

123 FERC ¶ 61,013  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Suedeem G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

MidAmerican Energy Company	Docket Nos. ER96-719-010 EL05-59-001
Cordova Energy Company	ER99-2156-008
MidAmerican Energy Company	ER96-719-011 EL05-59-002
MidAmerican Energy Company	ER96-719-015 EL05-59-003
MidAmerican Energy Company Cordova Energy Company PacifiCorp	ER96-719-013 ER99-2156-009 ER97-2801-011

ORDER ON REHEARING, COMPLIANCE FILING  
AND CHANGE IN STATUS

(Issued April 4, 2008)

1. In this order, the Commission denies MidAmerican Energy Company's (MidAmerican) request for clarification and/or rehearing of the Commission's March 17, 2006 order<sup>1</sup> addressing MidAmerican's mitigation proposal. Additionally, the Commission accepts in part and rejects in part MidAmerican's compliance filings submitted pursuant to the March 17 Order incorporating mitigation measures. The Commission also accepts a refund report and conditionally accepts a notification of change in status.

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<sup>1</sup> *MidAmerican Energy Co.*, 114 FERC ¶ 61,280 (2006) (March 17 Order).

## I. Background

2. On June 1, 2005, the Commission issued an order addressing MidAmerican's updated market power analysis associated with MidAmerican's market-based rate authority.<sup>2</sup> In the June 1 Order, the Commission found that MidAmerican satisfied the Commission's generation market power standard for the grant of market-based rate authority in the first-tier balancing authority areas.<sup>3</sup> However, the Commission determined that MidAmerican failed the wholesale market share screen for each of the four seasons considered in the MidAmerican balancing authority area.<sup>4</sup> Accordingly, the Commission instituted a proceeding, in Docket No. EL05-59-000, under section 206 of the Federal Power Act (FPA)<sup>5</sup> to investigate generation market power in the MidAmerican balancing authority area.<sup>6</sup> The Commission also established a refund effective date of August 7, 2005, pursuant to section 206 of the FPA.

3. In the June 1 Order, the Commission directed MidAmerican, for the MidAmerican balancing authority area, 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 April 14

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<sup>2</sup> *MidAmerican Energy Co.*, 111 FERC ¶ 61,320 (2005) (June 1 Order).

<sup>3</sup> We note that the Commission adopted the use of "balancing authority area" instead of "control area" in Order No. 697. *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 72 Fed. Reg. 39,904 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252, at P 250, *clarified*, 121 FERC ¶ 61,260 (2007) (Order Clarifying Final Rule).

<sup>4</sup> June 1 Order, 111 FERC ¶ 61,320 at P 25.

<sup>5</sup> 16 U.S.C. § 824e (2000).

<sup>6</sup> The Commission limited the section 206 proceeding, as well as any resulting mitigation or refunds, to the MidAmerican balancing authority area.

Order's<sup>7</sup> default cost-based rates or propose other cost-based rates and submit cost support for such rates.<sup>8</sup>

4. In its August 1, 2005 compliance filing responding to the June 1 Order, MidAmerican submitted a mitigation proposal to address the Commission's concerns. Specifically, MidAmerican proposed to revise its market-based rate tariff to provide that it will not "sell capacity and energy under this Tariff to serve load that sinks within the MidAmerican [balancing authority] [a]rea," and also proposed a new power sales tariff, providing rates, terms, and conditions of service for sales within the MidAmerican balancing authority area. The power sales tariff contained tailored mitigation, in the form of both cost-based rates and a market-based price cap, to address generation market power concerns that were raised in connection with MidAmerican's updated market power analysis.<sup>9</sup>

5. In the March 17 Order, the Commission rejected in part and conditionally accepted in part MidAmerican's mitigation proposal, established hearing procedures, and accepted a notification of change in status. The Commission accepted MidAmerican's commitment to not make sales under its market-based rate tariff in the MidAmerican balancing authority area, but rejected its proposed tariff language.<sup>10</sup> The Commission

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<sup>7</sup> *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004) (May 13 Order). The May 13 Order addressed the procedures for implementing the generation market power analysis announced on April 14, 2004 and clarified on July 8, 2004. *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

<sup>8</sup> June 1 Order, 111 FERC ¶ 61,320 at P 25.

<sup>9</sup> Specifically, MidAmerican's proposed power sales tariff offered two power supply products: (1) negotiated capacity and energy (Schedule A), providing for sales of capacity, at a negotiated rate and level of firmness, and associated energy for periods of one week to one year; and (2) short term energy (Schedule B), which was defined by MidAmerican as sales of non-firm energy for periods of one hour to one month. MidAmerican proposed charges in Schedule A that would be negotiated amounts, subject to "up to" cost-based rate caps. For Schedule B, MidAmerican proposed negotiated rates capped at the weighted average of the hourly locational marginal prices calculated by PJM Interconnection, LLC (PJM) for the applicable hours and days of the individual transactions. *See* March 17 Order, 114 FERC ¶ 61,280 at P 8-13.

