

112 FERC ¶ 61,237  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Nora Mead Brownell, and Suedeen G. Kelly.

PPL Montana, LLC.	Docket Nos. ER99-3491-002; ER99-3491-003; and ER99-3491-004
PPL Colstrip II, LLC	Docket Nos. ER00-2184-001 and ER00-2184-002
PPL Colstrip I, LLC	Docket Nos. ER00-2185-001 and ER00-2185-002
PPL Montana, LLC, PPL Colstrip I, LLC and PPL Colstrip II, LLC	Docket No. EL05-124-000

ORDER ON UPDATED MARKET POWER ANALYSIS,  
INSTITUTING SECTION 206 PROCEEDING AND  
ESTABLISHING REFUND EFFECTIVE DATE

(Issued September 1, 2005)

1. On November 9, 2004, PPL Montana, LLC (PPL Montana), PPL Colstrip I, LLC (PPL Colstrip I), and PPL Colstrip II, LLC (PPL Colstrip II) (collectively, Applicants) submitted for filing an updated market power analysis in compliance with the Commission's order issued May 13, 2004.<sup>1</sup> The May 13 Order addresses the procedures for implementing the new generation market power screens announced by the Commission on April 14, 2004, and clarified on July 8, 2004.<sup>2</sup> The Commission's

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<sup>1</sup> *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004) (May 13 Order).

<sup>2</sup> *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

analysis indicates that Applicants fail the wholesale market share screen in the relevant geographic market in the control area operated by NorthWestern Energy (NorthWestern).<sup>3</sup>

2. As the Commission stated in the April 14 Order, where an applicant is found to have failed a generation market power screen, such failure provides the basis for instituting a proceeding under section 206 of the Federal Power Act (FPA)<sup>4</sup> and establishes a rebuttable presumption of market power in the section 206 proceeding. Accordingly, as discussed below, in this order, the Commission institutes a proceeding pursuant to section 206 of the FPA to determine whether Applicants may continue to charge market-based rates and establishes a refund effective date pursuant to the provisions of section 206. The instant section 206 proceeding, as well as any resulting mitigation or refunds, is limited to the NorthWestern control area because the filing indicates that this is the geographic market for which Applicants fail the wholesale market share screen.

### **Background**

3. On August 26, 2002, Applicants submitted for filing an updated market power analysis pursuant to the requirements of the Commission's August 24, 1999 order granting Applicants authority to sell capacity and energy at market-based rates.<sup>5</sup>

4. In the April 14 Order, as clarified by the July 8 Order, the Commission adopted two indicative screens for assessing generation market power: a pivotal supplier screen and a wholesale market share screen. The Commission stated that passage of both screens establishes a rebuttable presumption that the applicant does not possess generation market power, while failure of either screen creates a rebuttable presumption that the applicant has generation market power. The Commission further stated that

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<sup>3</sup> The Commission's analysis shows market shares as high as 24.6 percent.

<sup>4</sup> 16 U.S.C. § 824e (2000).

<sup>5</sup> See *Illinova Power Marketing, Inc.*, 88 FERC ¶ 61,189 (1999) (*Illinova Power Order*). In the *Illinova Power Order*, we also granted market-based rate authority to Applicants' affiliate, PP&L Colstrip III, LLC (PP&L Colstrip III). In a subsequent filing, however, PP&L Colstrip III submitted a notice canceling its market-based rate tariff. See *PP&L Colstrip III, LLC*, Docket No. ER01-357-000 (unpublished letter order). In addition, corporate name changes applicable to PPL Colstrip I and PPL Colstrip II were submitted by Applicants in Docket Nos. ER00-2184-000 and ER00-2185-000.

applicants and intervenors may, however, rebut the presumption established by the results of the initial screens by submitting a Delivered Price Test. Alternatively, an applicant may accept the presumption of market power or forego the generation market power analysis altogether and go directly to mitigation.<sup>6</sup>

5. On November 9, 2004, as noted above, Applicants submitted for filing an updated market power analysis in compliance with the May 13 Order, including the results of the two generation market power screens. As required by the May 13 Order, Applicants also provided information on the other three prongs of the Commission's four-part analysis. Based on these submittals, Applicants state that they lack the ability to manipulate access to transmission facilities that they own or control, cannot erect or control any other barrier to entry, and cannot engage in anticompetitive practices through preferential affiliate transactions or reciprocal dealing.<sup>7</sup>

6. Applicants state that currently, neither PPL Colstrip I nor PPL Colstrip II own facilities subject to the Commission's jurisdiction. Applicants state, however, that PPL Montana does own jurisdictional facilities. Specifically, Applicants state the PPL Montana owns generating facilities located in the NorthWestern control area, including shares in the Colstrip Power Plant (Colstrip Plant), a coal-fired generating facility located east of Billings, Montana. Applicants state that the Colstrip Plant, a jointly-owned facility, is comprised of Units 1 through 4, which collectively are capable of producing a total of up to 2,094 MW of capacity.<sup>8</sup>

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<sup>6</sup> In addition, as the Commission stated in the April 14 Order, the applicant or intervenors may present evidence such as historical sales data to support whether the applicant does or does not possess market power. *See* April 14 Order, 107 FERC ¶ 61,018 at P 37.

