

155 FERC ¶ 61,249
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Nevada Power Company	Docket Nos. ER10-2475-006 EL15-22-000
Sierra Pacific Power Company PacifiCorp	ER10-2474-006 ER10-3246-002 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	ER13-1266-002 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 RESPONSE TO SHOW CAUSE ORDER

(Issued June 9, 2016)

1. On December 9, 2014, the Commission issued an order addressing a change in status filed by subsidiaries of Berkshire Hathaway Energy Company (Berkshire Hathaway).¹ In that order, the Commission instituted a proceeding under section 206 of the Federal Power Act (FPA)² in Docket No. EL15-22-000 to determine whether the market-based rate authority of the Berkshire MBR Sellers³ in the PacifiCorp-East (PACE), PacifiCorp-West (PACW), Idaho Power Company (Idaho Power), and NorthWestern Corporation (NorthWestern) balancing authority areas remains just and reasonable.⁴ Additionally, the Commission directed the Berkshire MBR Sellers to provide additional information related to their horizontal market power indicative screen analyses 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.

2. In this order, as discussed more fully below, we find that the additional information supplied by the Berkshire MBR Sellers has failed to rebut the presumption of market power in the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas. In the absence of reliable delivered price test (DPT) analyses rebutting the presumption of market power, we find that continuation of the Berkshire MBR Sellers' market-based rate authority in these four balancing authority areas is not just

¹ *Nevada Power Co.*, 149 FERC ¶ 61,219 (2014) (December 9 Order).

² 16 U.S.C. § 824e (2012).

³ For purposes of this order, Berkshire MBR Sellers includes the following: Nevada Power Company (Nevada Power), Sierra Pacific Power Company (Sierra Pacific) (collectively, NV Energy), 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.

⁴ Notice establishing January 9, 2015, as the effective date of this proceeding was published in the *Federal Register*, 80 Fed. Reg. 1408 (2015).

and reasonable.⁵ Therefore, we herein revoke the Berkshire MBR Sellers' market-based rate authority in the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas.⁶

3. Accordingly, the Berkshire MBR Sellers are directed to file revised market-based rate tariffs further limiting sales at market-based rates to areas outside of the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas within 30 days of the date of this order.⁷ The revised market-based rate tariffs are to be effective during the refund period established in this proceeding (i.e., January 9, 2015 to April 9, 2016), and prospectively from the date of this order. In addition, each of the Berkshire MBR Sellers is directed to file with the Commission under FPA section 205 a separate tariff to provide for default cost-based rates as specified in Order No. 697⁸ to be effective

⁵ We note that PacifiCorp and CalEnergy, LLC (CalEnergy) filed an updated market power analysis in 2013. In light of the Commission's action herein, the 2013 triennial has been overtaken by events and, accordingly, the Commission will terminate that proceeding, specifically Docket Nos. ER10-3246-002 and ER13-1266-002.

⁶ The revocation of the Berkshire MBR Sellers' market-based rate authority in the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas does not apply to, or affect, existing market-based rate contracts that were entered into prior to the refund effective date in this proceeding and 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).

⁷ As noted in the December 9 Order, 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 NV Energy, and is subject to the same restrictions on market-based rate sales in the markets where NV Energy is mitigated. December 9 Order, 149 FERC ¶ 61,219 at 6 n.9 (citing *MidAmerican Energy Co.*, Docket No. ER14-725-000 (Feb. 12, 2014) (delegated letter order)). Thus, the Berkshire MBR Sellers currently do not have market-based rate authority in the NV Energy balancing authority area.

⁸ *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, at PP 620, 648, 659, *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*

(continued ...)

during the refund period established in this proceeding (i.e., January 9, 2015 to April 9, 2016) and prospectively from the date of this order, and to provide refunds based on the default cost-based rates and file a refund report with the Commission. The Berkshire MBR Sellers are directed to provide cost support for these rates.⁹ This cost-based filing is directed without prejudice to the Berkshire MBR Sellers' ability to propose tailored mitigation that would apply prospectively or to make sales under their existing Commission-approved cost-based rate tariffs, if applicable.

4. The Berkshire MBR Sellers are also directed to identify any affiliates that have or are seeking market-based rate authorization and inform such affiliates that they should revise their market-based rate tariffs to limit sales at market-based rates to areas outside of the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas.¹⁰

5. The revocation of the Berkshire MBR Sellers' market-based rate authority in the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas is without prejudice to the Berkshire MBR Sellers making a new filing with the Commission under

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).

⁹ The Berkshire MBR Sellers must provide cost support if they adopt the default cost-based rates or propose other cost-based rates. *See* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 630 (citing *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018, at PP 106-108 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (where a seller proposes to adopt the default cost-based rates (or where it proposes other cost-based rates), it must provide cost support for such rates)). To the extent that the Berkshire MBR Sellers propose to rely on any applicable existing Commission-approved cost-based rate tariffs, additional cost support may not be necessary.

¹⁰ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 335 (“mitigated sellers *and their affiliates* are prohibited from selling power at market-based rates in the balancing authority area[s] in which a seller is found, or presumed, to have market power.” (emphasis added)).

section 205 of the FPA¹¹ to request market-based rate authority prospectively for the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas.

6. As discussed more fully below, this order also finds that the Berkshire MBR Sellers pass the 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 CAISO market.¹²

I. Background

7. On January 2, 2014, subsidiaries of Berkshire Hathaway¹³ filed a notice of change in status in connection with a merger that resulted in their affiliation with NV Energy, Inc., which is the parent company of Nevada Power and Sierra Pacific. The Berkshire MBR Sellers included an updated market power analysis and represented that they pass the pivotal supplier and wholesale market share indicative screens in certain balancing authority areas but fail the wholesale market share screen in other balancing authority areas. Specifically, the Berkshire MBR Sellers represented that they pass the 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 and have failures in the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas. The Berkshire MBR Sellers included DPT analyses to rebut the presumption of horizontal market power indicated by the screen failures 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 filing with respect to the study year and also with respect to the simultaneous transmission import limits (SIL). They represented that they continue to pass the pivotal supplier and wholesale market share screens for the balancing authority areas in

¹¹ 16 U.S.C. § 824d (2012).

¹² We note that this reference to the CAISO market does not include the CAISO Energy Imbalance Market (EIM), which is not addressed in this proceeding.

¹³ Berkshire Hathaway was formerly known as MidAmerican Energy Holdings Company.

which there were no screen failures in the previously filed market power analysis. They included revised DPT analyses for the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas, but did not include revised pivotal supplier and wholesale market share indicative screens for the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas. The revised DPT analyses indicated that the Hirschman-Herfindahl Index (HHI) test for market concentration¹⁴ in the Idaho Power balancing authority area exceeds the Commission's 2,500 threshold in one season/load level, and that the Berkshire MBR Sellers have market shares exceeding the 20 percent threshold in some periods in the PACE and PACW balancing authority areas.

9. The Berkshire MBR Sellers' July 16 filing also reflected certain changes that occurred subsequent to the study period, including energization of a transmission line, the consolidation of the Nevada Power and Sierra Pacific balancing authority areas into a single balancing authority area (the NV Energy 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 terminated.

10. Additionally, the Berkshire MBR Sellers' July 16 filing described two other filings made by some of the Berkshire MBR Sellers. First, they stated 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.¹⁵ Second, the Berkshire MBR Sellers stated that on June 12, 2014, certain wholly owned subsidiaries of Berkshire Hathaway with market-based rate authority that own or control generation in the Southwest region submitted a supplement to their June 26, 2013 triennial in which they informed the Commission that Berkshire Hathaway's indirect interest in Agua Caliente is passive and that neither Berkshire

¹⁴ 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, $HHI = (20)^2 + (20)^2 + (20)^2 + (20)^2 + (20)^2 = 2,000$.

¹⁵ The related disposition of jurisdictional facilities was authorized by the Commission in *MidAmerican Geothermal, LLC*, 147 FERC ¶ 62,034 (2014).

Hathaway nor any of its subsidiaries with market-based rate authority is an affiliate of Agua Caliente.¹⁶

11. In the December 9 Order, the Commission found that the Berkshire MBR Sellers' failure of the wholesale market share 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 DPT analyses for these balancing authority areas in their amended filing provided the basis for the Commission to institute the proceeding in Docket No. EL15-22-000, pursuant to section 206 of the FPA, to determine whether the Berkshire MBR Sellers' market-based rate authority in the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas remains just and reasonable.¹⁷ The Commission directed the Berkshire MBR Sellers to show cause as to why the Commission should not revoke their market-based rate authority in the PACE, PACW, Idaho Power and NorthWestern balancing authority areas.¹⁸ The Commission stated that the Berkshire MBR Sellers' DPTs for the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas are deficient and thus have not rebutted the presumption of market power. The Commission identified some deficiencies with the DPT analyses and stated that if the Berkshire MBR Sellers want the Commission to rely on their DPTs, they must submit corrected versions. The Commission also stated that, 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.

¹⁶ 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. They attributed 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.

¹⁷ December 9 Order, 149 FERC ¶ 61,219 at P 19 (citing Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 78 (if a seller submits a delivered price test rather than an indicative screen, it concedes that it fails the screen, which establishes a rebuttable presumption of market power)).

¹⁸ Notice setting January 20, 2015 as the due date for intervention in the section 206 proceeding was published in the *Federal Register*, 80 Fed. Reg. 2408 (2015).

12. The Commission limited the scope of the section 206 proceeding to the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas. The Commission stated that the section 206 proceeding 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 because the Berkshire MBR Sellers represented that they pass the pivotal supplier and wholesale market share screens in those areas. However, the Commission determined that it would require additional information to complete its analysis of the indicative screens. In this regard, the Commission directed the Berkshire MBR Sellers to provide supporting information and documentation, including workpapers, explaining the methodologies used in their indicative screens. In addition, the Commission stated that the section 206 proceeding does not extend to the sale of imbalance service in the CAISO EIM.¹⁹

13. On February 9, 2015, the Berkshire MBR Sellers filed a response to the December 9 Order. The filing includes revised DPT analyses for the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas, along with supporting workpapers and data underlying the analyses, including detailed supplier data. The Berkshire MBR Sellers contend that the additional information, documentation and analyses rebut any presumption of market power in the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas. They request that the Commission find that they continue to satisfy the Commission’s requirements for market-based rate authority in these balancing authority areas and terminate the section 206 proceeding.