<sup>10</sup> *Id.* P 29.

stated that MidAmerican's proposed tariff language would improperly limit mitigation to certain customers in the MidAmerican balancing authority area, namely, limiting mitigation only to sales to those buyers that serve end-use customers in the MidAmerican balancing authority area. The Commission stated that such a limitation would not mitigate MidAmerican's ability to attempt to exercise market power over sales in its balancing authority area and is inconsistent with the Commission's direction in the April 14 and July 8 Orders.<sup>11</sup> Therefore, the Commission directed MidAmerican to revise the mitigation language to prohibit any sales at market-based rates within the MidAmerican balancing authority area.<sup>12</sup>

6. With regard to the power sales tariff, the Commission generally found the terms and conditions of Schedule A acceptable, but set for hearing MidAmerican's proposed cost-based rates for sales under Schedule A, stating that its preliminary analysis indicated that the rates had not been shown to be just and reasonable.<sup>13</sup> The Commission rejected the proposed Schedule B, however, finding that the proposed rates were not just and reasonable because the April 14 and July 8 Orders contemplated that mitigation proposals based on rates would be cost-based.<sup>14</sup> The Commission directed MidAmerican to submit a compliance filing to either revise Schedule B to set the just and reasonable rate at the default rate or to propose different cost-based rates (together with cost support) based on MidAmerican's particular circumstances, consistent with the April 14 and July 8 Orders.<sup>15</sup>

7. On April 3, 2006, MidAmerican made a compliance filing revising Schedule A to provide for daily and hourly negotiated capacity and energy transactions, in addition to weekly, monthly, and yearly transactions, that will be made subject to the "up to" cost-based rates. On May 19, 2006, MidAmerican filed an Offer of Settlement and Settlement Agreement (Settlement) containing a revised Schedule A setting forth rates for service under that schedule. On November 9, 2006, the Commission accepted the compliance

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<sup>11</sup> *Id.* P 31-32.

<sup>12</sup> *Id.* P 33.

<sup>13</sup> *Id.* P 37-41.

<sup>14</sup> *Id.* P 43.

<sup>15</sup> *Id.*

filing and Settlement, and directed the payment of refunds and the filing of a refund report.<sup>16</sup>

## II. Description of Filings

8. On April 17, 2006, MidAmerican submitted a request for clarification, or in the alternative, rehearing of the March 17 Order. MidAmerican seeks clarification that the mitigation proposed by the Commission was not intended to apply to entities that deliver the power into destination markets other than the MidAmerican balancing authority area. If the Commission does not grant clarification, it seeks rehearing of the Commission's decision to reject the sink language because it argues that the Commission: (1) failed to provide a reasoned basis for rejecting MidAmerican's proposed language; (2) impermissibly applied a change in policy retroactively; and (3) unjustifiably required MidAmerican to make refunds for transactions over which the Commission already determined MidAmerican could not exercise market power.

9. On April 17, 2006, MidAmerican submitted a compliance filing to revise its market-based rate tariff and power sales tariff in accordance with the March 17 Order.

10. On April 20, 2006, MidAmerican, Cordova Energy Company (Cordova),<sup>17</sup> and PacifiCorp filed a notice of change in status regarding the transfer of ownership of PacifiCorp from PacifiCorp Holdings, Inc. to PPW Holdings LLC, a subsidiary of MidAmerican Energy Holdings Company (MidAmerican Holdings) on March 21, 2006.<sup>18</sup>

11. On December 22, 2006, MidAmerican filed a refund report in response to the November 9 Order.

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<sup>16</sup> *MidAmerican Energy Co.*, 117 FERC ¶ 61,178 (2006) (November 9 Order).

<sup>17</sup> Cordova, an affiliate of MidAmerican, owns a 537 MW generator in the PJM Interconnection, L.L.C., which Cordova sells to a third-party (El Paso Merchant Energy, L.P.) under a long-term tolling arrangement.

<sup>18</sup> MidAmerican Holdings is the indirect parent of MidAmerican and Cordova, and, as a result of this transfer of ownership, also of Pacificorp.

### **III. Notice of Filings and Responsive Pleadings**

12. Notice of MidAmerican's April 17, 2006 compliance filing was published in the *Federal Register*, 71 Fed. Reg. 26,489 (2006), with interventions or protests due on or before May 8, 2006. None was filed.

