horizontal market power and that NBP Generation's horizontal market power analysis is flawed.<sup>17</sup> Integrys also argues that NBP Generation possesses vertical market power and, among other things, questions whether Attachment M to the NBSO OATT, which provides procedures for customers seeking to utilize what is referred to as the "MEPCO Reservation" (188 MW of transmission capacity), in fact constitutes open access.
12. On September 24, 2009, NBP Generation filed an answer to Integrys' September 9, 2009 Protest. NBP Generation argues that Integrys fails to substantiate a number of claims, presents irrelevant data, and makes assumptions without factual support.
13. On September 29, 2009, the Maine Public Utilities Commission (Maine Commission) filed a motion to intervene in Docket No. ER08-1439-002 and an answer to

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<sup>14</sup> In addition to submitting a study for the NBSO balancing authority area, NBP Generation studied the Maritimes control area. However, for the reasons discussed herein, our analysis focuses on the NBSO balancing authority area.

<sup>15</sup> The SIL study is required as a basis for transmission access for both the indicative screens and the DPT analysis. Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 384.

<sup>16</sup> 74 Fed. Reg. 42,066 (2009).

<sup>17</sup> Integrys' September 9, 2009 Protest at 1, 4.

Integrys' September 9, 2009 Protest.<sup>18</sup> On October 15, 2009, Integrys filed an answer to the Maine Commission's September 29, 2009 filing.

14. On October 16, 2009, staff acting under delegated authority, requested additional information from NBP Generation (October 16, 2009 Request). Specifically, staff requested information pertaining to NBP Generation's DPT, the SIL study values used in that DPT, along with additional information about NBP Generation's representations concerning the NBSO OATT.

15. On November 9, 2009, NBP Generation submitted a response to the October 16, 2009 Request (November 9, 2009 Filing). Notice of NBP Generation's November 9, 2009 Filing was published in the *Federal Register*,<sup>19</sup> with interventions or protests due on or before November 30, 2009. On November 30, 2009, Integrys filed a protest arguing that NBP Generation's market power analysis continues to be deficient.<sup>20</sup>

16. On January 15, 2010, staff requested additional information from NBP Generation (January 15, 2010 Request), finding that the November 9, 2009 Filing was not fully responsive to the October 16, 2009 Request. Specifically, staff requested that NBP Generation provide a revised SIL study and a revised DPT with appropriate SIL values calculated from the relevant study period (December 2005-November 2006) for the NBSO balancing authority area.

17. On March 31, 2010, NBP Generation submitted a response to the January 15, 2010 Request, which included a revised DPT analysis that used transmission import capability values from the relevant study period (March 31, 2010 Filing).

18. Notice of NBP Generation's March 31, 2010 Filing was published in the *Federal Register*,<sup>21</sup> with interventions or protests due on or before April 21, 2010.

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<sup>18</sup> The Maine Commission states that the Commission's determination with regard to NBP Generation's market power analysis should not impair NBP Generation's ability to meet the Northern Maine ISA market rules to meet a balanced schedule for energy and capacity obligations. We note that this order does not need to address the Maine Commission's filing, since we are not revoking NBP Generation's market-based rate authority.

<sup>19</sup> 74 Fed. Reg. 61,342 (2009).

<sup>20</sup> Integrys' November 30, 2009 Protest at 5.

<sup>21</sup> 75 Fed. Reg. 18,493 (2010).

19. On April 21, 2010, Integrys filed another protest reiterating that NBP Generation has not complied with the Commission's direction.<sup>22</sup> Integrys stated that NBP Generation's DPT analysis still fails to address the flaws that Integrys identified in its September 9, 2009 Protest.

20. On July 30, 2010, Integrys filed a motion requesting that the Commission expeditiously issue an order revoking the market-based rate authorization of NBP Generation or impose mitigation for its activities in the portion of northern Maine administered by the Northern Maine ISA.

## **II. Discussion**

### **A. Procedural Matters**

21. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the Northern Maine ISA's timely, unopposed motion to intervene and the Maine Commission's notice of intervention serve to make them parties to this proceeding.<sup>23</sup>

22. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We will accept the answers filed by NBP Generation, the Maine Commission, and Integrys because they have provided information that assisted us in our decision-making process.

### **B. Analysis**

23. Integrys argues that NBP Generation's horizontal market power analysis is flawed, that NBP Generation has not submitted the required information, and that it possesses horizontal market power. Integrys also argues that NBP Generation possesses vertical market power and, among other things, questions whether procedures in the NBSO OATT allow for open access transmission service.

24. As discussed more fully below, we reject Integrys' horizontal and vertical market power claims as unsubstantiated and conclude that NBP Generation has complied with the Commission's requirements for the grant of market-based rate authority.

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<sup>22</sup> Integrys' April 21, 2010 Protest at 1.

<sup>23</sup> We note that the Northern Maine ISA and the Maine Commission were already parties to the proceeding in Docket No. EL09-32-000.

## 1. Market-Based Rate Authorization

25. 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.<sup>24</sup>

### a. Horizontal Market Power

26. After receiving Integrys' complaint, and in order to investigate more fully whether NBP Generation had horizontal market power in the NBSO balancing authority area, the Commission directed NBP Generation to submit preliminary indicative market power screens. As noted above, in addition to providing those studies, NBP Generation on its own elected to also file a DPT study.

#### i. Indicative Screens

27. For purposes of obtaining market-based rate authorization, the NBSO balancing authority area is a relevant geographic market for NBP Generation.<sup>25</sup> Although NBP Generation's generation assets are all located in the Canadian part of the NBSO balancing authority area, it seeks market-based rate authorization for jurisdictional power sales in the United States, which includes the part of the NBSO balancing authority area located in northern Maine. It is therefore required to study the entire NBSO balancing authority area. In response to the Commission's direction in its June 10 Order, NBP Generation prepared the pivotal supplier and wholesale market share indicative screens for the NBSO balancing authority area. It failed the wholesale market share screen with market shares ranging by season from 26.7 percent to 34.1 percent. NBP Generation also voluntarily submitted a revised DPT analysis for the NBSO balancing authority area.

#### ii. Delivered Price Test

28. As the Commission has previously explained, the DPT identifies potential suppliers based on market prices, input costs, and transmission availability, and calculates

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<sup>24</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 62, 399, 408, 440.

