

135 FERC ¶ 61,090
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Shell Energy North America (US), L.P. Docket Nos. ER08-656-007
ER08-656-009
EL10-83-000
EL10-83-001

ORDER ON MARKET-BASED RATES, TERMINATING SECTION 206
PROCEEDING, AND DENYING REQUEST FOR REHEARING AND
CLARIFICATION

(Issued April 28, 2011)

1. On October 12, 2010, the Commission issued an order addressing an updated market power analysis filed by Shell Energy North America (US), L.P. (Shell) for the Southwest Power Pool (SPP) region.¹ In that order, the Commission instituted a proceeding under section 206 of the Federal Power Act (FPA)² to investigate horizontal market power issues in the Central and Southwest (CSWS)³ balancing authority area. In this order, the Commission finds that Shell satisfies the Commission's horizontal market power standard for the grant of market-based rate authority. Accordingly, this order terminates the section 206 proceeding instituted in Docket No. EL10-83-000. Also, the Commission denies Shell's request for rehearing of the October 12 Order.

I. Background

2. On March 1, 2010, as amended on April 12, 2010 and July 9, 2010, Shell filed an updated market power analysis for the SPP region in accordance with the regional

¹ *Shell Energy North America (US), L.P.*, 133 FERC ¶ 61,033 (2010) (October 12 Order).

² 16 U.S.C. § 824e (2006).

³ The Central and Southwest balancing authority area is also known as the American Electric Power-West (AEP-West) balancing authority area.

schedule adopted in Order No. 697.⁴ Shell's market power analysis indicated that Shell passed the pivotal supplier indicative screen, but failed the wholesale market share indicative screen in the CSWS balancing authority area, which is within the SPP region. Accordingly, Shell submitted a supplement containing a delivered price test (DPT) analysis and additional arguments in an attempt to rebut the presumption of horizontal market power arising from its failure of the wholesale market share indicative screen in the CSWS balancing authority area.

3. In addition, Shell provided evidence that, according to Shell, demonstrated that transmission constraints significantly limit the amount of generation that can be delivered within the CSWS balancing authority area from the Tenaska Gateway (Gateway)⁵ and Tenaska Kiamichi (Kiamichi)⁶ generating facilities, the output of which Shell controls under long-term tolling agreements with their respective owners Tenaska Gateway Partners, Ltd. and Kiowa Partners, LLC.⁷ Shell also stated that although these facilities are each connected to both the CSWS balancing authority area and the Electric Reliability Council of Texas (ERCOT) market, due to physical deliverability constraints and market conditions, these two generating facilities are almost always dispatched into the ERCOT market and are very rarely dispatched into the CSWS balancing authority area.⁸ Shell claimed that when those transmission constraints and actual historical operations are taken into account, its market share falls well below the Commission's 20 percent threshold.

⁴ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010).

⁵ Tenaska Gateway is an 863 megawatt (MW) generating facility located in Rush County, Texas.

⁶ Tenaska Kiamichi is a 1,178 MW facility located in Pittsburg County, Oklahoma.

⁷ Under the terms of Shell's tolling agreements, Shell provides the fuel for the Gateway and Kiamichi facilities and purchases the electrical energy produced by these facilities. Show Cause Filing at 2-3.

⁸ October 12 Order, 133 FERC ¶ 61,033 at P 4. According to Shell, "each of the four generators at [Tenaska] Gateway and each of the six generators at [Tenaska] Kiamichi is 'switchable' between the ERCOT and SPP grids, that is, the generators can be synchronized to either the ERCOT or Eastern Interconnection grids, but not both grids at the same time." April 12, 2010 Filing, Supplemental Affidavit of Julie Solomon at 2-3.

4. In the October 12 Order, the Commission found that, after weighing all of the relevant evidence, the results of Shell's analysis merited further investigation into whether or not Shell has the ability to exercise market power in the CSWS balancing authority area. Therefore, the Commission instituted a proceeding in Docket No. EL10-83-000, pursuant to section 206 of the FPA, to determine whether Shell's market-based rate authority in the CSWS balancing authority area remains just and reasonable. In doing so, the Commission directed Shell, within 60 days of the issuance of the order, to show cause as to why the Commission should not revoke its authority to sell power at market-based rates in the CSWS balancing authority area. In this regard, the Commission noted that Shell could present additional evidence, and that the Commission would further examine Shell's evidence concerning deliverability constraints and historical sales as part of the section 206 investigation. In the alternative, the Commission gave Shell the option to file a mitigation proposal tailored to Shell's particular circumstances or inform the Commission that it will adopt the Commission's default cost-based rates or propose other cost-based rates.⁹

5. On November 12, 2010, Shell filed a timely request for rehearing of the October 12 Order. Shell filed its response to the October 12 Order on January 12, 2011.¹⁰

II. Notice and Responsive Pleadings

6. Notice of Shell's response to the October 12 Order was filed in the *Federal Register*, 76 Fed. Reg. 4647 (2011), with interventions or protests due on or before February 2, 2011. None was filed.

