

149 FERC ¶ 61,219
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

Nevada Power Company	Docket Nos. ER10-2475-006 EL15-22-000
Sierra Pacific Power Company	ER10-2474-006
PacifiCorp	ER10-3246-003
Pinyon Pines Wind I, LLC	ER13-520-002
Pinyon Pines Wind II, LLC	ER13-521-002
Solar Star California XIX, LLC	ER13-1441-002
Solar Star California XX, LLC	ER13-1442-002
Topaz Solar Farms LLC	ER12-1626-003
CalEnergy, LLC	ER13-1266-003
CE Leathers Company	ER13-1267-002
Del Ranch Company	ER13-1268-002
Elmore Company	ER13-1269-002
Fish Lake Power LLC	ER13-1270-002
Salton Sea Power Generation Company	ER13-1271-002
Salton Sea Power L.L.C.	ER13-1272-002
Vulcan/BN Geothermal Power Company	ER13-1273-002
Yuma Cogeneration Associates	ER10-2605-006
MidAmerican Energy Company	
Bishop Hill Energy II LLC	
Cordova Energy Company LLC	
Power Resources, Ltd.	
Saranac Power Partners, L.P.	
Agua Caliente Solar, LLC	ER12-21-013

ORDER ON NOTICE OF CHANGE IN STATUS, INSTITUTING SECTION 206
PROCEEDING AND ESTABLISHING REFUND EFFECTIVE DATE

(Issued December 9, 2014)

1. On January 2, 2014, as amended on July 16, 2014, subsidiaries of Berkshire Hathaway Energy Company¹ (collectively, Berkshire MBR Sellers)² filed a notice of change in status stating that the merger of NV Energy, Inc. (NV Energy) and Silver Merger Sub, Inc. (Silver Merger Sub) was completed, resulting in the affiliation of the Pre-Merger Berkshire MBR Sellers with Nevada Power and Sierra Pacific (together with Nevada Power, NV Energy Utilities).³ The change in status included an updated market power analysis. The Berkshire MBR Sellers represent that they fail the wholesale market share screen in the PacifiCorp-East (PACE), PacifiCorp-West (PACW), Idaho Power Company (Idaho Power), and NorthWestern Corporation (NorthWestern) balancing authority areas. Such failures establish a rebuttable presumption of horizontal market power.

2. Although the Berkshire MBR Sellers have submitted delivered price test analyses to rebut the presumption of market power, their failure of the wholesale market share indicative screens in the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas in their initial filing and their decision not to submit revised indicative screens and to proceed straight to delivered price tests for these balancing authority areas in their amended filing provides the basis for instituting a proceeding pursuant to section 206 of the Federal Power Act (FPA)⁴ to determine whether the Berkshire MBR Sellers' and their affiliates' market-based rate authority in the PACE, PACW, Idaho

¹ Berkshire Hathaway Energy Company (Berkshire Hathaway) is formerly known as MidAmerican Energy Holdings Company (MidAmerican). For the purpose of clarity, any reference to MidAmerican made in the January 2, 2014 filing will be replaced with Berkshire Hathaway in this order.

² The Berkshire MBR Sellers for purposes of this filing consist of: Nevada Power Company (Nevada Power), Sierra Pacific Power Company (Sierra Pacific), PacifiCorp, Agua Caliente Solar, LLC (Agua Caliente), Pinyon Pines Wind I, LLC, Pinyon Pines Wind II, LLC, Solar Star California XIX, LLC, Solar Star California XX, LLC, Topaz Solar Farms LLC, CalEnergy, LLC (CalEnergy), CE Leathers Company, Del Ranch Company, Elmore Company, Fish Lake Power LLC, Salton Sea Power Generation Company, Salton Sea Power L.L.C., Vulcan/BN Geothermal Power Company, and Yuma Cogeneration Associates. The Pre-Merger Berkshire MBR Sellers include all of the above except Nevada Power and Sierra Pacific.

³ The related disposition of jurisdictional facilities was authorized by the Commission in *Silver Merger Sub, Inc.*, 145 FERC ¶ 61,261 (2013) (*Silver Merger Sub*).

⁴ 16 U.S.C. § 824e (2012).