14. The Berkshire MBR Sellers state that the supporting information and documentation, together with the results of the indicative screen analyses already submitted in this proceeding, demonstrate that the Berkshire MBR Sellers 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 and Power, Western Area Power Administration – Colorado Missouri, and Western Area Power Administration – Lower Colorado balancing authority areas and the CAISO market. Therefore, they request that the Commission issue an order finding that they

¹⁹ December 9 Order, 149 FERC ¶ 61,219 at P 14 & n.20 (“Although the CAISO EIM footprint includes the PACE and PACW balancing authority areas, the Commission has previously concluded that the CAISO EIM ‘will be a new relevant geographic market for market power purposes.’” (citing *PacifiCorp*, 147 FERC ¶ 61,227, at P 206 (2014))).

continue to meet the Commission's standards for market-based rate authority in these balancing authority areas and in the CAISO market.

15. On July 21, 2015, the Director of the Division of Electric Power Regulation – West issued a letter under delegated authority directing the Berkshire MBR Sellers to submit additional information with respect to their DPTs.²⁰

16. On September 4, 2015, as amended on September 8, 2015, the Berkshire MBR Sellers submitted responses to the July 21 Deficiency Letter. In the September 4 filing, the Berkshire MBR Sellers include revised base case DPTs as well as four alternate base case analyses.²¹ The Berkshire MBR Sellers represent that there are some failures but that the results of their analyses are within the range previously accepted by the Commission, with the exception of a few time periods in one of the alternate base case analyses.²²

II. Notice and Responsive Pleadings

17. Notice of the Berkshire MBR Sellers' February 9, 2015 filing was published in the *Federal Register*,²³ with interventions and protests due on or before March 2, 2015.

²⁰ *Nevada Power Co.*, Docket No. EL15-22-000 (July 21, 2015) (delegated letter order) (July 21 Deficiency Letter).

²¹ The Berkshire MBR Sellers refer to the alternate base case analyses as sensitivities; however, we use the term "alternate base case" to avoid confusing the alternate base cases with the +/- 10 percent price sensitivity analyses that the Berkshire MBR Sellers submitted with their DPTs.

²² In this regard, the Berkshire MBR Sellers reference various proceedings, including the following: *Kansas City Power & Light Co.*, Docket No. ER10-2074-001 (Nov. 22, 2013) (delegated letter order) (accepting Kansas City Power & Light Company's (KCP&L) updated market power analysis, which included a DPT for the KCP&L balancing authority area, where KCP&L had a 35.6 percent market share in the Summer Off-Peak season); *PacifiCorp*, Docket No. ER97-2801-030 (June 29, 2011) (delegated letter order) (accepting PacifiCorp's updated market power analysis, which included a DPT for the Idaho Power balancing authority area where PacifiCorp had a 35 percent market share in the Summer Off-Peak season).

²³ 80 Fed. Reg. 8303 (2015).

18. Notices of the Berkshire MBR Sellers' September 4, 2015 and September 8, 2015 filings were published in the *Federal Register*,²⁴ with interventions and protests due on or before September 29, 2015.

19. Timely motions to intervene were filed by Truckee Donner Public Utility District; Pacific Gas and Electric Company; the Bonneville Power Administration; California Department of Water Resources State Water Project; Nevada Office of Consumer Advocate; Western Power Trading Forum; Powerex Corp.; and Noble Americas Solutions LLC. The Public Utilities Commission of Nevada filed a notice of intervention. Motions to intervene out-of-time were filed by Cargill Power Markets, LLC and Utah - Division of Public Utilities. Timely motions to intervene and comments were filed, on January 20, 2015, by Kennecott Utah Copper LLC (Kennecott) and also by Barrick Goldstrike Mines Inc. (Goldstrike), Barrick Cortez Inc. as operator of Cortez Joint Venture d/b/a Cortez Gold Mines (Cortez); and Barrick Turquoise Ridge Inc. as operator of Turquoise Ridge Joint Venture (Turquoise Ridge) (collectively, Barrick Mines). On March 2, 2015, Barrick Mines and Kennecott filed joint comments. On March 17, 2015, as supplemented on March 19, 2015 and March 20, 2015, the Berkshire MBR Sellers filed an answer to the March 2, 2015 comments of Barrick Mines and Kennecott. On March 30, 2015, Barrick Mines and Kennecott filed a reply to the March 17, 2015 answer of the Berkshire MBR Sellers. On August 7, 2015, Barrick Mines and Kennecott submitted supplemental information and comments supporting their positions. On September 29, 2015, as supplemented on September 30, 2015, Barrick Mines and Kennecott filed comments in response to the Berkshire MBR Sellers' September 4, 2015 filing. On October 13, 2015, the Berkshire MBR Sellers filed an answer to the September 29, 2015 comments of Barrick Mines and Kennecott. On November 20, 2015, Barrick Mines and Kennecott filed supplemental information and comments.

20. In their individual January 20, 2015 comments, Barrick Mines and Kennecott state that while they do not wish for the Berkshire MBR Sellers to lose their authorization to sell at market-based rates, the Commission should fully investigate the market power of the Berkshire MBR Sellers in the west. Barrick Mines and Kennecott raise specific issues with the Berkshire MBR Sellers' analyses, including the Berkshire MBR Sellers' DPTs and the SIL values into each balancing authority area they studied. Barrick Mines and Kennecott take specific issue with the Berkshire MBR Sellers' failure to account for natural gas price basis differentials, their treatment of available

²⁴ 80 Fed. Reg. 57,166 (2015).

economic capacity (AEC)²⁵ and economic capacity (EC),²⁶ and their HHI calculations. In addition, Barrick Mines and Kennecott argue that there is evidence of vertical market power and that the Commission should expand this proceeding to include an investigation of vertical market power. Barrick Mines and Kennecott request that the Commission eliminate the Berkshire MBR Sellers harmful practices of refusing to sell into each other's balancing authority areas, use of paths and bubbles in transmission allocation, and rate pancaking between the NV Energy and PacifiCorp balancing authority areas.²⁷

21. In their March 2, 2015 joint comments, Barrick Mines and Kennecott contend that, rather than relying on historic remedies, the Commission should tailor a mitigation plan that fits the circumstances. They request that the Commission order the Berkshire MBR Sellers to sell in the NV Energy and PACE balancing authority areas at the lower of market-based or average cost-based rates. Further, Barrick Mines and Kennecott state that the Commission should address key policy questions, such as whether the market-based rate program is structured effectively and whether the Commission should re-evaluate whether its customary tests are effective.

22. On March 30, 2015, Barrick Mines and Kennecott filed comments in reply to the Berkshire MBR Sellers' March 17 filing. Barrick Mines and Kennecott state that they are unable to verify the results of any of the Berkshire MBR Sellers' analyses because the Berkshire MBR Sellers have not provided a publicly available working version of the model.

²⁵ AEC of a supplier is "the amount of generating capacity meeting the definition of economic capacity less the amount of generating capacity needed to serve the potential supplier's native load commitments." 18 C.F.R. § 33.3(c)(4)(i)(B) (2015).

²⁶ The EC of a supplier is "the amount of generating capacity owned or controlled by a potential supplier with variable costs low enough that energy from such capacity could be economically delivered to the destination market." 18 C.F.R. § 33.3(c)(4)(i)(A) (2015).

²⁷ Barrick Mines and Kennecott state that PacifiCorp uses path-based transmission capacity determinations, treating the high-voltage electric transmission system as if it were a natural gas or oil pipeline, based on undefined "load bubbles." They contend that such treatment has the effect of artificially reducing available transmission capability (ATC) and when coupled with the rate-pancaking between NV Energy and PacifiCorp are evidence of vertical market power issues.

23. Barrick Mines and Kennecott note that the Berkshire MBR Sellers claim that this proceeding does not address the NV Energy balancing authority area because the Berkshire MBR Sellers do not have market-based rate authorization in that balancing authority area. Barrick Mines and Kennecott assert that this is part of the problem. Barrick Mines and Kennecott argue that this lack of authority was a voluntary omission with no basis and no investigation as to what it would do to the energy markets in the west.

24. Barrick Mines and Kennecott maintain that vertical market power issues are not foreclosed. They state that the deadline for a request for rehearing is only applicable to parties and that they did not request a rehearing because they are not parties until granted intervention. Barrick Mines and Kennecott request that the Commission take advantage of this 206 proceeding to eliminate pancaked rates. They state that interconnected affiliates are typically required to file a single-system transmission rate and, given that PacifiCorp and NV Energy are interconnected affiliates, they should be required to file a single-system transmission rate.

25. Barrick Mines and Kennecott argue that the Berkshire MBR Sellers should have applied the actual firm Open Access Transmission Tariff (OATT) rates (pancaked), including losses, applicable to each specific generator, rather than an overall Western Electricity Coordinating Council regional average.

26. Barrick Mines and Kennecott contend that the Berkshire MBR Sellers did not fully incorporate the suggestions of Barrick Mines and Kennecott when the Berkshire MBR Sellers revised their analysis in the March 17 filing. For example, they state that the Berkshire MBR Sellers only partially incorporated the suggestions regarding regional natural gas prices. Barrick Mines and Kennecott contend that there still appears to be a disconnect in the Berkshire MBR Sellers' DPT model regarding AEC and EC.

27. On August 7, 2015, Barrick Mines and Kennecott submitted additional information and comments. They state that on July 24, 2015, CAISO submitted a petition for market power mitigation authority in relation to PacifiCorp and NV Energy's participation in the CAISO EIM and request that the Commission take into account the results of the CAISO assessment as it relates to the Berkshire MBR Sellers.

28. On September 29, 2015, Barrick Mines and Kennecott filed comments in response to the Berkshire MBR Sellers' response to the July 21 Deficiency Letter, maintaining that the Berkshire MBR Sellers' DPT model contains errors, including an error that allows numerous generators' AEC values into market areas to exceed their EC values. Barrick Mines and Kennecott contend that there are numerous database errors, including improper transmission rates, improper transmission losses, inaccurate generating plant heat rates, and inaccurate emissions rates assumptions. Additionally, Barrick Mines and Kennecott note that the Berkshire MBR Sellers' response states that

the filing assumes there is no ATC between the PACW and PACE balancing authority areas; however the supplier reports show that the analysis does assume PACW plants having AEC and EC into PACE. Barrick Mines and Kennecott state that if there is no available firm transmission capacity, then it is not possible for these PACW plants to deliver generation to the PACE balancing authority area. Barrick Mines and Kennecott also argue that another flaw in the analysis is the finding that including the cost of the final transmission wheel into the destination markets reduces the Berkshire MBR Sellers' market power.

29. Barrick Mines and Kennecott request that the Commission mitigate the Berkshire MBR Sellers' market power by enjoining the Berkshire MBR Sellers from applying their current tariffs, rules, practices, and commitments under which individual member companies are prohibited from selling power to wholesale and retail customers at market-based rates in each other's balancing authority areas.