III. Discussion

A. Response to the October 12 Order

1. Shell's Response

7. Shell argues that its evidence of historical sales and existing transmission constraints is sufficient to rebut the presumption that Shell has horizontal market power in the CSWS balancing authority area. Shell claims that this evidence conclusively demonstrates that Shell lacks the ability to exercise horizontal market power in the CSWS balancing authority area. Shell maintains that the Commission defines market power as a seller's ability to significantly influence price in the market by withholding

⁹ *Id.* P 24.

¹⁰ On December 8, 2010, in response to a motion filed by Shell, the time for Shell to comply with the requirements of the October 12 Order was extended to January 12, 2011.

service and excluding competitors for a significant period of time. Shell also maintains that a seller with market power should reasonably be expected to use its ability to exercise market power to make profitable sales in that market and that, by the same token, a seller for whom sales in a particular market are neither profitable nor possible obviously lacks market power. Thus, according to Shell, the fact that Shell has not sold power in the CSWS balancing authority area since 2007 negates any contention that Shell may have the ability to exercise market power in that balancing authority area.¹¹

8. Shell further argues that the existing transmission limitations within the CSWS balancing authority area rebut any indicative screen suggesting that Shell's market share in the CSWS balancing authority area exceeds 20 percent. Shell states that, in order to confirm this fact, as recently as July 2010, Shell submitted transmission service requests to SPP to deliver a share of the output of the Kiamichi facility into the CSWS balancing authority area. It submitted requests for one day of firm point-to-point transmission service for 1,120 MW, 1,020 MW, 920 MW, and 820 MW. It states that SPP refused each of those requests. Shell states that SPP's response to these requests is consistent with previous studies by AEP and SPP, which found limited deliverability from the Gateway and Kiamichi facilities. Shell contends that the existence of transmission constraints, along with Shell's historical sales data, demonstrates that the potential market power concerns identified by the indicative screens are vastly overstated.¹²

9. Shell goes on to argue that the Commission erred by failing to consider the additional data and evidence submitted by Shell and that the Commission ignored the fact that, despite uneven DPT results, the alternative data Shell submitted shows that transmission constraints prevent Shell from fully dispatching power from the Gateway and Kiamichi facilities within the CSWS balancing authority area and that Shell has not sold any power in the CSWS balancing authority area since 2007. Shell claims that the Commission instead applied a pass/fail test based on the DPT and that the Commission's rigid emphasis on screen results and disregard for alternative evidence is inconsistent with Commission precedent. Shell requests that, to the extent that the Commission has deferred weighing the DPT results and Shell's alternative evidence, the Commission consider such evidence now.¹³

10. In the event that the Commission finds that Shell has failed to rebut the presumption of horizontal market power, Shell proposes tailored mitigation. Specifically, Shell proposes to cap its rates for short-term sales in the CSWS balancing authority area at the cost of purchasing power from the Gateway and Kiamichi facilities (including costs

¹¹ Show Cause Filing at 7-9.

¹² *Id.* at 9.

¹³ *Id.* at 9-11.

incurred by Shell to purchase and deliver fuel to the generating facilities pursuant to the tolling agreement), plus 10 percent. In the event that Shell purchases power from other unaffiliated suppliers to be resold to customers, Shell proposes to cap its rate at its purchase cost (including transmission and losses), plus 10 percent. Shell states that any contracts for long-term power sales (i.e., one year or more) will be filed with the Commission for review and prior authorization under section 205 of the FPA.¹⁴

11. Shell states that if the Commission revokes Shell's market-based rate authorization in the CSWS balancing authority area, the Commission should allow Shell to retain its existing waivers of Parts 41, 101, and 141 of the Commission's regulations and its blanket authorization under Part 34. Shell states that none of Shell's activities in the CSWS balancing authority area implicates the policy concerns underlying these regulations and requirements and that the Commission has previously permitted sellers to retain these waivers where a non-traditional public utility had adopted cost-based rates for limited purposes.¹⁵

2. Commission Determination

12. After weighing all of the relevant factors, the Commission finds that, on balance, Shell has rebutted the presumption of horizontal market power in the CSWS balancing authority area and satisfies the Commission's horizontal market power standard for the grant of market-based rate authority.

13. In the October 12 Order, we determined that the results of Shell's market power analysis merited further scrutiny. Upon further examining the evidence submitted by Shell, we find that, on balance, Shell has rebutted the presumption of market power. Specifically, Shell's DPT analysis indicates that Shell is not pivotal in any season/load period under either the economic capacity measure or the available capacity measure. Moreover, while Shell's market shares exceed 20 percent in multiple seasons/load periods, Shell's market concentration analysis indicates that the Hirschman-Herfindahl Index (HHI)¹⁶ in the CSWS balancing authority area is below 2,500 in every season/load period under the available economic capacity measure.¹⁷ Thus, we find that Shell passes

¹⁴ *Id.* at 11, 13-14.

