

123 FERC ¶ 61,231  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Dayton Power and Light Company  
DPL Energy, LLC

Docket Nos. ER96-2601-020  
ER96-2602-009

ORDER ACCEPTING UPDATED MARKET POWER ANALYSIS AND  
ACCEPTING ORDER NO. 697 COMPLIANCE FILING, AND DIRECTING  
FURTHER COMPLIANCE FILING

(Issued June 3, 2008)

1. In this order, the Commission accepts an updated market power analysis filed by Dayton Power and Light Company (DP&L) and its affiliated marketer DPL Energy, LLC (DPLE) (collectively, Dayton). As discussed below, the Commission concludes that Dayton satisfies the Commission's standards for market-based rate authority. The Commission also conditionally accepts Dayton's proposed market-based rate tariff revisions to incorporate provisions as adopted in Order No. 697,<sup>1</sup> subject to a further compliance filing.
2. Additionally, as discussed below, Dayton meets the criteria for a Category 2 seller and is so designated. Dayton's next updated market power analysis must be filed according to the regional schedule adopted in Order No. 697.<sup>2</sup>

**Background**

3. Dayton is a wholly-owned subsidiary of DPL Inc. (DPL), a diversified regional energy company based in Dayton, Ohio.

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<sup>1</sup> *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 914-918, *clarified*, 121 FERC ¶ 61,260 (2007) (Order Clarifying Final Rule), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 (2008).

<sup>2</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 882-893, App. D; Order Clarifying Final Rule, 121 FERC ¶ 61,260 at P 9, 10, App. D-1.

4. DPL indirectly owns a total of 3,864 MW of generating capacity comprised of DP&L's 3,380 MW of capacity and DP&L's 484 MW of capacity, all of which is located in the PJM Interconnection, LLC (PJM) market.<sup>3</sup>

5. On December 17, 2007, as amended on April 23, 2008, Dayton filed an updated market analysis in accordance with the regional reporting schedule adopted in Order No. 697.<sup>4</sup> Dayton also submitted revised tariff sheets to incorporate the required provisions adopted by the Commission in Order No. 697.<sup>5</sup>

### **Notices and Responsive Pleadings**

6. Notices of Dayton's December 17, 2007 filing and its April 23, 2008 filing were published in the *Federal Register*,<sup>6</sup> with interventions or protests due on or before January 7, 2008 and May 5, 2008, respectively. None were filed.

### **Discussion**

#### **A. Market-Based Rate Authorization**

7. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, horizontal and vertical market power.<sup>7</sup> As discussed below, the Commission concludes that Dayton satisfies the Commission's standards for market-based rate authority.

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<sup>3</sup> Dayton was authorized to sell electric energy and capacity at wholesale at market-based rates in *DPL Energy, Inc., et al.*, 76 FERC ¶ 61,367 (1996).

<sup>4</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 882. The Commission stated that "both the Commission and market participants will benefit from greater data consistency that will result from regional examination of updated market power analyses and a methodical study of all sellers in the same region. This will give the Commission a more complete view of market forces in each region and the opportunity to reconcile conflicting submissions, enhancing our ability to ensure that sellers' rates remain just and reasonable." *See also* Order Clarifying Final Rule, 121 FERC ¶ 61,260 at P 13.

<sup>5</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 914-918.

<sup>6</sup> 72 Fed. Reg. 74,278 (2007); 73 Fed. Reg. 24,274 (2008).

<sup>7</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 62, 399, 408, 440.

**B. Horizontal Market Power**

8. The Commission adopted two indicative screens for assessing horizontal market power, the pivotal supplier screen and the wholesale market share screen.<sup>8</sup>

9. Dayton has prepared the pivotal supplier and wholesale market share screens for the PJM market, consistent with the requirements of Order No. 697.<sup>9</sup>

10. The Commission has reviewed Dayton's pivotal supplier screen and wholesale market share screen and has determined that Dayton passes the pivotal supplier screen and the wholesale market share screen in the PJM market. Accordingly, the Commission finds that Dayton satisfies the Commission's requirements for market-based rates regarding horizontal market power.