<sup>7</sup> Applicants' affiliates include PPL Sundance Energy, LLC; PPL EnergyPlus, LLC (PPL EnergyPlus); PPL Holtwood, LLC; PPL Montour, LLC; PPL Maine, LLC; PPL Great Works, LLC; PPL University Park, LLC; Lower Mount Bethel Energy, LLC; PPL Shoreham, LLC; PPL Martins Creek, LLC; and PPL Susquehanna, LLC.

<sup>8</sup> Units 1 and 2 each provide approximately 307 MW of generating capacity. Units 3 and 4 each produce about 740 MW of generating capacity.

7. Applicants state that the joint owners of the Colstrip Plant include, in addition to PPL Montana, Portland General Electric Company (Portland General); Puget Sound Energy, Inc. (Puget); PacifiCorp, Avista Corporation (Avista); and NorthWestern.<sup>9</sup> Applicants state that in addition to PPL Montana's Colstrip Plant interests, PPL Montana also owns the J.E. Corette coal-fired electric generating plant located outside of Billings, Montana, with a generating capacity of approximately 160 MW. Applicants state that PPL Montana also owns and operates 11 hydroelectric plants along the Missouri River, the Flathead River, the Clark Fork River, Rosebud Creek, and the Madison River, with a combined maximum generating capacity of 559 MW.

8. Applicants state that PPL Colstrip I and PPL Colstrip II are not currently engaged in the sale of power at market-based rates. Applicants state, however, that PPL Montana maintains long-term contractual obligations to provide capacity to wholesale customers through the use of PPL Montana's generating facilities. Specifically, Applicants state that PPL Montana maintains a contract to provide 300 MW of firm capacity to NorthWestern (used by NorthWestern to meet its native load obligations), and an additional 150 MW long-term contract with NorthWestern for on-peak capacity to meet NorthWestern's customer needs. Applicants state that, in addition, PPL Montana sells power at wholesale to its marketing affiliate, PPL EnergyPlus, which in turn has provided power under retail long-term contracts to 13 end-use native load customers in Montana, for which approximately 230 MW of capacity is dedicated.

9. Applicants state that in addition to conducting the screen for the NorthWestern control area, screens using the regional market of the Northwestern Power Pool (NWPP) were also used. Applicants assert that this market more appropriately reflects the relevant geographic market in which Applicants' assets are located. Applicants describe the NWPP as a loose power pool that allows for coordinated operations of the electricity system in the Pacific Northwestern portion of the U.S., British Columbia, and Alberta.

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<sup>9</sup> PPL Montana owns a 50 percent ownership share in each of Colstrip Plant Units 1 and 2, for a total 307 MW of capacity, while Puget owns the remaining 307 MW of capacity. PPL Montana also has a 30 percent ownership share in Colstrip Plant Unit 3 (representing 222 MW) with joint-owners Puget holding a 25 percent share (or 185 MW), Portland General holding a 20 percent share (or 148 MW), Avista holding a 15 percent share (or 111 MW), and PacifiCorp holding a 10 percent share (or 74 MW). Finally, Colstrip Plant Unit 4 is jointly-owned by Puget, holding a 25 percent share (or 185 MW), Portland General, holding a 20 percent (or 148 MW), Avista, holding a 15 percent share (or 111 MW), PacifiCorp, holding a 10 percent share (or 74 MW), and NorthWestern, holding a 30 percent share (or 222 MW).

Applicants also note that transactions in the NWPP are centered around the Bonneville Power Administration (BPA) and that much of the region's electricity production can move freely between the various control areas interconnected to the BPA control area due, they claim, to the existence of a liquid trading point, *i.e.*, Mid-Columbia. Applicants argue that their reliance on this regional market is consistent with regional trading patterns and observed prices. Specifically, Applicants assert that there are price correlations between the Mid-Columbia trading point and the California-Oregon border and an absence of these price correlations for points reported in California and the desert southwest.

10. Applicants claim that they pass the screens, based either on the Pacific Northwest market, or the NorthWestern control area market. Specifically, Applicants assert that their screen results demonstrate that PPL Montana's market share for the NorthWestern control area varies from 8.25 percent (in the fall) to 13.81 percent (in the summer), while its market share for the Pacific Northwest region ranges from a low of 2.65 percent (in the spring) to a high of 3.2 percent (in the summer).<sup>10</sup>

11. Finally, Applicants submitted revisions to their market-based rate tariffs to incorporate the Market Behavior Rules adopted by the Commission in *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*,<sup>11</sup> and to comply with the change-in-status reporting requirement adopted by the Commission in Order No. 652.<sup>12</sup>

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<sup>10</sup> As noted below, Applicants also rely, in an answer filed January 25, 2005, on a simultaneous import capability study submitted for filing by Northwestern in Docket No. ER03-329-006 (NorthWestern's triennial market-based rate update filing).

<sup>11</sup> 105 FERC ¶ 61,218 (2003), *order on reh'g*, 107 FERC ¶ 61,175 (2004) (Market Behavior Rules Rehearing Order). Applicants' revisions are included at PPL Colstrip I, LLC FERC Electric Tariff, Original Volume No. 1, First Revised Sheet No. 5, Superseding Original Sheet No. 5 and PPL Colstrip II, LLC FERC Electric Tariff, Original Volume No. 1, First Revised Sheet No. 1, Superseding Original Sheet No. 1.