¹⁵ *Id.* at 14-15.

¹⁶ The HHI is the sum of the squared market shares. For example, in a market with five equal size firms, each would have a 20 percent market share. For that market, $HHI = (20)^2 + (20)^2 + (20)^2 + (20)^2 + (20)^2 = 400 + 400 + 400 + 400 + 400 = 2,000$.

¹⁷ Furthermore, under the economic capacity measure, Shell's market shares are below 20 percent in every season/load period.

two of the three screens (pivotal supplier and HHI) under the available economic capacity measure. In addition, we note that Shell has not made sales in the CSWS balancing authority area since 2007.¹⁸ In conclusion, after weighing all of the evidence, we find that Shell does not have the ability to exercise horizontal market power in the CSWS balancing authority area. Our decision is based on our review and analysis of the evidence in the record, including the historical sales data. However, should Shell or any of its affiliates make sales in the CSWS balancing authority area, we would consider this a change in the circumstances on which the Commission relied in finding that Shell has rebutted the presumption of horizontal market power and Shell must notify the Commission within 30 days of the date of any such sale.¹⁹

B. Request for Rehearing

1. Shell's Request for Rehearing

14. Shell argues that the Commission erred in the October 12 Order by ignoring the evidence that Shell had provided to the Commission at that time, which Shell contends demonstrates that, despite the mixed results of the DPT analysis, Shell does not have the ability to exercise market power in the CSWS balancing authority area.

2. Commission Determination

15. We will deny Shell's request for rehearing of the October 12 Order. In Order No. 697, the Commission stated that a seller may present evidence, such as a DPT analysis or historical sales and transmission data to support or rebut the results of the indicative screens. The Commission clearly stated, however, that

sellers should not expect that the Commission will postpone initiating a section 206 investigation to protect customers while it examines this supplemental information if screen failures are indicated. Nevertheless, the Commission may factor in this alternative evidence before deciding whether to initiate a section 206 investigation if the alternative evidence is appropriately supported, comprehensive and unambiguous, and conducive to prompt review by the Commission.²⁰

¹⁸ March 1 Filing, Supplemental Affidavit of Julie Solomon at 10. Staff's analysis of EQR data confirms that Shell has not sold power from these facilities in the CSWS balancing authority area since 2007.

¹⁹ 18 C.F.R. § 35.42(a) (2010).

²⁰ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 75.

16. Consistent with Order No. 697, we instituted a section 206 investigation in order to protect customers while we further examined Shell's supplemental information. We further note that, as discussed above, we have examined the alternative evidence provided by Shell and find that Shell has rebutted the presumption of market power. Accordingly, we will deny rehearing.

C. Reporting Requirements

17. 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 (EQR) 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.²¹ Public utilities must file EQRs no later than 30 days after the end of the reporting quarter.²²

²¹ *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), *order on refining filing requirements*, Order No. 2001-E, 105 FERC ¶ 61,352 (2003), *order on clarification*, Order No. 2001-F, 106 FERC ¶ 61,060 (2004), *order revising filing requirements*, Order No. 2001 G, 120 FERC ¶ 61,270, *order on reh'g and clarification*, Order No. 2001-H, 121 FERC ¶ 61,289 (2007), *order revising filing requirements*, Order No. 2001-I, 125 FERC ¶ 61,103 (2008). Attachments B and C of Order No. 2001 describe the required data sets for contractual and transaction information. Public utilities must submit EQRs 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>.

²² The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2010). Failure to file an EQR (without an appropriate request for extension), or failure to report an agreement in an EQR, 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.

18. Shell 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.²³ This includes the timely submission of land acquisition reports.²⁴

19. Additionally, Shell must file an updated market power analysis in the SPP region, in compliance with the regional reporting schedule adopted in Order No. 697.²⁵ The Commission also reserves the right to require such an analysis at any intervening time.

D. Docket No. EL10-83-000

20. The Commission terminates Docket No. EL10-83-000. That proceeding was established to investigate horizontal market power issues in the CSWS balancing authority area. Based on the above findings, the Commission finds that there is no further need for this proceeding.

The Commission orders:

(A) Shell's updated market power analysis is hereby accepted for filing, as discussed in the body of this order.

(B) Shell is hereby directed to file an updated market power analysis according to the regional reporting schedule adopted in Order No. 697, as discussed in the body of this order.

²³ *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 (2010).

²⁴ *See* Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 at P 18 (requiring market-based rate sellers to report the acquisition of control of sites for new generation capacity development on a quarterly basis instead of within 30 days of the acquisition); Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 at P 21-24; 18 C.F.R. § 35.42(d) (2010); *Notice of New Docket Prefix "LA" for Land Acquisition Reports and Guidelines for Filing Under Order No. 697-C*, Docket No. RM04-7-006, 75 Fed. Reg. 22,125 (2010).

²⁵ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 882.

(C) The section 206 proceeding in Docket No. EL10-83-000 is hereby terminated, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.