30. Barrick Mines and Kennecott state that the Berkshire MBR Sellers' analysis relies on data and assumptions that are out of date. Barrick Mines and Kennecott request that the Commission consider the pending changes to western electric markets, especially expansion of the CAISO EIM and possible formation of a western regional transmission organization and urge the Commission to address the Berkshire MBR Sellers' market position in a forward-looking manner. In the alternative, Barrick Mines and Kennecott request the Commission set this proceeding for a full evidentiary hearing.

31. Finally, on November 20, 2015, Barrick Mines and Kennecott submitted a filing requesting that the Commission take administrative notice in this section 206 proceeding of an order issued by the Commission on November 19, 2015 (*Nevada Power Co.*, 153 FERC ¶ 61,206 (2015)). Barrick Mines and Kennecott state that, among other things, in that order, the Commission recognized that PacifiCorp and NV Energy failed to demonstrate a lack of horizontal market power in the CAISO EIM, which includes the PACE and PACW balancing authority areas. They state that, as a mitigation measure, the Commission ordered that NV Energy and PacifiCorp offer their units in the CAISO EIM at or below each unit's Default Energy Bid. Barrick Mines and Kennecott request that the Commission consider a comparable type of mitigation measure if the Commission determines that the Berkshire MBR Sellers have market power in the balancing authority areas at issue in the instant section 206 proceeding.

32. On March 17, 2015, the Berkshire MBR Sellers submitted an answer to Barrick Mines' and Kennecott's March 2, 2015 joint comments. The Berkshire MBR Sellers contend that Barrick Mines' and Kennecott's proposed remedies are contrary to law, violate the Commission's long-established policy, orders, and regulations, constitute prohibited collateral attacks on prior Commission orders and regulations, and raise issues that are beyond the scope of this section 206 proceeding. They state that to the extent Barrick Mines and Kennecott seek to raise vertical market power issues, their

arguments are beyond the scope of the proceeding and constitute an untimely request for rehearing of the December 9 Order, in which the Commission found that the Berkshire MBR Sellers satisfy the Commission's requirements for market-based rate authority regarding vertical market power.

33. The Berkshire MBR Sellers state that while Barrick Mines and Kennecott may disagree with the natural gas and transmission cost assumptions in the DPTs, the Berkshire MBR Sellers' assumptions are reasonable and the Berkshire MBR Sellers are not required to use Barrick Mines' and Kennecott's proposed alternatives. However, they state that nevertheless, they have performed additional analyses employing alternative natural gas and transmission cost assumptions, which demonstrate that they continue to satisfy the Commission's requirements, even under Barrick Mines' and Kennecott's proposed assumptions.

34. On October 13, 2015, the Berkshire MBR Sellers filed an answer in response to Barrick Mines' and Kennecott's September 29 comments. The Berkshire MBR Sellers contend that Barrick Mines and Kennecott are incorrect in their assertion that a generator's AEC can never exceed EC in a DPT analysis. The Berkshire MBR Sellers state that Barrick Mines' and Kennecott's proposed fix to the DPT model, to cap AEC at the value of EC in the destination market, is an error and should be rejected. The Berkshire MBR Sellers state that the cap would artificially limit imports into the destination market.

35. The Berkshire MBR Sellers state that adding the cost of the final transmission wheel increases the costs of supply for all suppliers in the destination market. They state that in the case of the Berkshire MBR Sellers in the PACE and PACW balancing authority areas, adding the cost of the final transmission wheel makes some of their generating capacity uneconomic. They state that adding the same cost increase to competing suppliers did not always have an equivalent effect because there often was capacity that would still be economic even with the added cost of the final transmission wheel. They state that this change, therefore, results in a decrease in the market shares of the Berkshire MBR Sellers.

36. The Berkshire MBR Sellers state there are multiple problems with Barrick Mines' and Kennecott's claim that the transmission loss rates used by the Berkshire MBR Sellers are incorrect. The Berkshire MBR Sellers state that they used a Western Electricity Coordinating Council-wide regional average transmission loss rate in the analysis and maintain that Barrick Mines' and Kennecott's proposal that the Berkshire MBR Sellers use transmission loss rates for Salt River Project and Public Service Company of New Mexico (or any other transmission provider) from 2013, 2014 and 2015 directly contradicts the Commission's policy for section 205 horizontal analyses and, more specifically, the Commission's express direction that the Berkshire MBR Sellers use data for the 2011-2012 study period in their market power analysis. The Berkshire MBR Sellers assert that Barrick Mines' and Kennecott's proposal to

instead use more recent historical or forward-looking data is a collateral attack on the December 9 Order.

37. The Berkshire MBR Sellers note Barrick Mines' and Kennecott's claim that the Berkshire MBR Sellers' filing stated that there is no ATC between the PACW and PACE balancing authority areas, and yet the detailed supplier reports show PACW generating facilities with AEC and EC in PACE. The Berkshire MBR Sellers state that while their filings show zero ATC from the PACW to PACE balancing authority area, there are two PacifiCorp generating facilities, Colstrip and Bridger, which are pseudo-tied to the PACW balancing authority area. They state that the treatment of Bridger was addressed extensively in the September 4 filing and that they included an analysis that treated a share of the Bridger facility within the PACE balancing authority area. With respect to Colstrip, the Berkshire MBR Sellers state that PacifiCorp has firm third-party transmission reservations to bring approximately 50 percent of the PacifiCorp-owned capacity into the PACE balancing authority area to serve PACE load. They state that this capacity is imported using existing firm transmission reservations, and not brought in using ATC.

38. The Berkshire MBR Sellers respond to Barrick Mines' and Kennecott's questioning of the source of heat rate data and explain that the Berkshire MBR Sellers used generator heat rate data from the Ventyx Energy Database, which is a well-established source that is widely used throughout the energy industry.

39. With regard to Barrick Mines' and Kennecott's assertion that the Berkshire MBR Sellers use incorrect natural gas prices because the DPT uses regional average natural gas prices rather than region-specific natural gas prices, the Berkshire MBR Sellers contend that they have already addressed the impact of using average natural gas prices and have shown it to be not material. The Berkshire MBR Sellers state that including emissions rates would not impact the results of the DPT analysis because the impact of emissions on assumed dispatch costs in the DPT analysis is *de minimis*, a small fraction of a percent, or much less. The Berkshire MBR Sellers state that, while not incorrect, Barrick Mines' and Kennecott's assertion is not material to the analysis.

40. The Berkshire MBR Sellers note that Barrick Mines and Kennecott urge the Commission to "enjoin the [Berkshire MBR Sellers] from applying its current tariff, rules, practices, and commitments 'under which individual member companies are prohibited from selling power to wholesale and retail customers at market-based rates in each other's [balancing authority areas].'"²⁸ The Berkshire MBR Sellers state that other

²⁸ Berkshire MBR Sellers October 13, 2015 Filing at 21 (quoting Barrick/Kennecott September 29, 2015 Filing at 11).

than the statement about retail customers, which is outside the scope of this proceeding, Barrick Mines' and Kennecott's request is that the Berkshire MBR Sellers no longer be subject to the current tariff restrictions that prohibit Berkshire MBR Sellers from selling power at market-based rates in the NV Energy balancing authority area. The Berkshire MBR Sellers state that presumably this request would also seek to ensure that there are no restrictions on the Berkshire MBR Sellers selling at market-based rates in the PACE, PACW, Idaho and NorthWestern balancing authority areas. The Berkshire MBR Sellers state that they agree with Barrick Mines and Kennecott that there should be no such restrictions in these other balancing authority areas and the DPT demonstrates that the Berkshire MBR Sellers continue to satisfy the Commission's requirements for market-based rate authority in these markets. The Berkshire MBR Sellers state that as for the NV Energy balancing authority area, that market is not before the Commission in this proceeding, and the Berkshire MBR Sellers therefore take no position on Barrick Mines' and Kennecott's request to allow sales at market-based rates in the NV Energy balancing authority area.

III. Discussion

A. Procedural Matters

41. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

42. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2015), prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We will accept the answers filed in this proceeding because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

43. We accept the Berkshire MBR Sellers' change in status filing. However, as discussed below we find that the Berkshire MBR Sellers have failed to rebut the presumption of market power in the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas, and, therefore, find that continuation of the Berkshire MBR Sellers' market-based rate authority in these four balancing authority areas is not just and reasonable.

1. Market-Based Rate Authorization

44. 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.²⁹ An applicant that fails one or more of the indicative screens is provided with several procedural options including the right to challenge the market power presumption by submitting a DPT analysis.³⁰ As discussed below, the Berkshire MBR Sellers' DPT analysis includes modeling errors and is inconsistent with the Commission's regulations.

a. Horizontal Market Power

45. The Commission adopted two indicative screens for assessing horizontal market power: the pivotal supplier screen and the wholesale market share screen.³¹ The 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.³² An applicant that fails one or both of the indicative screens is provided with several procedural options including the right to challenge the market power presumption by submitting a DPT analysis, or, alternatively, sellers can accept the presumption of market power and adopt some form of cost-based mitigation.

i. Indicative Screens

46. The Berkshire MBR Sellers prepared the 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 consistent with the requirements of Order No. 697.³³

²⁹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at PP 62, 399, 408, 440.

³⁰ *Id.* P 63.

³¹ *Id.* P 62.

³² *Id.* PP 33, 62-63.

³³ *Id.* PP 231-232.

Commission Determination

47. We have reviewed the Berkshire MBR Sellers' pivotal supplier and wholesale market share screens and we find that the Berkshire MBR Sellers 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 the CAISO market. Accordingly, we find that the Berkshire MBR Sellers satisfy the Commission's requirements for market-based rates regarding horizontal market power 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 the CAISO market.

ii. Delivered Price Test

48. As a result of failing the indicative screens in the January 2 filing, the Berkshire MBR Sellers performed DPT analyses and submitted alternative evidence to rebut the presumption of market power in the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas. As discussed above, the Berkshire MBR Sellers have submitted revisions to their DPT analyses in response to the December 9 Order, the July 21 Deficiency Letter, and comments made by Barrick Mines and Kennecott.³⁴

49. As the Commission has previously explained, the DPT analysis identifies potential suppliers based on market prices, input costs, and transmission availability, and calculates each supplier's EC and AEC for each season/load level.³⁵ The results of the DPT can be used for pivotal supplier, market share, and market concentration (HHI) analyses.³⁶ An HHI of less than 2,500 in the relevant market for all season/load levels, 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 levels, would

³⁴ Unless otherwise noted, any discussion of the DPT analysis refers to the "corrected base case" analyses submitted with the September 4 filing.