**C. Vertical Market Power**

11. The Commission requires in cases where a public utility, or any of its affiliates, owns, operates, or controls transmission facilities that there be a Commission-approved Open Access Transmission Tariff (OATT) on file before granting a seller market-based rate authorization.<sup>10</sup>

12. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.<sup>11</sup> The Commission requires a seller to provide a description of its ownership or control of, or affiliation with an entity that owns or controls, intrastate natural gas transportation, storage or distribution facilities; sites for generation capacity development; and sources of coal supplies and equipment for the transportation of coal supplies such as barges and rail cars (collectively, inputs to electric power production).<sup>12</sup> The Commission also requires sellers to make an affirmative statement that they have not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.<sup>13</sup>

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<sup>8</sup> *Id.* P 62.

<sup>9</sup> *Id.* P 235.

<sup>10</sup> *Id.* P 408.

<sup>11</sup> *Id.* P 440.

<sup>12</sup> *Id.* P 447. In Order No. 697-A, the Commission revised the definition of inputs to electric power production to include "physical coal supply sources and ownership of or control over who may access transportation of coal supplies." Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 176.

<sup>13</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447.

13. Dayton states that it is a member of PJM which is a Commission-approved Regional Transmission Operator with an OATT on file with the Commission, and therefore has mitigated any transmission market power.<sup>14</sup>

14. Further, Dayton states that it does not own or control inputs to electric power production and Dayton affirmatively states that its affiliates have not erected barriers to entry and will not erect barriers to entry in the future.

15. Based on Dayton's representations, Dayton's submittal satisfies the Commission's requirements for market-based rates regarding vertical market power.

#### **D. Order No. 697 Compliance Filing**

16. In Order No. 697, the Commission adopted two standard required provisions that each seller must include in its market-based rate tariff: a provision requiring compliance with the Commission's regulations and a provision identifying any limitations and exemptions regarding the seller's market-based rate authority.<sup>15</sup> In addition to the required tariff provisions, the Commission adopted a set of standard provisions that must be included in a seller's market-based rate tariff to the extent that they are applicable.<sup>16</sup>

17. Dayton's revised market-based rate tariffs include the provision requiring compliance with the Commission's regulations and, thus, satisfy the requirements of Order No. 697.

18. However, Dayton's proposed section on Limitations and Exemptions Regarding Market-Based Rate Authority does not satisfy the requirements of Order No. 697 in three respects. First, as stated in Appendix C of Order No. 697, in this section of the tariff, "Seller should list all limitations (including markets where the seller does not have market-based rate authority) on its market-based rate authority and any exemptions from or waivers granted of Commission regulations and include relevant cites to Commission orders."<sup>17</sup> Dayton has not done so in its revised tariffs. Also, Dayton's proposed section on Ancillary Services should be in a stand-alone section, not in the section on Limitations and Exemptions Regarding Market-Based Rate Authority. In addition, Dayton's proposed section on Affiliate Transactions should be deleted from the tariff, because that language has been superseded by Appendix C of Order No. 697. Dayton should reflect

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<sup>14</sup> See *MidContinent Area Power Pool, et al.*, 81 FERC ¶ 61,257 (1997).

<sup>15</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 914.

<sup>16</sup> *Id.* P 917.

<sup>17</sup> See, e.g., the tariff filed in Docket No. ER99-2541-009, et al., that the Commission accepted for filing in *Carthage Energy, LLC*, 123 FERC ¶ 61,186 (2008).

these changes in a compliance filing within 30 days of the date of this order, as ordered below.

19. Dayton's revised tariffs include a set of standard provisions with regard to sales of certain ancillary services in the PJM market. These provisions satisfy the requirements of Order No. 697.

20. In P 9 of its April 23 filing, Dayton requests a finding that "DP&L, DPLE and other affiliated entities do have 'captive customers' and that, therefore, the restrictions set forth in 18 C.F.R. § 35.39 do not apply and should be waived." We assume that Dayton meant to request that the Commission find that DP&L, DPLE, and other affiliated entities do *not* have captive customers, and we have reviewed its filing accordingly. Dayton states that it has no captive wholesale sales customers, and that the only customers purchasing under fixed rate agreements have the ongoing option, at 90-day intervals, exercisable at their own option, to schedule purchases from DP&L at their stated rates or to purchase power elsewhere. Additionally, Dayton states that the stated cost-based prices are subject to a cap that permits escalation at no more than three percent per year through 2014, and even then, any such change would not be effective without a filing at the Commission pursuant to section 205 of the Federal Power Act.<sup>18</sup> Dayton also states that it has no captive retail sales customers and that under Ohio law and enabling orders of the Public Utility Commission of Ohio every retail customer has retail choice.