<sup>25</sup> June 10 Order, 127 FERC ¶ 61,232 at P 23. For traditional markets (i.e., non-regional transmission organization and non-independent system operator markets), a seller's default relevant geographic market is first, the balancing authority area where the seller is physically located (in this case, the NBSO balancing authority area), and second, the markets directly interconnected to the seller's balancing authority area. Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 232.

each supplier's economic capacity and available economic capacity<sup>26</sup> for each season/load period.<sup>27</sup> Under the DPT, applicants must also calculate market concentration using the Hirschman-Herfindahl Index (HHI).<sup>28</sup> A showing of an HHI less than 2,500 in the relevant market for all season/load periods for sellers that have also shown that they are not pivotal and do not possess a 20 percent or greater market share in any of the season/load periods would constitute a showing of a lack of market power, absent compelling contrary evidence from intervenors.

29. As with the indicative screens, applicants and intervenors may present evidence such as historical wholesale sales data, which can be used to calculate market shares and market concentration and to refute or support the results of the DPT.

30. NBP Generation's revised DPT uses an import capability into the NBSO balancing authority area ranging from 1,600 MW to 1,864 MW of simultaneous total transfer capability (TTC) during the 2005-2006 study period. NBP Generation's DPT analysis for the NBSO balancing authority area indicates that, when the available economic capacity measure is used, NBP Generation is not a pivotal supplier during any of the season/load periods.<sup>29</sup> In addition, NBP Generation's HHIs range from 1,329

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<sup>26</sup> "Economic capacity" is the total generation capacity of all the suppliers that can compete in the destination market, given their costs and transmission availability. "Available economic capacity" is derived by subtracting each supplier's native load obligation from its total capacity and adjusting transmission availability accordingly. *See AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018, at Appendix F (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004); *see also* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at n.78.

<sup>27</sup> Super-peak, peak, and off-peak, for winter, shoulder, and summer periods and an additional highest super-peak for the summer.

<sup>28</sup> The HHI is the sum of the squared market shares. For example, in a market with five equal size firms, each would have a 20 percent market share. For that market,  $HHI = (20)^2 + (20)^2 + (20)^2 + (20)^2 + (20)^2 = 400 + 400 + 400 + 400 + 400 = 2,000$ .

<sup>29</sup> The Commission's analysis herein focuses on NBP Generation's revised DPT analysis in its March 31, 2010 Filing. NBP Generation's revised DPT analysis was performed for the correct relevant geographic market (i.e., the NBSO balancing authority area) and used transmission import data from the correct study period (December 2005 to November 2006). NBP Generation's revised DPT analysis correctly used simultaneous TTC values from the December 1, 2005 to November 30, 2006 study period. NBP Generation's revised DPT analysis results differ only slightly from the results it

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to 1,883. The DPT analysis also indicates that NBP Generation's market shares are below 20 percent during all season/load periods except during the winter-off peak season/load period when its market share is 23.4 percent.

31. NBP Generation claims that, during this season/load period, loads are relatively low while generation is relatively plentiful and elastic in supply. NBP Generation states that a 20 percent market share during the winter-off peak overstates or does not accurately represent its market share because NBP Generation is required, even if it is not economic to do so, to operate a portion of its higher incremental cost, oil-fired 972 MW Coleson Cove facility during that season/load period. It explains that it must operate this facility during the winter-off peak season/load period so that it can accept oil deliveries and allow the oil pipeline serving the facility to continue to operate for reliability reasons. Such required operation, NBP Generation claims, causes the entire output of the Coleson Cove facility to be treated in the DPT as economic during the winter off-peak for the available economic capacity measure. NBP Generation asserts that, while Coleson Cove may operate in off-peak periods in order to be available in higher load time periods, the actual value of energy during these time periods was below the facility's incremental cost. Further, it maintains that the HHI level in the winter off-peak season/load period is 1,609, indicating a moderately concentrated market, and also that NBP Generation is not pivotal. In sum, NBP Generation contends that a single market share above 20 percent during an off-peak season/load period is not demonstrative of any market power concern.<sup>30</sup>

32. With regard to the economic capacity measure, NBP Generation's results indicate that it is a pivotal supplier during six season/load periods with HHIs above 2,500 in those same six season/load periods. It has market shares above 20 percent during all season/load periods. NBP Generation defends its failure of the economic capacity measure by arguing that this measure fails to take into account an entity's native load obligations which, in the case of load serving entities like NBP Generation's affiliate NBP Distribution, are significant.<sup>31</sup>

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submitted in its August 10, 2009 Filing, which used simultaneous TTC values from an earlier time period.

<sup>30</sup> NBP Generation's August 10, 2009 Filing, Arenchild Affidavit at 12.

<sup>31</sup> NBP Generation's August 10, 2009 Filing at 6.

iii. **Responsive Pleadings Addressing Horizontal Market Power**

33. Integrys complains that NBP Generation's horizontal market power analysis is flawed, that NBP Generation possesses market power in the relevant market, and therefore submits that NBP Generation's market-based rate authority must be revoked.<sup>32</sup> Integrys asserts that NBP Generation's actual market behavior proves that its DPT results are not economically plausible. Integrys argues that NBP Generation's DPT analysis is flawed because it: (1) overestimates the import capability from the Hydro-Quebec balancing authority area into the NBSO balancing authority area; (2) fails to account for firm reservations across interfaces; (3) incorrectly allocates import capability to competitors; and (4) improperly accounts for generation capacity from NBP Generation's Coleson Cove facility and its hydro-facilities. Integrys argues that, when it adjusts NBP Generation's DPT to account for some of these issues, NBP Generation's market shares are significantly above 20 percent and HHIs are significantly above 2,500 for the available economic capacity measure.

34. Integrys also argues that NBP Generation's failure to supply a SIL study renders its market power study deficient.<sup>33</sup> It states that NBP Generation's analysis does not conform to Commission requirements for simultaneous import limits.

35. In its April 21, 2010 Protest, Integrys argues that even in its March 31, 2010 Filing NBP Generation still has not complied with the Commission's request to submit a SIL study that corresponds with a revised DPT. Integrys claims that NBP Generation has not submitted the required information because such information would show that NBP Generation cannot meet the Commission's horizontal market power standards. Integrys notes that NBP Generation's response submits TTC values rather than the required SIL values in its revised DPT analysis. Integrys also states that NBP Generation's revised DPT analysis does not address the flaws Integrys identified in its initial protest.

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<sup>32</sup> Integrys' September 9, 2009 Protest at 1.

<sup>33</sup> Integrys' November 30, 2009 Protest. Integrys argues that, among other things, NBP Generation's market power analysis does not conform to the Commission's SIL requirements because it relies upon data three years prior to the appropriate study period. As explained above, this issue is no longer relevant because, on March 31, 2010, NBP Generation submitted simultaneous TTC values, in lieu of a SIL study, with a revised DPT analysis that used data from 2005-2006, the relevant study period.

iv. **Commission Determination Regarding Horizontal Market Power**

36. As discussed below, the Commission concludes that NBP Generation satisfies the Commission's requirements for market-based rate authority regarding horizontal market power in the NBSO balancing authority area and has complied with the requirements of Order No. 697 as well as our previous directives in this proceeding.

