

157 FERC ¶ 61,230
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Nevada Power Company	Docket Nos. ER10-2475-014 ER10-2475-015 EL15-22-001
Sierra Pacific Power Company	ER10-2474-014 ER10-2474-015
PacifiCorp	ER16-2145-000 ER10-3246-009
Pinyon Pines Wind I, LLC	ER16-2157-000 ER13-520-007
Pinyon Pines Wind II, LLC	ER16-2158-000 ER13-521-007
Solar Star California XIX, LLC	ER16-2162-000 ER13-1441-007
Solar Star California XX, LLC	ER16-2163-000 ER13-1442-007
Topaz Solar Farms LLC	ER16-2164-000 ER12-1626-008
CalEnergy, LLC	ER16-2148-000 ER13-1266-010
CE Leathers Company	ER16-2150-000 ER13-1267-007
Del Ranch Company	ER16-2152-000 ER13-1268-007
Elmore Company	ER16-2153-000 ER13-1269-007
Fish Lake Power LLC	ER16-2154-000 ER13-1270-007
Salton Sea Power Generation Company	ER16-2159-000 ER13-1271-007
Salton Sea Power L.L.C.	ER16-2160-000 ER13-1272-007
Vulcan/BN Geothermal Power Company	ER16-2165-000 ER13-1273-007
Yuma Cogeneration Associates	ER16-2166-000 ER10-2605-011

MidAmerican Energy Company	ER16-2069-000
Bishop Hill Energy II LLC	ER16-2146-000
Cordova Energy Company LLC	ER16-2151-000
Saranac Power Partners, L.P.	ER16-2161-000
Power Resources, Ltd.	
Grande Prairie Wind, LLC	ER16-2155-000
Marshall Wind Energy LLC	ER16-2156-000
Phillips 66 Company	ER16-2144-000

ORDER ON REHEARING AND COMPLIANCE FILINGS AND TERMINATING
SECTION 206 PROCEEDING

(Issued December 21, 2016)

1. On June 9, 2016, the Commission issued an order revoking the Berkshire MBR Sellers' market-based rate authority in the PacifiCorp-East (PACE), PacifiCorp-West (PACW), Idaho Power Company (Idaho Power), and NorthWestern Corporation (NorthWestern) balancing authority areas.¹ The Commission directed the Berkshire MBR Sellers to revise their market-based rate tariffs to limit sales at market-based rates to areas outside of these four balancing authority areas and 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. The Commission also directed the Berkshire MBR Sellers to provide refunds.² The Berkshire MBR Sellers sought rehearing and clarification of the June 9 Order. As discussed below, we deny the request for rehearing and we clarify certain aspects of the June 9 Order. Also, as discussed below, we accept the Berkshire MBR Sellers' revised market-based rate tariffs filed in compliance with the

¹ *Nevada Power Co.*, 155 FERC ¶ 61,249 (2016) (June 9 Order). The Berkshire MBR Sellers, as identified in the June 9 Order, include the following: Nevada Power Company, Sierra Pacific Power Company, PacifiCorp, 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.

² The refund period is January 9, 2015 to April 9, 2016.

June 9 Order, effective as of the dates requested.³ Accordingly, this order terminates the section 206 proceeding instituted in Docket No. EL15-22-000.

I. Background

2. On December 9, 2014,⁴ the Commission issued an order instituting a proceeding pursuant to section 206 of the Federal Power Act (FPA)⁵ 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. The Commission stated that the Berkshire MBR Sellers' delivered price test (DPT) analyses for these four balancing authority areas are deficient and thus have not rebutted the presumption of market power. The Commission directed the Berkshire MBR Sellers to show cause as to why the Commission should not revoke their market-based rate authority in these four balancing authority areas.

3. In the June 9 Order, the Commission found that the information supplied by the Berkshire MBR Sellers failed to rebut the presumption of market power in the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas. The Commission stated that in the absence of reliable DPT analyses rebutting the presumption of market power, continuation of the Berkshire MBR Sellers' market-based rate authority in these four balancing authority areas is not just and reasonable. Therefore, the Commission revoked the Berkshire MBR Sellers' market-based rate authority in the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas.⁶ The Commission directed

³ For purposes of this order, for simplicity, we refer to the above-captioned entities as "the Berkshire MBR Sellers" but we clarify here that three of the above-captioned entities (Grande Prairie Wind, LLC, Marshall Wind Energy LLC, and Phillips 66 Company) were not among the Berkshire MBR Sellers captioned in the June 9 Order or included in the request for rehearing. Therefore, when we refer to the Berkshire MBR Sellers' request for rehearing we do not include these three entities. However, these three entities filed revised tariffs and refund reports and therefore we include these three entities when we refer to the Berkshire MBR Sellers' tariff filings and refund reports.

⁴ *Nevada Power Co.*, 149 FERC ¶ 61,219 (2014) (December 9 Order).

⁵ 16 U.S.C. § 824e (2012).

⁶ The Commission noted that 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

(continued ...)

the Berkshire MBR Sellers 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.

4. On July 11, 2016, the Berkshire MBR Sellers filed a request for rehearing and/or clarification of the June 9 Order.⁷ They seek clarification on three issues: (a) whether they are required to adopt cost-based mitigation and calculate refunds based on the Commission's default cost-based rates;⁸ (b) whether the June 9 Order found that the Berkshire MBR Sellers forfeited their rights to propose their own, case-specific cost-based rates for mitigation and refund purposes when they chose to submit a DPT;⁹ and (c) whether the June 9 Order intended to establish the following three new requirements for market-based rate authority: (i) to submit confidential eTag data; (ii) that the DPT results must match historical sales data; and (iii) that there be a linear, one-to-one relationship between market prices and market shares.¹⁰

5. Depending on how the Commission addresses the requests for clarification, the Berkshire MBR Sellers seek rehearing on those and other issues. Specifically, the Berkshire MBR Sellers request rehearing on the following bases: (a) the Commission failed to afford the Berkshire MBR Sellers the opportunity to submit a revised DPT analysis that would "address the Commission's newly announced standards for determining market power," thus denying their rights to due process and fair notice;

extend to Agua Caliente Solar, LLC (Agua Caliente) based on Agua Caliente's representations that Berkshire Hathaway's interests in Agua Caliente are passive. June 9 Order, 155 FERC ¶ 61,249 at P 2 n.6.

⁷ For some of the issues raised on rehearing, the Berkshire MBR Sellers first seeking clarification and then, in the alternative, seek rehearing.

⁸ To the extent that the Commission clarifies that the June 9 Order requires that the Berkshire MBR Sellers use the Commission's default cost-based rates, and does not permit them the option to propose their own case-specific cost-based rates, the Berkshire MBR Sellers seek rehearing of the June 9 Order. Request for Rehearing at 2.

⁹ If the Commission clarifies that the Berkshire MBR Sellers forfeited their rights to propose case-specific cost-based rates, they seek rehearing of the June 9 Order. Request for Rehearing at 2-3.

¹⁰ To the extent that the Commission clarifies the establishment of new criteria, the Berkshire MBR Sellers seek rehearing of the June 9 Order. Request for Rehearing at 3.

(b) the Commission's decision to revoke the Berkshire MBR Sellers' market-based rates and to impose cost-based mitigation without an actual finding that they had market power is contrary to law and violates FPA section 206; (c) the Commission violated the requirements of the Administrative Procedure Act by violating its own process, which requires that the Commission make a "definitive finding" that a seller has "market power" before revoking the seller's market-based rate authority; (d) the Commission's decision not to allow the Berkshire MBR Sellers the option to propose or use their own, case-specific cost-based rates on file for the purposes of calculating refunds or for prospective mitigation is contrary to law insofar as it deprived them of their exclusive right to propose their own rates under FPA section 205; (e) the Commission's decision to revoke the Berkshire MBR Sellers' market-based rate authority in the Idaho Power and NorthWestern balancing authority areas, first-tier balancing authority areas in which the Berkshire MBR Sellers do not own or control any generation and where there were no or minimal screen failures, constitutes an unannounced and unjustified departure from precedent; and (f) the Commission erred in imposing three new and unreasonable requirements for obtaining or retaining market-based rate authority, which violate due process and constitute an unexplained and unjustified departure from precedent.¹¹

6. On June 29, 2016, July 7, 2016, and July 8, 2016, the individual Berkshire MBR Sellers each filed their revised market-based rate tariffs reflecting the limitation of their sales at market-based rates to areas outside of the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas.¹² Some of them state that their tariff filings also

¹¹ Request for Rehearing at 3-4.