³⁵ The seasons/load periods are as follows: super-peak, peak, and off-peak, for winter, shoulder, and summer periods and an additional highest super-peak for the summer.

³⁶ April 14 Order, 107 FERC ¶ 61,018 at PP 106-108.

constitute a showing of a lack of horizontal market power, absent compelling contrary evidence from interveners. A detailed description of the mechanics of the DPT analysis is provided in Order No. 697.³⁷

50. As with the indicative screens, applicants and interveners may present evidence, such as historical sales and transmission data, which may be used to calculate market shares and market concentration and to refute or support the results of the DPT analysis. In Order No. 697, the Commission encouraged applicants to present the most complete analysis of competitive conditions in the market as the data allow.³⁸

51. The Berkshire MBR Sellers' corrected base case DPT analysis show numerous screen failures for the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas.

52. Using the EC measure the Berkshire MBR Sellers indicate that in the PACE and PACW balancing authority areas they are pivotal and fail the market share test in every season/load level. Further, they fail the market concentration test in the PACW balancing authority area in every season/load level, and in the PACE balancing authority area in all season/load levels except the summer off-peak, shoulder peak, and shoulder off-peak season/load levels. Additionally, they indicate that in the Idaho Power balancing authority area they are pivotal in the summer off-peak and shoulder off-peak season/load levels, and fail the market concentration in every season/load level except for the shoulder off-peak season/load level. They indicate no screen failures in the NorthWestern balancing authority area.

53. Using the AEC measure the Berkshire MBR Sellers indicate that they are not pivotal in any season/load level in the PACE, PACW, Idaho Power, or NorthWestern balancing authority areas. Further, they pass the market concentration test for all season/load levels in the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas except for the winter super-peak season/load level in the Idaho Power balancing authority area. Additionally, they report market shares below 20 percent in all season/load levels in the Idaho Power and NorthWestern balancing authority areas.

54. Under the AEC measure in the PACE balancing authority area, they report market shares in excess of 20 percent in the winter super-peak and winter peak

³⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at PP 104-117.

³⁸ *Id.* PP 71, 111.

season/load levels. In the PACW balancing authority area, they report market shares in excess of 20 percent in the summer super-peak 2, summer peak, and winter off-peak season/load levels.

Commission Determination

55. As discussed below, we find that, due to deficiencies in the DPT analyses provided by Berkshire MBR Sellers, we are unable to properly analyze the results or rely on the DPT analyses to rebut the presumption of market power.

56. In Order No. 697, the Commission provided the option for a seller to submit a DPT analysis when that seller fails an indicative screen.³⁹ Commission staff provided the following summary of the steps to perform a DPT analysis, which are found in the April 14 Order: (1) choose a destination market; (2) choose the season/load levels to analyze: Super-Peak, Peak, and Off-Peak, for winter, shoulder and summer periods, and an extreme Summer Peak, for a total of ten season/load levels; (3) choose a market price to correspond to each season/load period; (4) determine the suppliers that could sell into the destination market at a price less than or equal to 5 percent over the market price; (5) allocate transmission availability; and (6) calculate the economic capacity, i.e., the number of megawatts that can compete in the destination market, given costs and the transmission availability.⁴⁰

57. We find that the DPT analysis as presented by the Berkshire MBR Sellers is flawed; thus we are unable to conclude that the Berkshire MBR Sellers rebutted the presumption of their horizontal market power in the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas. The DPT deficiencies include the following: (1) calculation of season/load levels; (2) calculation of market prices; (3) demonstration that the results do not vary significantly in response to small variations in price; (4) use of historical transaction data to corroborate; and (5) identification of potential supply. Each of these items is discussed further below.⁴¹

³⁹ *Id.* P 105.

⁴⁰ April 14 Order, 107 FERC ¶ 61,018 at App. F.

⁴¹ We note that Commission staff held a publicly-noticed meeting with the Berkshire MBR Sellers on January 29, 2015 to discuss matters related to their market power analyses and provided guidance and requested additional information in the

(continued ...)

(1) Calculation of Season/Load Levels

58. For the PACE balancing authority areas, the Berkshire MBR Sellers appropriately chose PACE as the destination market and calculated season/load levels based on PACE's actual load. Although the Berkshire MBR Sellers also correctly chose the PACW, Idaho Power, and NorthWestern balancing authority areas as destination markets, the Berkshire MBR Sellers did not calculate unique season/load levels for each of those balancing authority areas; instead they applied the season/load levels that they had calculated for the PACE balancing authority area.⁴²

59. This methodology calls into question the results of the DPT in the PACW, Idaho Power, and NorthWestern balancing authority areas, which precludes us from relying on the DPTs to rebut the presumption that the Berkshire MBR Sellers have market power in these balancing authority areas. The Berkshire MBR Sellers define the summer super-peak 1 season/load level as the top load hour in the summer season.⁴³ However, the Berkshire MBR Sellers used the top load hour(s) in the PACE balancing authority area for the other three balancing authority areas even though balancing authority areas had different extreme summer peaks. The Berkshire MBR Sellers therefore used incorrect season/load levels, which affected the outcome of the DPT analyses for those areas.

60. In the case of the summer super-peak season 1 season/load levels, the effect is to reduce the Berkshire MBR Sellers' market shares in the non-PACE balancing authority areas. This occurs for two reasons. First, the majority of the Berkshire MBR Sellers' generation capacity is located in the PACE balancing authority area, which is also where they have the greatest load obligations, especially during its peak season/load levels. Modeling the other balancing authority areas to have the same peak season/load levels as PACE's peak season/load levels has the effect of falsely reducing the Berkshire MBR Sellers' AEC in those balancing authority areas, because the Berkshire

July 21 Deficiency Letter. The Berkshire MBR Sellers submitted 57 unique DPT analyses, none of which fully complied with the Commission's regulations, policies, and orders. This hinders the Commission's ability to timely analyze the results of the Berkshire MBR Sellers' DPT analyses.

⁴² The exception, as discussed below, is Alternate Base Case B, where the Berkshire MBR Sellers remodeled the PACW balancing authority area as winter peaking and accordingly chose season/load levels based on PACW's actual load.

⁴³ Berkshire MBR Sellers February 9 Filing, Solomon Aff. Ex. JRS-C at 8.

MBR Sellers' EC located in the PACE balancing authority area will be committed to PacifiCorp's load. Second, failing to properly calculate the peak season/load levels in the non-PACE balancing authority areas misstates the AEC of the load serving entities in those areas, affecting the Berkshire MBR Sellers' market shares in those areas. For example, in the Idaho Power balancing authority area, Idaho Power would likely not be a competing supplier in certain season/load levels in the AEC analysis, even though it is listed as having the most competing capacity in many of the season/load levels.⁴⁴

61. In their February 9 filing, the Berkshire MBR Sellers contend that the results of using unique season/load levels are not materially different from the base case DPT.⁴⁵ We disagree. In the February 9 filing, the Berkshire MBR Sellers submit the results of DPTs conducted using season/load levels calculated for each balancing authority area. In the Idaho Power balancing authority area, the Berkshire MBR Sellers' market shares in the summer super-peak 1 and summer super-peak 2 season/load levels increased from zero and three percent to 19 and 20 percent, respectively.⁴⁶ However, regardless of the results, the Berkshire MBR Sellers' use of PACE's season/load levels for the remaining three balancing authority areas was inappropriate. The Berkshire MBR Sellers are

⁴⁴ In the Berkshire MBR Sellers' DPT, load during the summer super-peak 1 season/load level for the Idaho Power balancing authority area is listed at 2,383 MW, based on hour 14 of July 12, 2012. However, the correct top hour in Idaho Power is listed as June 11, 2012, so the correct load value for the summer super-peak 1 season/load level should have been 3,587 MW. According to the "Wkp – Detailed Suppliers 12.1- Base Pricing" worksheet, the most EC that Idaho Power has in a summer season/load level in the analysis of the Idaho Power balancing authority area is 3,209 MW. Thus, due to load mismatch described above, Idaho Power is allotted 826 MW of AEC in the Idaho Power balancing authority area in the summer super-peak 1 season/load level, and is the largest competitive supplier in that season/load level despite having more load obligations than EC during its extreme summer peak.

⁴⁵ Berkshire MBR Sellers February 9 Filing, Solomon Aff. Ex. JRS-C at 8 n.17.

⁴⁶ We attempted to correct some of the deficiencies, and copied some of the season/load level data from the February 9 filing into the DPTs submitted in the September 4 filing. Even with this and no additional corrections, some of the Berkshire MBR Sellers' market shares change significantly. For example, in the Idaho Power balancing authority area, the Berkshire MBR Sellers' market shares in the summer super peak 1, and summer super peak 2 season/load levels increased to 24 percent from 2 and 5 percent, respectively.

attempting to demonstrate that they do not have market power in four different balancing authority areas. In order to do so, the DPT analyses submitted by the Berkshire MBR Sellers should have used inputs, assumptions, and facts appropriate to the unique characteristics of each balancing authority area when studying that particular area.

62. Additionally, the Berkshire MBR Sellers state that they used FERC Form No. 714 data for load information for all balancing authority areas other than the CAISO market and those operated by the Berkshire MBR Sellers.⁴⁷ However, there appear to be many discrepancies between the load data that Idaho Power submitted for its own balancing authority area in its 2012 FERC Form No. 714 filing⁴⁸ and the load data submitted by the Berkshire MBR Sellers in their workpapers.⁴⁹

(2) Calculation of Market Prices

63. In order to calculate market prices, the Berkshire MBR Sellers use an Electronic Quarterly Report (EQR) database to retrieve transaction data on: (1) short-term energy and booked-out power transactions; and (2) any transaction for which the Point of Delivery Balancing Authority was PACE or PACW. They used this data to calculate a set of hourly prices that was then averaged into the 10 DPT season/load levels. The PACE/PACW EQR prices were used to analyze the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas.⁵⁰

⁴⁷ Berkshire MBR Sellers February 9 Filing, Solomon Aff. Ex. JRS-C at 8.

⁴⁸ See Idaho Power, FERC Form No. 714, at Part II, Schedule 2 (filed May 30, 2013) (annual electric balancing authority area and planning area report).

⁴⁹ For example, sorting the “Wkp – Load Cuts on PACE” worksheet submitted with the September 4 filing or the “IPCO Load Cuts” tab of the “Wkp – Load Backups” worksheet submitted with the February 9 filing, indicate that the peak load hour in the Idaho Power balancing authority area was hour 17 of June 11, 2012, where Idaho Power had 3,587 MW of load obligations. However, a review of Idaho Power’s FERC Form No. 714 data shows that Idaho Power’s peak load of 3,587 MW actually occurred on hour 16 of July 12, 2012.