37. The Commission has previously explained that failure of either the economic capacity or available economic capacity measure in a DPT analysis alone does not result in an automatic finding of market power. In particular, the Commission has recognized that not all generation capacity is always available to compete in wholesale markets and that accounting for native load requirements is warranted.<sup>34</sup> As we explained in Order No. 697, available economic capacity accounts for native load requirements:

[I]n markets where utilities retain significant native load obligations, an analysis of available economic capacity may more accurately assess an individual seller's competitiveness, as well as the overall competitiveness of a market, because available economic capacity recognizes the native load obligations of the sellers. On the other hand, in markets where the sellers have been predominantly relieved of their native load obligations, an analysis of economic capacity may more accurately reflect market conditions and a seller's relative size in the market.[<sup>35</sup>]

38. Because NBP Generation's affiliate, NBP Distribution, has significant native load obligations in the NBSO balancing authority area, we find that the available economic capacity measure of the DPT more accurately captures conditions in the relevant market. As discussed below, using the available economic capacity measure in its DPT analysis, NBP Generation has shown that it is not pivotal, has less than a 20 percent market share in 9 of 10 season/load periods, and does not exceed the 2,500 HHI threshold in any of the 10 season/load periods.

(a) **Total Transfer Capability Values**

39. While Integrys claims that NBP Generation failed to meet the Commission's requirements by submitting TTC values rather than the requisite SIL study, we disagree.

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<sup>34</sup> April 14 Order, 107 FERC ¶ 61,018 at P 67.

<sup>35</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 112.

In its March 31, 2010 Filing, NBP Generation complied with the Commission's directive by providing simultaneous TTC values and supporting documentation, in accordance with Order No. 697. In that order, the Commission explained that the use of simultaneous TTC values is consistent with the SIL study provided that such values are used in operating the transmission system and posting availability on the Open Access Same-Time Information System (OASIS).<sup>36</sup> The simultaneous TTC values, which include a seller's balancing authority area and aggregated first-tier areas, must represent more than interface constraints at the balancing authority area border and must reflect all transmission limitations within the study area and limitations within first-tier areas. The source (first-tier remote resources) can only deliver power to load in the seller's balancing authority area if adequate transmission is available out of its first-tier area, adequate transmission is available at the seller's balancing authority area interface, and transmission is internally available. Thus, the TTC values must be appropriately adjusted for all applicable firm transmission commitments held by affiliated companies that represent transfer capability not available to first-tier supply. The Commission stated that sellers submitting simultaneous TTC values must provide evidence that these values account for simultaneity, account for all internal transmission limitations, account for all external transmission limitations existing in first-tier areas, account for all transmission reliability margins, and are used in operating the transmission system and posting availability on OASIS.<sup>37</sup>

40. We find that NBP Generation's submitted TTC values meet the requirements discussed in Order No. 697 for allowing the use of simultaneous TTC values in lieu of a SIL study.<sup>38</sup> NBP Generation has provided hourly TTC values, over the study period, for each of the first-tier areas, and states that these same hourly TTC values were used while operating the transmission system and posting availability on OASIS, and because there were no applicable transmission reservations, no adjustments to these hourly TTC values were required. NBP Generation further states that these same hourly TTC values represent more than interface constraints at the balancing authority area border and reflect all transmission limitations within the study area as well as the first-tier area. In addition, NBP Generation has provided evidence that its simultaneous TTC values were calculated by summing each of the first-tier balancing authority areas' hourly TTC value for the same season/load period.<sup>39</sup> Therefore, we find that NBP Generation has provided

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<sup>36</sup> *Id.* P 364.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> The first-tier balancing authority areas to the NBSO balancing authority area are not directly interconnected with each other.

sufficient evidence that its submitted simultaneous TTC values account for simultaneity, account for transmission limitations within the study area and first-tier areas, and account for net area interchange for firm reservations. We are satisfied by NBP Generation's submittal of simultaneous TTC values, which the Commission will accept in lieu of a SIL study. NBP Generation's revised DPT and work papers support its use of an import capability into the NBSO balancing authority area ranging from 1,600 MW to 1,864 MW of simultaneous total transfer capability during the relevant 2005-2006 study period.

**(b) Infeasibility of DPT Results**

41. Integrys' broad argument regarding the economic infeasibility of the DPT results is rejected. Integrys asserts that NBP Generation is able to "procure rights to serve additional load in northern Maine" and, as such, NBP Generation must have preferential access to energy supplies not measured as available economic capacity in its DPT.<sup>40</sup> However, Integrys has not explained how rights to serve *load* somehow equate to access to energy *supplies*. Furthermore, Integrys has failed to define what it means by "procure rights to serve additional load." If by "rights" Integrys is referring to transmission reservations, it is mistaken in its claim that the DPT fails to accurately reflect transmission reservations to serve load, because all of a seller's transmission reservations are reflected in the DPT.<sup>41</sup> Thus, in this respect Integrys' argument appears to be a collateral attack on the validity of the DPT generally. In summary, Integrys' claim is unsubstantiated because it failed to identify which, if any, such rights NBP Generation was able to procure, or otherwise demonstrate why the DPT results are not economically plausible.

**(c) Import Capability (Overestimation, Firm Reservations, Pro-Rata Allocation)**

42. Integrys argues that NBP Generation's *initial* DPT analysis fails to account for an accurate import capability from Hydro-Quebec, firm reservations across interfaces, and a correct pro-rata allocation of transmission capacity among NBP Generation's competitors.<sup>42</sup> Integrys further claims that when it makes adjustments to correct for these

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<sup>40</sup> Integrys' September 9, 2009 Protest, Morris Affidavit at 10.

<sup>41</sup> See Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 364, 369; see also April 14 Order, 107 FERC ¶ 61,018 at Appendix F & n.217.

<sup>42</sup> In its April 21, 2010 Protest, Integrys, despite NBP Generation's revised DPT which used simultaneous TTC values from the relevant study period and included supporting documentation, effectively only incorporated by reference its arguments made in its September 9, 2009 Protest. Integrys did not explain how its claims against the initial SIL values used by NBP Generation in its August 10, 2009 DPT remain relevant to

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errors, NBP Generation's market shares under the available economic capacity measure are above 20 percent, ranging from 29.1 percent to 41 percent, during five of 10 season/load periods, and the HHI market concentrations are above 2,500 during four of those season/load periods.<sup>43</sup> For the reasons discussed below, we disagree with each of Integrys' adjustments to NBP Generation's DPT.