13. Notice of the April 20, 2006 change of status filing was published in the *Federal Register*, 71 Fed. Reg. 26,950 (2006), with interventions or protests due on or before May 11, 2006. None was filed.

14. Notice of MidAmerican's December 22, 2006 refund report was published in the *Federal Register*, 72 Fed. Reg. 1,505 (2007), with interventions or protests due on or before January 12, 2007. None was filed.

### **IV. Discussion**

#### **A. Request for Clarification/Rehearing**

15. MidAmerican seeks clarification that the Commission, in rejecting its proposed tariff language prohibiting market-based sales "to serve load that sinks within the MidAmerican balancing authority area," did not rule that MidAmerican should not have transacted in the past – and may not transact in the future – with entities that transmitted the purchased power out of the MidAmerican balancing authority area for ultimate consumption in other markets, where MidAmerican cannot exercise market power. MidAmerican claims that its proposed language was intended to prevent customers from purchasing power within the MidAmerican balancing authority area and then reselling it to the balancing authority area customers the mitigation is designed to protect. MidAmerican states that the proposed tariff restricted it from making any market sales to load in the balancing authority area, while at the same time permitting it to continue to transact with outside entities, regardless of the location at which title is transferred. According to MidAmerican, this is consistent with the June 1 Order because the Commission found that MidAmerican may possess the ability to exercise market power in its balancing authority area, but cannot exercise market-power outside. Therefore, MidAmerican asserts that it intentionally focused its mitigation to sales within its MidAmerican balancing authority area.

16. MidAmerican recognizes the Commission's concerns that MidAmerican's proposed tariff language could permit roundtrip or "ricochet" transactions. Accordingly, MidAmerican proposed additional tariff language in its April 17, 2006 compliance filing, which it says makes clear that any mitigation will apply with equal force to any entity

that seeks to purchase capacity or energy to serve any wholesale load within the MidAmerican balancing authority area.<sup>19</sup> Under this language, MidAmerican would require buyers taking title to purchased power inside the balancing authority area to confirm that the power will ultimately be delivered outside the balancing authority area. MidAmerican will also monitor these transactions using North American Electric Reliability Corporation (NERC) tags. If MidAmerican discovers that, contrary to the confirmations, the power is scheduled for ultimate delivery inside the balancing authority area, it states that it will then either curtail the transaction or charge a cost-based rate pursuant to its power sales tariff. Further, if required by the Commission, MidAmerican would submit the NERC tag data to the appropriate market monitor.

17. According to MidAmerican, this proposed language accommodates the practical aspects of selling outside the balancing authority area and properly focuses on the Commission's policy to analyze market power on a destination market basis. MidAmerican states that certain MidAmerican customers already have transmission reservations on MidAmerican's system that allows them to move power from generation buses inside the MidAmerican system to outside the balancing authority area. MidAmerican argues that the Commission provided no basis for a "bus/border" distinction. MidAmerican believes that its proposed compliance language will ensure enforcement of its mitigation obligation, and as a result, sales at the bus will not present an enforcement problem. Furthermore, it states that, when power is delivered to the

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<sup>19</sup> MidAmerican's new proposed tariff states:

Seller will not sell capacity and energy under this Tariff to any entity to supply load within the MidAmerican control area either (i) as a retailer; (ii) as an entity arranging wholesale power supplies on behalf of such retailers; or (iii) as a trader or broker supplying capacity and/or energy to meet in-control area loads. Sales under this Tariff will be made to buyers in MidAmerican's control area only when the buyer confirms that the power being purchased is exclusively for export to serve loads outside the MidAmerican control area. This confirmation will be verified by NERC tag data showing the load sink to be outside the MidAmerican control area. Failure to meet the required verification test will result in the termination of further sales under this Tariff.

borders of the MidAmerican balancing authority area, the delivered price reflects the market price of the adjacent market, and as a result, transmission purchased at a balancing authority area border should be deemed as a sale outside of the balancing authority area; MidAmerican should not be required to obtain additional transmission rights on the adjacent system for the transaction to be considered a non-balancing authority area transaction.

18. If the Commission does not grant the clarification, MidAmerican requests rehearing of the Commission's decision to reject the "sink" language. MidAmerican contends that the Commission failed to provide a reasoned basis for rejecting its sink language, because it: (1) did not provide a reasoned explanation as to how the proposed language would lead to unjust and unreasonable rates, and (2) did not narrowly apply mitigation to those destination markets where the record suggests MidAmerican has market power, as required by Commission policy.