<sup>12</sup> *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005). Applicants' revisions are included at PPL Montana, LLC, FERC Electric Tariff, First Revised Volume No. 1, Superseding Original Volume No. 1, Original Sheet No. 7; PPL Colstrip I, LLC, FERC Electric Tariff, Original Volume No. 1, Original Sheet No. 9; and PPL Colstrip II, LLC, FERC Electric Tariff, Original Volume No. 1, Original Sheet No. 9.

**Notice of Filing and Responsive Pleadings**

12. Notice of Applicants' August 26, 2002 filing was published in the *Federal Register*, 67 Fed. Reg. 56,998 (2002), with interventions or protests due on or before September 16, 2002. A notice of intervention was timely filed by the Montana Consumer Counsel (MCC) and an unopposed motion to intervene was timely filed by Energy West Resources, Inc. (Energy West). Comments were filed by the MCC and Energy West asserting that Applicants' market analyses required additional support and documentation.<sup>13</sup>

13. Notice of Applicants' November 9, 2004 filing was published in the *Federal Register*, 69 Fed. Reg. 68,893 (2004), with interventions or protests due on or before November 30, 2004. Notices of intervention were timely filed by the MCC and the Montana Public Service Commission (Montana Commission) and an unopposed motion to intervene was timely filed by NorthWestern. A protest was filed by the MCC.

14. The MCC, in its protest, states that most retail electricity consumers in the State of Montana were formerly served by the Montana Power Company (Montana Power), a vertically integrated utility. The MCC points out, however, that following Montana's restructuring, nearly all of Montana Power's generation was sold to PPL Montana, the result of which has impeded the creation of a competitive generation market. The MCC asserts that PPL Montana remains the only option to meet native load needs due to the lack of alternative suppliers. The MCC points out that, in the meantime, insufficient new generation has been brought on line, while transmission capability does not permit NorthWestern to access outside electricity supply in amounts, or in a form, that would constrain PPL Montana's exercise of market power.

15. The MCC also asserts that while Applicants purportedly pass the Commission's screens, under the analytical assumptions they rely on, in fact, Applicants have exaggerated the amount of PPL Montana's capacity that is committed to serve native load. The MCC points out, for example, that while Applicants credit PPL Montana with having 680 MW of committed generation (as opposed to PPL Montana's uncommitted capacity), this 680 MW of claimed committed capacity includes a 300 MW contract and a 150 MW contract to serve NorthWestern's load, both of which contracts expire in 2007. The MCC states that this 680 MW of claimed committed capacity also includes 230 MW

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<sup>13</sup> Answers were filed by Applicants on October 1 and October 10, 2002.

of power sales to industrial end users. The MCC concludes that hearing procedures are warranted to examine the significant market power concerns raised by Applicants' filing.

16. On December 15, 2004, Applicants filed an answer to the MCC's protest, in which they assert, among other things, that the MCC's protest fails to controvert Applicants' study results demonstrating that their market shares fall below the Commission's 20 percent benchmark. Applicants also challenge the MCC's arguments regarding contract expirations and the effect of those expirations on Applicants' calculation of their committed capacity. Applicants counter that in the July 8 Order, the Commission endorsed the deduction of eligible contracts for terms of one year or more.<sup>14</sup>

17. On January 10, 2005, the Montana Commission and the MCC filed supplemental protests. The Montana Commission, in its supplemental protest, questions whether, as Applicants contend, all native load generation owned by others in the NorthWestern control area is uncommitted. The Montana Commission also argues that Applicants have not used a simultaneous transmission import capability study that comports with the requirements set forth in Appendix E of the April 14 Order.<sup>15</sup> The Montana Commission further notes that while Applicants count, as committed capacity, a 450 MW supply contract (covering approximately 60 percent of NorthWestern's default load), the contract at issue expires on July 1, 2007, well before a decision on any future triennial review can be anticipated. The Montana Commission concludes that Applicants overstate their uncommitted generation capacity and their import capability, while understating their market power.

18. The MCC, in its supplemental protest, argues that PPL Montana fails both of the Commission's screens. The MCC asserts, among other things, that PPL Montana now owns nearly all of the potentially available generation capacity in the NorthWestern control area and that generation prices, as a result, have increased substantially. The MCC further concludes that transmission import constraints into the NorthWestern control area mean that PPL Montana retains a high level of market concentration.

19. On January 25, 2005, Applicants submitted an answer addressing the arguments raised by the Montana Commission and the MCC in their supplemental protests.

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<sup>14</sup> Applicants' answer at 9, *citing* July 8 Order, 108 FERC ¶ 61,026 at P 4 and P 60.

<sup>15</sup> Montana Commission supplemental protest, *citing* April 14 Order, 107 FERC ¶ 61,018 at P 81.

Included in that answer, at Attachment B, is a simultaneous import capability study submitted by NorthWestern in its triennial update filing in Docket No. ER03-329-006. Applicants assert that using this data, Applicants still pass the Commission's screens. Applicants further assert that, as evidenced by NorthWestern's filing and supporting data, the MCC's contrary conclusions must be rejected.<sup>16</sup>

### **Deficiency Letter and Responsive Pleadings**

20. On March 25, 2005, the Director, Division of Tariffs and Market Development – South, acting pursuant to delegated authority, issued a deficiency letter seeking additional information related to Applicants' updated market power analysis. On April 15, 2005, Applicants submitted their responses to the deficiency letter. In their responses, Applicants assert that the answers to each of the deficiency letter requests can be found "primarily by reference to information contained in [Applicants'] November 9[, 2004] filing or January 25[, 2005 answer]."