Power, and NorthWestern balancing authority areas remains just and reasonable and to establish a refund effective date.⁵

3. In this order, we direct the Berkshire MBR Sellers, within 60 days of the date of issuance of this order, to: (1) show cause as to why the Commission should not revoke the Berkshire MBR Sellers' market-based rate authority in the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas, including addressing the issues discussed below; (2) file a mitigation proposal tailored to their particular circumstances that would eliminate their ability to exercise market power; or (3) inform the Commission that they will adopt the default mitigation set forth in the Commission's regulations or propose other cost-based rates and submit cost support for such rates.⁶

4. Moreover, as discussed below, due to insufficient data and potentially flawed studies, we are unable to properly analyze the results of or rely on the delivered price tests submitted by the Berkshire MBR Sellers, or the revised horizontal market power indicative screens for the Arizona Public Service Company, Bonneville Power Administration, Los Angeles Department of Water and Power, Western Area Power Administration – Colorado Missouri, and Western Area Power Administration – Lower Colorado balancing authority areas, and the California Independent System Operator Corporation (CAISO) market. Thus, we further direct the Berkshire MBR Sellers, within 60 days of the date of issuance of this order, to provide all supporting information and documentation for these studies as specified below.

I. Background

5. On January 2, 2014, the Berkshire MBR Sellers submitted a notice of change in status to inform the Commission that on December 19, 2013, the merger of NV Energy

⁵ The section 206 investigation will extend to any affiliate of the Berkshire MBR Sellers with market-based rate authorization including, but not limited to: MidAmerican Energy Company, Bishop Hill Energy II LLC, Cordova Energy Company LLC, Power Resources, Ltd., and Saranac Power Partners, L.P. Additionally, the section 206 investigation will not extend to Agua Caliente based on Agua Caliente's representations that Berkshire Hathaway's interests in Agua Caliente are passive. *See Agua Caliente Solar, LLC*, Docket No. ER12-21-008 (Aug. 5, 2014) (delegated letter order).

⁶ 18 C.F.R. § 35.38 (2014).

and Silver Merger Sub was approved and consummated.⁷ The Berkshire MBR Sellers state that following the completion of the merger, NV Energy became an indirect, wholly-owned subsidiary of Berkshire Hathaway. They further state that NV Energy directly owns the NV Energy Utilities, each of which is a public utility with a franchised service territory in Nevada.

6. The Berkshire MBR Sellers state that for their updated market power analysis, they performed the pivotal supplier and wholesale market share indicative screens for the PACE, PACW, Arizona Public Service Company, Bonneville Power Administration, Idaho Power, Los Angeles Department of Water and Power, NorthWestern, Western Area Power Administration – Colorado Missouri, and Western Area Power Administration – Lower Colorado balancing authority areas, and the California Independent System Operator Corporation (CAISO) market. The Berkshire MBR Sellers state that no market power analyses were performed for the Nevada Power and Sierra Pacific balancing authority areas⁸ because each Berkshire MBR Seller has adopted, or proposed to adopt, revisions to its market-based rate tariff that would prohibit it from making market-based rate sales in those balancing authority areas.⁹

⁷ See *Silver Merger Sub*, 145 FERC ¶ 61,261; *Silver Merger Sub, Inc.*, Notice of Consummation, Docket No. EC13-128-000 (filed Dec. 19, 2013).

⁸ The Berkshire MBR Sellers explain that upon the energization of the One Nevada Transmission Line (ON Line), the Nevada Power and Sierra Pacific balancing authority areas became interconnected and thus consolidated into a single Nevada Power balancing authority area. The Commission recognized the consolidation of the Sierra Pacific and Nevada Power balancing authority areas as combined into the Nevada Power balancing authority on May 20, 2014. See *Sierra Pacific Power Co.*, 147 FERC ¶ 61,137 (2014). The Berkshire MBR Sellers state that market power analyses were performed using a single, consolidated Nevada Power balancing authority area. See *Nevada Power Co.*, 145 FERC ¶ 61,238 (2013) (accepting an Interim Joint Dispatch Agreement between Nevada Power and Sierra Pacific, effective January 1, 2014, and revisions to the NV Energy Open Access Transmission Tariff (OATT), effective the later of January 1, 2014, or the in-service date of the ON Line, that will permit joint dispatch of the Nevada Power and Sierra Pacific systems).

⁹ Berkshire MBR Sellers January 2 Filing at 2-3. The Berkshire MBR Sellers explain that Nevada Power and Sierra Pacific each previously relinquished their market-based rate authority in their respective balancing authority areas, and as of the closing of the NV Energy merger, each of the Berkshire Hathaway subsidiaries and affiliates with market-based rate authority became an affiliate of the NV Energy Utilities, and is subject to the same restrictions on market-based rate sales in the markets where the NV Energy

(continued...)