43. First, Integrys argues that the import capability values used by NBP Generation in its initial DPT analysis overestimate the transmission transfer capability into the NBSO balancing authority area. Integrys states that imports from Hydro-Quebec to the NBSO balancing authority area are typically more limited than the 1,135 MW in the summer and shoulder seasons or the 1,200 MW during the winter season used by NBP Generation in its initial DPT analysis. Integrys argues that the more accurate import capability from Hydro-Quebec to the NBSO balancing authority area would be 716 MW, which is the TTC. Integrys argues that NBP Generation should not count the potential 295 MW import capability from the two alternating current (AC) interconnections between Hydro-Quebec and the NBSO balancing authority area because these AC interconnections can transfer power to New Brunswick only when the New Brunswick transmission system enters a radial mode, at which time the NBSO disconnects load from the main New Brunswick transmission system and serves that load radially from the Quebec system. Integrys argues that, because the decision to switch to radial mode resides with NBP Generation and the transfer capability is not available to other users of the New Brunswick transmission system, NBP Generation should not treat those potential 295 MW of transfer capability as available.

44. NBP Generation states that Integrys points to a 2009-2010 NBSO report to state that there is zero TTC for this radial usage. NBP Generation notes that such information is not consistent with the 2005-2006 relevant study period. Furthermore, NBP Generation states that it has no control over the operation of the radial transmission between New Brunswick and Quebec, and that such authority lies solely with the NBSO and its counterparty in Quebec.<sup>44</sup>

45. We are not persuaded by Integrys' assertion that NBP Generation should treat as unavailable 295 MW of transfer capability potentially resulting when the New Brunswick transmission system enters a radial mode. Integrys has failed to substantiate its claim, with information from the relevant study period, that NBP Generation controls the

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a DPT which relies on different transmission import capability values, derived from a different study, and from a different study period.

<sup>43</sup> Integrys' September 9, 2009 Protest, Morris Affidavit at 12-13.

<sup>44</sup> NBP Generation's September 24, 2009 Answer at 7.

operation of the radial transmission between New Brunswick and Quebec. Moreover, Integrys provided no evidence that NBSO has operated the transmission system to restrict access to Integrys, or in an otherwise unduly discriminatory or preferential manner.

46. Integrys also submits that NBP Generation's allocation of import capability into the NBSO balancing authority area is flawed because it did not take into account firm reservations across interfaces. Integrys asserts that, had NBP Generation accounted for firm reservations, only 216 MW of transfer capability would be left to allocate to suppliers.<sup>45</sup> However, according to NBP Generation, based on NBSO's historical information, during the 2005-2006 relevant study period, NBP Generation and its affiliates had no monthly or long-term transmission reservations into the NBSO balancing authority area.<sup>46</sup> Thus, NBP Generation would have had no way to deny access to competing suppliers, including Integrys, across these transmission interfaces. We therefore disagree with Integrys' claim. NBP Generation accounted for firm reservations by using historical TTC values from NBSO's OASIS, thereby requiring no additional adjustments to the TTC values.

47. Integrys also claims that NBP Generation incorrectly assumes that imports from Quebec can be modeled as power coming from three independent suppliers, which has the effect of underestimating NBP Generation's market HHI. According to Integrys, this is inappropriate because Hydro-Quebec owns or controls 80 percent of the generation capacity in Quebec. As such, Integrys contends that NBP Generation, under the Commission's pro-rata allocation, should have allocated 80 percent of the available import capability to Hydro-Quebec.

48. Integrys has failed to submit a power flow analysis or other supporting evidence to substantiate its claim that NBP Generation incorrectly allocated import capability among competitors from Quebec. Therefore, we dismiss as unsupported that claim.

**(d) Coleson Cove Facility and Hydro-Facilities**

49. Integrys maintains that, *if* NBP Generation's generation plant Coleson Cove Unit 1 is a must-run unit year-round, then NBP Generation would have market shares above 20 percent in 9 out of 10 season/load periods under the available economic capacity measure of its DPT. Integrys does not argue or show that NBP Generation's Coleson Cove Unit 1 is a must-run unit year-round. NBP Generation explains that the Coleson Cove Unit 1, an oil-fired facility, is not a must-run unit year-round, but that during the

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<sup>45</sup> Integrys' September 9, 2009 Protest, Morris Affidavit at 11.

<sup>46</sup> NBP Generation's March 31, 2010 Filing, TTC DATA Comparison and Reservations work sheet. NBP\_3\_31\_2010.XLS.

very cold weather in January and February, a minimum amount of generation at Coleson Cove must be operated so that it can accept oil deliveries and allow the oil pipelines serving the facility to continue to operate.<sup>47</sup>

50. NBP Generation has properly accounted for the Coleson Cove facility in its DPT analysis by reflecting that it must appear as a must-run unit during January and February when a portion of the unit must remain in operation to ensure the reliability of the facility. We reject Integrys' unsupported assumption and speculation of market shares under the scenario where the Coleson Cove facility is treated as a must-run unit year-round. NBP Generation confirmed that the Coleson Cove facility is not a must-run unit year round.

51. Integrys also states that, if NBP Generation's hydro-electric facilities have the ability to store water (pondage), NBP Generation's market shares would be higher during peak periods because NBP Generation would have greater generation capability in peak periods than it assumed in its DPT. NBP Generation clarified that its hydro-electric facilities are primarily run-of-the-river resources, which by definition have very limited pondage capabilities.<sup>48</sup>

(e) **Conclusion**

52. The Commission concludes that, on balance, NBP Generation's revised DPT analysis rebuts the presumption of horizontal market power and satisfies the Commission's horizontal market power standard for the grant of market-based rate authority in the NBSO balancing authority area. As noted above, using the available economic capacity measure in its DPT analysis, NBP Generation has less than a 20 percent market share in 9 of 10 season/load periods. While NBP Generation's market share is 23.4 percent during the winter off-peak season/load period, when it must run its oil-fired 972 MW Coleson Cove facility, it does not exceed the 2,500 HHI threshold in any of the 10 season/load periods and it is not a pivotal supplier in any season/load periods. We thus conclude that on balance and after weighing the evidence under all three of the measures (market share, market concentration, and whether the seller is pivotal), as well as the additional evidence and arguments presented by the parties as

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<sup>47</sup> NBP Generation's September 24, 2009 Answer at 9, NBP Generation's August 10, 2009 Filing at 12.