21. Notice of Applicants' data responses was published in the *Federal Register*, 70 Fed. Reg. 22,026 (2005), with interventions or protests due on or before May 6, 2005. Notices of intervention were timely filed by the MCC and the Montana Commission and an unopposed motion to intervene was timely filed by NorthWestern. Protests were filed by NorthWestern, the MCC, and the Montana Commission.

22. NorthWestern states that Applicants' reliance on NorthWestern's data, submitted in NorthWestern's triennial market-based rate update filing in Docket No. ER03-329-006, does not support Applicants' conclusions. NorthWestern also asserts that Applicants' market power analyses are flawed, including Applicants' assertion that all generation capacity owned by others at the Colstrip Plant is uncommitted and available to serve load in Montana. NorthWestern claims that, in fact, this capacity is maintained for the benefit of the regulated customers of the non-Montana Colstrip Plant owners,<sup>17</sup> is not in the NorthWestern control area (as recognized by North American Electric Reliability Council) and is dynamically scheduled; therefore NorthWestern claims it is not available for customers in Montana.

23. NorthWestern also disputes Applicants' claimed 230 MW native load commitment. NorthWestern points out that this claim, which is based on wholesale

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<sup>16</sup> Additional answers were filed by the MCC (on February 9, February 11, and March 14, 2005) and by Applicants (on February 28, 2005).

<sup>17</sup> See P 8, *supra*.

power sales from PPL Montana to PPL EnergyPlus (and PPL EnergyPlus' subsequent sales to industrial, end-use customers in Montana under a limited term contract) cannot qualify as a native load commitment because neither PPL Montana nor PPL EnergyPlus has any native load obligations imposed by statute or franchise.

24. NorthWestern also asserts that Applicants are not subject to any meaningful competition within the NorthWestern control area and that PPL Montana has used its competitive advantage of low-cost coal-fired and hydro-electric generation resources to raise the price of power by nearly 50 percent, from \$22.50 per MWh in 1999 to 2001 to approximately \$32 per MWh during 2002 to 2007.<sup>18</sup> NorthWestern adds that PPL Montana is now seeking to renew its supply agreement with NorthWestern for the 2007 to 2012 period and increase rates to levels nearly double the price of power provided just four years ago.

25. The Montana Commission, in its protest, asserts that the arguments it raised in its initial protest remain valid and renews its request for section 206 hearing procedures. Similarly, the MCC asserts that Applicants' responses to the deficiency letter fail to correct or otherwise address the flaws contained in Applicants' market power analyses.<sup>19</sup>

## **Discussion**

### **Procedural Matters**

26. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,<sup>20</sup> the timely filed notices of intervention submitted by the Montana Commission and the MCC and the timely filed, unopposed motions to intervene submitted by Energy West and NorthWestern serve to make these entities parties to this proceeding.

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<sup>18</sup> NorthWestern also argues that these price increases do not appear to be based on cost because PPL Montana's coal and hydro-based resources have not changed over the time period at issue.

<sup>19</sup> Answers responsive to these protests were submitted by Applicants (on May 23, 2005) and by NorthWestern (on June 7, 2005).

<sup>20</sup> 18 C.F.R. § 385.214 (2004).

27. Rule 213(a) of the Commission's Rules of Practice and Procedure<sup>21</sup> prohibits an answer to a protest, or an answer to an answer, unless otherwise permitted by the decisional authority. We will accept the above-identified answers and supplemental pleadings submitted by Applicants, the MCC, the Montana Commission, and NorthWestern because they have provided information that assisted us in our decision-making process.

### **Market-Based Rate Authorization**

28. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. The Commission also considers whether there is evidence of affiliate abuse or reciprocal dealing.<sup>22</sup>

### **Generation Market Power**

29. The Commission's analysis indicates that Applicants' share of uncommitted capacity in the NorthWestern control area exceeds 20 percent in at least one of the four seasons during the relevant time period. Consequently, Applicants fail the wholesale market share screen in the NorthWestern control area. While Applicants' wholesale market share analysis indicates market shares of no more than 13.81 percent, this analysis, for the reasons discussed below, is flawed and inconsistent with the requirements set forth in the April 14 and July 8 Orders.

30. Applicants classify all non-affiliate capacity from the Colstrip Plant as uncommitted competing supply -- a capacity total that, were it classified as committed supply, would result in Applicants' failure of the wholesale market share screen. However, as pointed out by NorthWestern in its protest, and as discussed below, the generation market power analyses submitted to the Commission by the other entities that own portions of this capacity (*i.e.*, Portland General, Puget, Avista, and PacifiCorp) these "other entities," have little, if any, uncommitted capacity.<sup>23</sup> In addition, as

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<sup>21</sup> *Id.* at § 385.213(a)(2).

<sup>22</sup> *See, e.g., Progress Power Marketing, Inc.*, 76 FERC ¶ 61,155 at 61,919 (1996); *Northwest Power Marketing Co., L.L.C.*, 75 FERC ¶ 61,281 at 61,899 (1996); *accord Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223 at 62,062-63 (1994).

<sup>23</sup> *See Portland General Electric Company*, 111 FERC ¶ 61,151 at P 7 (2005); *Puget Sound Energy, Inc.*, 111 FERC ¶ 61,020 (2005); *Avista Corporation*, 110 FERC ¶ 61,216 (2004); and *PacifiCorp and PPM Energy, Inc.*, 111 FERC ¶ 61,205 (2005). For  
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discussed below, the Colstrip Plant capacity is dynamically scheduled by the other owners which, in effect, electronically moves the generation capacity into their respective control areas.