19. MidAmerican argues that the Commission's policy on market-based rates does not support rejection of MidAmerican's proposed revisions. It asserts that the Commission has consistently reviewed market power on a destination market specific basis, applying mitigation only in markets where the record suggests that the applicant may have the ability to exercise market power. It argues that the ability to sell to entities that have prior transmission reservations to take power outside of the MidAmerican balancing authority area does not allow MidAmerican to exercise market power, and does not undermine mitigation within its balancing authority area. MidAmerican states that its mitigation obligation hinges on the character of the transaction, which is defined by the location of the load to be served, and that buyers served outside of the mitigated market do not become subject to mitigation, depending upon where a given transaction closes. Further, MidAmerican asserts that, in several previous cases, the Commission has accepted language similar to the rejected "sink" language.<sup>20</sup> Therefore, by rejecting MidAmerican's sink language, it asserts that the Commission has impermissibly departed from prior practice without a reasoned explanation.

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<sup>20</sup> MidAmerican's Rehearing Request at 20-23, *citing AEP Power Marketing, Inc.*, 112 FERC ¶ 61,047 (2005) (accepting tariff language defining "mitigated sales" as "physical sales of power and or energy . . . that sink in the control area"); *Duke Power*, 113 FERC ¶ 61,192 (2005) (accepting tariff revision stating that market-based rate tariff would not be used "to serve load within the Duke Power Control Area"); *South Carolina Electric & Gas Co.*, 114 FERC ¶ 61,143 (2006) (accepting South Carolina Electric and Gas Company's proposal to revise its tariff to prohibit any wholesale sales under its market-based rate tariffs to loads that sink within its control area).

20. Finally, MidAmerican asserts that ordering it to make refunds to customers outside its balancing authority area violates due process<sup>21</sup> and is unfairly retroactive, primarily because MidAmerican had no notice that its sales to these customers were subject to refund. It argues that the Commission's approach to analyzing market power articulated in the April 14 and July 8 Orders and the subsequent orders did not put applicants on notice that transactions involving power destined for markets where the seller lacks market power could trigger refund liability. Moreover, MidAmerican asserts that it had no opportunity to respond regarding markets outside its balancing authority area because the Commission previously found that it passed the screens in those areas, leading it to believe sales in those markets were not subject to refund.<sup>22</sup> MidAmerican states that retroactive application of mitigated rates to sales for export transactions is inappropriate, absent a showing of abuse. In many cases, it argues, such refunds would transfer wealth from MidAmerican to intermediate buyers who negotiated their deals at arms length, but would not necessarily reduce prices for load-serving entities receiving the power or achieve any other public policy goal. MidAmerican notes that the parties that would receive these refunds do not serve load inside the MidAmerican balancing authority area. Thus, the refunds would not be directed to entities in the destination market subject to the mitigation protection. Therefore, MidAmerican believes a refund order may only have the effect of providing intermediate buyers with a windfall.<sup>23</sup>

### **Commission Determination**

21. We will deny MidAmerican's request for clarification and/or rehearing. As an initial matter, we disagree with MidAmerican's argument that the Commission in the March 17 Order failed to provide a reasoned basis for rejecting the proposed tariff

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<sup>21</sup> MidAmerican asserts that an agency must provide regulated entities with adequate notices. MidAmerican's Rehearing Request at 26, citing *Upton v. SEC*, 75 F.3d 92, 98 (2<sup>nd</sup> Cir. 1996); *KPMG, LLP v. SEC*, 289 F.3d 109, 116-17 (D.C. Cir. 2002).

<sup>22</sup> MidAmerican argues that due process requires that MidAmerican receive an opportunity to respond to allegations against it. Yet, the Commission has never given market-based sellers an opportunity to demonstrate that the sink language will ensure just and reasonable rates. *Id.* at 27 (footnote omitted).

<sup>23</sup> MidAmerican notes that majority of sales made at the bus resulted in delivery out of the balancing authority area. From August 7, 2005 to March 31, 2006, MidAmerican made approximately 2.1 million MWh of bus sales to entities who moved the energy outside of the balancing authority area and only 1808 MWh (0.08 percent of bus sales) unknowingly ended up in the MidAmerican balancing authority area. *Id.* at 29.

language. The March 17 Order fully explained the basis for rejecting MidAmerican's sink language. Specifically, the Commission explained that MidAmerican's proposed tariff language ("to serve load that sinks within the MidAmerican [balancing authority] area") would improperly limit mitigation to certain customers, namely, only to sales to buyers that serve end-use customers in the MidAmerican balancing authority area, while improperly allowing market-based rate sales within the MidAmerican balancing authority area to entities that do not serve end-use customers there. The Commission explained that such limitation would not mitigate MidAmerican's ability to attempt to exercise market power over sales in the MidAmerican balancing authority area.<sup>24</sup>