7. The Berkshire MBR Sellers state in their January 2, 2014 filing that they pass the pivotal supplier and wholesale market share indicative screens in the Arizona Public Service Company, Bonneville Power Administration, Los Angeles Department of Water and Power, Western Area Power Administration – Colorado Missouri, and Western Area Power Administration – Lower Colorado balancing authority areas, and in the CAISO market. However, they state that they fail the wholesale market share screen in the PACE, PACW, and Idaho Power balancing authority areas in certain seasons, and the NorthWestern balancing authority area in certain seasons in the low hydroelectric and low wind capacity factors sensitivity analyses. The Berkshire MBR Sellers also have market share screen failures in the PACE, PACW, and Idaho Power balancing authority areas in the low hydroelectric and wind and high hydroelectric and wind sensitivity analyses.¹⁰ As a result, the Berkshire MBR Sellers included in that filing delivered price test analyses to rebut the presumption of horizontal market power in the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas.

8. On July 16, 2014, the Berkshire MBR Sellers amended their January 2, 2014 market power analysis by submitting the pivotal supplier and wholesale market share indicative screens using a December 1, 2011 through November 30, 2012 study year¹¹ and the simultaneous transmission import limits accepted by the Commission in connection with the most recent triennial market power updates for the Northwest and

Utilities are mitigated. *See MidAmerican Energy Co.*, Docket No. ER14-725-000 (Feb. 12, 2014) (delegated letter order).

¹⁰ *See* Berkshire MBR Sellers January 2 Filing, Attachments 16, 17.

¹¹ The most recent, complete set of historical data that was available for the 10 balancing authority areas at the time the change in status was filed covers the December 2011 – November 2012 time period. Therefore, the Berkshire MBR Sellers should use data for this time period in their market power analysis. *See Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, *clarified*, 121 FERC ¶ 61,260, at P 12.c (2007) (Clarification Order), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, at PP 124-313 *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), *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 26 (2012).

Southwest regions.¹² The Berkshire MBR Sellers' amendment also reflects certain changes that have occurred since the December 1, 2011 through November 30, 2012 study year, including energization of the ON Line on January 1, 2014, the consolidation of the Nevada Power and Sierra Pacific balancing authority areas into a single Nevada Power balancing authority area, the addition of certain generating units that were acquired or entered service after the study year, the addition of long-term purchases that began after the study year, and the removal of long-term purchases that have since terminated. The Berkshire MBR Sellers state that they continue to pass the revised pivotal supplier and wholesale market share indicative screens for the balancing authority areas in which there were no screen failures in the initial market power analysis.

9. In addition, the Berkshire MBR Sellers submitted revised delivered price test analyses for the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas (i.e., those balancing authority areas for which there were horizontal market share screen failures in the January 2, 2014 filing). However, the Berkshire MBR Sellers did not include revised pivotal supplier and wholesale market share indicative screens for those balancing authority areas. The revised delivered price test analyses indicate that the Hirschman-Herfindahl Index (HHI) test for market concentration in Idaho Power exceeds the Commission's 2,500 threshold, and that the Berkshire MBR Sellers have market shares exceeding the 20 percent threshold in some periods in PACE and PACW.¹³ The Berkshire MBR Sellers state that these failures are within tolerance levels previously accepted by the Commission.

10. Additionally, the Berkshire MBR Sellers' July 16, 2014 filing informs the Commission of two recent filings. First, they state that on June 12, 2014, MidAmerican Geothermal, LLC, an indirect subsidiary of Berkshire Hathaway that already indirectly owned 50 percent of the membership interests in CalEnergy and CE Generation, LLC (CE Generation), purchased from TransAlta (CE GEN) Investment USA, Inc. the remaining 50 percent of the membership interests in CalEnergy and CE Generation.¹⁴ Second, the Berkshire MBR Sellers state that also on June 12, 2014, certain wholly-owned Berkshire Hathaway subsidiaries with market-based rate authority that own or control generation in the Southwest region submitted a supplement to their June 26, 2013

¹² See *Puget Sound Energy, Inc.*, 147 FERC ¶ 61,021 (2014); *Public Serv. Co. of New Mexico*, 146 FERC ¶ 61,126 (2014).

¹³ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 113.

¹⁴ The related disposition of jurisdictional facilities was authorized by the Commission in *MidAmerican Geothermal, LLC*, 147 FERC ¶ 62,034 (2014).

triennial in which they informed the Commission that Berkshire Hathaway's indirect interest in Agua Caliente is passive and that neither Berkshire Hathaway nor any of its subsidiaries with market-based rate authority is an affiliate of Agua Caliente.¹⁵

11. The Berkshire MBR Sellers request waiver of Rule 203(b)(3) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.203(b)(3) (2014), to the extent necessary to permit more than two persons to be included on the official service list on their behalf in this proceeding.

II. Notices and Responsive Pleadings

12. Notices of the Berkshire MBR Sellers' filings were published in the *Federal Register*,¹⁶ with interventions and comments due on or before August 6, 2014. None was filed.

