

139 FERC ¶ 61,140
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

LS Power Marketing, LLC
Arlington Valley, LLC
Griffith Energy LLC
Las Vegas Power Company, LLC

Docket Nos. ER96-1947-029
ER10-450-003
ER00-3696-015
ER07-1000-008

ORDER ON UPDATED MARKET POWER ANALYSIS

(Issued May 22, 2012)

1. On July 30, 2010, LS Power Marketing, LLC (LS Power Marketing), Las Vegas Power Company, LLC (Las Vegas Power Company), Arlington Valley, LLC (Arlington Valley), and Griffith Energy LLC (Griffith Energy) (collectively, the LS Power Entities) filed an updated market power analysis for the Southwest region in accordance with the regional schedule adopted in Order No. 697.¹ As discussed below, the Commission's analysis indicates that the LS Power Entities fail the wholesale market share screen in the Western Area Power Administration – Lower Colorado (WALC) balancing authority area. Such failure establishes a rebuttable presumption of horizontal market power. In this order, the Commission finds that the LS Power Entities have rebutted the presumption of market power in the WALC balancing authority area and satisfy the Commission's standards for the grant of market-based rate authority.

¹ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 882, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *aff'd sub nom. Montana Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011).

I. Background

2. The LS Power Entities state that they are wholly owned by LS Power Group, which consists of LS Power Development, LLC, LS Power Associates, L.P., and their subsidiaries. The LS Power Entities state that LS Power Group develops, owns, and operates independent power projects in the United States.

3. The LS Power Entities represent that they own three generation facilities in the Southwest region which have a combined capacity of 1,644 megawatts (MW): the Apex Project, owned and operated by Las Vegas Power Company; the Arlington Valley Project, owned and operated by Arlington Valley; and the Griffith Project, owned and operated by Griffith Energy. They state that the Apex Project is located in the Nevada Power Company balancing authority area, the Arlington Valley Project is interconnected to the Salt River Project balancing authority area, and the Griffith Project is interconnected to the WALC balancing authority area.

4. The LS Power Entities explain that, under the Commission's regulations, they and other members of LS Power Group are assumed to be affiliated with Calpine Corporation and its subsidiaries based on interests in Calpine Corporation held by affiliates of LSP Development, LLC.

5. In their updated market power analysis, the LS Power Entities included the generation owned or controlled by Calpine Corporation and its respective affiliates and subsidiaries.² According to the LS Power Entities, Calpine Corporation owns or controls approximately 6,300 MW of generation in the Southwest region. They further state that Calpine Corporation owns a 550 MW generation facility (the South Point Facility) within the WALC balancing authority area.

6. The LS Power Entities represent that they and their affiliates (including Calpine Corporation) have no uncommitted capacity in the WALC balancing authority area. The LS Power Entities state that the output of the Griffith Project is sold to Nevada Power Company during the summer months. The LS Power Entities also cite the transmission reservations held by the Griffith Project and the South Point Facility, both of which, according to the LS Power Entities, have points of delivery outside of the WALC balancing authority area. They also claim that those transmission reservations exceed the seasonal generating capacity of the respective facilities. The LS Power Entities thus assert that these transmission reservations are evidence that the output of these facilities

² The Commission accepted the updated market power analysis filed by Calpine Corporation in Docket No. ER10-2042-001. *See Calpine Energy Services, L.P.*, 137 FERC ¶ 61,085 (2011).

is exported outside of the WALC balancing authority area. Therefore, for purposes of their pivotal supplier and market share screens, the LS Power Entities deducted the amount of their firm transmission reservations from installed capacity, resulting in zero uncommitted capacity. The LS Power Entities submit that this treatment of transmission export reservations is consistent with the Commission's requirements to account for long-term firm transmission reservations both when conducting the indicative screens and calculating simultaneous transmission import limitations (SILs).³

7. On August 30, 2010, the LS Power Entities amended their updated market power analysis by filing historical sales data which they state demonstrate that the transmission reservations were used to export energy from the WALC balancing authority area into other markets. The LS Power Entities contend that the historical sales data demonstrate that all of the output from the Griffith Project was sold outside of the WALC balancing authority area during the relevant study period.⁴ The LS Power Entities assert that this historical sales data provide further support for their claim that they have no uncommitted capacity in the WALC balancing authority area.

8. On February 11, 2011, the LS Power Entities filed a further amendment to their updated market power analysis in which they propose to adopt, on a prospective basis, and if needed to remedy a market power problem that is identified by the Commission, the Commission's default, cost-based mitigation for any sales made by Griffith Energy or LS Power Marketing within the WALC balancing authority area.