<sup>48</sup> NBP Generation's September 24, 2009 Answer at 10.

discussed above, NBP Generation satisfies the Commission's requirements for market-based rate authority regarding horizontal market power.<sup>49</sup>

**b. Vertical Market Power**

53. As described above, in its Complaint, Integrys argued that, until NBP Generation submits the appropriate information showing that it does not possess market power in the NBSO balancing authority area, the Commission should order NBP Generation to cease market-based rate sales in the market administered by Northern Maine ISA, which is one of the areas included in the NBSO balancing authority area. As discussed below, the Commission concludes that NBP Generation satisfies the Commission's vertical market power standard for the grant of market-based rate authority in the NBSO balancing authority area and has complied with the requirements of Order No. 697 as well as our previous directives in this proceeding.

**i. Commission Requirements**

54. 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 OATT on file before granting a seller market-based rate authorization.<sup>50</sup> The Commission also considers a seller's ability to erect barriers to entry.<sup>51</sup>

**ii. Responsive Pleadings Addressing Vertical Market Power**

55. Integrys maintains that the Commission must consider other factors in rendering its decision, including the vertically integrated nature of the electric industry in New Brunswick.<sup>52</sup> Integrys states that NBP Generation has exclusive contracts for the sale of generation to NBP Distribution to serve load that allows for a portion of NBP Generation's costs to be recovered from that load, a benefit that no other market participant in the portion of northern Maine administered by the Northern Maine ISA can

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<sup>49</sup> NBP Generation's August 10, 2009 filing indicates similar results for both the Maritimes control area and the NBSO balancing authority area when the available economic capacity measure is used. As explained above, our analysis focuses on the NBSO balancing authority.

<sup>50</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 408.

<sup>51</sup> *Id.* P 440.

<sup>52</sup> Integrys' September 9, 2009 Protest at 3.

obtain. Thus, Integrys asserts that NBP Distribution company customers subsidize NBP Generation's wholesale business activities, allowing NBP Generation to offer below market prices that do not reflect the cost of generating, to the detriment of competitors like Integrys.<sup>53</sup> Integrys also contends that NBP Generation possesses control over transmission reservations and that there is a lack of nondiscriminatory transmission access for competitors, which gives NBP Generation the ability to monopolize the wholesale market in northern Maine and also to create barriers to entry.<sup>54</sup>

56. In support of its claims, Integrys explains that Attachment M to the NBSO OATT provides procedures for customers seeking to utilize what is referred to as the "MEPCO Reservation." According to Integrys, the MEPCO Reservation, consisting of 188 MW of transmission capacity, is the only capacity on the New Brunswick to Maine Electric Power Company transmission line not committed under firm contracts with affiliates of New Brunswick Power Corporation and its successors. Integrys maintains that the Attachment M procedures do not allow for open access because they require a potential purchaser to disclose to its competing supplier (NBP Generation) a viable business plan that benefits New Brunswick, and such purchasers must also disclose sufficient financial resources to use the reservation.<sup>55</sup>

57. Integrys argues that sellers in northern Maine lack sufficient competitive alternatives in which to sell electricity. Specifically, Integrys argues that sellers' only options in northern Maine are to sell energy to the retail suppliers in northern Maine, sell to NBP Generation, or attempt to export the energy to the competitive wholesale market operated by ISO New England. But to sell competitively into the ISO New England market, it is necessary to have a firm contract path into the market. Integrys argues that transmission transfer capability is tied up by Hydro-Quebec and NBP Generation. Integrys states that Attachment M specifies that 188 MW must be posted as available for firm transmission, but that transmission capability is only provided when it is in NBP Generation's best interest.<sup>56</sup>

58. Integrys argues that lack of transmission access gives NBP Generation the ability to monopolize the wholesale market in northern Maine. Integrys submits that, if competing generators do not have firm access to ISO New England, such entities may be forced to sell to NBP Generation. Additionally, Integrys argues that, if NBP Generation

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<sup>53</sup> *Id.* at 3-4.

<sup>54</sup> Integrys' September 9, 2009 Protest at 6, Morris Affidavit at 16.

<sup>55</sup> Integrys' September 9, 2009 Protest at 2 n.3, Morris Affidavit at 15-16.

<sup>56</sup> Integrys' September 9, 2009 Protest, Morris Affidavit at 15-16.

can offer artificially low prices for retail service, merchant wholesale generators in northern Maine may then be forced to sell power to NBP Generation. Integrys adds that a lack of transmission access can also create barriers to entry where no rational rival generation company installs new generation facilities absent access to a competitive wholesale market or a long-term contract with the dominant retail supplier.<sup>57</sup>

59. NBP Generation responds by asserting that competing generators in northern Maine can sell energy to Hydro-Quebec, Nova Scotia Power, ISO New England, and other wholesale entities in northern Maine, New Brunswick, and Prince Edward Island unencumbered by transmission barriers.<sup>58</sup> Further, NBP Generation states that, although Integrys had the opportunity to purchase firm transmission to New England by participating in an open season for transmission conducted by the NBSO in 2007, it chose not to. NBP Generation explains that it was the New Brunswick Regulatory Board that directed the NBSO to include Attachment M in the NBSO OATT. NBP Generation states that the NBSO intends to proceed with an application to the New Brunswick Regulatory Board for revisions to the NBSO OATT in 2010. It states that, according to the NBSO, such revisions will include changes required to establish “compatibility” with the Commission’s Order No. 890<sup>59</sup> *pro forma* tariff.<sup>60</sup> Additionally, NBP Generation states that it regularly relinquishes transfer capabilities to rival generation companies, both on a short-term and long-term basis.<sup>61</sup>

60. Integrys counters by claiming that NBP’s Generation’s November 9, 2009 Filing shows that NBP Generation possesses market power in the NBSO balancing authority area and controls vital transmission access between ISO New England and northern Maine that gives it great discretion and control over all transactions.<sup>62</sup> Integrys further states that NBP Generation’s control over the MEPCO transmission line is such that,

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<sup>57</sup> *Id.* at 16.

<sup>58</sup> NBP Generation’s September 24, 2009 Answer at 11.

<sup>59</sup> *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh’g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh’g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh’g*, Order No. 890-C, 126 FERC ¶ 61,228, *order on reh’g*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

<sup>60</sup> NBP Generation’s November 9, 2009 Filing at 3.

<sup>61</sup> NBP Generation’s September 24, 2009 Answer at 11.

<sup>62</sup> Integrys’ November 30, 2009 Protest at 7.

rather than follow the Attachment M procedures, in order to transmit power an entity can pay NBP Generation for service such as a “scheduling service” at an undisclosed rate. Integrys states that, in effect, NBP Generation is the gatekeeper on the New Brunswick to MEPCO transmission path. In both its November 30, 2009 Protest and April 21, 2010 Protest, Integrys reiterates its vertical market power concerns with Attachment M.