III. Discussion

A. Market-Based Rate Authorization

13. 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.¹⁷ As discussed below, we find that the Berkshire MBR Sellers' failure of the wholesale market share indicative screens in the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas in their initial filing and their decision not to submit revised screens and to proceed straight to delivered price tests for these balancing

¹⁵ Berkshire MBR Sellers July 16 Filing at 3, 4 (citing *Pinyon Pines Wind I, LLC*, Supplement to Updated Market Power Analysis, Docket No. ER13-520-001 (filed June 12, 2014) and *Agua Caliente Solar, LLC*, Updated Market Power Analysis, Docket No. ER12-21-008 (filed June 26, 2013)). The Berkshire MBR Sellers included Agua Caliente in the caption of the January 2, 2014 filing, but removed it from the caption of the July 16, 2014 filing. The Berkshire MBR Sellers state, however, that they have, out of an abundance of caution, continued to attribute 100 percent of the Agua Caliente facility's output to the Berkshire MBR Sellers for the purposes of the supplemental market power analysis included in the July 16, 2014 filing.

¹⁶ 79 Fed. Reg. 2431 (2014); 79 Fed. Reg. 42,784 (2014).

¹⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at PP 62, 399, 408, 440.

authority areas¹⁸ in their amended filing provide the basis for the Commission to institute the instant proceeding in Docket No. EL15-22-000, pursuant to section 206 of the FPA, to determine whether the Berkshire MBR Sellers may continue to make sales of energy and capacity at market-based rates in the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas.

14. The scope of this section 206 proceeding is limited to the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas. It does not include the Arizona Public Service Company, Bonneville Power Administration, Los Angeles Department of Water and Power, Western Area Power Administration – Colorado Missouri, and Western Area Power Administration – Lower Colorado balancing authority areas, or the CAISO market.¹⁹ Further, it does not extend to the sale of imbalance service in the CAISO Energy Imbalance Market.²⁰

1. Horizontal Market Power

15. The Commission has adopted two indicative screens for assessing horizontal market power: the pivotal supplier screen and the wholesale market share screen.²¹ The

¹⁸ If a seller submits a delivered price test rather than an indicative screen, the seller concedes that it fails the indicative screen. *See id.* P 78.

¹⁹ The section 206 proceeding does not extend to these areas because the Berkshire MBR Sellers state that they pass the pivotal supplier and wholesale market share screens in their revised indicative screens. However, as discussed below, we require additional information to complete our analysis of the revised indicative screens. The Commission could institute a further section 206 proceeding for any area in which it later concludes that the Berkshire MBR Sellers fail the indicative screens.

²⁰ Although the CAISO Energy Imbalance Market footprint includes the PACE and PACW balancing authority areas, the Commission has previously concluded that the CAISO Energy Imbalance Market “will be a new relevant geographic market for market power purposes.” *PacifiCorp*, 147 FERC ¶ 61,227, at P 206 (2014). The CAISO Energy Imbalance Market is subject to market monitoring and mitigation implemented by the CAISO Department of Market Monitoring. *See Cal. Indep. Sys. Operator Corp.*, 147 FERC ¶ 61,231, at P 60 (2014). The Commission has directed PacifiCorp to make a market-based rate change of status filing within nine months of the launch of the CAISO Energy Imbalance Market, at which time the Commission will assess whether PacifiCorp has market power in the CAISO Energy Imbalance Market. *See PacifiCorp*, 147 FERC ¶ 61,227 at P 206.

²¹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 62.

Commission has stated that passage of both screens establishes a rebuttable presumption that the applicant does not possess horizontal market power, while failure of either screen creates a rebuttable presumption that the applicant has horizontal market power.²² The Commission has stated that an applicant that fails one or more of the indicative screens is provided with several procedural options, including the right to challenge the presumption of market power by submitting a delivered price test analysis, or, alternatively, sellers can accept the presumption of market power and adopt some form of cost-based mitigation.²³ The Commission has stated that if a seller wishes to file a delivered price test rather than the indicative screens, it may do so.²⁴ In doing so, the seller concedes that it fails the indicative screens, which concession establishes a rebuttable presumption of market power, and the Commission will issue an order instituting a section 206 proceeding to investigate whether the seller has market power and establish a refund effective date for the protection of customers while the Commission evaluates the filed delivered price test.²⁵

16. In the January 2, 2014 filing, as amended on July 16, 2014, the Berkshire MBR Sellers prepared pivotal supplier and wholesale market share screens for the Arizona Public Service Company, Bonneville Power Administration, Los Angeles Department of Water and Power, Western Area Power Administration – Colorado Missouri, and Western Area Power Administration – Lower Colorado balancing authority areas, and the CAISO market.²⁶ While the Berkshire MBR Sellers prepared the pivotal supplier and wholesale market share screens and delivered price tests for the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas as part of their January 2, 2014 filing, they did not file revised pivotal supplier and wholesale market share screens for those balancing authority areas as part of their July 16, 2014 filing. Instead, the Berkshire MBR Sellers provided revised delivered price tests for the PACE, PACW,

²² *Id.* PP 33, 62-63.