³ LS Power Entities' February 11, 2011 Filing at 4 (noting that the Commission requires a seller to "assume that any seller's uncommitted first-tier generation capacity fully utilizes the seller's firm transmission rights" and "to the extent the seller has remaining uncommitted first-tier generation capacity, the remaining simultaneous import limit capability is allocated on a pro rata basis to import the remaining uncommitted first-tier generation capacity of both the seller and competing suppliers" (citing Order No. 697 at PP 368-369 and Order No. 697-B at P 23)). However, as the LS Power Entities acknowledge, the requirement they refer to in these citations pertains to imports, not exports.

⁴ Calpine Corporation, LS Power's affiliate, also submitted historical sales data, which they state showed that less than one percent of the sales made by the South Point Facility were sold in the WALC balancing authority area during the relevant study period.

9. On January 17, 2012, the LS Power Entities filed a delivered price test (DPT) for the WALC balancing authority area⁵ and contend that, based on the results of their DPT analysis, they no longer need to adopt the proposed mitigation measures. LS Power Entities explain that 100 percent of the equity interests in Griffith Energy, which owns and operates LS Power Entities' sole generation facility located in the WALC balancing authority area (the Griffith Project), and 100 percent of the equity interests in Arlington Valley, was sold to Star West Generation LLC, an unaffiliated entity.⁶

II. Notice of Filings and Responsive Pleadings

10. Notice of the LS Power Entities' July 30, 2010 filing, as amended on August 30, 2010, was published in the *Federal Register*, 75 Fed. Reg. 54,602 (2010), with interventions or protests due on or before September 20, 2010. None was filed.

11. Notice of the LS Power Entities' February 11, 2011 filing was published in the *Federal Register*, 76 Fed. Reg. 10,347 (2011), with interventions or protests due on or before March 4, 2011. None was filed.

12. Notice of the LS Power Entities' January 17, 2012 filing was published in the *Federal Register*, 77 Fed. Reg. 14,357 (2012), with interventions or protests due on or before March 22, 2012. None was filed.

III. Discussion

A. Market-Based Rate Authorization

13. 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.⁷ As discussed below, the Commission finds that the LS Power Entities have rebutted the presumption of market power in the WALC balancing authority area and concludes that the LS Power Entities satisfy the Commission's standards for the grant of market-based rate authority.

⁵ The DPT analysis submitted by the LS Power Entities was previously submitted by Calpine Corporation on July 22, 2011.

⁶ See *LS Power Equity Partners, L.P.*, 135 FERC ¶ 62,109 (2011) (May 5, 2011 Order) and *LS Power Equity Partners, L.P.*, Notice of Consummation of Transaction, Docket No. EC11-59-000 (filed May 24, 2011) (informing the Commission that the transaction authorized by the May 5, 2011 Order had been consummated).

⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at PP 62, 399, 408, and 440.

B. Horizontal Market Power**1. Indicative Screens**

14. The Commission adopted two indicative screens for assessing horizontal market power, the pivotal supplier screen and the wholesale market share screen.⁸ The Commission has 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.⁹

15. The LS Power Entities prepared the pivotal supplier and wholesale market share screens for the Nevada Power Company, Salt River Project, and WALC balancing authority areas, consistent with the requirements of Order No. 697.¹⁰

16. The Commission has reviewed the LS Power Entities' pivotal supplier and wholesale market share screens for the relevant geographic markets. We find that the LS Power Entities pass the pivotal supplier and wholesale market share screens for the Nevada Power Company balancing authority area, with market shares ranging from 16.1 to 18.3 percent, and the Salt River Project balancing authority area, with market shares ranging from 10.4 to 16.4 percent.¹¹ Accordingly, we find that the LS Power Entities satisfy the Commission's requirements regarding horizontal market power in the Nevada Power Company and Salt River Project balancing authority areas.

17. With respect to the WALC balancing authority area, the LS Power Entities pass the pivotal supplier screen, but do not pass the wholesale market share screen. The LS Power Entities and their affiliate, Calpine Corporation, own a combined 1,120 MW¹² of

⁸ *Id.* P 62.

⁹ *Id.* PP 33, 62-63.

¹⁰ *Id.* PP 231-232.

¹¹ The LS Power Entities represent that they sold 100 percent of the equity interests in Arlington Valley, which owns and operates the Arlington Valley Project, their sole generation facility in the Salt River Project balancing authority area, to an unaffiliated entity. *See* May 5, 2011 Order, 135 FERC ¶ 62,109 and LS Power Equity Partners, L.P., Notice of Consummation of Transaction, Docket No. EC11-59-000 (filed May 24, 2011).