¹² One of the companies included on the caption of the June 9 Order, Power Resources, Ltd., did not submit a revised market-based rate tariff because it previously cancelled its market-based rate tariff. July 8 Filing at 2 n.6 (citing *Power Resources, Ltd.*, Docket No. ER16-516-000 (Jan. 14, 2016) (accepting notice of cancellation of market-based rate tariff)). The MidAmerican Energy Company tariff was filed on June 29, 2016, with a requested effective date of June 30, 2016. The Phillips 66 Company tariff was filed on July 7, 2016, with a requested effective date of July 8, 2016. The tariffs for the following were filed on July 8, 2016, with a requested effective date of June 9, 2016: Nevada Power Company; Sierra Pacific Power Company; PacifiCorp; 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; 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; Grande Prairie Wind, LLC; Marshall Wind Energy LLC; Yuma Cogeneration Associates; Bishop Hill Energy II LLC; Cordova Energy Company LLC; and Saranac Power Partners, L.P.

include ministerial changes, including revisions to reference the Nevada Power Company balancing authority area and to remove a reference to the former Sierra Pacific Power Company balancing authority area, which is no longer a separate balancing authority area after it was consolidated with the Nevada Power Company balancing authority area.¹³ Philips 66 Company revised its tariff to indicate that waiver of the provisions of Part 101 of the Commission's regulations that apply to hydropower licensees is not granted with respect to licensed hydropower projects.

7. On June 20, 2016 and July 21, 2016 the Berkshire MBR Sellers¹⁴ filed refund reports.¹⁵ More specifically, on June 20, 2016, the majority of the Berkshire MBR Sellers filed a refund report stating that they did not make sales in any of the four balancing authority areas and thus did not owe refunds.¹⁶ On July 21, 2016, Nevada Power Company and Sierra Pacific Power Company (together, NV Energy) and PacifiCorp filed a refund report. They explain that they have cost-based rate tariffs on file that are incorporated into Schedule Q of the Western Systems Power Pool Agreement.

¹³ *See, e.g.*, Sierra Pacific Power Company's July 8 Filing at 3 n.7.

¹⁴ On June 27, 2016, MidAmerican Energy Services, LLC submitted a filing in Docket No. ER15-2211-000 stating that it was not a named party to the section 206 proceeding since its market-based rate authority was granted after the commencement of the section 206 proceeding. MidAmerican Energy Services, LLC states that it did not make any wholesale sales of electric energy in the mitigated markets during the refund period and accordingly it does not owe refunds.

¹⁵ On October 5, 2016, the Director of the Division of Electric Power Regulation – West issued a letter under delegated authority to NV Energy and PacifiCorp directing the submission of additional information with respect to the refund reports, which they responded to on November 4, 2016. We are not acting on the refund reports in this order.

¹⁶ The following companies reported that no refunds are owed during the refund period: 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, 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, Yuma Cogeneration Associates, Bishop Hill Energy II LLC, Cordova Energy Company LLC, Saranac Power Partners, L.P., Power Resources, Ltd., Marshall Wind Energy LLC, and Grand Prairie Wind, LLC.

II. Notice and Responsive Pleadings

8. Notice of the June 29, 2016 tariff filing was published in the *Federal Register*,¹⁷ with interventions and protests due on or before July 20, 2016.

9. Notice of the July 7, 2016 tariff filing was published in the *Federal Register*,¹⁸ with interventions and protests due on or before July 28, 2016.

10. Notice of the July 8, 2016 tariff filings was published in the *Federal Register*,¹⁹ with interventions and protests due on or before July 29, 2016.

11. On July 29, 2016, Barrick Goldstrike Mines Inc.; Barrick Cortez Inc. as operator of Cortez Joint Venture d/b/a Cortez Gold Mines; and Barrick Turquoise Ridge Inc. as operator of Turquoise Ridge Joint Venture (Barrick Mines) filed a timely motion to intervene and comments in response to the July 8 tariff filings of Sierra Pacific Power Company in Docket No. ER10-2474-014 and Nevada Power Company in ER10-2475-014. On August 15, 2016, the Berkshire MBR Sellers filed an answer to Barrick Mines' comments. On August 22, 2016, Barrick Mines filed an answer to the Berkshire MBR Sellers' answer.

III. Discussion

A. Procedural Matters

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2016), the timely, unopposed motion to intervene of Barrick Mines as to the July 8 tariff filings of NV Energy serves to make it a party to those proceedings.

13. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2016), prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We will accept the answers filed by Barrick Mines and the Berkshire MBR Sellers because they have provided information that assisted us in our decision-making process.

¹⁷ 81 Fed. Reg. 44,015 (2016).

¹⁸ 81 Fed. Reg. 45,474 (2016).

¹⁹ 81 Fed. Reg. 45,469; 81 Fed Reg. 46,668 (2016).

B. Substantive Matters

14. As discussed below, we reject the Berkshire MBR Sellers' request for rehearing, but grant certain clarifications. Additionally, we accept the Berkshire MBR Sellers' revised market-based rate tariffs, effective as of the dates requested.

1. Request for Rehearing and/or Clarification**a. Cost-Based Rates**

15. Berkshire MBR Sellers seek clarification as to whether they may propose their own, case-specific cost-based rates for mitigation and refund purposes. In this order, we clarify that the Berkshire MBR Sellers may propose their own, case-specific cost-based rates for refunds and mitigation, including the Schedule Q cost-based rates on file with the Commission.

16. In Order No. 697, the Commission stated that upon the loss or surrender of market-based rate authority, a seller has a number of options on how to make wholesale power sales, including reverting to a cost-based rate tariff on file with the Commission.²⁰ In the June 9 Order, the Commission directed the Berkshire MBR Sellers to provide refunds based on the default cost-based rates, file a refund report with the Commission, and provide cost support for these rates.²¹ The Commission stated that the Berkshire MBR Sellers must provide cost support if they adopt the default cost-based rates or propose other cost-based rates; however, the Commission noted that, 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.²² The Commission stated that the cost-based compliance filing is without prejudice to the Berkshire MBR Sellers' ability to make sales under their existing Commission-approved cost-based rate

²⁰ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 655 n.699, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 26 (2012).

²¹ June 9 Order, 155 FERC ¶ 61,249 at P 3.

²² June 9 Order, 155 FERC ¶ 61,249 at P 3 n.9

tariffs, if applicable.²³ The Commission also stated that the cost-based compliance filing 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.²⁴

17. We clarify that the June 9 Order did not find that the Berkshire MBR Sellers forfeited their filing rights, including the right to propose case-specific mitigation or propose new cost-based rates.²⁵ The Commission does not limit a seller's ability to propose and support cost-based rates that are different from the default cost-based rates.²⁶ When the Commission revokes market-based rates and imposes cost-based rate mitigation, sales made on or after the refund effective date will be subject to refund,²⁷ "where the refund floor would be the default cost-based rate or the case-specific cost-based rate approved by the Commission, if any."²⁸ Thus, we grant the Berkshire MBR Sellers' request that the Commission clarify that NV Energy and PacifiCorp may propose their own, case-specific cost-based rates for refunds and mitigation, including the Schedule Q cost-based rates on file with the Commission.