²³ *Id.* P 63.

²⁴ *Id.* P 78.

²⁵ *Id.*

²⁶ In addition to the base case pivotal supplier and wholesale market share screens, the Berkshire MBR Sellers provided pivotal supplier and market share screens sensitivity analyses that use the lowest and highest hydroelectric and wind generating capacity factors in the previous five years. *See id.* P 344.

Idaho Power, and NorthWestern balancing authority areas, thus conceding it would fail the indicative screens in those balancing authority areas.²⁷

17. In their January 2, 2014 and July 16, 2014 filings, the Berkshire MBR Sellers represent that their indicative screens demonstrate that they pass both the pivotal supplier and wholesale market share screens in the Arizona Public Service Company, Bonneville Power Administration, Los Angeles Department of Water and Power, Western Area Power Administration – Colorado Missouri, and Western Area Power Administration – Lower Colorado balancing authority areas, and in the CAISO market. In their January 2, 2014 filing, the Berkshire MBR Sellers state that they fail the wholesale market share screen with market shares exceeding 20 percent in at least one season in the PACE, PACW, and Idaho Power balancing authority areas²⁸ and that the sensitivity analysis using the lowest hydroelectric and wind capacity factors indicates that they fail the wholesale market share screen in two seasons in the NorthWestern balancing authority area. As noted above, in their July 16, 2014 filing, the Berkshire MBR Sellers submitted revised delivered price tests analyses for the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas that are still being analyzed by the Commission.

Commission Determination

a. Indicative Screens

18. We have reviewed the Berkshire MBR Sellers' pivotal supplier and wholesale market screens for the Arizona Public Service Company, Bonneville Power Administration, Los Angeles Department of Water and Power, Western Area Power Administration – Colorado Missouri, and Western Area Power Administration – Lower Colorado balancing authority areas, and the CAISO market, and find that we require additional information to complete the analysis of the revised indicative screens. Although the Berkshire MBR Sellers used the correct study year in their revised indicative screens, they failed to include workpapers or source data in their July 16, 2014 submittal. The Commission directs the Berkshire MBR Sellers, within 60 days of the date of issuance of this order, to provide all supporting information and documentation,

²⁷ *See id.* P 78.

²⁸ *See id.* P 44 (“A seller with a market share of 20 percent or more in the relevant market for any season will have a rebuttable presumption of market power but can present historical evidence to show that the seller satisfies our generation market power concerns.”).

including workpapers, explaining the methodologies used in their indicative screens.²⁹ As noted above, upon receipt of this additional information and documentation, the Commission could institute a further section 206 proceeding for any area in which it concludes the Berkshire MBR Sellers fail the indicative screens.

19. Although the Berkshire MBR Sellers submitted delivered price tests to rebut the presumption of market power in the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas, we conclude that the Berkshire MBR Sellers' failure of the wholesale market share screens in their January 2, 2014 filing and their decision not to submit revised screens and to proceed directly to delivered price tests in their July 16, 2014 filing provide the basis for the Commission to institute the instant section 206 proceeding in Docket No. EL15-22-000 to determine whether the Berkshire MBR Sellers, and the Berkshire MBR Affiliates, may continue to charge market-based rates in the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas and to establish a refund effective date for the protection of customers, while the Commission evaluates the filed delivered price tests.³⁰ As the Commission has previously stated, sellers submitting evidence, such as a delivered price test, in support of a contention that they do not possess market power, should not expect that the Commission will postpone instituting a section 206 investigation while it examines the supplemental information.³¹

20. Under the section 206 proceeding established herein, the Berkshire MBR Sellers must show cause, within 60 days of the date of issuance of this order, as to why the

²⁹ See *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018, App. G, *order on reh'g*, 108 FERC ¶ 61,026 (2004) ("Applicants should provide documentation to all data used, and list all assumptions relied upon in all figures derived by the applicant.").

³⁰ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 78. The Berkshire MBR Sellers did not submit revised indicative screens for PACE, PACW, Idaho Power, and NorthWestern balancing authority areas as part of their July 16, 2014 supplemental filing. The Commission has found that "if a seller wishes to file a [delivered price test] rather than the indicative screens, it may do so. In doing so, the seller concedes that it fails the indicative screens, which concession establishes a rebuttable presumption of market power, and the Commission will issue an order initiating a section 206 proceeding to investigate whether the seller has market power and establishing a refund effective date for the protection of customers while the Commission evaluates the filed [delivered price test]." *Id.*

³¹ *Id.* P 75 & n.59 (citing *LG&E Energy Mktg. Inc.*, 111 FERC ¶ 61,153, at PP 21, 22 (2005); *Tampa Electric Co.*, 110 FERC ¶ 61,206, at PP 24, 25 (2005); *Entergy Services, Inc.*, 109 FERC ¶ 61,282, at P 36 (2004)).