¹² This is the combined uncommitted capacity of the LS Power Entities' Griffith unit and Calpine Corporation's South Point unit.

generation capacity in the WALC balancing authority area. According to the LS Power Entities' updated market power analysis, the total uncommitted seasonal capacity of all sellers in the WALC balancing authority area ranges from approximately 2,200 MW to 2,700 MW. Thus, according to our analysis, the LS Power Entities fail the wholesale market share screen in the WALC balancing authority area with market shares ranging from 30 to 52 percent.¹³

18. As discussed above, the LS Power Entities assert that all of their generation capacity in the WALC balancing authority area is exported outside of that balancing authority area in all four seasons, resulting in zero uncommitted capacity within that balancing authority area. Taking these exports into consideration, under their analysis, the LS Power Entities assert that they do not fail the wholesale market share screen in the WALC balancing authority area. The LS Power Entities cite the transmission reservations held by the Griffith Project and the South Point Facility, which, according to the LS Power Entities, have points of delivery outside of the WALC balancing authority area and exceed the seasonal generating capacity of the respective facilities. The LS Power Entities claim that these transmission reservations are evidence that the output of these facilities is exported outside of the WALC balancing authority area.¹⁴

19. We find that the LS Power Entities' assertion that their treatment of transmission export reservations is consistent with the Commission's requirements to account for long-term firm transmission reservations when calculating SIL values is misplaced. The Commission requires sellers to submit SIL studies to calculate the aggregated simultaneous transfer capability into the market or balancing authority area being studied.¹⁵ These studies take into account a study area's imports and exports and associated long-term firm transmission reservations.¹⁶ Determining a study area's simultaneous import capability is a different analysis from determining, for the purposes of our indicative screens, whether an individual seller's generation capacity is committed to a particular market. While the transmission reservations held by the LS Power Entities may affect the calculation of the WALC balancing authority area SIL, they do not affect

¹³ The LS Power Entities fail the wholesale market share screen in the WALC balancing authority area even with the sale of LS Power's Griffith unit, with market shares ranging from 27 to 34 percent.

¹⁴ The LS Power Entities have not identified any transmission constraints that prevent them from selling in WALC.

¹⁵ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 354.

¹⁶ *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018, at Appendix E, *order on reh'g*, 108 FERC ¶ 61,026 (2004).

or constrain the LS Power Entities' ability to sell power in the WALC balancing authority area.

20. The Commission has stated that an applicant that fails one or more of the indicative screens is provided with several procedural options, including the right to challenge the presumption of market power by submitting a DPT analysis, or, alternatively, sellers can accept the presumption of market power and adopt some form of cost-based mitigation.¹⁷ Accordingly, we turn to the LS Power Entities' DPT analysis for the WALC balancing authority area.

2. Delivered Price Test

21. As the Commission has previously explained, the DPT identifies potential suppliers based on market prices, input costs, and transmission availability, and calculates each supplier's economic capacity and available economic capacity¹⁸ for each season/load period.¹⁹ Under the DPT, applicants must also calculate market concentration using the Hirschman-Herfindahl Index (HHI).²⁰ An HHI of less than 2,500 in the relevant market for all season/load periods, in combination with a demonstration that the applicants are not pivotal and do not possess more than a 20 percent market share in any of the season/load periods would constitute a showing of a lack of market power, absent compelling contrary evidence from intervenors. A detailed description of the mechanics of the DPT is provided in Order No. 697.²¹

22. As with our initial screens, applicants and intervenors may present evidence such as historical wholesale sales data, which can be used to calculate market shares and

¹⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 63.

¹⁸ "Economic capacity" is the total generation capacity of a potential supplier that can compete in the destination market, given its costs and transmission availability. "Available economic capacity" is derived by subtracting each potential supplier's native load obligation from its total capacity and adjusting transmission availability accordingly. *See id.* P 96, n.78.

¹⁹ Super-peak, peak, and off-peak, for winter, shoulder, and summer periods and an additional highest super-peak for the summer.

²⁰ 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, $HHI = (20)^2 + (20)^2 + (20)^2 + (20)^2 + (20)^2 = 400 + 400 + 400 + 400 + 400 = 2,000$.

²¹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at PP 104-117.

market concentration and to refute or support the results of the DPT. In Order No. 697, the Commission encouraged applicants to present the most complete analysis of competitive conditions in the market as the data allows.²²

23. The LS Power Entities' DPT analysis for the WALC balancing authority area indicates that the LS Power Entities are not pivotal in any season/load period using either the economic capacity measure or the available economic capacity measure. The LS Power Entities pass the market share screen and the HHI screen in all season/load periods when the economic capacity measure is used. When the available economic capacity measure is used, however, the LS Power Entities fail the market share screen in all ten season/load periods with market shares ranging from 20.4 percent to 28.9 percent but pass the HHI test in all season/load periods with HHIs ranging from 1,632 to 2,460.