18. In the July 21 refund report, NV Energy and PacifiCorp state that they calculated refunds based on Schedule Q cost-based rates. They state that they made refunds for the difference between the agreed-upon market-based rate and the respective company's cost-based rate on file with the Commission.²⁹ They specify that they used the cost-based

²³ June 9 Order, 155 FERC ¶ 61,249 at P 113.

²⁴ June 9 Order, 155 FERC ¶ 61,249 at P 114.

²⁵ See Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 622; *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018, at P 147 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

²⁶ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 620 n.653.

²⁷ However, sales made under agreements entered into prior to the refund effective date are not subject to refund. June 9 Order 155 FERC ¶ 61,249 at P 2 n.6; *see also Duke Power*, 111 FERC ¶ 61,506, at P 4 n.8 (2005) ("The revocation of Duke Power's MBR authority in the Duke Power control area does not apply to, or affect, existing MBR contracts that were entered into prior to the refund effective date in this proceeding.").

²⁸ July 8 Order, 108 FERC ¶ 61,026 at P 158.

²⁹ They add that interest was calculated in accordance with the Commission's interest rate as provided in 18 C.F.R. § 35.19(a) (2016).

rate tariffs on file that are incorporated into Schedule Q of the Western Systems Power Pool Agreement to calculate the refund floor.³⁰ While we are not acting on the refund reports in this order, we take this opportunity to clarify that calculating the refund floor based on their applicable cost-based rates on file is consistent with Commission policy. Based on our clarifications herein, we do not believe that the Berkshire MBR Sellers seek rehearing on the cost-based rate issues.

b. Criteria for Market-Based Rate Authority

19. As noted above, the Berkshire MBR Sellers request clarification on the issue of whether the June 9 Order established the following three new criteria for obtaining and retaining market-based rate authority: (1) sellers must provide eTag data on historical transmission transactions; (2) the DPT results must match historical sales data; and (3) sellers must prove that the results of the DPT analysis do not vary significantly between the base case and price sensitivity analysis. To the extent that the Commission clarifies that these elements are requirements for obtaining and retaining market-based rate authority, the Berkshire MBR Sellers seek rehearing of the June 9 Order.

20. We clarify that the June 9 Order did not create new criteria for obtaining or retaining market-based rate authority. Rather, in the June 9 Order, the Commission identified areas where the Berkshire MBR Sellers' analysis fell short of existing requirements and, where appropriate, provided suggestions for meeting the requirements.

21. As an initial matter, the June 9 Order did not state that sellers are required to provide eTag data on historical transmission transactions. Rather, the June 9 Order noted that sellers must provide corroborating evidence so that the Commission can properly evaluate their model and that the Berkshire MBR Sellers failed to provide any historical transmission data to corroborate the results of their DPTs.³¹ The June 9 Order does note that eTag data is an example of historical transmission data, but it does not state that sellers must provide eTag data to meet this requirement. In fact, in the June 9 Order, the Commission stated that “[t]he Commission has previously noted that if the necessary data is not readily available to sellers they should make their best efforts to provide accurate

³⁰ July 21 Refund Report.

³¹ June 9 Order, 155 FERC ¶ 61,249 at P 72 (citing *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044, at Appendix A (1996) (Merger Policy Statement), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997); *Public Service Co. of New Mexico*, 153 FERC ¶ 61,060, at P 65 (2015) (PNM); *Southern Co. Energy Marketing, Inc.*, 112 FERC ¶ 61,054, at P 55 (2005)).

substitute data.”³² The Berkshire MBR Sellers failed to provide any historical transmission data, eTag or otherwise, to corroborate the results of their DPTs as required by section 33.3(c)(6) of the Commission’s regulations.³³ Moreover, as noted in the June 9 Order and above, the Commission’s review of transmission data was not able to corroborate the results of the Berkshire MBR Sellers’ DPTs.³⁴

22. The June 9 Order also did not establish a requirement that “sellers must prove that the actual historical transactions during the time period match the transactions that are reflected in the DPT analyses.”³⁵ Instead, the June 9 Order noted that the Commission’s policy is that applicants must provide a “trade data check” to support the results of the DPT analysis.³⁶ This is not a new standard or a higher threshold test; it is the obligation the Commission has required for DPTs since 1997.³⁷ The Berkshire MBR Sellers note

³² June 9 Order, 155 FERC ¶ 61,249 at P 72 (citing *Revised Filing Requirements Under Part 33 of the Commission’s Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111, at 31,878 n.22 (2000), *order on reh’g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001) (“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.”)).

³³ The Berkshire MBR Sellers introduced the idea of eTag data in their March 17, 2015 filing, which stated that “a review of EQR and eTag data” was performed but the Berkshire MBR Sellers did not submit any eTag data or the summary of any such review. *See* Berkshire MBR Sellers March 17 Filing at 7. However, the relevant point is that no corroborating transmission data was submitted.

³⁴ June 9 Order, 155 FERC ¶ 61,249 at P 72.

³⁵ Request for Rehearing at 46.

³⁶ June 9 Order, 155 FERC ¶ 61,249 at P 70 (citing Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,133; *PNM*, 153 FERC ¶ 61,060 at PP 63-66).

³⁷ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,133 (“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.

that the regulations require that sellers provide an explanation only where there are “significant differences” between the results of the Commission’s DPT test and trade patterns in the historical time period.³⁸ While the Berkshire MBR Sellers did provide some electric quarterly report (EQR) data in support of their calculated destination market prices, they failed to meet the requirement to explain significant differences between the historical trade data and their purported results. As noted in the June 9 Order, the DPT results indicate that significant generation capacity is available to compete in the PACE balancing authority area from the Bonneville Power Administration balancing authority area.³⁹ However, the existence of such competing supply from the Bonneville Power Administration balancing authority area is not corroborated by the Berkshire MBR Sellers’ historical data and they do not provide an explanation of the differences.

23. Third, the Berkshire MBR Sellers present several arguments regarding the sensitivity analyses of the DPT. In the June 9 Order, the Commission explained that Commission regulations provide 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.⁴⁰ First, the Berkshire MBR Sellers argue that the Commission has created a new unreasonable standard stating that sellers must prove that the results of their DPT Analysis do not “vary significantly” between the base case and the price sensitivity analyses. Next, the Berkshire MBR Sellers further argue that the regulation does not define “vary significantly” or “small variations.”⁴¹ Finally, the Berkshire MBR Sellers argue that the Commission has adopted a new standard of a one-to-one relationship between the change in the price sensitivity and the changes in the resulting DPT output. We respond to the Berkshire MBR Sellers’ assertions below.

24. As an initial matter, we clarify that the Commission did not create a new standard. The requirement in 18 C.F.R. § 33.3(d)(6) 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 was described in Order No. 642, which was issued on November 15, 2000.⁴² The Berkshire MBR Sellers also claim that the Commission has

³⁸ Request for Rehearing at 45-46.

³⁹ June 9 Order, 155 FERC ¶ 61,249 at PP 71-72.

⁴⁰ *Id.* P 67 (citing 18 C.F.R. § 33.3(d)(6)).

⁴¹ Request for Rehearing at 49.

⁴² Order No. 642, FERC Stats. & Regs. ¶ 31,111. The Berkshire MBR Sellers state that the Commission has created the +/- 10 percent sensitivities as bounding

created the two sensitivities of a 10 percent price increase and a 10 percent price decrease as “bounding sensitivities.”⁴³

25. The Berkshire MBR Sellers also note that the Commission has not defined the phrases “vary significantly” or “small variations.”⁴⁴ It is true that the Commission has not prescribed a particular method to compute the exact level of price sensitivity; instead, the Commission has given leeway to sellers to present a reasonable case relevant to their individual circumstances for the Commission to review. However, as discussed below, the Commission supported its finding that the results in this case vary significantly in response to small variations in price.

26. The Berkshire MBR Sellers claim that the Commission has taken the position that there must be a one-to-one linear relationship between market prices and market shares. In support of this claim, the Berkshire MBR Sellers note the statement in the June 9 Order that in the 10 percent price increase sensitivity their market shares increase by more than 15 percentage points in three season/load levels.⁴⁵ The Berkshire MBR Sellers argue that on this “thin reed” the Commission concluded that they have failed to demonstrate that the results of their analysis do not vary significantly in response to small variations in prices.⁴⁶ We disagree with this characterization of the Commission’s June 9 Order.