Commission should not revoke its market-based rate authority in the PACE, PACW, NorthWestern, and Idaho Power balancing authority areas. In this regard the Berkshire MBR Sellers may present additional alternative evidence such as historical sales and transmission data to rebut the Commission's finding that they have the ability to exercise market power in the PACE, PACW, NorthWestern, and Idaho Power balancing authority areas.³² We note that the Berkshire MBR Sellers' delivered price tests for the PACE, PACW, NorthWestern and Idaho Power balancing authority areas are deficient and thus have not rebutted the presumption of market power. If the Berkshire MBR Sellers want the Commission to rely on their submitted delivered price tests, they must submit corrected delivered price tests, as discussed below. In the alternative, the Berkshire MBR Sellers may (1) file a mitigation proposal tailored to their particular circumstances that would eliminate the ability to exercise market power, or (2) inform the Commission that they will adopt the Commission's default cost-based rates or propose other cost-based rates and submit cost support for such rates.

21. In cases where, as here, the Commission institutes a section 206 proceeding on its own motion, section 206(b) requires that the Commission establish a refund effective date that is statutorily-limited to "no earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than five months after the publication date."³³ In such cases, in order to give maximum protection to customers, and consistent with our precedent, we have historically tended to establish the section 206 refund effective date at the earliest date allowed by section 206, and we will do so here as well.³⁴ That date is the date of publication of notice of initiation of this proceeding in the *Federal Register*.

22. In addition, section 206 requires that, if no final decision has been rendered by the 180-day period commencing upon institution of a proceeding pursuant to this section, the Commission shall state the reasons why it failed to do so and shall state its best estimate as to when it reasonably expects to make such a decision. We expect that we should be able to render a decision by May 29, 2015.

³² Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 117.

³³ 16 U.S.C. § 824e(b) (2012).

³⁴ *See, e.g., Canal Electric Co.*, 46 FERC ¶ 61,153, *order on reh'g*, 47 FERC ¶ 61,275 (1989).

23. In addition, we clarify that, consistent with Order No. 697,³⁵ the Commission expects that going forward we will institute section 206 proceedings in instances where there are pivotal supplier or wholesale market share indicative screen failures prior to completing our review of any supplemental information, such as a delivered price test, in order to establish refund protection while the Commission analyzes such supplemental information.³⁶

b. Delivered Price Test

24. The Commission has explained that the delivered price test identifies potential suppliers based on market prices, input costs, and transmission availability, and calculates each supplier's economic capacity and available economic capacity³⁷ for each season/load period.³⁸ Under the delivered price test, applicants must also calculate market concentration using the HHI.³⁹ An HHI of less than 2,500 in the relevant market for all season/load periods, in combination with a demonstration that the applicants are not pivotal and do not possess more than a 20 percent market share in any of the season/load periods, would constitute a showing of a lack of market power, absent

³⁵ In Order No. 697, the Commission noted that sellers may present alternative evidence, such as a delivered price test study, to rebut the results of the indicative screens, but that “sellers should not expect that the Commission will postpone initiating a section 206 investigation to protect customers while it examines this supplemental information if screen failures are indicated.” Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 75.

³⁶ *See, e.g., Arizona Public Serv. Co.*, 149 FERC ¶ 61,013 (2014); *Idaho Power Co.*, 145 FERC ¶ 61,122 (2013).

³⁷ “Economic capacity” is the total generation capacity of a potential supplier that can compete in the destination market, given its costs and transmission availability. “Available economic capacity” is derived by subtracting each potential supplier's native load obligation from its total capacity and adjusting transmission availability accordingly. *See* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 96 n.78.

³⁸ Super-peak, peak, and off-peak for winter, shoulder, and summer periods and an additional highest super-peak for the summer.