3. Commission Determination

24. After weighing all of the relevant factors, the Commission finds that, on balance, based on the record evidence, the LS Power Entities have rebutted the presumption of horizontal market power and satisfy the Commission's horizontal market power standard for the grant of market-based rate authority. As noted above, the LS Power Entities' DPT analysis for the WALC balancing authority area varies depending on whether the economic capacity or available economic capacity measure is used. As the Commission has stated, the DPT does not function like the initial screens – i.e., failure of either the economic capacity or available economic capacity analyses does not result in an automatic failure of the test as a whole. Neither measure is definitive; the Commission weighs the results of both the economic capacity and the available economic capacity analyses and considers the arguments of the parties.²³

25. We note that the LS Power Entities' DPT analysis for the WALC balancing authority area indicates that the LS Power Entities' market shares under the economic capacity measure are below 20 percent in all season/load periods, HHIs are below 2,500 in every season/load period, and the LS Power Entities are not pivotal in any season/load period. Under the available economic capacity measure, although the LS Power Entities' market share exceeds 20 percent in all ten season/load periods, HHIs are below 2,500 in every season/load period and the LS Power Entities are not pivotal in any season/load period. Thus, because the DPT analysis indicates that, under the available economic measure, the LS Power Entities are not pivotal and HHIs are below 2,500 in every

²² *Id.* P 111.

²³ *Id.* P 112.

season/load period, the LS Power Entities pass two out of the three screens in every season/load condition under the available economic capacity measure.

26. We further note that, with the sale of the Griffith Project to Star West Generation LLC, the LS Power Entities no longer own or control any generation in the WALC balancing authority area. Thus, after weighing all of the evidence, we find that the LS Power Entities do not have horizontal market power in the WALC balancing authority area.

C. Vertical Market Power

27. In cases where a public utility, or any of its affiliates, owns, operates, or controls transmission facilities, the Commission requires that there be a Commission-approved open access transmission tariff (OATT) on file before granting that utility or affiliate market-based rate authorization.²⁴

28. The LS Power Entities represent that neither they nor their affiliates own or control transmission facilities other than the limited equipment necessary to interconnect their generation to the grid.

29. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.²⁵ 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 physical coal supply sources and ownership of or control over who may access transportation of coal supplies (collectively, inputs to electric power production).²⁶ 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.²⁷ The Commission adopted a rebuttable presumption that the ownership or control of, or affiliation with any entity that owns or controls, inputs to electric power production does not allow a seller to raise entry barriers but will allow intervenors to demonstrate otherwise.²⁸

²⁴ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 408.

²⁵ *Id.* P 440.

²⁶ *Id.* P 447; Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 176.

²⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447.

²⁸ *Id.* P 446.

30. The LS Power Entities state that neither they nor their affiliates own or control any intrastate natural gas transportation or intrastate natural gas storage or distribution facilities, any sites for generation capacity development that can be used to erect barriers to entry, any sources of physical coal supplies, or any facilities for the transportation of coal supplies, such as barges or rail cars.

31. The LS Power Entities affirmatively state that neither they nor their affiliates have erected barriers to entry in the relevant markets and will not erect barriers to entry in the relevant markets in the future.

32. Based on the LS Power Entities' representations, as discussed herein, we find that the LS Power Entities satisfy the Commission's requirements for market-based rate authority regarding vertical market power.

D. Reporting Requirements

33. 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.²⁹ Public utilities must file Electric Quarterly Reports no later than 30 days after the end of the reporting quarter.³⁰

²⁹ *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 Reports 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>.

³⁰ The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2011). 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.

34. The LS Power Entities 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.³¹ This includes the timely submission of land acquisition reports.³²

35. Additionally, the LS Power Entities must file updated market power analyses for the regions where they are designated as Category 2 sellers, in compliance with the regional reporting schedule adopted in Order No. 697.³³ The Commission also reserves the right to require such an analysis at any intervening time.

36. Last, we note that the current tariff for Las Vegas Power Company does not reflect the fact that the Commission previously granted waiver of 18 C.F.R. Part 141 with the exception of sections 141.14 and 141.15. Therefore, we direct Las Vegas Power Company to include a revised tariff to reflect these exceptions in the limitations and exemptions section the next time it makes a market-based rate filing with the Commission.

The Commission orders:

(A) The LS Power Entities' updated market power analysis for the Southwest region is accepted for filing, as discussed in the body of this order.

(B) Las Vegas Power Company is directed to revise its market-based rate tariff as discussed in the body of this order, effective the date of issuance of this order.

³¹ *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(a) (2011).

³² *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 PP 21-24; 18 C.F.R. § 35.42(d) (2011); *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).

³³ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 882.

(C) The LS Power Entities are hereby directed to file updated market power analyses according to the regional reporting schedule adopted in Order No. 697, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.