27. We clarify that the June 9 Order does not require a “one-to-one linear relationship” between prices and market shares as suggested by the Berkshire MBR

sensitivities. We clarify that the Commission has not prescribed ten percent as the sensitivities, but has accepted the use of a ten percent sensitivity to address the requirement in 18 C.F.R. § 33.3(d)(6). *See, e.g., Idaho Power Co.*, 148 FERC ¶ 61,182, at P 21 (2014) (“After weighing all of the relevant evidence, including the fact that Idaho Power’s DPT shows that it passes the pivotal supplier, wholesale market share, and market concentration analyses in all seasons/load period using the available economic capacity measure, even when the market price is increased or decreased by 10 percent, we conclude that Idaho Power does not have the ability to exercise market power in the Idaho Power balancing authority area.”).

⁴³ Request for Rehearing at 49.

⁴⁴ Request for Rehearing at 19.

⁴⁵ Request for Rehearing at 49 (citing June 9 Order, 155 FERC ¶ 61,249 at P 68).

⁴⁶ Request for Rehearing at 49.

Sellers, nor do we require such a relationship as a matter of general policy. The June 9 Order cites to Order No. 642,⁴⁷ *Idaho Power Co.*, 148 FERC ¶ 61,182 at P 20, and *Duke Energy Corp.*, 149 FERC ¶ 61,078, at P 14 (2014).⁴⁸ None of the authorities cited require a one-to-one relationship between prices and market shares; they do support the Commission's requirement that a seller demonstrate that the results of its DPT do not vary significantly in response to small variations in price. For example, in *Idaho Power*, the Commission found that "Idaho Power's sensitivity analyses indicate that the overall results from the six sensitivity DPT analyses *are little different* than those reported for the base case DPT analyses."⁴⁹ In short, there is nothing in the June 9 Order that requires a one-to-one linear relationship between prices and market shares; we do not have such a requirement. As stated in the June 9 Order, the requirement is that sellers demonstrate that the results of their analysis do not vary significantly in response to small variations in actual and/or estimated prices.⁵⁰

28. The Berkshire MBR Sellers incorrectly compare "percentage" to "percentage points" throughout their argument. As noted by the Berkshire MBR Sellers, the June 9 Order states that the Berkshire MBR Sellers' shares increased in certain instances by more than 15 *percentage points* in a 10 percent price increase. The Berkshire MBR Sellers term this the "thin reed" that the Commission bases its conclusion that the Berkshire MBR Sellers failed to show that the results of their DPT do not vary significantly in response to small variations in prices. The Berkshire MBR Sellers proceed to argue that a "15% *change in results* in response to a 10% change in price

⁴⁷ Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,892-893 ("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.").

⁴⁸ June 9 Order 155 FERC ¶ 61,249 at P 67 n.56.

⁴⁹ *Idaho Power*, 148 FERC ¶ 61,182 at P 20. Similarly, in *Duke*, the Commission noted that its regulations require applicants to provide sensitivity analyses to show that the results of their Delivered Price Tests do not vary significantly in response to variations in price and noted that a sensitivity analysis "is a standard statistical procedure designed to test whether the results of the model change significantly due to small changes in key parameters of the model." *Duke Energy Corp.*, 149 FERC ¶ 61,078 at P 20 (quoting *Duke Energy Corp.*, 113 FERC ¶ 61,297, at P 26 n.9 (2005)).

⁵⁰ June 9 Order, 155 FERC ¶ 61,249 at P 67.

cannot be understood to ‘vary significantly.’⁵¹ However, that is a misstatement of the June 9 Order. The June 9 Order did not include any examples of a 10 percent price increase causing a 15 percent increase in the Berkshire MBR Sellers’ market shares; it did highlight instances where a 10 percent price increase caused a greater than 15 *percentage point* increase in the Berkshire MBR Sellers’ market shares. For example, the Berkshire MBR Sellers’ market share percentage in the PACE balancing authority area in the winter off-peak season/load level increased from 17 to 34 percent in the +10 percent price sensitivity.⁵² While this is an increase of 17 *percentage points*, it is actually a doubling of, or 100 *percent increase* in, the Berkshire MBR Sellers’ market share. That is, a 10 percent (or \$2) increase in price (from \$24 to \$26) caused a 100 percent increase in the Berkshire MBR Sellers’ market shares (17 percent to 34 percent), and resulted in market shares above the Commission’s 20 percent threshold.⁵³ In other instances the results are more dramatic, such as the summer-off peak season/load level in the PACW balancing authority area, where the Berkshire MBR Sellers’ market share increased from zero to 41 percent in the +10 percent price sensitivity.⁵⁴ This is an increase in their market share of more than 400 percent in response to a two dollar, or 10 percent, increase in market prices (\$23 to \$25), clearly indicating that the results of the Berkshire MBR Sellers’ DPTs *vary significantly* in response to a relatively *small increase* in price. Thus, the Berkshire MBR Sellers address an argument that is not presented in the order and ignore the actual basis for the Commission’s conclusion, i.e., whether a DPT that shows a 100 percent or more increase in market share due to a 10 percent in price can be deemed to vary significantly in response to small increases in price. We find that it can.

29. We believe that the magnitude of these and other changes in the Berkshire MBR Sellers’ DPT results indicate that their DPT results do vary significantly with small changes in prices and that the levels of these changes indicate that their DPT results are not something on which the Commission can rely.⁵⁵

⁵¹ Request for Rehearing at 50 (emphasis added).

⁵² June 9 Order, 155 FERC ¶ 61,249 at P 68.

⁵³ For comparison, a 17 percent increase in the Berkshire MBR Sellers’ original market share (17 percent) would result in a new market share of 19.89 percent ($17 \times 1.17 = 19.89$).

⁵⁴ June 9 Order, 155 FERC ¶ 61,249 at P 68 n.57.

⁵⁵ See Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,891.

c. The Opportunity to Submit Another DPT

30. The Berkshire MBR Sellers seek rehearing claiming that the Commission failed to afford them the opportunity to submit a revised DPT analysis addressing “the Commission’s newly announced standards for determining market power.”⁵⁶ The Berkshire MBR Sellers allege that in doing so, the Commission denied their rights to due process and fair notice under the Fifth Amendment. They argue that the Commission should allow them to submit a new DPT.

31. We disagree with the Berkshire MBR Sellers in this regard. As noted in the June 9 Order, the Berkshire MBR Sellers submitted at least 57 unique DPTs and still did not submit an adequate analysis. As noted in the June 9 Order and discussed further below, all of the deficiencies identified in the June 9 Order are supported by Commission precedent and regulations. Additionally, eight months prior to the June 9 Order, the Commission issued *PNM*, which discussed many of the same DPT deficiencies identified in the June 9 Order. The Berkshire MBR Sellers note that the *PNM* order was issued two days after the Berkshire MBR Sellers submitted the last of their DPTs and “so did not provide fair notice to [them] of the new standards that the Commission intends to apply.”⁵⁷ However, in *PNM*, the Commission did not establish new standards, but rather the Commission took the “opportunity to remind applicants seeking initial MBR authority or seeking to retain such authority of the type of information and analysis that is useful and appropriate for our consideration of a [DPT] and what is not.”⁵⁸ Moreover, while the Commission may not have invited the Berkshire MBR Sellers to submit a revised DPT after issuance of the *PNM* order, the Berkshire MBR Sellers did not request to revise their DPT in light of any standards that they believed that the Commission was articulating in *PNM*.

32. The Berkshire MBR Sellers also argue that the five DPT deficiencies that the Commission identified in the June 9 Order are not supported by prior Commission guidance. We address each deficiency in turn. First, the June 9 Order noted that “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.”⁵⁹ The Berkshire MBR Sellers argue

⁵⁶ Request for Rehearing at 3.