⁵⁰ Berkshire MBR Sellers February 9 Filing, Solomon Aff. Ex. JRS-C at 9.

64. The regulations provide that sellers “must provide, for each relevant product and destination market, market prices for the most recent two years.”⁵¹ This is an important step because, as noted above, the DPT analysis seeks to determine the economic capability of a supplier to reach a market. The economic capability is determined by, among other things, the prevailing market price in the relevant market. Thus, if the market prices used in the DPT are not reflective of actual market prices, the results of the DPT will not be a reasonable estimate of the suppliers that can compete in that market.⁵²

65. In order to properly calculate prices for each balancing authority area, the Berkshire MBR Sellers should have first calculated unique season/load levels for each of the four studied balancing authority areas as noted above, and then used the EQR database to calculate unique market prices for each season/load level in each balancing authority area.

66. We note that in their February 9 filing, the Berkshire MBR Sellers did submit a “combined load shape and EQR price sensitivity” in which they analyzed for the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas, the effect on the results of the DPTs of using season/load levels and prices shaped to the specific balancing authority area. They contend that the results of this sensitivity are not materially different than the results when the EQR prices are based on the PACE/PACW balancing authority area. We disagree. While these corrections did not cause any additional failures in the February 9 filing’s “base case price” scenarios, they do show that the Berkshire MBR Sellers would have significantly higher market shares in certain season/load levels.⁵³ Nevertheless, the Berkshire MBR Sellers should have

⁵¹ 18 C.F.R. § 33.3(d)(6) (2015).

⁵² The Commission has stated that selecting representative market prices in a sensible manner is a critical component when determining players in the relevant market. *Revised Filing Requirements Under Part 33 of the Commission’s Regulations*,

Order No. 642, FERC Stats. & Regs. ¶ 31,111, at 31,891 (2000), *order on reh’g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001).

⁵³ For example, in Idaho Power their market shares in both the summer super-peak 1, and winter off-peak season/load levels increased from 0 to 19 percent.

used balancing authority area specific prices and season/load levels in all iterations of their DPT.⁵⁴ Their failure to do so renders the results of their DPTs unreliable.

(3) Demonstration that Results Do Not Vary Significantly in Response to Small Variations in Price

67. Commission regulations state that “Applicants must demonstrate that the results of the analysis do not vary significantly in response to small variations in actual and/or estimated prices.”⁵⁵ This is to provide an additional measure of confidence and assurance that the results of the DPT are reliable.⁵⁶

68. With every iteration of their DPT model, the Berkshire MBR Sellers submit sensitivity analyses that examine the effect on the results of the model of both a 10 percent increase and of a 10 percent decrease in market prices. In many instances, these analyses demonstrate that small variations in market prices have a large impact on the results of the DPT. For example, in the “corrected base case” analysis of the PACE balancing authority area, the Berkshire MBR Sellers fail the market share test in two season/load levels (winter super peak and winter peak). In the 10 percent price increase sensitivity, the Berkshire MBR Sellers fail the market share test in two additional season/load levels (summer peak and winter off-peak). Additionally, their market shares increased by more than 15 percentage points in three season/load levels: summer off-peak (0 percent to 16 percent); winter off-peak (17 percent to 34 percent); and

⁵⁴ We attempted to correct some of the deficiencies, and copied some of the season/load level and price data from the February 9 filing into the DPTs submitted in the September 4 filing. Even with this and no other corrections, some of the Berkshire MBR Sellers’ market shares change significantly. For example, in the Idaho Power balancing authority area, the Berkshire MBR Sellers’ market shares in the summer super-peak 1 and winter off-peak season/load levels increased to 24 and 22 percent from 2 and 0 percent, respectively.

⁵⁵ 18 C.F.R. § 33.3(d)(6) (2015).

⁵⁶ See Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,892-31,893 (“Given the importance of prices to the outcome of market definition, we will require applicants to perform sensitivity analysis of alternative prices on the predicted competitive effects. This provides us with an additional measure of confidence and assurance that results are reliable.”). See also *Idaho Power Co.*, 148 FERC ¶ 61,182, at P 20 (2014); *Duke Energy Corp.*, 149 FERC ¶ 61,078, at P 14 (2014).

shoulder-peak (0 percent to 16 percent). We observe similar volatility in the Berkshire MBR Sellers' market shares in the 10 percent price increase sensitivity analysis for the PACW balancing authority area.⁵⁷

69. Therefore, the Berkshire MBR Sellers have failed to demonstrate that the results of their analysis do not vary significantly in response to small variations in prices.

(4) Use of Historical Transaction Data

70. Applicants must provide historical trade data and historical transmission data to corroborate the results of the horizontal screen.⁵⁸ Further, Commission direction has been to provide a "trade data check" to support the results of the DPT analysis.⁵⁹

71. Sellers should submit historical transaction data or transmission data to corroborate the results of their model as required by Commission regulations.⁶⁰ For example, although the Berkshire MBR Sellers' model indicates that significant generation capacity from the Bonneville Power Administration (BPA) balancing authority area is available to compete in the PACE balancing authority area, the Berkshire MBR Sellers did not submit historical transaction or transmission data to corroborate this or any other putative results.

⁵⁷ For example, the Berkshire MBR Sellers' market share in the summer off-peak season was zero percent. This increased to 41 percent in the 10 percent price increase sensitivity.

⁵⁸ 18 C.F.R. § 33.3(c)(6) (2015). *See also Public Service Company of New Mexico*, 153 FERC ¶ 61,060, at P 63 (2015) (PNM).

⁵⁹ *See Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044, at 30,133 (1996) (Merger Policy Statement), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997). ("It would be expected that there be some correlation between the suppliers included in the market by the delivered price test and those actually trading in the market. As a check, actual trade data should be used to compare actual trade patterns with the results of the delivered price test. For example, it may be appropriate to include current trading partners in the relevant market even if the above analysis indicates otherwise."). *See also* PNM, 153 FERC ¶ 61,060 at PP 63-66.

⁶⁰ 18 C.F.R. § 33.3(c)(6) (2015).

72. Sellers must provide corroborating evidence so that the Commission can properly evaluate their model.⁶¹ The Commission has previously noted that if the necessary data is not readily available to sellers they should make their best efforts to provide accurate substitute data.⁶² The Commission has previously found DPTs to be deficient when they are lacking necessary corroborating data.⁶³ In their March 17 filing the Berkshire MBR Sellers state that a review of the EQR and eTag data readily reveals that they engage in sales for resale in the NV Energy and PACE balancing authority areas. However, the Berkshire MBR Sellers provide no evidence to support this claim. The Berkshire MBR Sellers could have presented EQR trade data they alluded to in order to show that sellers located in the BPA balancing authority area sell into the PACE balancing authority areas at volumes similar to what is reflected in their DPT analyses to add credence to their DPT results. Also, the Berkshire MBR Sellers did not provide any historical transmission data, such as eTag data, as evidence that suppliers in the BPA balancing authority area can reach, and actually sell significant amounts of power into, the PACE balancing authority area. Moreover, the Commission's review of eTag data was not able to corroborate the Berkshire MBR Sellers' results.

⁶¹ See Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at Appendix A (“Some past merger cases were delayed or set for hearing because an adequate analysis was not part of the application or because sufficient data that would allow the Commission to corroborate or independently check applicants conclusions was not provided in the application. This is especially true regarding the effect that transmission prices and capability may have on the scope of the geographic market.”).

⁶² Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,878 n.22 (“In the NOPR, the Commission recognized that certain data required for our analysis may not be available to applicants. When this is the case, the Commission proposed that applicants make their best efforts to provide accurate substitute data, as well as corroborating data to validate the results of the analysis. This is not to say that all such evidence will be accepted without challenge or verification.”).

⁶³ See, e.g., PNM, 153 FERC ¶ 61,060 at P 65 (“Without such information, we are concerned that the amount of competing generation capacity imported into the PNM study area in PNM's DPT analysis is not supported by historical trade or transmission data and is overstated.”) and *Southern Company Energy Marketing, Inc.*, 112 FERC ¶ 61,054, at P 55 (2005) (“Southern Companies did not provide adequate sensitivity analyses and the data necessary to corroborate its DPT results, and it provided incomplete information regarding transmission constraints, firm transmission rights, and historical trade and transmission access data.”).

(5) Identification of Potential Supply

73. The Commission provided industry guidance concerning the DPT in the Merger Policy Statement. The Commission provided an overview of the definition of the product market studied by the DPT analysis, and specifically stated that a key part “in determining the size of the geographic market is to identify those suppliers that can compete to serve a given market or customer and how much of a competitive presence they are in the market.” Suppliers must be able to reach the market both economically and physically. This is considered the product market analysis.

74. The first part of the product market analysis, that is, the calculation of all potential suppliers given the prevailing market price, determines the EC of each supplier. The EC of a supplier is the amount of generating capacity owned or controlled by a potential supplier with variable costs low enough that energy from such capacity could be economically delivered to the destination market. The first step in calculating a potential supplier’s EC is to calculate the variable cost of each unit owned or controlled by that supplier. Commission regulations state that, at a minimum, these costs include variable operation and maintenance, including both fuel and non-fuel operation and maintenance, and environmental compliance.⁶⁴

75. Any generation capacity acquired under long-term firm purchase contracts (i.e., contracts with a remaining commitment of more than one year) should be added to the potential supplier’s generation capacity.⁶⁵ In addition, generating capacity may also be attributed to another supplier based on operational control criteria as deemed necessary, but the applicant must explain the reasons for doing so.⁶⁶ The variable cost for contractual capacity acquired, or attributed to another supplier, should be calculated in the same way as generation owned or under the direct control of the supplier. Commission regulations also require that specific information on long-term purchase and sales data be submitted.⁶⁷

⁶⁴ 18 C.F.R. § 33.3(d)(2)(i) (2015).

⁶⁵ 18 C.F.R. § 33.3(c)(4)(i)(A) (2015) (specifying that the potential supplier’s capacity is adjusted by subtracting capacity committed under long-term firm sales contracts and adding capacity acquired under long-term firm purchase contracts).

⁶⁶ *Id.*

⁶⁷ 18 C.F.R. § 33.3(d)(3) (2015) (“*Long-term purchase and sales data.* For each sale and purchase of capacity, the applicant must provide the following

(continued ...)