22. Moreover, the Commission noted that MidAmerican's proposed tariff language was contrary to the Commission's direction in the April 14 and July 8 Orders, as well as recent precedent approving mitigation for other entities that failed the indicative screens.<sup>25</sup> As the Commission explained in the March 17 Order, the Commission authorizes sales of electric energy at market-based rates only if the seller and its affiliates do not have, or have *adequately* mitigated, market power in the generation and transmission of such energy, and cannot erect other barriers to entry by potential competitors.<sup>26</sup> The Commission also explained that it had rejected these precise arguments, that access to power sold under mitigated prices should be restricted to buyers serving end-use customers within the relevant geographic market in which the seller has been found to have market power, in the July 8 Order.<sup>27</sup> Therefore, the Commission fully explained in the March 17 Order the basis for its rejection of MidAmerican's sink

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<sup>24</sup> March 17 Order, 114 FERC ¶ 61,280 at P 31.

<sup>25</sup> *Id.* P 32; *see also Oklahoma Gas and Electric Co.*, 114 FERC ¶ 61,297, at P 22 (2006).

<sup>26</sup> March 17 Order, 114 FERC ¶ 61,280 at P 32 (footnote omitted) (emphasis added).

<sup>27</sup> In the July 8 Order, the Commission held that its "role is to assure customers that sellers who are authorized to sell at market-based rates do not have market power or have adequately mitigated it," and therefore, it is inappropriate "to determine the third party buyers with whom the seller will transact, nor is it appropriate to restrict . . . who may buy power from a seller whose sales have been mitigated." 108 FERC ¶ 61,026 at P 146.

language and how its action in that regard was consistent with Commission policy and precedent at the time.<sup>28</sup>

23. Additionally, since the issuance of the March 21 Order, the Commission has further addressed mitigation issues in Order No. 697, and rejected arguments similar to those raised by MidAmerican, such as that the Commission erroneously focused on the physical location of the transaction's point of sale. After careful consideration of the arguments raised by commenters on the scope of mitigation, the Commission concluded that adequately protecting customers from the potential exercise of market power required that it continue to apply mitigation to *all* sales in the balancing authority area in which a seller is found, or presumed, to have market power.<sup>29</sup> In this regard, the Commission rejected proposals that it limit mitigation to sales that "sink" in the balancing authority area in which the seller is mitigated.<sup>30</sup> The Commission stated that allowing a seller that has been found to have market power, or has so conceded, to make market-based rate sales in a balancing authority area in which a seller is found, or presumed, to have market power is inconsistent with the Commission's responsibility under the FPA to ensure that rates are just and reasonable and not unduly discriminatory or preferential.<sup>31</sup> The Commission further stated that, while it generally agrees that it is desirable to allow market-based rate sales into markets where the seller has not been found to have market power, it does not agree that it is reasonable to allow a mitigated seller to make market-based rate sales *anywhere* within a balancing authority area in which the seller has been found to have market power, or has so conceded, as it is unrealistic to believe that such sales could be effectively monitored to ensure against improper sales.<sup>32</sup> However, the Commission stated that it would allow mitigated sellers

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<sup>28</sup> The Commission rejected proposed tariff language with similar sink language. *See, e.g., Oklahoma Gas and Electric Co.*, 114 FERC ¶ 61,297 (2006) and *Westar Energy, Inc.*, 116 FERC ¶ 61,219 (2006).

<sup>29</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 817. Although the Commission used the term "mitigated market" in Order No. 697, the Commission later determined that "balancing authority area in which a seller is found, or presumed, to have market power" is a more accurate way to describe the area in which a seller is mitigated. Accordingly, we use that phrase herein. *See Order Clarifying Final Rule*, 121 FERC ¶ 61,260 at P 7 & n.10.

<sup>30</sup> *Id.* P 818.

<sup>31</sup> *Id.* P 819.

<sup>32</sup> *Id.* P 818-19.

to make market-based rate sales within a mitigated balancing authority area at the metered boundary with a balancing authority area in which the seller has market-based rate authority under certain circumstances.<sup>33</sup> Thus, if MidAmerican wants to make market-based rate sales at the metered boundary, consistent with Order No. 697, it can adopt the relevant tariff provision.<sup>34</sup>

24. Further, we recognize that, in some prior orders, the Commission accepted certain mitigation proposals that included sink language similar to that which we rejected in this proceeding. However, as the Commission has since explained,<sup>35</sup> the Commission's action in those orders was in error and was not consistent with Commission policy.<sup>36</sup> As the Commission stated, all sellers are subject to the requirements of Order No. 697 and thus may not limit mitigation to sales that "sink" in the balancing authority area where the mitigated seller has been found, or presumed, to have market power. Rather, such sellers are required to comply with the mitigation policy as stated in Order No. 697.<sup>37</sup>