⁵⁷ Request for Rehearing at 20.

⁵⁸ *PNM*, 153 FERC ¶ 61,060 at P 1.

⁵⁹ June 9 Order, 155 FERC ¶ 61,249 at P 58.

that the Commission's regulations merely require them to identify destination markets, "but do not specify that a 'unique' load-level must be made for each such market."⁶⁰

33. We reject this argument. The destination market is first, the default relevant geographic market, which for traditional (non-RTO/ISO) markets includes the balancing authority area where the seller is physically located (home balancing authority area) and second, markets directly interconnected to the seller's balancing authority areas (first-tier balancing authority areas).⁶¹ The Commission has explained that a balancing authority area means a collection of generation, transmission, and *loads* within the metered boundaries of a balancing authority.⁶² As a destination market in the DPT, a balancing authority area is necessarily defined in part by its load, any study that fails to use season/load levels appropriate for that balancing authority area is not truly a study of that balancing authority area as a destination market. Further, the Commission has given clear direction that the load to be studied in a default relevant geographic market is the load *within* the balancing authority area metered boundary. Appendix F of the April 14 Order contains a staff summary of the steps in the DPT.⁶³ The first step is to choose a destination market and the second is to choose the season/load levels to analyze.⁶⁴ The order of these steps dictate that the season/load levels must correspond to the chosen destination market. The Berkshire MBR Sellers appear to argue that it is unnecessary to consider the unique characteristics of a balancing authority area to determine whether or not a seller can exercise market power in that area. To do so would largely defeat the purpose of performing the analysis. We confirm here that when a seller is doing a DPT for a particular destination market, the seller must determine the specific season/load levels for that market based on data for that market.

34. Second, in the June 9 Order, the Commission further found that the Berkshire MBR Sellers should have "used balancing authority area specific prices and season/load

⁶⁰ Request for Rehearing at 17.

⁶¹ See *Refinements to Policies and Procedures for Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 816, FERC Stats. & Regs. ¶ 31,374 (2015), *order on reh'g*, Order No. 816-A, 155 FERC ¶ 61,188 (2016); *see also* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 232.

⁶² See Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 251.

⁶³ April 14 Order, 107 FERC ¶ 61,018 at Appendix F.

⁶⁴ *Id.*

levels in all iterations of their DPT” and “[t]heir failure to do so renders the results of their DPTs unreliable.”⁶⁵ The Berkshire MBR Sellers state that the Commission’s complaint is that they failed to “first calculate *unique* season/load levels for each of the four studied balancing authority areas” and so did not use balancing authority area specific prices and season/load levels in all iterations of their DPT.”⁶⁶ The Berkshire MBR Sellers argue that the Commission did not cite to any rule, regulation or order that supports the requirement that each balancing authority area requires a “unique” calculation for market prices or for the use of “balancing authority areas specific prices and season/load levels.” This is incorrect. The June 9 Order did provide citations to rules and orders regarding the use of prices in the DPT, including to Order No. 642, where the Commission stated that “selecting representative market prices in a sensible manner is among the most critical components of merger analysis when determining players in the relevant market.”⁶⁷

35. Moreover, as noted in the June 9 Order, the Commission has previously explained that the DPT defines the relevant market by identifying potential suppliers based on *market prices*, input costs, and transmission availability, and calculates each supplier’s economic capacity and available economic capacity for each season/load condition.⁶⁸ If the DPT is not based on the market prices of the market being analyzed, it is of little to no value. Sellers must use prices and season/load levels that are specific to the destination market being analyzed when performing their DPTs. Failure to do so renders the resulting DPT unreliable for purposes of analyzing a seller’s potential market power in that market.

36. Next, the Berkshire MBR Sellers argue that in Paragraph 65 of the June 9 Order the Commission acknowledged that the Berkshire MBR Sellers met the requirements under 18 C.F.R. 33.3(d)(6) which permits the use of “proxies for market prices”, and estimated prices so long as the data and approach is included in the application.⁶⁹ We disagree. Paragraph 65 of the June 9 Order does not state that the Berkshire MBR Sellers

⁶⁵ June 9 Order, 155 FERC ¶ 61,249 at P 66.

⁶⁶ Request for Rehearing at 18.

⁶⁷ June 9 Order, 155 FERC ¶ 61,249 at P 64 n.52 (citing Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,891).

⁶⁸ June 9 Order, 155 FERC ¶ 61,249 at P 49. *See also* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 106 (emphasis added).

⁶⁹ Request for Rehearing at 18.

met any standards, but rather provides instructions on how the Berkshire MBR Sellers should have calculated market prices for use in their DPTs. While the Commission did acknowledge in Paragraph 66 that the Berkshire MBR Sellers did provide balancing authority area specific prices in a “combined load shape and EQR price sensitivity” in which they analyzed the effect on the DPT had they used season/load levels and prices shaped to the individual balancing authority areas, the Commission disagreed with the Berkshire MBR Sellers’ contention that this showed that the results were not materially different than the results in the Berkshire MBR Sellers’ DPTs, which did not use prices for the specific market being analyzed. The Commission found and we confirm here that the Berkshire MBR Sellers should have used balancing authority area specific prices and season/load levels in all iterations of their DPT.⁷⁰

37. Third, the June 9 Order stated that the “Berkshire MBR Sellers have failed to demonstrate that the results of their analysis do not vary significantly in response to small variations in price.” The Berkshire MBR Sellers argue that they complied with this regulation by providing sensitivity analysis and that the variations present in their “analyses were in line with prior DPT analyses that the Commission has found to not be significant.”⁷¹ The June 9 Order acknowledged that the Berkshire MBR Sellers did submit sensitivity analyses that looked at the effects of 10 percent price increases and decreases. However, as noted in the June 9 Order, the results of the analyses varied significantly in response to small variations in price.⁷² For example, as discussed above, the Commission found several instances where market shares increased by more than 15 percentage points in three season/load periods with a 10 percent price increase, resulting in over 100 percent increases in market shares in some seasons. We reiterate that the Commission was not creating a new requirement when it noted the need for sellers to demonstrate that the results of their DPT analysis do not vary significantly

⁷⁰ June 9 Order, 155 FERC ¶ 61,249 at P 66. Additionally, the Commission rejected the Berkshire MBR Sellers contention that the results of the DPT using balancing authority area specific prices are not materially different than the results when the EQR prices are based on the PACE/PACW balancing authority areas.

⁷¹ Request for Rehearing at 19 n. 68 (citing *Osprey Energy Center, LLC*, 152 FERC ¶ 61,066 (2015); *Public Service Co. of New Mexico*, 153 FERC ¶ 61,377 (2015); *NorthWestern Corp.*, 147 FERC ¶ 61,138 (2014); *Tucson Electric Power Co.*, 149 FERC ¶ 61,056 (2014) (*Tucson*); *Florida Power & Light Co.*, 145 FERC ¶ 61,018 (2013); *Nevada Power Co.*, 145 FERC ¶ 61,022 (2013); *Arizona Public Service Co.*, 141 FERC ¶ 61,154 (2012)).

⁷² June 9 Order, 155 FERC ¶ 61,249 at PP 66, 68 & n.57.

in response to small variations in prices. The Commission appropriately considered the results of the price sensitivities in addition to other relevant factors, consistent with precedent, in reaching a determination.⁷³

38. The Berkshire MBR Sellers claim that their sensitivity analyses reflect variations that were in line with other DPT analyses that the Commission found to not be significant variations. However, the cases cited by the Berkshire MBR Sellers involve DPTs submitted to demonstrate that a proposed FPA section 203⁷⁴ transaction will not have an adverse effect on horizontal competition, an analysis that differs in some respects from the market-based rate DPT analysis.⁷⁵ Moreover, in many of these cases, the Commission pointed to specific information submitted by applicants that mitigated concerns despite screen failures. For example, in *Public Service Co. of New Mexico*, applicants argued that the proposed transaction would not create the ability and incentive for them to withhold output and that the applicants would have to return any profit earned on off-system sales to their retail ratepayers. The Commission noted that it “has considered these factors, among others, in prior cases, and concluded that they limit the ability and incentive of applicants to engage in economic withholding.”⁷⁶ Similarly, in *Osprey Energy Center*, applicants argued that additional screen failures in a sensitivity analysis were not indicative of competitive concerns for a number of reasons, including

⁷³ See, e.g., *Duke Energy Corp.*, 139 FERC ¶ 61,194 (2012); *order on reh’g*, 149 FERC ¶ 61,078 at P 20 (discussing sensitivity analyses); *Idaho Power Co.*, 148 FERC ¶ 61,182 at P 21.