76. The second step is to add to the estimate of the unit's variable generation cost any and all applicable transmission costs that a supplier would incur to deliver the energy into the study area. Commission regulations state that these costs include the maximum transmission rate in a transmission provider's tariff as well as the estimated cost of supplying energy losses.⁶⁸ The costs of ancillary services incurred to deliver the competing energy into the study area should also be included.⁶⁹ These costs should be accumulated beginning at the source of the generation and ending where the generation sinks in the study area.⁷⁰

77. The final step in calculating economically competitive capacity is to determine whether the computed generation cost of a unit is price competitive in the study area. The supplier should compare the computed cost of a generating unit (including all aforementioned generation, transmission, and other costs), to the computed market price plus five (5) percent in the study area.⁷¹ Generation with a delivered cost that meets all of the above conditions is referred to as the EC of that unit.

information: (i) Purchasing entity name; (ii) Selling entity name; (iii) Duration of the contract; (iv) Remaining contract term and any evergreen provisions; (v) Provisions regarding renewal of the contract; (vi) Priority or degree of interruptibility; (vii) FERC rate schedule number, if applicable; (viii) Quantity and price of capacity and/or energy purchased or sold under the contract; and (ix) Information on provisions of contracts which confer operational control over generation resources to the purchaser.”).

⁶⁸ 18 C.F.R. § 33.3(d)(5)(i) and § 33.3(d)(5)(iii)(H) (2015).

⁶⁹ 18 C.F.R. § 33.3(c)(4) (2015) (“*Perform delivered price test.* For each destination market, the applicant must calculate the amount of relevant product a potential supplier could deliver to the destination market from owned or controlled capacity at a price, including applicable transmission prices, loss factors and ancillary services costs, that is no more than five (5) percent above the pre-transaction market clearing price in the destination market.”).

⁷⁰ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 31,132 (“In contrast, a supplier that is three or four ‘wheels’ away from the same buyer may be an economic supplier if the *sum of the wheeling charges and the effect of losses* is less than the difference between the decremental cost of the buyer and the price at which the supplier is willing to sell.” (emphasis added)).

⁷¹ April 14 Order, 107 FERC ¶ 61,018 at Appendix F (“[D]etermine the suppliers that could sell into the destination market at a price less than or equal to 5%

(continued ...)

78. The AEC of the units and all suppliers must also be calculated. AEC includes “capacity from generating units that are not used to serve native load (or are contractually committed).”⁷² Accordingly, AEC is the amount of generating capacity meeting the definition of EC less the amount of generating capacity needed to serve the potential supplier's native load commitments, where native load commitments are “commitments to serve wholesale and retail power customers on whose behalf the potential supplier, by statute, franchise, regulatory requirement, or contract, has undertaken an obligation to construct and operate its system to meet their reliable electricity needs.”⁷³ Units that are contractually committed or needed to serve native load or meet reliable electricity needs are not available to compete in a DPT analysis.

79. Furthermore, as stated in the Merger Policy Statement, the presumption underlying the AEC measure is that the lowest running cost units are used to serve native load and other firm contractual obligations and would not be available.⁷⁴

80. The July 21 Deficiency Letter instructed the Berkshire MBR Sellers to explain how their model calculates the capacity for potential competitors, noting that the model seemingly assigned to the wrong supplier units that were fully committed to unaffiliated public utilities with native load. Additionally, the July 21 Deficiency Letter instructed the Berkshire MBR Sellers to submit details regarding suppliers modeled as having a non-zero contribution to the AEC in the study area.

81. In the September 4 filing, the Berkshire MBR Sellers explained that “a review of the DPT generation database...revealed approximately 5% of the generation in the database (mostly in CAISO) underlying the DPT model was incorrectly assigned to the owner rather than the purchaser under a long-term PPA.”⁷⁵

over the market price. That is, determine which generators have costs less than or equal to 1.05 times the market price.”); *id.*, Appendix F n.216 (“The costs include running costs, transmission charges, [operation and maintenance] and environmental adders.”).

⁷² Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 31,132.

⁷³ 18 C.F.R. § 33.3(d)(4)(i) (2015).

⁷⁴ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 31,132.

⁷⁵ Berkshire MBR Sellers September 4 Filing, Solomon Aff. at 2.

82. However, we continue to find other errors in the Berkshire MBR Sellers' calculation of competing supply. For example, the "AEC By Suppliers – PACE Market" tab of the Berkshire MBR Sellers' document titled "Wkp – Detailed Suppliers 12.1 – Base Prices" shows that the supplier with the abbreviation "PGE" has 2,725 MW of load obligation in the summer super peak 1 season/load level (cell AA, 2108). Summing the EC of the units with the identifier "PGE" for the same season/load level shows that it has 2,382 MW of EC. Because a supplier's AEC value is the value of a supplier's EC minus its load obligations in that season/load level, "PGE" should have zero AEC to compete in the summer super-peak 1 season/load level. Despite this, "PGE" is shown to be a competing supplier under the AEC measure in the PACE, Idaho Power, and NorthWestern balancing authority areas. Although "PGE's" contribution to AEC is relatively small, this is indicative of the concerns we have about the integrity and reliability of the DPT analysis.

iii. Alternate Base Case Analyses

83. The July 21 Deficiency Letter stated that the Berkshire MBR Sellers must provide additional information about their DPT model so that the Commission can process their filings, highlighted certain issues in the DPT model, and directed the Berkshire MBR Sellers to submit revised DPT analyses based on the provided instructions. The Berkshire MBR Sellers addressed some of the identified issues and incorporated the changes into their DPT model as part of their "corrected base case," while the effects of addressing other issues were examined in alternate base cases.

84. The Berkshire MBR Sellers submitted four alternate base cases for the PACW balancing authority area, which we will refer to as Alternate Base Case A, Alternate Base Case B, Alternate Base Case C, and Alternate Base Case D. The Berkshire MBR Sellers submitted three alternate base cases for the PACE, Idaho Power, and NorthWestern balancing authority areas (Alternate Base Case A, Alternate Base Case C, and Alternate Base Case D). Alternate Base Case A is the corrected base case adjusted to include the cost of the final transmission wheel into the destination market. Alternate Base Case B is the base case adjusted to reflect that PACW is a winter-peaking balancing authority area. Alternate Base Case C is the base case adjusted to reflect the historical interchange between the PACW and PACE balancing authority areas. Alternate Base Case D is the base case adjusted to include the cost of the final

transmission wheel into the destination market and to reflect the historical interchange between the PACW and PACE balancing authority areas.⁷⁶

Commission Determination

85. While the alternate base cases address some of the concerns identified in the July 21 Deficiency Letter, they also have the same flaws that we identified above for the “corrected base case” analysis. Therefore, we are unable to conclude from the results of the alternate base cases that the Berkshire MBR Sellers have rebutted the presumption of market power in the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas.

86. Inability to rely on the results aside, we do not find the Berkshire MBR Sellers’ use of alternate base cases to be responsive to the July 21 Deficiency Letter. The July 21 Deficiency Letter instructed the Berkshire MBR Sellers to submit revised DPT analyses for each balancing authority area in a specific manner, e.g., model the PACW balancing authority area as Winter peaking.⁷⁷ The Berkshire MBR Sellers failed to provide the required information necessary to cure the deficiencies in its application as specified in the July 21 Deficiency Letter. To the extent the Berkshire MBR Sellers wanted to provide information in addition to what was requested, they could have done so.

iv. Alternative Evidence

87. In addition to the DPT analyses, the Berkshire MBR Sellers present three factors they contend are relevant to evaluating whether they have horizontal market power in light of the results of the indicative screens and the DPT.

88. First, the Berkshire MBR Sellers contend that because winter loads are lower than summer loads, there is more excess supply in the Southwest region in the winter periods, frustrating any ability to raise market prices during those periods. They argue

⁷⁶ Alternate Base Case D is a combination of Alternate Base Case A and Alternate Base Case C.

⁷⁷ While in Alternate Base Case B, the Berkshire MBR Sellers correctly model the PACW balancing authority area as winter peaking, they failed to submit an analysis that modeled the PACW balancing authority area as winter peaking while also including the cost of the final transmission wheel into the destination market and reflecting the historical interchange between the PACW and PACE balancing authority areas.

that this should eliminate any concerns regarding the market share screen failures at base case prices in PACE, which occur only in the winter season, an off-peak season in the PACE balancing authority area. They state that the Commission considered this as a relevant fact in a Nevada Power Company section 203 application.⁷⁸

89. Second, the Berkshire MBR Sellers argue that Open Access Same-Time Information System (OASIS) postings show that there is a significant amount of ATC into the PACE and PACW balancing authority areas during the study period and that because external suppliers can readily access the PACE and PACW balancing authority area, attempts by internal suppliers to raise prices are not likely to be successful.

90. Lastly, the Berkshire MBR Sellers state that in evaluating off-peak results, the Commission previously has concluded that baseload coal and nuclear units, which generally set the market price in off-peak periods, are not suited to strategic economic withholding and that the same can be said about the PacifiCorp baseload coal and hydro generation routinely setting the market price in the PACE and PACW balancing authority areas. They argue that this should eliminate any concerns regarding the off-peak market share screen failures in the PACE and PACW balancing authority areas.⁷⁹

Commission Determination

91. We find that this proposed alternative evidence does not sufficiently demonstrate that the Berkshire MBR Sellers lack market power in the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas. We do not agree with the argument that our market power concerns in the PACE balancing authority area are unwarranted because the market share screen failures in that balancing authority area are limited to the winter season/load levels, which is an off-peak season in the PACE balancing authority area and because there is excess supply in the Southwest region in the winter periods.

As discussed above, the DPTs were not properly constructed, thus we are unable to rely on the results of the DPTs to make any determinations regarding market shares in any

⁷⁸ Berkshire MBR Sellers September 4 Filing, Solomon Aff. at 37, n.27 (citing *Nevada Power Co.*, 145 FERC ¶ 61,022, at P 29 n.40 (2013) (“Although there are also screen failures in the three Winter periods, winter is an off-peak season in the Southwest region, and there is typically a substantial amount of excess capacity in the market, frustrating any ability Nevada Power might have to withhold output to drive up prices.”)).

⁷⁹ Berkshire MBR Sellers September 4 Filing, Solomon Aff. at 37 & n.29.

season/load level. Moreover, unsupported statements of excess supply are not meaningful evidence. Rather, the identified amount, location of generation, and whether it is, for example, uncommitted, price competitive, and deliverable would have been more instructive. Also, a properly conducted DPT should already account for the mitigating effect of lower priced power from an adjacent balancing authority area being able to be imported into a study area.