25. Finally, we disagree with MidAmerican's assertion that ordering refunds is unfairly retroactive. As explained herein, in the March 17 Order, the Commission rejected MidAmerican's proposed market-based rate tariff regarding mitigation and

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<sup>33</sup> Such sales will be allowed provided: (i) legal title of the power sold transfers at the metered boundary of the balancing authority area where the seller has market-based rate authority; (ii) any power sold is not intended to serve load in the seller's mitigated market; and (iii) no affiliate of the mitigated seller will sell the same power back into the mitigated seller's mitigated market. Seller must retain, for a period of five years from the date of the sale, all data and information related to the sale that demonstrates compliance with items (i), (ii), and (iii) above. Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 830.

<sup>34</sup> The required tariff provision need not also be effective September 18, 2007, and may be effective as of the date that the market-based rate seller commences making market-based rate sales at the metered boundary.

<sup>35</sup> Order Clarifying Final Rule, 121 FERC ¶ 61,260 at P 7; *South Carolina Electric & Gas Co.*, 121 FERC ¶ 61,263, at P 12 (2007); *LG&E Energy Marketing, Inc.*, 122 FERC ¶ 61,175, at P 32 (2008).

<sup>36</sup> Indeed, the Commission otherwise has consistently rejected proposals to limit mitigation to sales that sink in the mitigated balancing authority area. *See supra* note 28.

<sup>37</sup> Order Clarifying Final Rule, 121 FERC ¶ 61,260 at P 7.

explicitly ordered MidAmerican not to make any sales in the MidAmerican balancing authority area.<sup>38</sup> Therefore, the March 17 Order provided sufficient notice that any sales under the rejected tariff language would be subject to refund. In addition, the Commission's basis for rejecting the tariff language was consistent with the April 14 and July 8 Orders,<sup>39</sup> and now Order No. 697.<sup>40</sup> Thus, to the extent MidAmerican made any sales under its market-based rate tariff since the refund effective date in this proceeding<sup>41</sup> in the MidAmerican balancing authority area, we will direct MidAmerican to make refunds within 30 days of the date of issuance of this order, with interest. In addition, we will direct MidAmerican to file a refund report within 15 days after making refunds. If no additional refunds are due, MidAmerican must file with the Commission within 30 days of the date of issuance of this order so stating.

26. For the foregoing reasons, we believe that we have fully explained the basis of our rejection of MidAmerican's mitigation proposal, including how such a rejection was consistent with Commission policy. Accordingly, we will reject the request for rehearing.

#### **B. Compliance Filing**

27. Notwithstanding the directives of the March 17 Order, in its compliance filing, MidAmerican proposes alternative market-based rate tariff language to address the Commission's market power concerns. MidAmerican states that its proposed tariff language focuses on whether MidAmerican could exercise market power over transactions that affect entities that purchase on behalf of, or for resale to, loads within the only destination market subject to mitigation. MidAmerican contrasts this against the geographical location where customers may take responsibility for transmitting the power to a final destination.

28. Additionally, MidAmerican claims that it has developed and implemented verification and oversight procedures to carry out the proposed tariff language and ensure

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<sup>38</sup> See discussion *supra* P 21-22; see also March 17 Order, 114 FERC ¶ 61,280 at P 31.

<sup>39</sup> March 17 Order, 114 FERC ¶ 61,280 at P 32.

<sup>40</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 817-19.

<sup>41</sup> The refund effective date is August 7, 2005.

that market-based sales of energy for delivery outside the MidAmerican balancing authority area are in fact delivered outside of the balancing authority area.<sup>42</sup>

29. MidAmerican also submitted revisions to its power sales tariff in accordance with the March 17 Order, where the Commission rejected Schedule B because it did not provide for cost-based rates. MidAmerican states that the pricing mechanism under Schedule B was not intended to provide for cost-based rates and MidAmerican does not believe that prior Commission orders reasonably can be read to limit mitigation proposals to cost-based rates. Nevertheless, MidAmerican states that, in compliance with the March 17 Order, it proposes to delete Schedule B from the power sales tariff, including certain internal references within the tariff to that schedule.