61. Integrys adds that, in addition to offering power prices subsidized by its Canadian retail customers in the NBSO balancing authority area, NBP Generation uses its control over transmission to limit the ability of competing generators located in northern Maine from reaching ISO New England markets, which threatens to strand generation in northern Maine.<sup>63</sup>

**iii. Commission Determination Regarding Vertical Market Power**

62. Section 35.37(d) of the Commission’s regulations provides that, in order to demonstrate a lack of vertical market power, a seller whose foreign affiliate(s) own, operate, or control transmission facilities outside of the United States that can be used by competitors of the seller to reach United States markets must demonstrate that such affiliate either has adopted and is implementing an OATT, or otherwise offers comparable, non-discriminatory access to such transmission facilities.<sup>64</sup> The Commission has also stated that it will determine, on a case-by-case basis, what arrangements or tariffs, other than the Order No. 888<sup>65</sup> *pro forma* tariff, would satisfy its concerns and that the Commission would judge any proposal against the Order No. 888 tariff in determining whether a proposal meets the basic comparability standards of Order No. 888. Further, it has been Commission policy to deny market-based rate authority

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<sup>63</sup> Integrys April 21, 2010 Protest at 5.

<sup>64</sup> 18 C.F.R. § 35.37(d) (2010).

<sup>65</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).

when an applicant fails to demonstrate that it satisfies the Commission's transmission market power concerns.<sup>66</sup>

63. As described above, Integrys claims that NBP Generation's transmission affiliate NB Power Transmission Corporation does not comply with the Commission's open access transmission service requirements. Integrys maintains that the procedures in Attachment M of the NBSO OATT are discriminatory in that they require a potential purchaser to disclose to its supply competitor a viable business plan that benefits New Brunswick and that such purchaser must also disclose sufficient financial resources to use the reservation. Further, Integrys characterizes the New Brunswick electric industry as "vertically integrated" and states that NBP Distribution company customers subsidize NBP Generation's wholesale business activities.

64. As noted above, NBP Generation's affiliate NBP Transmission has handed over operational control of its transmission facilities to the NBSO. Thus, the Commission's analysis of compliance with open access requirements focuses on the NBSO OATT. NBP Generation's November 9, 2009 filing included vertical market power information related to the NBSO OATT. Specifically, NBP Generation provided further information on the New Brunswick Regulatory Board's direction that the NBSO include Attachment M in its OATT, including that Board's formal order of April 14, 2004. NBP Generation also provided the Commission with an update regarding NBP Generation's statement that, in light of Order No. 890, and subject to approval by the New Brunswick Regulatory Board, the NBSO will undertake any needed revisions to its filed OATT to assure continuing compliance with the Commission's reciprocity requirements. However, NBP Generation did not indicate whether these revisions will include changes to

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<sup>66</sup> *Ontario Hydro Interconnected Markets, Inc.*, 78 FERC ¶ 61,369, at 62,529 (1997) ("Ontario Hydro not only fails to offer any transmission service into Ontario, but also offers only recallable "through" transmission and recallable export transmission for one year or less to any entity that seeks to reach United States markets (or Canadian markets outside of the Province of Ontario). We find that these limited services are inadequate to mitigate transmission market power."); *British Columbia Power Exchange Corp.*, 78 FERC ¶ 61,024, at 61,100 (1997) (While the Commission stated [in a previous order] that it would be amenable to a variety of approaches for foreign utilities to mitigate transmission market power, Powerex has not provided any explanation as to why BC Hydro did not adopt the Final Rule *pro forma* tariff or a tariff that is consistent with or superior to the Final Rule tariff. Nor has it otherwise persuaded us that its transmission and power sales arrangements mitigate market power.").

Attachment M. NBP Generation states that the NBSO estimates a decision from the New Brunswick Regulatory Board and implementation of those changes by late 2010.<sup>67</sup>

65. NBP Generation explains that, while the New Brunswick Regulatory Board had previously found that an open season for the 188 MW of transmission rights over the MEPCO line would be appropriate, after considering the evidence presented in a subsequent proceeding, that Board instead directed that Attachment M be added to the OATT. The New Brunswick Regulatory Board found that it was in the public interest for other parties to have access to the MEPCO line and that it was “in the public interest to require that [New Brunswick Power Corporation] negotiate in good faith with qualified parties... for access to the MEPCO reservations.” The New Brunswick Regulatory Board defined a qualified party as one that provides New Brunswick Power Corporation (or its successor)<sup>68</sup> with a viable business plan that would provide benefits to the province of New Brunswick and provides disclosure of sufficient financial resources to implement the proposed utilization of the MEPCO reservations.

66. As an initial matter, we note that there is no record evidence to demonstrate that NBP Generation or its affiliates have used Attachment M to discriminate against competitors or to reject a specific request from Integrys for transmission service.<sup>69</sup> At the same time, we recognize that the NBSO is revising its OATT in light of Order No. 890 and that those revisions will be subject to approval by the New Brunswick Regulatory Board.

67. Accordingly and in order to monitor compliance with our open access requirements, we will require NBP Generation to submit a compliance filing in Docket No. ER08-1439 once the New Brunswick Regulatory Board has acted on the revised NBSO OATT filing, within 30 days of the date of such action. The compliance filing must describe how the revised NBSO OATT offers comparable, non-discriminatory transmission access, including with respect to the provisions in Attachment M and any revisions to the provisions in Attachment M. At that time, the Commission will further examine whether comparable, non-discriminatory access is offered on the

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<sup>67</sup> We note that the NBSO submitted its application for approval of proposed OATT changes to the New Brunswick Regulatory Board on October 18, 2010.

<sup>68</sup> As described above, New Brunswick Power Corporation has been reorganized into a holding company with four subsidiary operating companies, which include NBP Generation and its transmission affiliate.

<sup>69</sup> The Commission also notes that Integrys has provided no evidence that the NBSO has operated the transmission system to restrict access to Integrys, or in an otherwise unduly discriminatory or preferential manner.

New Brunswick to MEPCO transmission line. However, if the New Brunswick Regulatory Board has not acted on the revised NBSO OATT filing within six months of the date of this order, we direct NBP Generation to submit the proposed revised OATT to the Commission along with an explanation of how the revised NBSO OATT offers comparable, non-discriminatory transmission access, including with respect to the provisions in Attachment M. Further, starting from the date of this order, we will require NBP Generation to submit a report to the Commission every 90 days regarding the status of the New Brunswick Regulatory Board's review of the OATT.<sup>70</sup>

68. We find Integrys' allegations regarding the vertically integrated nature of the electric industry in New Brunswick market to be misplaced in the context of this proceeding. Integrys asserts that NBP Generation's affiliate, NBP Distribution, subsidizes NBP Generation's wholesale business activities. Integrys does not explain how NBP Distribution subsidizes NBP Generation's wholesale business activities. However, we find the thrust of Integrys' argument here to be a complaint regarding the allocation of benefits and burdens among retail ratepayers. As such, it is not relevant to our examination of NBP Generation's market-based rate authority for wholesale sales in this proceeding.