³⁹ 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, $HHI = (20)^2 + (20)^2 + (20)^2 + (20)^2 + (20)^2 = 400 + 400 + 400 + 400 + 400 = 2,000$.

compelling contrary evidence from intervenors. A detailed description of the mechanics of the delivered price test is provided in Order No. 697.⁴⁰

25. As explained above, we are instituting the section 206 proceeding based on the Berkshire MBR Sellers' screen failures and decision not to submit screens and to proceed directly to delivered price tests in the revised filing. Although the Berkshire MBR Sellers argue that their delivered price tests demonstrate that they cannot exercise market power in the PACE, PACW, NorthWestern, and Idaho Power balancing authority areas, the Commission is unable to properly analyze the results or rely on these delivered price tests due to the deficiencies identified below.⁴¹

26. In the January 2, 2014 filing, the Berkshire MBR Sellers state that for purposes of conducting the delivered price tests, they rely exclusively on the analysis and underlying data included in *Silver Merger Sub*.⁴² In the July 16, 2014 supplemental filing, the Berkshire MBR Sellers revised their study to make it consistent with the requirements of Order No. 697, but did not include any revised workpapers or backup documentation.⁴³

27. In addition, the Berkshire MBR Sellers do not identify the assumptions underlying their delivered price test models or provide a description of the steps used in the model to calculate the final Economic Capacity and Available Economic Capacity values. The model submitted by the Berkshire MBR Sellers is a spreadsheet that does not include descriptions or an explanation of the source data for each of the worksheets therein. In addition, the Berkshire MBR Sellers do not include a detailed description of how the data

⁴⁰ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at PP 104-117.

⁴¹ If the Berkshire MBR Sellers submit revised delivered price tests, Commission staff may contact the Berkshire MBR Sellers for additional information if needed.

⁴² January 2, 2014 Filing, Attachment 2 (Affidavit of Julie Solomon) at 2 (citing *Silver Merger Sub*, 145 FERC ¶ 61,261).

⁴³ *Southern Cos. Energy Marketing, L.P.*, 119 FERC ¶ 61,301, at P 24 (2007) (upholding a decision that sellers' corroborative data was incomplete and their sensitivity analyses were inadequate and noting that Order No. 642, *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001), provides a set of guidelines and adopts the provisions of Part 33 of the Commission's regulations that describe the information requirements necessary to support the delivered price test).

in each worksheet is used in the model and how the data in the various worksheets relate to one another.⁴⁴

28. The Berkshire MBR Sellers also do not explain why the modeled limits for total transfer capability between all balancing authority areas are set at 90,000 (MW). The delivered price tests should respect the physical transfer limitations of the grid for the calculation or allocation of simultaneous transmission import limits.⁴⁵

29. The Berkshire MBR Sellers do not provide details regarding suppliers with a non-zero contribution to the available economic capacity in the study area of their model, particularly, the full name of each supplier, the name of the unit(s) that supplied the energy, and the balancing authority area location of the unit(s).

30. As noted above, if the Berkshire MBR Sellers want to rely on their submitted delivered price tests to show cause as to why the Commission should not revoke their market-based rate authorities in the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas, they must submit corrected delivered price tests for those areas within 60 days of the date of this order.

2. Vertical Market Power

31. 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 or that the seller has received waiver of the OATT requirement before granting a seller market-based rate authorization.⁴⁶

32. The Berkshire MBR Sellers state that MidAmerican Energy Company, a subsidiary of Berkshire Hathaway, has turned the operational control of its transmission

⁴⁴ As an example, the worksheet labeled “Generation Dataset” has a table called “Available Economic Capacity by Supplier - AEC Analyses (MW).” The formulas in this table refer to formulas in other worksheets of the spreadsheet, which themselves refer to formulas in still other worksheets, some of which refer to other tables in the “Generation Dataset.” The Berkshire MBR Sellers do not explain the mechanics of how the “Available Economic Capacity by Supplier - AEC Analyses (MW)” table is populated.

⁴⁵ 18 C.F.R. § 33.3(c)(4)(i)(C) (2014).

⁴⁶ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 408.

facilities over to the Midcontinent Independent System Operator, Inc. (MISO) and that MidAmerican Energy Company provides transmission service pursuant to MISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff, which is on file with the Commission.⁴⁷ The Berkshire MBR Sellers represent that the NV Energy Utilities own transmission facilities that they operate pursuant to an OATT on file with the Commission.⁴⁸ The Berkshire MBR Sellers also state that PacifiCorp provides transmission service pursuant to its OATT, which is on file with the Commission.⁴⁹

33. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.⁵⁰ 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 physical coal supply sources and ownership of or control over who may access transportation of coal supplies (collectively, inputs to electric power production).⁵¹ 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.⁵²

34. The Berkshire MBR Sellers state that they are affiliated with BNSF Railways, whose activities include the shipment of coal for power generation. The Berkshire MBR Sellers state that they and their affiliates do not own any sites for potential generation development, apart from sites that have been reported in quarterly land acquisition reports.

⁴⁷ Berkshire MBR Sellers January 2 Filing at 4-5. *See also Midwest Indep. Transmission Sys. Operator, Inc.*, 84 FERC ¶ 61,231 (1998).

⁴⁸ Berkshire MBR Sellers January 2 Filing at 5-6. *See also Sierra Pacific Power Co.*, 87 FERC ¶ 61,077, *reh'g denied*, 88 FERC ¶ 61,058 (1999); *Nevada Power Company*, 145 FERC ¶ 61,238 (2013).