31. First, Applicants treat the Colstrip Plant capacity of the other owners as uncommitted, an error that understates Applicants' market share and is inconsistent with the April 14 and July 8 Orders. Data submitted by Portland General and Puget confirms the intervenors' contention that these entities are capacity short/net purchasers who have no uncommitted capacity in their respective control areas. Similarly, Avista's updated generation market power analysis shows that it has no local uncommitted capacity and, in fact, relies on imports to serve its load. In addition, PacifiCorp's filing indicates that it has zero uncommitted capacity in its PacifiCorp west control area. As such, Applicants' assumptions, in this regard, are unsupported and unreliable.<sup>24</sup>

32. Second, Applicants erroneously presume that the Colstrip Plant capacity, that is dynamically scheduled, is competing capacity in the NorthWestern control area. This error also has the effect of understating Applicants' market share. In Applicants' response to staff's deficiency letter, Applicants state that they calculated uncommitted capacity in a manner they believe is consistent with the April 14 Order and that while the Colstrip Plant is physically located in the NorthWestern control area, the capacity can be dynamically scheduled as directed by the joint owners. Applicants further state that the joint owners are free to elect how they wish to deploy the capacity generated by the Colstrip Plant and can dynamically schedule it so it can be treated as if it were in their resident control areas, or schedule it to be delivered in Montana and/or at various other points within the NWPP region. As such, Applicants state that power can remain available to serve load within the NorthWestern control area.<sup>25</sup> However, the Colstrip

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purposes of the section 206 proceeding instituted herein, we will incorporate into the instant record the generation market power analyses submitted by Portland General, in Docket No. ER98-1643-006 (Portland General Data), by Puget, in Docket No. ER99-845-004 (Puget Data, by Avista, in Docket No. ER99-1435-006 (Avista Data), and by PacifiCorp. in Docket No. ER97-2801-005 (PacifiCorp Data).

<sup>24</sup> Uncommitted capacity is determined by adding the total nameplate capacity of generation owned or controlled through contract and firm purchases, less operating reserves, native load commitments and long-term firm requirements sales. *See* April 14 Order, 107 FERC ¶ 61,018 at P 95.

<sup>25</sup> Applicants' deficiency letter response at 2-3.

Plant capacity that is dynamically scheduled by the other owners that are outside of the NorthWestern control area and used to serve load in those control areas, as demonstrated below, would not be available to serve load in the NorthWestern control area. To the extent Applicants were making a simplifying assumption, it is not an appropriate assumption, and would overstate the amount of competing supplies within the control area, making Applicants' market shares smaller.<sup>26</sup>

33. In Order No. 888, we explained that dynamic scheduling can electronically "move" a remote generating unit into the appropriate control area.<sup>27</sup> In Order No. 888-A, we further stated that dynamic scheduling "allow[s] remote generators to follow closely the moment-to-moment variations of a local load."<sup>28</sup> The generation market power analyses submitted by the other entities that own portions of the Colstrip Plant capacity further demonstrate that this capacity is used to serve load in other control areas by dynamic scheduling. For example, Portland General states in its updated market power analysis that it modeled its Colstrip Plant capacity as internal to the Portland General control area and states that this modeling reflects the fact that the generation at issue is dynamically scheduled into Portland General's control area to serve load.<sup>29</sup> Avista also states in its updated market power analysis that it dynamically schedules power from the Colstrip Plant and that if the generation located inside Avista's service territory is insufficient to meet native load, then Avista's remote generation makes up that difference.<sup>30</sup> In addition, PacifiCorp's updated market analysis studying the NorthWestern Control area, a first-tier market, assumes 86 MW of capacity (out of PacifiCorp's total capacity of 155 MW) is local capacity in the NorthWestern control area; the remaining capacity is attributed to the PacifiCorp West

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<sup>26</sup> April 14 Order, 107 FERC ¶ 61,018 at P 117.

<sup>27</sup> Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996) at 31, 717, order on reh'g, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in part and rev'd in part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom., New York v. FERC*, 535 U.S. 1 (2002).

<sup>28</sup> Order No. 888-A at 31,710.

<sup>29</sup> *See* Portland General Data at 6, n. 10.

<sup>30</sup> *See* Avista Data at 5-8, and 11.

control area.<sup>31</sup> Applicants have not supported their contention that the other owners would elect to dynamically schedule their Colstrip Plant capacity into the NorthWestern control area.