69. Further, we find that Integrys has failed to submit evidence that supports its allegations that there is a lack of transmission access which gives NBP Generation the ability to monopolize the wholesale market in northern Maine. On the contrary, as NBP Generation notes, competing generators can sell to Hydro-Quebec, Nova Scotia Power, ISO New England, and other wholesale entities in northern Maine, New Brunswick, and Prince Edward Island.

70. Similarly, Integrys provided no evidence to show that NBP Generation has used other (i.e., non-transmission) inputs to generation to reduce transmission access in the relevant market, or otherwise erect barriers to entry. When considering a seller's ability to erect other barriers to entry as part of the vertical market power analysis, 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, intrastate natural gas storage or distribution facilities; sites for generation capacity development; and physical coal supply sources and ownership of or control over who many access transportation of coal supplies (collectively, inputs to electric power production).<sup>71</sup> The Commission also requires sellers to make an affirmative statement

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<sup>70</sup> We note that this report is for informational purposes only and will not be noticed, nor require Commission action.

<sup>71</sup> Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 176.

that they have not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.<sup>72</sup> Despite Integrys' general allegations, we find that it has not provided evidence to support a finding that NBP Generation has erected barriers to entry into the relevant market.

71. In light of our determinations herein, the Commission concludes that NBP Generation satisfies the Commission's requirements for market-based rate authority regarding vertical market power, subject to the compliance filing and reports directed herein.

## **2. Request for Rehearing and Clarification of the June 10 Order**

### **a. NBP Generation's Rehearing Request**

72. On rehearing, NBP Generation argues that the Commission should find that any wholesale sales into the portion of northern Maine administered by the Northern Maine ISA are not in interstate commerce and should be treated as non-jurisdictional sales. NBP Generation asserts that the holding in the June 10 Order undermines the Commission's previous statement that, for purposes of a market-based rate analysis involving a seller affiliated with a foreign utility, "[t]he Commission does not consider transmission and generation facilities that are located exclusively outside of the United States and that are not directly interconnected to the United States."<sup>73</sup> NBP Generation argues that, if the June 10 Order is viewed broadly, then any generator making a sale anywhere in Canada could be considered in United States interstate commerce by virtue of Canada and the United States being interconnected via numerous transmission lines. NBP Generation requests that the Commission clarify which generation in Canada interconnected to the United States is relevant to the Commission's market power analysis for determining whether to grant market-based rate authorization.

73. Additionally, NBP Generation argues that Integrys' position that wholesale sales in the portion of northern Maine administered by the Northern Maine ISA are subject to the Commission's jurisdiction is undermined by the appearance that Integrys does not report such sales in the Commission's required Electric Quarterly Reports along with all of its other jurisdictional sales.

74. Lastly, NBP Generation argues that a finding requiring additional analyses is in error to the extent such a finding is based on a belief that NBP Generation failed to

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<sup>72</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447.

<sup>73</sup> Rehearing Request at 9 (citing Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 1002).

disclose affiliation with generation located in the NBSO balancing authority area in its application for market-based rate authorization. NBP Generation states that Exhibit B of its August 22, 2008 market-based rate application included the fact that generation was located in the NBSO balancing authority area. NBP Generation submits that, if the Commission disagreed with NBP Generation's statements as to the relevant markets for analysis in the application, the Commission could have requested additional analyses at the time it issued the order on the application. In addition, NBP Generation states that the Commission was aware of the regional transmission and generation topography when it ruled on its market-based rate application and to imply otherwise in the June 10 Order is prejudicial to NBP Generation, which is now subject to a refund effective date for sales it believed to be permissible based on the Commission's prior order.

**b. Commission Determination**

75. We will deny NBP Generation's request for rehearing and clarification. As we explained in the June 10 Order, NBP Generation is required to provide a horizontal market power analysis of the NBSO balancing authority area because it and its affiliate own generation in the NBSO balancing authority area. The NBSO balancing authority area is a unique balancing authority area that includes portions of both Canada and the United States, but nonetheless is a relevant geographic market for NBP Generation to study.

76. We continue to disagree with NBP Generation's contention that wholesale sales into the portion of northern Maine administered by the Northern Maine ISA are not in interstate commerce. Although NBP Generation's generation is located exclusively outside of the United States, it is directly interconnected to both ISO New England and to northern Maine. Northern Maine is in interstate commerce by virtue of its connection with the rest of the United States through the transmission facilities of NBP Generation's affiliate, NB Power Transmission.<sup>74</sup> As we have explained, although the electric system in northern Maine is not directly interconnected with any other domestic United States electric system, northern Maine's access to the electric system that serves the remainder of New England is through the transmission facilities of New Brunswick Power Corporation.<sup>75</sup> Accordingly, wholesale sales into northern Maine are jurisdictional.

77. Additionally, we continue to find NBP Generation's reliance on *Sharyland Utilities, L.P.*<sup>76</sup> to support its claim that the Commission lacks jurisdiction over sales into

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<sup>74</sup> June 10 Order, 127 FERC ¶ 61,232 at P 27.

<sup>75</sup> *Northern Maine Independent System Administrator, Inc.*, 89 FERC ¶ 61,179, at 61,554-55 (1999).

<sup>76</sup> 121 FERC ¶ 61,006 (2007) (*Sharyland*).

northern Maine to be misplaced. In *Sharyland*, the Commission found that Sharyland, a utility in the Electric Reliability Council of Texas (ERCOT), ERCOT's market participants, and ERCOT would not become subject to Commission jurisdiction as "public utilities" by virtue of a new transmission interconnection between ERCOT and Mexico's Commission Federal de Electricidad (CFE). In the June 10 Order, the Commission explained its reasoning for distinguishing *Sharyland* from the instant proceeding; unlike in *Sharyland*, in the instant case, power is regularly transmitted between northern Maine and ISO New England through the transmission facilities of New Brunswick Power Corporation. In *Sharyland*, power would not regularly flow from Texas into another state (or vice versa) over the Sharyland facilities and any "comingling of electric energy generated in the United States with electric energy on the CFE transmission grid . . . will occur on an unplanned and infrequent basis."<sup>77</sup> In contrast, here the lines linking northern Maine with New Brunswick are *regularly* used to transmit power between northern Maine and ISO New England by way of New Brunswick.<sup>78</sup> Frequent and intentional flows of wholesale power from one state to another are Commission-jurisdictional, even if they necessarily cross international borders on the way, as is the case with northern Maine and the rest of the United States. The situation in *Sharyland* was an exception *only* because any comingling that occurred there would be unplanned and infrequent.