21. Consistent with Order Nos. 697 and 697-A, we find that, based on Dayton's representations, its wholesale customers are adequately protected from affiliate abuse.<sup>19</sup> Additionally, based on Dayton's representation that under Ohio law every retail customer has retail choice, we find that there are no captive retail customers. Accordingly, we find that the affiliate abuse restrictions of 18 C.F.R. § 35.39 do not apply. This determination that the affiliate restrictions do not apply will remain in effect unless there is a change in status that would require a review of the waiver. Should circumstances change, Dayton must make a change in status filing notifying us of such change.

22. In addition, in Exhibit 3 (Pivotal Supplier Analysis) of the April 23 filing, the calculation in row K (total uncommitted supply) should include the value of M (average daily peak native load in peak month), and the calculation in row P (net uncommitted supply) should not include the value of M.<sup>20</sup> However, even when we make these two

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<sup>18</sup> 16 U.S.C. § 824d (2000 & Supp. V 2005).

<sup>19</sup> See Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 480; Order No. 697-A, 123 FERC ¶ 61,055 at P 200.

<sup>20</sup> See Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, Appendix A (Standard Screen Format).

corrections to Dayton's calculations, the result does not change and Dayton still passes the pivotal supplier screen.

23. Dayton also includes an asset appendix, as required by Order No. 697,<sup>21</sup> that identifies generation assets owned and controlled by Dayton.

24. Therefore, Dayton's revised market-based rate tariffs, as modified herein, satisfy the Commission's requirements set forth in Order No. 697. Accordingly, we will accept Dayton's revised market-based rate tariffs, effective September 18, 2007, as requested, subject to the compliance filing ordered below.

#### **E. Reporting Requirements**

25. 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: (1) a summary of the contractual terms and conditions in every effective service agreement for market-based power sales; and (2) transaction information for effective short-term (less than one year) and long-term (one year or longer) market-based power sales during the most recent calendar quarter.<sup>22</sup> Public utilities must file Electric Quarterly Reports no later than 30 days after the end of the reporting quarter.<sup>23</sup>

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<sup>21</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 894.

<sup>22</sup> *Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127, *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reh'g denied*, Order No. 2001-B, 100 FERC ¶ 61,342, *order directing filing*, Order No. 2001-C, 101 FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001-D, 102 FERC ¶ 61,334 (2003). Attachments B and C of Order No. 2001 describe the required data sets for contractual and transaction information. Public utilities must submit Electric Quarterly Report 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>23</sup> The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2007). 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.

26. Dayton 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>24</sup>

27. Additionally, in Order No. 697, the Commission created two categories of sellers.<sup>25</sup> Category 1 sellers are not required to file regularly scheduled updated market power analyses. Category 1 sellers are wholesale power marketers and wholesale power producers that own or control 500 MW or less of generation in aggregate per region; that do not own, operate, or control transmission facilities other than limited equipment necessary to connect individual generation facilities to the transmission grid (or have been granted waiver of the requirements of Order No. 888); that are not affiliated with anyone that owns, operates or controls transmission facilities in the same region as the seller's generation assets; that are not affiliated with a franchised public utility in the same region as the seller's generation assets; and that do not raise other vertical market power issues.<sup>26</sup> Sellers that do not fall into Category 1 are designated as Category 2 and are required to file regularly scheduled updated market power analyses.<sup>27</sup>

28. Based on Dayton's representations, we find that Dayton meets the criteria for a Category 2 seller and is so designated based on its ownership of generation totaling greater than 500 MW of capacity and its ownership of transmission facilities in PJM. Thus, Dayton must file an updated market power analysis in compliance with the regional reporting schedule adopted in Order No. 697.<sup>28</sup> The Commission also reserves the right to require such an analysis at any intervening time.

The Commission orders:

(A) Dayton's updated market power analysis is hereby accepted for filing.

(B) Dayton is hereby directed to submit a compliance filing within 30 days of the date of this order, as discussed in the body of this order.

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<sup>24</sup> *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005); 18 C.F.R. § 35.42.

<sup>25</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 848.

<sup>26</sup> 18 C.F.R. § 35.36(a)(2).

<sup>27</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 850.

<sup>28</sup> *Id.* P 882.

(C) Dayton's revisions to its market-based rate tariff sheets are hereby accepted for filing, as modified in accordance with Ordering Paragraph (B), effective September 18, 2007, as requested, as discussed in the body of this order.

(D) Dayton is hereby directed to file an updated market analysis according to the regional reporting schedule adopted in Order No. 697.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.