92. We are also unpersuaded by the statement that there was a significant amount of ATC into the PACE and PACW balancing authority areas during the study period. ATC is a non-simultaneous measure of import capability. The Commission adopted the SIL study to be used as a basis for transmission access for both the indicative screens and the DPT analysis and has stated that the SIL study as shown in Appendix E of the April 14 Order meets the Commission's requirements.⁸⁰ The Commission has noted that where a seller submits total transfer capability values, the seller must provide evidence that these values account for: simultaneity, all internal transmission limitations, all external transmission limitations existing in first-tier areas, and all transmission reliability margins. In addition, the seller must provide evidence that those values are used in operating the transmission system and posting availability on OASIS.⁸¹

93. We are also unpersuaded by the Berkshire MBR Sellers' argument that the Commission previously has concluded that baseload coal and nuclear units, which generally set the market price in off-peak periods, are not suited for strategic economic withholding and that the same can be said about the PacifiCorp baseload coal and hydro generation. The Berkshire MBR Sellers contend that these units routinely set the market price in off-peak seasons in the PACE and PACW balancing authority areas. The Berkshire MBR Sellers seem to extend previous Commission determinations on baseload coal and nuclear plants to their hydro plants without supporting their contention, particularly given that hydro units have different operating characteristics. Further, they have not provided any specific or explicit evidence that the market prices in the PACE and PACW balancing authority areas are set by baseload coal or hydro plants.

⁸⁰ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 19.

⁸¹ *Id.* P 364.

v. **Additional Matters**

94. As discussed above, Barrick Mines and Kennecott raised a number of issues with the Berkshire MBR Sellers' DPT analyses and business practices, some of which were also raised in the July 21 Deficiency Letter. The Berkshire MBR Sellers have provided responses to many of these issues. Although our decision to revoke the Berkshire MBR Sellers' market-based rate authority in the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas is not based on the results of the DPTs (but rather on our inability to rely on the DPTs to rebut the presumption of market power), we will take this opportunity to address some of the concerns raised by Barrick Mines and Kennecott.

95. Barrick Mines and Kennecott take issue with the fact that the Berkshire MBR Sellers do not have market-based rate authority in the NV Energy balancing authority area. They argue that the lack of authority is a voluntary omission with no basis, and that none of the Berkshire MBR Sellers attempted to rebut the presumption of market power in the NV Energy balancing authority area, arguably because it is to their advantage to not do so. We find these contentions to be beyond the scope of this proceeding. This section 206 investigation is into the justness and reasonableness of the Berkshire MBR Sellers' market-based rate authority in the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas, not the NV Energy balancing authority area. Moreover, our policy is that a seller is mitigated in any market in which its affiliate is subject to mitigation.⁸² The position put forth by Barrick Mines and Kennecott is directly contrary to that policy.

96. Barrick Mines and Kennecott state that the Berkshire MBR Sellers refuse to sell power into each other's balancing authority areas.⁸³ They recommend that the Commission order the Berkshire MBR Sellers to sell in the NV Energy and PACE balancing authority areas at the lower of market-based or average cost-based rates. The Berkshire MBR Sellers dispute this claim stating that EQR and eTag data readily reveals that they engage in sales for delivery in the NV Energy and PACE balancing authority areas.⁸⁴ Our review of EQR data shows that both NV Energy and PacifiCorp engage in cost-based rate sales for delivery in the NV Energy balancing authority area,

⁸² Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 335.

⁸³ Barrick Mines March 2 Filing, at 3 and n.4. Barrick Mines January 20 Filing at 8.

⁸⁴ Berkshire MBR Sellers March 17 Filing at 7.

and market-based and cost-based rate sales into the PACE balancing authority area. Therefore, we will not adopt the must-offer requirement as proposed by Barrick Mines and Kennecott.

97. We agree with Barrick Mines' and Kennecott's assertion that the DPT analyses should be based on actual conditions to the greatest extent possible. The DPT measures the ability of a supplier to provide the relevant product to a defined market at a presumed market price. Suppliers should be included in the analysis to the extent that they can economically and physically deliver generation services to the destination market. As evidenced by the Berkshire MBR Sellers' ability to update their DPT in response to Barrick Mines' and Kennecott's comments and the July 21 Deficiency Letter, information on OATT transmission rates, transmission losses, ancillary services costs, and gas prices are available to market-based rate sellers.

98. We find Barrick Mines' and Kennecott's comments concerning whether the market-based rate program is structured effectively and their suggestion that the Commission should not base market-based rate decisions on historical market conditions that no longer exist to be beyond the scope of the proceeding. Further, we find that Barrick Mines' and Kennecott's requests for the Commission to look at the Berkshire MBR Sellers' market position in a forward-looking manner are inconsistent with the Commission's market-based rate requirements.⁸⁵

99. At various points, Barrick Mines and Kennecott express concern that certain sellers are shown to have more AEC than EC in the Berkshire MBR Sellers' analysis. The Berkshire MBR Sellers have explained that for a given generator, the amount of AEC imported into the market may be, and frequently is, greater than the amount of EC imported into that market.⁸⁶ For an individual seller, EC must be greater than or equal to AEC. For sellers with capacity committed under long-term sales contracts or native load, EC must be greater than AEC. However, typically, the total amount of EC and AEC exceeds the transmission capability into a study area in a season/load level. Therefore, transmission capability has to be allocated among the potential suppliers. The pool of potential suppliers and their amounts of "competing" capacity may be

⁸⁵ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at PP 298-301 ("We will continue to require the use of historical data for both the indicative screens and the DPT in market-based rate cases.").

⁸⁶ Berkshire MBR Sellers March 17 Filing at 17.

different in the EC and AEC analyses.⁸⁷ Therefore, as the Berkshire MBR Sellers explain, a given generator may be allocated more transmission capability in the AEC analysis than in the EC analysis in a given season/load level.

100. Barrick Mines and Kennecott raise further arguments in their August 7 Filing that are unsupported. For example, Barrick Mines and Kennecott represent that in their assessment of the EIM, CAISO treats the PACE and NV Energy balancing authority areas as one balancing authority area, thus the “CAISO studies do not view imports from PACE as providing competition.”⁸⁸ We understand this comment to say that generation from the PACE balancing authority area is not considered to be providing competition to the NV Energy balancing authority area. Nevertheless, this comment is not relevant in the context of the section 206 investigation, as the section 206 investigation did not extend to the NV Energy balancing authority area and it was not studied in this proceeding because the Berkshire MBR Sellers do not have market-based rate authority there.

101. In their November 20 Filing, Barrick Mines and Kennecott note that the Commission found that PacifiCorp and NV Energy had failed to demonstrate a lack of horizontal market power in the CAISO EIM and mitigated both sellers to offering their participating units into the EIM at or below each unit’s Default Energy Bid. They request that the Commission consider a comparable mitigation measure if they find the Berkshire MBR Sellers have market power in this proceeding. As discussed above, and in the December 9 Order, the CAISO EIM is a new relevant geographic market for market power purposes, thus a finding that PacifiCorp and NV Energy failed to demonstrate a lack of market power in the CAISO EIM and any subsequent mitigation related to that market power is inapplicable to this proceeding. Further, as discussed below, the Commission’s mitigation procedures for sellers who fail to demonstrate a

⁸⁷ As an example, take the hypothetical study area, “Market A.” First-tier to Market A is “Market B” and the transmission capability between the two markets is 100 MW. In Market B, there are two sellers with EC: “Seller A” who has 1,000 MW of EC, and 750 MW of load; and “Seller B” who has 1,000 MW of EC, and no load. Under the EC analysis in Market A, using the Berkshire MBR Sellers’ pro-rata allocation methodology, Seller A and Seller B have an equal amount of the eligible capacity, and thus would both be allocated 50 percent of the transmission capability into the Market A, or 50 MW of EC. However, under the AEC analysis, Seller B has 80 percent of the eligible capacity into Market B, and thus would be allocated 80 percent of the transmission capability into Market A, or 80 MW of AEC.

⁸⁸ Barrick Mines August 7 Filing at 1, 2.

lack of market power are set forth in Order No. 697 and the Commission's regulations at 18 C.F.R. § 35.38.

102. As to Barrick Mines' and Kennecott's contention that because the Berkshire MBR Sellers do not have appropriate ring-fencing in place, the potential for anticompetitive cross-subsidies exist, and that the existence of such cross-subsidies can create barriers to competitive market entry, we agree with the Berkshire MBR Sellers' response that we address potential cross-subsidization by market-based rate sellers through the affiliate restrictions in section 35.39 of the Commission's regulations. Barrick Mines and Kennecott further state that there are no restrictions preventing Berkshire MBR Sellers from selling power into the wholesale market at below-cost prices, and recouping the additional costs from captive ratepayers in each balancing authority area. They claim that neither the Utah nor the Nevada state utility commissions that oversee the Berkshire MBR Sellers evaluates whether each individual wholesale sale is at a market price greater than marginal cost. They allege that, even if a Berkshire MBR Seller sells power at above marginal cost, but below average cost, it can still recover the additional costs from captive ratepayers. We find these arguments to be outside the scope of this proceeding. While the Commission's market-based rate rules restrict certain affiliate transactions, those restrictions relate to sales between a franchised public utility with captive customers and a market-regulated power sales affiliate.⁸⁹

103. We find Barrick Mines' and Kennecott's recommendation that the Commission order single-system rates between PacifiCorp and NV Energy to be beyond the scope of this proceeding.⁹⁰ Likewise, we find Barrick Mines' and Kennecott's request that the Commission use this proceeding to eliminate pancaked rates to be beyond the scope of this market-based rate proceeding.

104. We disagree with Barrick Mines' and Kennecott's argument that including the cost of the final transmission wheel into the destination market must increase the Berkshire MBR Sellers's market power. The DPT measures a supplier's presence in a market at a calculated price by, in part, determining which of that supplier's units are economically capable of reaching the study area. Adding to each unit's marginal cost the cost of the final transmission wheel will cause some units to become uneconomic. If a seller has a significant amount of units with marginal cost already near the presumed

⁸⁹ See 18 C.F.R. § 35.39 (2015).

⁹⁰ We understand this comment to recommend single-system transmission rates between PacifiCorp and NV Energy.

market price, it is entirely possible that universally adding the cost of the final transmission wheel to each unit in the study will reduce that sellers' market shares, because the marginal costs of those units would now be above the presumed market price.