### **Commission Determination**

30. While MidAmerican offers verification and oversight procedures to protect customers in a mitigated market, we find that its proposal is inconsistent with the Commission directives in March 17 Order and, therefore, we will reject it.<sup>43</sup> MidAmerican's proposed tariff language allows for sales within MidAmerican's balancing authority area, as long as the sale is ultimately going outside. That is inconsistent with our direction in the March 17 Order. Additionally, in Order No. 697, the Commission explained that it is unrealistic to believe that sales made anywhere in a balancing authority area can be traced to ensure that no improper sales are taking place. Indeed, several commenters noted that complex administrative problems would be associated with trying to monitor such sales.<sup>44</sup> In contrast, however, the Commission stated that it would allow market-based rate sales at the metered boundary for export

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<sup>42</sup> See discussion *supra* P 16 and note 19.

<sup>43</sup> We note that MidAmerican's proposed methodology is outside the scope of this compliance filing. The Commission has long established that compliance filings must be limited to the specific directives ordered by the Commission. The purpose of a compliance filing is to make the directed changes and the Commission's focus in reviewing them is whether they comply with the Commission's previously-stated directives. See *Pacific Gas and Electric Co.*, 109 FERC ¶ 61,336, at P 5 (2004); *Midwest Independent Transmission System Operator, Inc.*, 99 FERC ¶ 61,302, at 62,264 (2002); *ISO New England, Inc.*, 91 FERC ¶ 61,016, at 61,060 (2000); *Sierra Pacific Power Co.*, 80 FERC ¶ 61,376, at 62,271 (1997); *Delmarva Power & Light Co.*, 63 FERC ¶ 61,321, at 63,160 (1993).

<sup>44</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 818.

because such sales lend themselves to being monitored for compliance, and the nature of these types of sales does not unduly disadvantage customers or competitors. Therefore, the Commission stated that it would allow such sales to be made at market-based rates.<sup>45</sup> In that regard, if MidAmerican wants to make market-based rate sales at the metered boundary, it may adopt the relevant tariff provisions required under Order No. 697 and file them with the Commission.<sup>46</sup>

31. We will direct MidAmerican to revise its market-based tariff to reflect its commitment not to make any sales at market-based rates in its balancing authority area, effective August 7, 2005, and to file it with the Commission within 30 days of the date of this order.<sup>47</sup> The revised tariff will be effective until September 18, 2007, the effective date of Order No. 697.<sup>48</sup> Additionally, to the extent that MidAmerican made any sales under its market-based rate tariff in the MidAmerican balancing authority area during the refund effective period at rates that were above the rates under the mitigation proposal accepted by the Commission, we will direct MidAmerican, within 30 days of the date of issuance of this order, to make refunds, with interest. Also, we will direct MidAmerican to file a refund report within 15 days after making refunds. If no refunds were due, MidAmerican is expected to file with the Commission within 30 days of the date of issuance of this order so stating.

32. In addition, we note that MidAmerican's tariff is not consistent with the Commission's current policy as set forth in Order No. 697 in other respects. For example: (1) the ancillary service provisions do not conform to the two standard provisions required under Order No. 697 – a provision requiring compliance with Commission regulations and a provision identifying all limitations and exemptions regarding the seller's market-based rate authority;<sup>49</sup> (2) the now-codified change in status

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<sup>45</sup> *Id.* P 820-21.

<sup>46</sup> *See supra* note 33.

<sup>47</sup> March 17 Order, 114 FERC ¶ 61,280 at P 33.

<sup>48</sup> In the Order Clarifying Final Rule, the Commission clarified that sellers are required to comply with all of the requirements of Order No. 697 as of the effective date of the Final Rule. Thus, any sales made after September 18, 2007 are expected to be in compliance with the requirements of Order No. 697. Order Clarifying Final Rule, 121 FERC ¶ 61,260 at P 5.

<sup>49</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 914-915.

reporting requirement must be removed; (3) the affiliate sales restriction must be removed; (4) the code of conduct must be removed; (5) any transmission-related provisions that are still in its market-based rate tariff must be removed; and (6) the tariff must be properly designated according to Order No. 614.<sup>50</sup> As of the effective date of Order No. 697 (September 18, 2007), MidAmerican became subject to the requirements of that Final Rule. Accordingly, we will direct MidAmerican, within 30 days from the date of this order, to revise its market-based rate tariff in compliance with Order No. 697.<sup>51</sup>

33. With regard to the revisions to MidAmerican's power sales tariff specifically deleting Schedule B and any references to Schedule B contained therein, the Commission finds these revisions to be consistent with the March 17 Order. Therefore, we will accept these revisions, effective August 7, 2005.<sup>52</sup>

### **C. Refund Report**

34. On December 22, 2006, MidAmerican filed a refund report pursuant to the Settlement filed on May 19, 2006, which set forth rates for service under Schedule A. In the refund report, MidAmerican states that it determined that certain refunds are owed to Ames (IA) Municipal Electric System, Corn Belt Power Cooperative, Pella (IA) Municipal Power & Light Department, and Geneseo (IL) Municipal Electric Utility as a result of the mitigation measures. MidAmerican states that it identified those transactions occurring during the refund period in which the energy sold was at a total cost above the cost caps set forth in the settlement rates accepted by the Commission in the November 9 Order, that sank in the MidAmerican balancing authority area. We will accept MidAmerican's refund report.<sup>53</sup>

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<sup>50</sup> *Designation of Electric Rate Schedule Sheets*, Order No. 614, FERC Stats. & Regs. ¶ 31,096 (2000).