⁷⁴ 16 U.S.C. § 824b (2012).

⁷⁵ Most of the cases cited by the Berkshire MBR Sellers involve failures of the Herfindahl-Hirschman Index (HHI) screens. The analysis of HHI for purposes of section 203 cases has different thresholds than the 2,500 threshold used to analyze horizontal market power for market-based rate purposes. We also note that, while section 203 cases look at ability and incentive to exercise market power, market-based rate cases look solely at ability to exercise market power. See *BE Louisiana, LLC*, 132 FERC ¶ 61,118, at P 28 (2010) (“the Commission has previously stated that its analysis in the market-based rate context focuses on the ability to exercise market power, not the incentive to do so.”).

⁷⁶ *Public Service Co. of New Mexico*, 153 FERC ¶ 61,377 at P 31. The Commission also noted that applicants submitted data “that leads us to conclude that the Proposed Transaction will not eliminate meaningful competition in the PNM Balancing Authority Area.” *Id.* P 32.

reasons that limited the incentive and ability to increase market prices. The Commission's decision to approve the transaction noted that "in this case there are factors that reduce any potential ability or incentive to exercise market power."⁷⁷ With the exception of *Florida Power & Light*, none of the other cases cited by the Berkshire MBR Sellers specifically found that price sensitivity variations were not significant.⁷⁸ In *Florida Power & Light*, the Commission found that there were not competitive concerns raised where there were no screen failures in the base case and only isolated failures in the sensitivity analysis.⁷⁹ Applicant also argued that the proposed transaction has the pro-competitive result of increasing a competitor's available economic capacity. The Commission found that protester failed to provide evidence to refute or contradict

⁷⁷ *Osprey Energy Center*, 152 FERC ¶ 61,066 at P 36.

⁷⁸ See *Tucson*, 149 FERC ¶ 61,056 at PP 29-30 (finding that changes in HHI that will result from the proposed transaction do not exceed thresholds, even under price sensitivity scenarios and noting that "in this case there are several factors that reduce any potential incentives to exercise market power"); *Nevada Power Co.*, 145 FERC ¶ 61,022 at PP 26-30 (finding based on several factors specific to the proposed transaction that demonstrate that applicant does not have the ability and incentive to withhold output in order to drive up market prices, and for these reasons, the transaction will not result in an adverse effect on competition); *Arizona Public Service Co.*, 141 FERC ¶ 61,154 at P 28 ("finding in spite of certain shortcomings in the DPT results presented" that when considering the other relevant factors, the proposed transaction will not have an adverse effect on horizontal market power).

⁷⁹ *Florida Power & Light*, 145 FERC ¶ 61,018 at P 45 & n.59 ("We find that the isolated screen failures in FPL's Available Economic Capacity analysis do not raise competitive concerns. The Commission is normally concerned with cases where there are systematic screen failures, that is, where screen failures 'present a consistent pattern across time periods and/or markets.' *CP&L Holdings, Inc.*, 92 FERC ¶ 61,023, at 61,054 (2000); see also *Arizona Pub. Serv. Co.*, 141 FERC ¶ 61,154, at PP 30, 35-36 (2012) (finding screen failures that were small in magnitude, short in duration, occurring during off-peak periods and not systematic did not indicate adverse impact on competition); *FirstEnergy Corp.*, 133 FERC ¶ 61,222, at P 49 (2010) (finding screen failures that did not involve systematic failures in a competitive market did not raise competitive concerns."). In *Florida Power & Light*, the DPT showed one screen failure in the plus ten percent sensitivity (HHI increase of 134 points in a highly concentrated market in the summer super peak 1 season/load level) and one failure in the minus ten percent sensitivity (HHI increase of 916 points in a highly concentrated market in the winter off-peak season/load level). *Florida Power & Light*, 145 FERC ¶ 61,018 at P 28 n.31.

evidence applicant submitted demonstrating that the proposed transaction does not raise any competitive concerns. Thus, because of the distinctions noted above, our finding in the instant case is not inconsistent with the cases cited by Berkshire MBR Sellers.

39. Fourth, as noted by the Commission in the June 9 Order, Applicants must provide historical transaction data and transmission data to corroborate their results. This is required pursuant to section 33.3(c)(6) of the Commission's regulations.⁸⁰ The Berkshire MBR Sellers state "that the relevant EQR and transmission eTag data was already in the Commission's possession" and that the Berkshire MBR Sellers "complied with Section 33.3(c)(6) of the Commission's regulations by submitting publicly available EQR data."⁸¹ As noted above, while the Berkshire MBR Sellers did provide some EQR data, they did not use it to corroborate the results of their model. The Berkshire MBR Sellers used EQR data to calculate destination market prices, not to verify or corroborate the list of potential suppliers produced by their DPT that could be reasonably considered as potential competitors in the destination market. However, even if we consider the Berkshire MBR Sellers' EQR data as sufficient to meet the historical transaction/trade data requirements of the regulation, the Berkshire MBR Sellers still failed to comply with regulation's requirement to provide transmission data. Further, the June 9 Order states that the Commission attempted to use the data available to it to corroborate the results of the Berkshire MBR Sellers' DPTs, but was unable to do so, specifically noting that it was unable to verify the Berkshire MBR Sellers' claim that there are sellers in the Bonneville Power Authority balancing authority area that sell into the PACE balancing authority area at volumes similar to those reflected in the DPT.⁸²

40. The Berkshire MBR Sellers argue that the Commission's citation to *PNM* in support of the need for corroborating data is inappropriate because it was issued October 15, 2015, two days after the Berkshire MBR Sellers submitted their last analysis on October 13, 2015.⁸³ They argue that "to constitute fair notice, guidance must be taken from the perspective of the regulated party ... at the time of the conduct at issue."⁸⁴ However, as stated above, *PNM* did not create *new* standards that the Commission intended to apply in the future. The *PNM* decision was based on existing regulations and

⁸⁰ 18 C.F.R. § 33.3(c)(6).

⁸¹ Request for Rehearing at 20.

⁸² June 9 Order, 155 FERC ¶ 61,249 at P 72.

⁸³ Rehearing Request at 20.

⁸⁴ *Id.*

reminded sellers of the Commission's direction on how to perform a DPT. This is supported by the fact that the Commission applied those standards to *PNM*. Thus, the Berkshire MBR Sellers had notice of the requirements prior to *PNM* and had no basis to believe that the Commission would not hold them to the same standards. In addition, the Berkshire MBR Sellers had almost eight months *after* the issuance of *PNM* to re-submit their analyses if they were concerned that it did not meet the Commission's standards.