⁴⁹ Berkshire MBR Sellers January 2 Filing at 6. *See also Allegheny Power System, Inc.*, 80 FERC ¶ 61,143 (1997).

⁵⁰ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 440.

⁵¹ *Id.* P 448; Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 176; Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 at P 38.

⁵² Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 446.

35. 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.⁵³ The Berkshire MBR Sellers affirmatively state that they have not and will not erect barriers to entry into the relevant markets.⁵⁴

36. Based on the Berkshire MBR Sellers' representations, we find that they satisfy the Commission's requirements for market-based rate authority regarding vertical market power.

B. Request for Waiver

37. We will grant the Berkshire MBR Sellers' request for waiver of Rule 203(b)(3), 18 C.F.R. § 385.203(b)(3) (2014), to permit service to more than two designated service recipients.⁵⁵

C. Reporting Requirements

38. An entity with market-based rate authorization must file an Electric Quarterly Report (EQR) with the Commission, consistent with Order Nos. 2001⁵⁶ and

⁵³ *Id.* P 448.

⁵⁴ We interpret this statement to apply to the Berkshire MBR Sellers and their affiliates, and our authorizations herein are predicated on the Berkshire MBR Sellers complying with this commitment. *See* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447.

⁵⁵ 18 C.F.R. § 385.203(b)(3) (2014).

⁵⁶ *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, *order refining filing requirements*, Order No. 2001-E, 105 FERC ¶ 61,352 (2003), *order on clarification*, Order No. 2001-F, 106 FERC ¶ 61,060 (2004), *order revising filing requirements*, Order No. 2001-G, 120 FERC ¶ 61,270, *order on reh'g and clarification*, Order No. 2001-H, 121 FERC ¶ 61,289 (2007), *order revising filing requirements*, Order No. 2001-I, FERC Stats. & Regs. ¶ 31,282 (2008).

768,⁵⁷ to fulfill its responsibility under FPA section 205(c)⁵⁸ to have rates on file in a convenient form and place.⁵⁹ The Berkshire MBR Sellers must file EQRs electronically with the Commission consistent with the procedures set forth in Order No. 770.⁶⁰ Failure to timely and accurately file an EQR is a violation of the Commission's regulations for which the Berkshire MBR Sellers may be subject to refund, civil penalties, and/or revocation of market-based rate authority.⁶¹

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and by the FPA, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R., Chapter I), the Commission hereby institutes a proceeding in Docket No. EL15-22-000, concerning the justness and reasonableness of the Berkshire MBR Sellers' and their affiliates' market-based rates in the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas as discussed in the body of this order.

(B) The Berkshire MBR Sellers are directed, within 60 days from the date of issuance of this order, to submit all of the required supporting information and documentation related to their horizontal market power indicative screen analyses, as discussed in the body of this order, in support of their representations that they continue to meet the Commission's standards for market-based rate authority in the Arizona Public Service Company, Bonneville Power Administration, Los Angeles Department of Water

⁵⁷ *Electricity Mkt. Transparency Provisions of Section 220 of the Federal Power Act*, Order No. 768, FERC Stats. & Regs. ¶ 31,336 (2012), *order on reh'g*, Order No. 768-A, 143 FERC ¶ 61,054 (2013).

⁵⁸ 16 U.S.C. § 824d(c) (2012).

⁵⁹ *See Revisions to Electric Quarterly Report Filing Process*, Order No. 770, FERC Stats. & Regs. ¶ 31,338, at P 3 (2012) (citing Order No. 2001, FERC Stats. & Regs. ¶ 31,127 at P 31).

⁶⁰ Order No. 770, FERC Stats. & Regs. ¶ 31,338.

⁶¹ The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2014). Forfeiture of market-based rate authority may require a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

and Power, Western Area Power Administration – Colorado Missouri, and Western Area Power Administration – Lower Colorado balancing authority areas, and the CAISO market.

(C) For the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas, the Berkshire MBR Sellers are directed, within 60 days from the date of issuance of this order to (1) show cause as to why the Commission should not revoke their market-based rate authorities in those areas; (2) file a mitigation proposal tailored to their particular circumstances that would eliminate the ability to exercise market power; or (3) inform the Commission that they will adopt the Commission’s default cost-based rates or propose other cost-based rates and submit cost support for such rates.

(D) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission’s initiation of the proceeding under section 206 of the FPA in Docket No. EL15-22-000.

(E) The refund effective date in Docket No. EL15-22-000 established pursuant to section 206 of the FPA shall be the date of publication in the *Federal Register* of the notice discussed in Ordering Paragraph (D) above.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.