<sup>51</sup> *See* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 923-24; *see also Niagara Mohawk Power Corporation*, 121 FERC ¶ 61,275 (2007).

<sup>52</sup> FERC Electric Tariff, Original Volume No. 11, First Substitute Sheet No. 1, First Substitute Sheet Nos. 9-10.

<sup>53</sup> While we will accept this refund report, as noted above, MidAmerican is subject to refund for any sales made under MidAmerican's market-based rate tariff since the refund effective date in this proceeding in its balancing authority area that were not captured in this refund report.

**D. Notice of Change in Status**

35. MidAmerican, Cordova, and PacifiCorp state that they are providing notice to the Commission of the change in ownership of PacifiCorp which results in a change in the ownership or control of generation and transmission facilities of PacifiCorp. Additionally, they believe that the change in status resulting from the change does not raise any market power concerns that would provide a basis for the Commission to disturb the existing grant of market-based rate authority to each of MidAmerican, Cordova, and PacifiCorp.

**Commission Determination**

36. 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>54</sup> MidAmerican, Cordova, and Pacificorp provided analysis on horizontal market power, vertical market power, and affiliate abuse that support their statement that no market power concerns are raised with the change in status. Based on their representation, the Commission finds that they satisfy the Commission's horizontal and vertical market power standard for the grant of market-based rate authority and satisfy the Commission's concerns with regard to affiliate abuse.

37. The Commission evaluates whether a market-based rate seller or any of its affiliates have market power.<sup>55</sup> The Commission notes that, when a seller relinquishes market-based rate authority in certain balancing authority areas, each affiliate of the seller is required to do so as well. In this regard, we will conditionally accept this notice of change in status subject to Cordova and PacifiCorp making a filing, within 30 days of the date of this order, to inform the Commission of how they intend to treat the MidAmerican

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<sup>54</sup> We note that the Commission recently revised and codified in the Commission's regulations the standards pertaining to market-based rates. *See* Order No. 697, FERC Stats. & Regs. ¶ 31,252. Given that MidAmerican, Cordova, and PacifiCorp filed their market power analysis prior to the effective date of Order No. 697, the Commission examined the filing based on the market-based rate analysis in effect at that time. However, they are reminded that they became subject to the requirements of Order No. 697 on September 18, 2007, the effective date of Order No. 697.

<sup>55</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 3.

balancing authority area, i.e., whether Cordova and PacifiCorp intend to revise their existing market-based rate tariffs to include a mitigation provision for this area.

The Commission orders:

(A) MidAmerican's request for clarification and/or rehearing is hereby denied, as discussed in the body of this order.

(B) MidAmerican's revised market-based rate tariff revisions are hereby rejected, as discussed in the body of this order.

(C) MidAmerican's revisions to its power sales tariff concerning Schedule B, effective August 7, 2005, are hereby accepted, as discussed in the body of this order.

(D) MidAmerican is hereby directed, within 30 days of the date of this order, to revise its market-based rate tariff to reflect its commitment not to make any sales at market-based rates in its balancing authority area, as discussed in the body of this order.

(E) MidAmerican is hereby directed, within 30 days of the date of this order, to revise its market-based rate tariff to comply with Order No. 697, as discussed in the body of this order.

(F) The notice of change in status filed by MidAmerican, Cordova, and PacifiCorp is hereby conditionally accepted for filing.

(G) Cordova and PacifiCorp are hereby directed, within 30 days of the date of this order, to make a filing informing the Commission as to how they intend to treat the MidAmerican balancing authority area, as discussed in the body of this order.

(H) MidAmerican's refund report is hereby accepted for filing, as discussed in the body of this order.

(I) MidAmerican is hereby directed to make refunds within 30 days of the date of issuance of this order, with interest, calculated pursuant to 18 C.F.R. § 35.19a(a)(2) (2007), and to file a refund report with the Commission within 15 days of the date

refunds are made, as discussed in the body of the order. If no refunds are due, MidAmerican is directed to file with the Commission within 30 days of the date of issuance of this order so stating.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.