41. Finally, the June 9 Order stated that the Commission "continued to find other errors in the Berkshire MBR Sellers' calculation of competing supply."⁸⁵ The Commission used, as an example, a supplier, "PGE," that the DPT model showed as having more load obligations than economic capacity, but which was still listed as a competing supplier in the available economic capacity (AEC) measure.⁸⁶ The Berkshire MBR Sellers argue that they had no notice that this mistake would warrant revocation of their market-based rate authority and that the Commission's past practice was to provide an opportunity to correct such mistakes. The Berkshire MBR Sellers argue that the Commission acknowledged that the impact of this mistake is relatively small and quotes the June 9 Order's statement that the Berkshire MBR Sellers "submitted 57 unique DPT analyses, none of which fully complied with the Commission's regulations, policies, and orders" to argue that they should have had another opportunity to satisfy the Commission's "new" standards.⁸⁷

42. The Berkshire MBR Sellers' statement that they had no notice that this mistake would warrant revocation of their market-based rate authority is misleading. The Berkshire MBR Sellers' market-based rate authority was revoked because they failed to rebut the presumption of market power.⁸⁸ The Commission did not need to determine whether this one particular error presented a sufficient basis for terminating the Berkshire MBR Sellers' market-based rate authority. As the Commission noted in its June 9 Order, there were numerous deficiencies in the DPTs submitted by the Berkshire MBR Sellers.

⁸⁵ *Id.* at 20.

⁸⁶ June 9 Order, 155 FERC ¶ 61,249 at P 82. The 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 comments. 18 C.F.R. § 33.3(c)(4)(i)(B) (2016).

⁸⁷ June 9 Order, 155 FERC ¶ 61,249 at P 82.

⁸⁸ June 9 Order, 155 FERC ¶ 61,249 at PP 2, 43.

43. In addition, we disagree with the Berkshire MBR Sellers' argument that the Commission failed to follow its past practice by not allowing them an opportunity to correct mistakes in their submittal. The Berkshire MBR Sellers were given many opportunities to correct errors in their DPT. As an initial matter, the December 9 Order explained that the Commission was "unable to properly analyze the results or rely on [the four DPTs] due to the deficiencies identified" in the December 9 Order.⁸⁹ The December 9 Order went on to describe multiple deficiencies in detail in order to assist the Berkshire MBR Sellers to comply with the Commission's requirements for DPTs. These deficiencies include, for example: lack of revised workpapers or backup documentation; failure to identify the assumptions underlying the DPT or a description of the steps used to calculate the final economic capacity and available economic capacity values and no explanation of the source data for the worksheets; and failure to provide details (full name of supplier, name of unit supplying energy, and location) regarding suppliers with non-zero contribution to available economic capacity.⁹⁰ Many of these deficiencies prevented a more thorough analysis of the DPTs. On January 2, 2015, Commission staff met with the Berkshire MBR Sellers and other interested parties to discuss matters related to the December 9 Order. The Berkshire MBR Sellers submitted their response to the December 9 Order on February 9, 2015, with supplemental information submitted in March 2015. On July 21, 2015, the Director of the Division of Electric Power Regulation – West issued a letter order under delegated authority directing the Berkshire MBR Sellers to submit additional information with respect to their DPTs.⁹¹ The July 21 Deficiency Letter identified additional issues with respect to the Berkshire MBR Sellers' DPTs. The Berkshire MBR Sellers submitted information in response to the July 21 Deficiency Letter on September 4 and 8, 2015. In addition, on September 30 and October 13, 2015, the Berkshire MBR Sellers submitted additional information related to their DPTs in response to comments by intervenors. As noted in the June 9 Order, and acknowledged by the Berkshire MBR Sellers, they submitted 57 unique DPT analyses throughout this process. Despite this myriad of opportunities to correct their analysis, the Commission continued to find fundamental errors in the Berkshire MBR Sellers' analyses, such as the one illustrated through the "PGE" example noted above. Further, the Berkshire MBR Sellers failed to submit a DPT that addressed all of the issues identified in the July 21 Deficiency Letter. Instead, the Berkshire MBR Sellers took a piecemeal approach to addressing the issues and submitted five separate, incomplete

⁸⁹ December 9 Order, 149 FERC ¶ 61,219 at P 25.

⁹⁰ December 9 Order, 149 FERC ¶ 61,219 at PP 26-30.

⁹¹ *Nevada Power Co.*, Docket No. EL15-22-000 (July 21, 2015) (delegated letter order) (July 21 Deficiency Letter).

DPTs.⁹² The record clearly belies the Berkshire MBR Sellers' claims that "instead of giving them an opportunity to satisfy the Commission's new standards, the Commission rejected the DPT analyses outright"⁹³ As explained above, there were no new standards. In addition, the Commission gave the Berkshire MBR Sellers' guidance and numerous opportunities to correct their DPT. It is not incumbent on the Commission to identify every single deficiency and provide detailed instructions to the seller on how to remedy a deficient market power study. Rather, it is incumbent on the seller to rebut the presumption of market power created by screen failures. In this case, the Berkshire MBR Sellers failed to do so. For the foregoing reasons, we deny the Berkshire MBR Sellers' request for rehearing based on the Commission's failure to afford the Berkshire MBR Sellers the opportunity to submit a revised DPT analysis.

d. Finding of Market Power

44. The Berkshire MBR Sellers argue that the Commission erred by revoking market-based rate authority in the four balancing authority areas without an actual or definitive finding that they had market power. They state that the Commission "did not make a 'definitive finding' that any of the Berkshire MBR Sellers had market power after ruling on their DPT analyses" and that "the Commission made no findings at all on the merits of the DPT analyses."⁹⁴ The Berkshire MBR Sellers refer to the April 14 Order where the Commission stated that "[m]arket-based rates will not be revoked and cost-based rates will not be imposed until there has been a Commission order making a definitive finding that the applicant has market power (*i.e.*, after the Commission has ruled on a Delivered Price Test analysis)."⁹⁵

45. We deny rehearing on this issue. When the Commission issued the April 14 Order, the Commission concurrently issued a notice establishing a generic rulemaking to initiate a comprehensive generic review of the appropriate analysis for market-based rate

⁹² As noted in the June 9 Order, to the extent that the Berkshire MBR Sellers wished to provide information in addition to what was requested, they could have done so in addition to providing a complete response to the July 21 Deficiency Letter. *See* June 9 Order, 155 FERC ¶ 61,249 at P 86 & n.77.

⁹³ Request for Rehearing at 22.

⁹⁴ Request for Rehearing at 33.

⁹⁵ April 14 Order, 107 FERC ¶ 61,018 at P 149.

authority.⁹⁶ This comprehensive review led to the Commission's issuance of Order No. 697. In Order No. 697, the Commission stated that sellers that fail either of the indicative screens will be rebuttably presumed to have the ability to exercise market power and that such sellers will have full opportunity to present evidence through the submission of a DPT analysis or alternative evidence demonstrating that, despite a screen failure, they do not have market power.⁹⁷ In Order No. 697-A, the Commission stated that although failure of an indicative screen is a sufficient basis to establish a presumption of market power, the Commission allows a seller to continue to sell under market-based rate authority, subject to refund, until a definitive finding is made.⁹⁸ Under the Commission's regulations, a seller that does not rebut a presumption of horizontal market power or that concedes market power is subject to mitigation.⁹⁹ Mitigation will apply to the "market(s) in which the [s]eller is found, or presumed, to have market power."¹⁰⁰

46. In the June 9 Order, the Commission determined that the Berkshire MBR Sellers failed to rebut the presumption of market power in the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas.¹⁰¹ The language from the April 14 Order cited by the Berkshire MBR Sellers states that the Commission will not revoke a seller's market-based rate authority until after the Commission has ruled on any offered DPT analysis. In the instant case, the Commission examined the Berkshire MBR Sellers' DPT and specifically found that it could not rely on the DPT to rebut the presumption of market power. Thus, by finding that the Berkshire MBR Sellers failed to rebut the presumption of market power, the Commission implicitly made a finding the Berkshire MBR Sellers have the ability to exercise market power.

47. In the June 9 Order, the Commission explained that the decision to revoke the Berkshire MBR Sellers' market-based rate authority in the PACE, PACW, Idaho Power,

⁹⁶ See April 14 Order, 107 FERC ¶ 61,018 at P 2 (citing *Market-Based Rates for Public Utilities*, 107 FERC ¶ 61,019 (2004)).

⁹⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at PP 13, 75. Also in Order No. 697, the Commission stated that "market-based rate assessments are used to determine the ability to exercise, not the exercise of, market power." *Id.* P 70.