78. With respect to NBP Generation's argument that Integrys does not appear to be reporting its sales in the portion of northern Maine administered by the Northern Maine ISA in its Electric Quarterly Reports, we note that Integrys' Electric Quarterly Reports were not a determinative factor in requiring NBP Generation to submit a horizontal

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<sup>77</sup> *Id.* P 23 (emphasis added). The Commission has recognized that power does regularly flow between ERCOT and other states over other interconnections (i.e., the existing, so-called North and East ties). *See, e.g., Central Power and Light Co.*, 40 FERC ¶ 61,077, at 61,223, Ordering Paragraphs (I) and (J) (1987) (*CP&L*). However, because those other interconnections were established pursuant to sections 210 and 211 of the FPA, 16 U.S.C. §§ 824i, 824j (2006), the Commission has explained that those other interconnections do not cause electric utilities in ERCOT or other entities in ERCOT that are not otherwise public utilities to become public utilities and thus become subject to Commission oversight as public utilities. *See Sharyland*, 121 FERC ¶ 61,006 at P 7, 22; *see also CP&L*, 40 FERC at 61,223, Ordering Paragraphs (I) and (J).

<sup>78</sup> June 10 Order, 127 FERC ¶ 61,232 at P 26-27.

market power study for the NBSO balancing authority area if it wished to retain its market-based rate authority.<sup>79</sup>

79. We also disagree with NBP Generation's argument that the June 10 Order can be interpreted to mean that any generator making a sale anywhere in Canada could be considered in United States interstate commerce by virtue of Canada and the United States being interconnected via numerous transmission lines. The Commission found that NBP Generation must comply with our market-based requirements if it plans to sell power in the United States. These requirements, include, among other things, that it demonstrate that it does not possess market power in all relevant geographic markets.<sup>80</sup>

80. Moreover, NBP Generation's request that the Commission clarify which generation in Canada interconnected to the United States is relevant to the Commission's market power indicative screens is outside the scope of this proceeding, as this proceeding is limited to NBP Generation's market power study of the NBSO balancing authority area. As we explained in the June 10 Order, customers in northern Maine have access to generation from the ISO New England market via the New Brunswick Power Corporation's transmission lines linking northern Maine and ISO New England by way of New Brunswick.<sup>81</sup>

81. Finally, whether NBP Generation should have been clearer in its market-based rate application in explaining that its generation is located in the NBSO balancing authority area is irrelevant for purposes of this proceeding. In Order No. 697, the Commission stated that it will continue to reserve the right to require an updated market power analysis from any market-based rate seller at any time.<sup>82</sup> Accordingly, the Commission ordered NBP Generation to submit an updated market power analysis in this proceeding. We also disagree with NBP Generation's contention that the Commission's determinations in the June 10 Order result in prejudice to NBP Generation. NBP Generation is not subject to a refund effective date prior to the date that the Complaint was filed, and NBP Generation was on notice that the Commission would be further examining its market-based rate authorization from that date. The Complaint was filed pursuant to section 206 of the FPA, which allowed the Commission to establish a refund

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<sup>79</sup> While we will deny NBP Generation's arguments in this regard, we note that it is free to file a complaint pursuant to section 206 of the FPA, 16 U.S.C. § 824e (2006).

<sup>80</sup> June 10 Order, 127 FERC ¶ 61,232 at P 24.

<sup>81</sup> *Id.* P 27-28.

<sup>82</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 853.

effective date. As such, NBP Generation had prior notice that refunds were possible.<sup>83</sup> Our actions in this proceeding do not call into question sales between the date that the Commission granted NBP Generation market-based rate authorization and the date that the Complaint was filed.

### 3. Seller Category Status

82. In Order No. 697, the Commission created two categories of sellers.<sup>84</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 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.<sup>85</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>86</sup>

83. Based on NBP Generation's representations that it owns more than 500 MW of generation capacity and transmission facilities in the NBSO balancing authority area, we find that NBP Generation meets the criteria for a Category 2 seller for the Northeast region and is so designated. Thus, NBP Generation is directed to submit a compliance filing, within 30 days from the date of this order, revising its market-based rate tariff to reflect its Category 2 seller status in the Northeast region.<sup>87</sup>

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<sup>83</sup> 16 U.S.C. § 824e(b).

<sup>84</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 848.

<sup>85</sup> 18 C.F.R. § 35.36(a)(2) (2010).

<sup>86</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 850.

<sup>87</sup> We note that NBP Generation was designated as a Category 1 seller in the October 6, 2008 Order. However, recognizing that NBP Generation owns more than 500 MW of generation in the NBSO balancing authority area located in the Northeast region, NBP Generation is designated as a Category 2 seller for this region.

84. NBP Generation must file an updated market power analysis for the Northeast region according to the regional reporting schedule adopted in Order No. 697.<sup>88</sup> The Commission also reserves the right to require such an analysis at any intervening time.

#### **4. Termination of Complaint Proceeding**

85. In light of our finding herein that NBP Generation satisfies the Commission's standards for market-based rate authority in the NBSO balancing authority area, Integrys' Complaint in this proceeding is hereby dismissed and the proceeding is terminated.

#### **The Commission orders:**

(A) NBP Generation's compliance filings are hereby accepted for filing, as discussed in the body of this order.

(B) NBP Generation's request for rehearing and clarification is hereby denied, as discussed in the body of this order.

(C) NBP Generation is hereby directed to submit a compliance filing, within 30 days of the date of this order, revising its market-based rate tariff to reflect its Category 2 seller status in the Northeast region, as discussed in the body of this order.

(D) NBP Generation is hereby directed to submit a report to the Commission every 90 days regarding the status of the New Brunswick Regulatory Board's review of the OATT, as discussed in the body of this order. NBP Generation is directed to file the first such report within 90 days of the date of this order.

(E) NBP Generation is hereby directed to submit a compliance filing, within 30 days of the date of action by the New Brunswick Regulatory Board on revisions to the NBSO OATT, as discussed in the body of this order.

(F) NBP Generation is hereby directed to submit a compliance filing containing the proposed revised NBSO OATT no later than six months after the date of this order, as discussed in the body of this order.

(G) NBP Generation is hereby directed to file an updated market power analysis for the Northeast region according to the regional reporting schedule adopted in Order No. 697, as discussed in the body of this order.

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<sup>88</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 882.

(H) Integrys' Complaint in this proceeding is hereby dismissed and the proceeding is terminated, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.