105. Finally, in light of our determination to revoke the Berkshire MBR Sellers' market-based rate authority in these four markets based on their failure to rebut the presumption of market power in those markets, we will not set this proceeding for a full evidentiary hearing as requested by Barrick Mines and Kennecott.

b. Vertical Market Power

106. Barrick Mines and Kennecott argue that there is evidence of vertical market power and that the Commission should expand this investigation to include an investigation of vertical market power. They argue that PacifiCorp uses path-based transmission capacity determinations, treating the high-voltage electric transmission system as if it were a natural gas or oil pipeline, based on undefined "load bubbles." They contend that such treatment has the effect of artificially reducing ATC and when coupled with the rate-pancaking between NV Energy and PacifiCorp is evidence of vertical market power. The Berkshire MBR Sellers contend that to the extent Barrick Mines and Kennecott seek to raise vertical market power issues, their arguments are beyond the scope of the proceeding and constitute an untimely request for rehearing of the December 9 Order, in which the Commission found that the Berkshire MBR Sellers satisfy the Commission's requirements for market-based rate authority regarding vertical market power. Barrick Mines and Kennecott maintain that vertical market power issues are not foreclosed. They state that the deadline for a request for rehearing is only applicable to parties and that they did not request a rehearing because they are not parties until granted intervention.

Commission Determination

107. In the December 9 Order, the Commission found that the Berkshire MBR Sellers satisfy the Commission's requirements for market-based rate authority regarding vertical market power.⁹¹ Timely rehearing was not sought on this issue.

⁹¹ December 9 Order, 149 FERC ¶ 61,219 at P 36.

c. **Conclusion**

108. As described above, there are numerous flaws with the way in which the Berkshire MBR Sellers prepared and submitted their DPT analyses. Thus, we are unable to validate the results of the Berkshire MBR Sellers' DPT analyses and are unable to rely on the DPT analyses to rebut the presumption of market power in the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas. We are also unpersuaded by the Berkshire MBR Sellers' alternative evidence. Thus, we find that the Berkshire MBR Sellers have not adequately rebutted the presumption of horizontal market power caused by their failure, or decision to forego, the indicative screens in the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas.

109. Given the Berkshire MBR Sellers' failure to provide verifiable DPT analyses to rebut the presumption of market power, we find that continuation of their market-based rate authority in the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas is not just and reasonable. Accordingly, we revoke the Berkshire MBR Sellers' market-based rate authority in these balancing authority areas. The Commission provided the Berkshire MBR Sellers ample opportunity to correct their DPT model consistent with the Commission's regulations.

110. Order No. 697 stated that "[f]ailure to pass either of the indicative screens . . . will constitute a prima facie showing that the rates charged by the seller pursuant to its market-based rate authority may have become unjust and unreasonable and that continuation of the seller's market-based rate authority may no longer be just and reasonable."⁹² 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 DPT analysis, or, alternatively, sellers can accept the presumption of market power and adopt some form of cost-based mitigation.⁹³ In the December 9 Order, the Berkshire MBR Sellers were told that they could (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.⁹⁴ As stated in Order No. 697, default cost-based rates are as

⁹² Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 63 (quoting April 14 Order, 107 FERC ¶ 61,018 at P 209).

⁹³ *Id.*

⁹⁴ December 9 Order, 149 FERC ¶ 61,219 at P 20.

follows: (1) sales of power of one week or less will be priced at the applicant's incremental cost plus a 10 percent adder;⁹⁵ (2) sales of power of more than one week but less than one year will be priced at an embedded cost "up to" rate reflecting the costs of the unit(s) expected to provide the service;⁹⁶ and (3) sales of power for one year or more will be priced on an embedded cost-of-service basis and each such contract will be filed with the Commission for review and approved prior to the commencement of service.⁹⁷

111. The Berkshire MBR Sellers have not proposed mitigation. In *Duke Power*,⁹⁸ the Commission found that because Duke Power had not availed itself of the opportunity of proposing tailored mitigation options, the Commission's proper course was to impose the default cost-based rates as defined in the April 14 Order.⁹⁹

112. Accordingly, we direct each of the Berkshire MBR Sellers to submit a compliance filing within 30 days of the date of this order to set the just and reasonable rate for sales in the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas at the default cost-based rates specified in the Order No. 697. The Berkshire MBR Sellers are directed to provide cost support for these rates. In particular, the Berkshire MBR Sellers are directed to provide the formulas and methodology according to which they intend to calculate the incremental cost component of these rates. We direct the Berkshire MBR Sellers to submit a compliance filing that adopts the default cost-based rates in tariffs separate from their market-based rate tariffs, and to file these tariffs to be effective during the refund period established in this proceeding (i.e., January 9, 2015 to April 9, 2016). In addition, we direct the Berkshire MBR Sellers to submit a compliance filing to revise their market-based rate tariffs to limit sales at market-based rates to areas outside of the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas.¹⁰⁰ We direct the Berkshire MBR Sellers to file

⁹⁵ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 620.

⁹⁶ *Id.* P 648.

⁹⁷ *Id.* P 659. *See also* 18 C.F.R. § 35.38(b) (2015).

⁹⁸ *Duke Power*, 111 FERC ¶ 61,506 (2005) (*Duke Power*).

⁹⁹ *Id.* P 60.

¹⁰⁰ The tariffs should continue to reflect that the Berkshire MBR Sellers do not have authority to make sales in the NV Energy balancing authority area at market-based rates.

the revisions to their market-based rate tariffs to be effective during the refund period established in this proceeding and prospectively from the date of this order and to provide refunds based on the default cost-based rates and file a refund report with the Commission.

113. The cost-based compliance filing directed herein is without prejudice to the Berkshire MBR Sellers' ability to make sales under their existing Commission-approved cost-based rate tariffs, if applicable.¹⁰¹ However, to the extent that the Berkshire MBR Sellers elect to replace market-based rate sales in the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas with cost-based rate sales pursuant to their existing cost-based rate tariffs, the Berkshire MBR Sellers are directed to inform the Commission within 30 days of the date of issuance of this order and specify under which tariff(s) they intend to transact. We note that the Commission retains the right to investigate whether existing cost-based rates continue to be just and reasonable.

114. The cost-based compliance filing directed herein is without prejudice to the Berkshire MBR Sellers proposing, on a prospective basis, case-specific mitigation tailored to their particular circumstances that would eliminate their ability to exercise market power.

115. The revocation of the Berkshire MBR Sellers' market-based rate authority in the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas is without prejudice to the Berkshire MBR Sellers making a new filing with the Commission under section 205 of the FPA to request market-based rate authority prospectively for the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas.

116. Certain waivers and authorizations previously granted in connection with the Berkshire MBR Sellers' market-based rate authority may no longer be applicable.¹⁰² The Berkshire MBR Sellers should verify whether any granted waivers are affected by their loss of market-based rate authority and propose revisions to their market-based tariffs as necessary.

¹⁰¹ Any sales made under the Berkshire MBR Sellers' market-based rate tariff in these balancing authority areas, excluding sales into the EIM, during the refund effective period will be considered to be under the default cost-based tariff directed herein.

¹⁰² See Order No. 697, FERC Stats. & Regs. ¶ 31,252 at PP 984 & n.1126, 986, 992, 1000.

117. In accordance with Order No. 697-A, mitigated sellers *and their affiliates* are prohibited from selling power at market-based rates in the balancing authority area(s) in which a seller is found, or presumed to have market power.¹⁰³ Thus, the Commission directs the Berkshire MBR Sellers to inform any affiliates that have or are seeking market-based rate authorization and to inform such affiliates that they should revise their market-based rate tariffs to limit sales at market-based rates to areas outside of the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas.

2. Reporting Requirements

118. An entity with market-based rate authorization must file an EQR with the Commission, consistent with Order Nos. 2001¹⁰⁴ and 768,¹⁰⁵ to fulfill its responsibility under FPA section 205(c)¹⁰⁶ to have rates on file in a convenient form and place.¹⁰⁷ The Berkshire MBR Sellers must file EQRs electronically with the Commission consistent with the procedures set forth in Order No. 770.¹⁰⁸ Failure to timely and accurately file an EQR is a violation of the Commission's regulations for which the Berkshire MBR

¹⁰³ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 335.

¹⁰⁴ *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).

¹⁰⁵ *Electricity Mkt. Transparency Provisions of Section 220 of the Fed. Power Act*, Order No. 768, FERC Stats. & Regs. ¶ 31,336 (2012), *order on reh'g*, Order No. 768-A, 143 FERC ¶ 61,054 (2013).

¹⁰⁶ 16 U.S.C. § 824d(c) (2012).

¹⁰⁷ *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).

¹⁰⁸ Order No. 770, FERC Stats. & Regs. ¶ 31,338.

Sellers may be subject to refund, civil penalties, and/or revocation of market-based rate authority.¹⁰⁹

119. The Berkshire MBR Sellers must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.¹¹⁰

120. Additionally, for the areas in which they retain market-based rate authority, the Berkshire MBR Sellers must file updated market power analyses for all regions in which they are designated as Category 2 sellers in compliance with the regional reporting schedule adopted in Order No. 697.¹¹¹ The Commission also reserves the right to require such an analysis at any intervening time.¹¹²

The Commission orders:

(A) The Berkshire MBR Sellers' notice of change in status filing is hereby accepted for filing, as discussed in the body of this order.

(B) Docket Nos. ER10-3246-002 and ER13-1266-002 related to the 2013 triennial are hereby terminated, as discussed in the body of this order.

(C) The Commission hereby revokes the Berkshire MBR Sellers' market-based rate authority in the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas. Certain waivers and authorizations previously granted in connection with the Berkshire MBR Sellers' market-based rate authorization are no longer applicable, as discussed in the body of this order.

(D) The Berkshire MBR Sellers are hereby directed, within 30 days of the

¹⁰⁹ The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2015). 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.

¹¹⁰ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005); 18 C.F.R. § 35.42 (2015).

¹¹¹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at PP 882-893.

¹¹² *Id.* P 853.

date of this order, to revise their market-based rate tariffs to limit sales at market-based rates to areas outside of the PACE, PACW, Idaho Power, NorthWestern, and NV Energy balancing authority areas as discussed in the body of this order.

(E) Each Berkshire MBR Seller is hereby directed to submit, within 30 days of the date of this order, a separate tariff to provide for the default cost-based rates for the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas, or inform the Commission of its intention to use its cost-based tariff currently on file, if applicable, as discussed in the body of this order.

(F) The Berkshire MBR Sellers are hereby directed to file cost support, as appropriate, as discussed in the body of the order.

(G) The Berkshire MBR Sellers are hereby ordered to make refunds within 30 days of the date of this order, and file a refund report with the Commission within 15 days of the date refunds are made, as discussed in the body of the order.

(H) The Berkshire MBR Sellers are hereby directed to identify any affiliates that have or are seeking market-based rate authorization and to inform such affiliates that they should revise their market-based rate tariffs to limit sales at market-based rates to areas outside of the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.