34. In addition, Applicants have not sufficiently demonstrated that PPL Montana has a native load (or long-term firm) contractual commitment to its affiliated power marketer, PPL EnergyPlus. Applicants claim that this capacity is under a long-term contract with PPL EnergyPlus, pursuant to which PPL EnergyPlus meets a 230 MW retail load obligation for 13 large retail electricity consumers in Montana; however Applicants are silent as to the nature or term of this contract with the large retail consumers. Specifically, Applicants did not submit this contract for the record or provide additional data to support their claim that the entire 230 MW is, in fact, committed and not available for wholesale sales. Accordingly, we cannot conclude that this contract satisfies the requirements of the April 14 and July 8 Orders with respect to long-term firm sales deductions from applicant's (or applicant's affiliates) installed capacity.<sup>32</sup>

35. The Commission's analysis indicates that were this sales contract between PPL Montana and PPL EnergyPlus excluded from Applicants' calculation of their committed capacity, Applicants would fail the wholesale market share screen in all four seasons considered.<sup>33</sup>

36. While the default relevant geographic market for purposes of the indicative generation market power screens is the control area where the applicant is physically located, the Commission recognizes that this may not be appropriate in all circumstances and therefore allows additional sensitivity runs to show that another

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<sup>31</sup> See PacifiCorp Data at Attachments 25-26, and at 5, n. 6. We note that PacifiCorp's treatment of the Colstrip Plant capacity in this regard is a simplifying assumption as it allocates a portion of its dynamically scheduled capacity to PacifiCorp which increases its market share in the NorthWestern control area. PacifiCorp's analysis demonstrates that the Colstrip Plant capacity is dynamically scheduled and refutes Applicants' claim that all of the Colstrip Plant capacity of other owners is available to serve load in the NorthWestern control area.

<sup>32</sup> July 8 Order, 108 FERC ¶ 61,026 at P 65 and P 66.

<sup>33</sup> The Commission's analysis indicates that with this adjustment to Applicant's analysis, including the adjustment discussed above regarding the Colstrip Plant capacity, Applicants' market share would rise to as high as 32.3 percent.

geographic market should be considered as the relevant market. For example, parties may present evidence that the relevant market is broader than a particular control area.<sup>34</sup> In this case, Applicants argue that the NWPP area more appropriately reflects the relevant geographic market in which Applicants' assets are located. Applicants submitted a screen analysis based on the NWPP market that indicates they pass the indicative screens. For the reasons discussed below, Applicants have not demonstrated that the NWPP is the appropriate relevant geographic market and the Commission cannot rely on the indicative screen analysis based on the NWPP market.

37. Applicants define the NWPP as the control area of the BPA and eleven other U.S. control areas in the region, including that of NorthWestern.<sup>35</sup> Applicants argue that BPA's transmission system is the backbone of the NWPP and much of the region's electricity production can move freely between and among the control areas interconnected to BPA. In addition, Applicants state that tens of thousands of contracts and transactions source and sink at the Mid-Columbia liquid trading point. Applicants point to price correlations between the Mid-Columbia trading point and the California-Oregon Border as evidence of a high degree of regional integration in the Washington-Oregon region. Applicants note that NorthWestern's control area is located a considerable distance from "BPA's central hub" but state that no binding transmission constraints occurred between BPA and NorthWestern's system, and between BPA and Idaho, during a recent four and one-half year period. As such, Applicants conclude that NorthWestern and Idaho Power are appropriately included in the larger NWPP market.<sup>36</sup>

38. Applicants have not demonstrated that, for purposes of the indicative screen analysis, the relevant geographic market should be the NWPP area for customers located in the NorthWestern control area. First, Applicants' analysis includes substantially more uncommitted generation capacity in the NWPP than can be simultaneously imported into the NorthWestern control area.<sup>37</sup> The Commission's

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<sup>34</sup> April 14 Order, 107 FERC ¶ 61,018 at P 73 and P 75.

<sup>35</sup> Applicants' November 9, 2004 filing, Attachment C, at 26. Applicants state that this region was found to be a relevant geographic market by the Presiding Judge in *Puget Sound Energy, Inc. v. Jurisdictional Sellers*, 96 FERC ¶ 63,044 (2001). *Id.* at 24, n. 49.

<sup>36</sup> *Id.* at 25-26.

<sup>37</sup> Applicants include 14,417 MW of uncommitted capacity from the NWPP while Applicants' import study shows that up to 1,713 MW can be simultaneously imported into the Northwestern control area. As noted by Applicants, NorthWestern's updated  
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indicative screen calculates total supply in a market as the supply in the relevant control area plus uncommitted supplies that can be imported (limited by simultaneous transmission import capability).<sup>38</sup> Applicants have not explained how any amount of uncommitted supply in the NWPP outside of the NorthWestern control area greater than the simultaneous import limit can discipline an attempted price increase inside that control area. Applicants explain that competition among all owners of uncommitted capacity in the NWPP maintains prices such that transmission constraints do not bind between the NorthWestern control area and the area encompassed by the NWPP. While competition among suppliers in the broader NWPP may discipline prices in the NWPP region, even to the border of the NorthWestern control area, the indicative screen analysis examines whether enough of that energy can be imported into the NorthWestern control area to indicate that the Applicant is not a pivotal supplier and that its market shares are under 20 percent. The amount of energy that can be imported for this purpose is limited by the simultaneous import capability.

39. Applicants' observation that transmission constraints do not bind between NWPP and the NorthWestern control area misses the mark. Applicants' support for this observation is based on a level of operational transfer capability between Montana and BPA (approximately 2,200 MW)<sup>39</sup> that is greater than the simultaneous import capability into the NorthWestern control area (up to approximately 1,550 MW) and therefore does not address whether demand in the NorthWestern control area for power from the NWPP could have been satisfied. In addition, it may have been the case that transfer capability between Montana and BPA was not fully loaded because uncommitted generation capacity in the NWPP may have been sold elsewhere and was thus simply not available to the NorthWestern control area in sufficient quantities to cause transmission constraints to bind. Because of the shortcomings of Applicants' analysis, as discussed above, we need not address here the Applicants' price correlation analysis.