⁹⁸ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 25.

⁹⁹ 18 C.F.R. § 35.37(c)(3).

¹⁰⁰ 18 C.F.R. § 35.38(a).

¹⁰¹ June 9 Order, 155 FERC ¶ 61,249 at PP 2, 43.

and NorthWestern balancing authority areas is based on the Commission's inability to rely on the DPTs to rebut the presumption of market power. This is consistent with Commission precedent. For example, in *Pinnacle*, the Commission revoked the Pinnacle West Companies' market-based rate authority in the Arizona Public Service (APS) control area without explicitly making a "definitive finding" of market power.¹⁰² Instead, the Commission stated that in the absence of an updated market power analysis that contains a simultaneous transmission import capability study that complies with the Commission's requirements, continuation of Pinnacle West Companies' market-based rate authority in the APS control areas is not just and reasonable.¹⁰³

48. We deny rehearing with regard to this issue. If the Commission cannot revoke market-based rate authority in areas where sellers fail to rebut the presumption of market power created by a failure of the indicative screens, then sellers could deliberately submit inadequate evidence for the Commission to analyze and thus be allowed to keep their market-based rate authority in perpetuity. This would be a nonsensical outcome that is not just and reasonable. Although sellers failing the indicative screens have the right to challenge the market power presumption by submitting a DPT,¹⁰⁴ the DPT must be conducted in accordance with the Commission's requirements. Because the Berkshire MBR Sellers did not provide evidence that the Commission could rely on to rebut the presumption of market power, the Commission finds that the Berkshire MBR Sellers' have market power and their market-based rate authority is thus revoked.

e. **The Idaho Power and NorthWestern Balancing Authority Areas**

49. We deny rehearing with respect to the Berkshire MBR Sellers' assertion that the Commission has no basis for revoking their market-based rate authority in the Idaho Power and NorthWestern balancing authority areas. The Berkshire MBR Sellers argue that the Commission did not provide a basis in fact or Commission precedent for revoking their market-based rate authority in these areas where they do not own any generation and have no, or *de minimis*, DPT screen failures.

50. In Order No. 697, the Commission stated that the default relevant geographic market for transmission-owning sellers will be first, the balancing authority area where the seller is physically located, and second, the markets directly interconnected to the

¹⁰² *Pinnacle West Capital Corp.*, 115 FERC ¶ 61,066 (2006) (*Pinnacle*).

¹⁰³ *Pinnacle*, 115 FERC ¶ 61,066 at P 4.

¹⁰⁴ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 63.

seller's balancing authority area (first-tier balancing authority area markets).¹⁰⁵ The Idaho Power and NorthWestern balancing authority areas are both first-tier to the PACE balancing authority area, and thus are relevant geographic markets for the Berkshire MBR Sellers, regardless of whether the Berkshire MBR Sellers own generation in those areas. The Berkshire MBR Sellers' failure of the indicative screens for those balancing authority areas and subsequent failure to rebut the presumption of market power caused by the failure of the screens provides a sufficient basis for the Commission to revoke their market-based rate authority in those areas. Any argument to the contrary is a collateral attack on Order No. 697. For these reasons, we deny rehearing with respect to this issue.

2. Revised Market-Based Rate Tariffs

51. We will accept the revised market-based rate tariffs, effective as of the dates requested. The revised market-based tariffs limit the Berkshire MBR Sellers' sales at market-based rates to areas outside of the PACE, PACW, Idaho Power, and NorthWestern balancing authority areas in compliance with the June 9 Order and also contain other ministerial changes. Phillips 66 Company's revision to its tariff with respect to waiver of Part 101 complies with Order No. 816.¹⁰⁶

52. As noted above, Barrick Mines filed comments in response to the tariff filings of Sierra Pacific Power Company and Nevada Power Company. Barrick Mines suggest that the revocation of market-based rates and imposition of cost-based rates in the four balancing authority areas, as well as in the Nevada Power Company balancing authority area, "may not be the best remedy."¹⁰⁷ They argue that the Commission's rules allow sellers to withhold and this, combined with the elimination of market-based rate authority in these balancing authority areas, greatly reduces the ability of power marketers to efficiently purchase energy for Nevada retail access customers. Barrick Mines suggest that a prohibition on physical withholding should apply to the Berkshire MBR Sellers in the Nevada Power Company, PACE, PACW, Idaho Power, NorthWestern balancing authority areas and that the Berkshire MBR Sellers be required to agree to accept a must-offer obligation, which must be met with an offer at the lower of their market based or their cost-based rate.

¹⁰⁵ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 232.

¹⁰⁶ See Order No. 816, FERC Stats. & Regs. ¶ 31,374 at PP 345-350.

¹⁰⁷ Barrick Mines July 29 Comments at 4.

53. In response, the Berkshire MBR Sellers state that the comments rehash issues raised in the underlying proceeding and should be dismissed as an untimely rehearing request, and generally outside the scope of the compliance filing.¹⁰⁸ Barrick Mines respond to this by stating that in the June 9 Order the Commission ruled that the issues raised by Barrick Mines are beyond the scope of the proceeding and therefore they could not have requested rehearing on the substance of these issues and the instant matter is the only other opportunity for raising these issues.¹⁰⁹

54. We find that Barrick Mines' comments are an attempt to revisit issues the Commission has already decided and are outside the scope of the compliance filing. Barrick Mines was a party to the section 206 proceeding and could have sought rehearing of the June 9 Order. Instead, their comments in this compliance filing proceeding constitute a collateral attack on the June 9 Order. In the June 9 Order, the Commission considered similar comments from Barrick Mines and determined that it would not adopt the must-offer requirement proposed by Barrick Mines.¹¹⁰

55. Further, in Order No. 697, the Commission determined that it would not impose an across-the-board must-offer requirement for mitigated sellers.¹¹¹ The Commission noted that although commenters raised theoretical concerns that they will be unable to access power absent a must-offer requirement, the record includes evidence of utilities continuing to make cost-based sales after loss or surrender of market-based rate authority.¹¹² The Commission stated that it was not ruling out the possibility that the Commission might find the imposition of a must-offer requirement, or some other condition on the seller's market-based rate authority, to be an appropriate remedy in a

¹⁰⁸ Berkshire MBR Sellers August 15 Answer at 1.

¹⁰⁹ Barrick Mines August 22 Answer at 2.

¹¹⁰ June 9 Order, 155 FERC ¶ 61,249 at PP 95-96 (also stating that the section 206 investigation involves 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 Nevada Power Company balancing authority area and that the Commission's policy is that a seller is mitigated in any market in which its affiliate is subject to mitigation).

¹¹¹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 759.

¹¹² Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 762.

particular case depending on the facts and circumstances.¹¹³ However, we find that Barrick Mines have not presented persuasive evidence in this proceeding demonstrating that they are unable to access power absent a must-offer requirement. Finally, we note that the Nevada Power Company balancing authority area was never a subject of this proceeding.

3. **Docket No. EL15-22-000**

56. Finally, we will terminate Docket No. EL15-22-000. Based on the above discussion and our acceptance of the revised market-based rate tariffs, there is no further need for the proceeding in Docket No. EL15-22-000.

The Commission orders:

(A) The Berkshire MBR Sellers' request for rehearing is denied, as discussed in the body of this order.

(B) The Berkshire MBR Sellers' request for clarification is granted in part, as discussed in the body of this order.

(C) The Berkshire MBR Sellers' proposed revisions to their market-based rate tariffs are hereby accepted, effective as of the dates requested, as discussed in the body of this order.

¹¹³ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 764. The Commission expressed concern that adopting a must-offer requirement could harm other markets, explaining that if a mitigated seller is required to offer its available power first to customers in the mitigated market, such a requirement may effectively preclude the mitigated seller from participating in adjoining markets particularly at times when additional supply is most needed. Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 767.

(D) The section 206 proceeding in Docket No. EL15-22-000 is hereby terminated, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.