40. In addition, Applicants have not accounted for transmission limitations in delivering power from the NWPP in their calculations of uncommitted capacity available to the NorthWestern control area. When considering geographic markets other than the default geographic market, an accounting must be made of all monitored

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market power study shows that up to 1,556 MW can be simultaneously imported into the NorthWestern control area.

<sup>38</sup> April 14 Order, 107 FERC ¶ 61,018 at P 94.

<sup>39</sup> Applicants' November 9, 2004 filing at Exhibit 3.

lines/constraints and critical contingencies that were historically applied during the seasonal peaks in assessing available transmission for non-affiliate transmission customers.<sup>40</sup> Applicants have not done so and therefore their study may overstate uncommitted capacity in the NWPP.<sup>41</sup>

41. Finally, Applicants have not explained how transmission service is arranged and priced in the NWPP. For example, Applicants have not explained whether service is arranged and priced on a system-by-system basis or whether there is a centralized means of doing so. The ease or difficulty of arranging transmission service is an important consideration in demonstrating that customers in the NorthWestern control area can access suppliers in the NWPP area.<sup>42</sup>

42. As outlined in the April 14 Order, Applicants' failure of the wholesale market share screen provides the basis for the Commission to institute the instant section 206 proceeding, to determine whether Applicants may continue to charge market-based rates and establishes a rebuttable presumption of market power. This order establishes a refund effective date in order to put in place the necessary procedural framework to promptly impose an effective remedy, in case the Commission determines that such a remedy is required. Our decision to establish a refund effective date does not constitute a determination that refunds will be ordered.

43. The Commission's decision to institute the instant section 206 proceeding does not constitute a definitive finding by the Commission that Applicants have market power in the NorthWestern control area. As discussed in the April 14 and July 8 Orders, the screens are conservatively designed to identify the subset of applicants who require closer scrutiny. Accordingly, Applicants will have 60 days from the date of issuance of this order finding a screen failure to: (i) file a Delivered Price Test analysis; (ii) file a mitigation proposal tailored to its particular circumstances that would eliminate the ability to exercise market power; or (iii) inform the Commission that it will adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates.<sup>43</sup> In addition, as the Commission stated in the

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<sup>40</sup> April 14 Order, 107 FERC ¶ 61,018 at P 86.

<sup>41</sup> The staff deficiency letter requested that Applicants take this into account (see Staff Question Six).

<sup>42</sup> The staff deficiency letter also requested that Applicants address this matter (see Staff Question Six).

<sup>43</sup> See April 14 Order, 107 FERC ¶ 61,018 at P 201, 207-209.

April 14 Order, the applicant or intervenors may present evidence such as historical sales data to support whether Applicants do or do not possess market power.<sup>44</sup>

44. In cases where, as here, the Commission institutes a section 206 proceeding on its own motion, section 206(b) requires that the Commission establish a refund effective date that is no earlier than 60 days after publication of notice of the initiation of the Commission's proceeding in the *Federal Register*, and no later than five months subsequent to the expiration of the 60-day period. In order to give maximum protection to customers, and consistent with Commission precedent,<sup>45</sup> the Commission will establish a refund effective date at the earliest date allowed. This date will be 60 days from the date on which notice of the initiation of the proceeding in Docket No. EL05-124-000 is published in the *Federal Register*. In addition, section 206 requires that, if no final decision has been rendered by that date, the Commission must provide its estimate as to when it reasonably expects to make such a decision. Given the times for filing identified in this order, and the nature and complexity of the matters to be resolved, the Commission estimates that it will be able to reach a final decision by January 31, 2006.

45. In the April 14 and July 8 Orders, we stated that applicants and intervenors may present historical evidence to show that the market-based rate seller satisfies the Commission's generation market power concerns. The evidence that will be considered is historical sales and/or access to transmission to move supplies within, out of, and into a control area.<sup>46</sup> Intervenors' arguments regarding sales contracts that expire in 2007, the lack of alternative suppliers to serve native load in the NorthWestern control area, and the correct simultaneous import capability limit may be examined in conjunction with other evidence submitted in the section 206 proceeding we institute herein.

### **Transmission Market Power**

46. Applicants state that other than minor generation interconnection facilities, the only transmission assets owned by Applicants are the transmission facilities of Applicants' parent company, PPL Electric Utilities Corporation (PPL). Applicants state that these facilities are operated by PJM Interconnection, L.L.C. (PJM) and that

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<sup>44</sup> *Id.* at P 37.

<sup>45</sup> *See, e.g., Canal Electric Company*, 46 FERC ¶ 61,153, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

<sup>46</sup> April 14 Order, 107 FERC ¶ 61,018 at P 102.

transmission service over these facilities is provided by PJM under the its open access transmission tariff (OATT). Applicants state that, consequently, they are unable to prevent competitors from obtaining access to PPL's transmission facilities and thus cannot restrict access in an effort to affect or sustain a non-competitive change in wholesale or retail electricity prices.

47. Applicants state that they filed, on November 2, 1999, an OATT with respect to portions of the Colstrip Transmission System that they intended to obtain from the Montana Power.<sup>47</sup> Applicants state that while their filing was accepted by the Commission, they have not yet acquired an interest in the Colstrip Transmission System and thus do not provide transmission service over these facilities and do not provide transmission over any other facilities. Further, no intervenor has raised transmission market power concerns. Based on Applicants' representations, the Commission finds that Applicants satisfy the Commission's transmission market power standard for the grant of market-based rate authority.

### **Other Barriers to Entry**

48. Applicants state that their inability to erect barriers to entry has remained unchanged over the period of time following the Commission's issuance of Applicants' market-based rate authority. Applicants further state that they do not have control over potential generating sites or fuel supplies that could be required by competitors and that neither PPL Montana nor its affiliates have sufficient control over such inputs to thwart entry by competitors. No intervenor has raised concerns regarding barriers to entry. Based on Applicants' representations, the Commission is satisfied that Applicants cannot erect barriers to entry.

### **Affiliate Abuse**

49. Applicants state that they will continue to comply with the code of conduct contained in their market-based rate tariffs. Furthermore, we note that Applicants' market-based rate tariffs contain prohibitions on transactions with affiliates. In addition, no intervenor has raised concerns regarding affiliate abuse. However, the Commission's review of PPL Colstrip I's and PPL Colstrip II's market-based rate tariffs indicates that the tariffs do not prohibit sales to an electric utility affiliate with a franchised service territory "without first receiving" Commission authorization of the transaction under section 205 of the FPA. Therefore, consistent with Commission precedent, PPL Colstrip I and PPL Colstrip II are directed to make a compliance filing

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<sup>47</sup> See PP&L Montana, LLC, 89 FERC ¶ 61,33 (1999).

within 30 days of the date of issuance of this order to revise their market-based rate tariffs to include such language.<sup>48</sup> Based on Applicants' representations and subject to the tariff revision directed herein, we find that Applicants satisfy the Commission's concerns with regard to affiliate abuse.

### **Reporting Requirements**

50. Consistent with the procedures the Commission adopted in Order No. 2001, an entity with market-based rates must file electronically with the Commission an Electric Quarterly Report containing: (i) a summary of the contractual terms and conditions in every effective service agreement for market-based power sales; and (ii) transaction information for effective short-term (less than one year) and long-term (one year or greater) market-based power sales during the most recent calendar quarter.<sup>49</sup> Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.<sup>50</sup> Applicants must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.<sup>51</sup> Order No. 652 requires that the change in status reporting requirement be incorporated in the market-based rate tariff of each entity authorized to make sales at market-based rates. As noted above, PPL Montana has revised its tariff to include the change in status reporting requirement.

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<sup>48</sup> *Aquila, Inc.*, 101 FERC ¶ 61,331 at P 12 (2002) (*Aquila*).

<sup>49</sup> *Revised Public Utility Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31,043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002). Required data sets for contractual and transaction information are described in Attachments B and C of Order No. 2001. The Electric Quarterly Report must be submitted to the Commission using the EQR Submission System Software, which may be downloaded from the Commission's website at <http://www.ferc.gov/docs-filing/eqr.asp>.

<sup>50</sup> The exact dates for these reports are prescribed in 18 C.F.R. § 35.10b (2004). Failure to file an Electric Quarterly Report (without an appropriate request for extension), or failure to report an agreement in an Electric Quarterly Report may result in forfeiture of market-based rate authority, requiring filing of a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

<sup>51</sup> Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, order on reh'g, 111 FERC ¶ 61,413 (2005).

### **Market Behavior Rules**

51. Applicants state that their submittals incorporate the Commission's Market Behavior Rules, as required by the Commission.<sup>52</sup> However, we find that Market Behavior Rule 2(b), as included in Applicants' submittals, fails to comply with the Market Behavior Rules Rehearing Order, where we clarified that the parenthetical clause "scheduling non-firm service *or* products as firm" as it appears in Market Behavior Rules 2(b) should be revised to read: "scheduling non-firm service *for* products as firm" (emphasis added).<sup>53</sup> Accordingly, Applicants are directed, within 30 days of the date of issuance of this order, to revise their market-based rate tariffs to include this required clarification.

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

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and by the FPA, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R., Chapter I), the Commission hereby institutes a proceeding in Docket No. EL05-124-000 concerning the justness and reasonableness of Applicants' market-based rates in the NorthWestern control area, as discussed in the body of this order.

(B) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of the proceeding under section 206 of the FPA in Docket No. EL05-124-000.

(C) The refund effective date established pursuant to section 206(b) of the FPA will be 60 days following publication in the *Federal Register* of the notice discussed in Ordering Paragraph (B) above.

(D) For the NorthWestern control area, Applicants are directed, within 60 days from the date of issuance of this order, to: (1) file a Delivered Price Test analysis; (2) file a mitigation proposal tailored to its particular circumstances that would eliminate the ability to exercise market power; or (3) inform the Commission that it will adopt the

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<sup>52</sup> See *supra* P 11.

<sup>53</sup> Market Behavior Rules Rehearing Order, 107 FERC ¶ 61,175 at P 73.

April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates, as discussed in the body of this order.

(E) Applicants' are directed to revise their proposed tariff sheets incorporating the Market Behavior Rules within 30 days of the date of issuance of this order, as discussed in the body of this order.

(F) Applicants' revised tariff sheets incorporating the change in status reporting requirements are hereby accepted for filing, effective March 21, 2005.

(G) Applicants are directed to revise the affiliate sales prohibition language in their market-based rate tariffs within 30 days of the date of issuance of this order, as discussed in the body of this order.

By the Commission.

( S E A L )

Linda Mitry,  
Deputy Secretary.