

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

FirstEnergy Operating Companies	Docket Nos. ER01-1403-002
FirstEnergy Solutions Corporation	ER01-2968-002
	ER01-2968-003
FirstEnergy Generation Corporation	ER01-845-001
	ER01-845-002
Jersey Central Power & Light Company	ER04-366-002
Metropolitan Edison Company, et al.	ER04-372-002
FirstEnergy Corporation	ER99-2330-001
	ER99-2330-002
	ER99-2330-004

ORDER CONDITIONALLY ACCEPTING UPDATED MARKET POWER ANALYSIS
AND PROVIDING GUIDANCE ON THE SCOPE OF COMPLIANCE FILINGS

(Issued April 14, 2005)

1. In this order, we accept an updated market power analysis filed by FirstEnergy Corporation and its subsidiaries, FirstEnergy Operating Companies (FirstEnergy Operating Companies)¹, FirstEnergy Solutions Corporation (FESolutions), FirstEnergy Generation Corporation (FEGeneration), Jersey Central Power & Light Company (JCP&L), and Metropolitan Edison Company et al. (MetEd)² (collectively, FirstEnergy Companies). As discussed below, we conclude that, subject to the Commission's acceptance of the compliance filing directed herein, FirstEnergy Companies satisfy the Commission's standards for market-based rate authority. This order benefits customers by reviewing the conditions under which market-based rate authority is granted, thus ensuring that the prices charged for jurisdictional sales are just and reasonable.

¹ FirstEnergy Operating Companies consist of The Cleveland Electric Illuminating Company, Ohio Edison Company, Pennsylvania Power Company, and The Toledo Edison Company.

² MetED consist of MetED and Pennsylvania Electric Company (Penelec).

FirstEnergy Companies' next updated market power analysis is due three years from the date of this order.

2. In this order, we reject as outside the scope of FirstEnergy Companies' compliance filing certain proposed tariff revisions that FirstEnergy Companies included with their December 31, 2003 updated market power analysis.

Background

3. FirstEnergy Operating Companies are public utilities that provide retail and wholesale electric service in areas of Ohio and Pennsylvania and are participants in the Midwest Independent Transmission System Operator (Midwest ISO) markets. JCP&L, MetEd and Penelec are public utilities that provide retail and wholesale electric service in areas of New Jersey and Pennsylvania and are located in the PJM Interconnection, LLC (PJM) control area. FEGeneration is a stand-alone generation company that owns and/or operates electric generating facilities previously owned by FirstEnergy Operating Companies. FEGeneration also owns and operates approximately 1155 MW of new generation capacity that it has installed or acquired since 2000 and all of the power from those facilities is committed by contract for sale to FESolutions. All of the generating facilities owned and/or operated by FEGeneration are connected to either the Midwest ISO or the PJM transmission grid. FESolutions is a power marketer engaged in the sale of electricity at market-based rates to wholesale and retail customers throughout the eastern and midwestern United States in which retail access programs have been initiated.

4. On December 31, 2003 FirstEnergy Companies filed their triennial updated market power analysis pursuant to the Commission's order granting authority to sell electric energy and capacity at market-based rates.³ This filing used the then applicable Supply Margin Assessment to assess generation market power. FirstEnergy Companies' December 31, 2003 Filing also included modifications to the market-based rate power sales tariffs of FirstEnergy Companies incorporating the Commission's market behavior rules.⁴

³ *FirstEnergy Operating Companies*, Docket No. ER01-1403-000, Letter Order issued November 30, 2001; *Cleveland Electric Illuminating Company*, 76 FERC ¶ 61,346 (1996); *Toledo Edison Company*, 78 FERC ¶ 61,013 (1997); *GPU Advanced Resources, Inc.*, 80 FERC ¶ 61,255 (1997); *Jersey Central Power & Light Company, et al.*, 82 FERC ¶ 61,023 (1998); *FirstEnergy Services Corp.*, 94 FERC ¶ 61,052 (2001); *FirstEnergy Solutions Corp.*, Docket No. ER01-2968-000, Letter Order issued October 24, 2001; *FirstEnergy Generation Corporation*, 94 FERC ¶ 61,177 (2001).

⁴ *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003).

5. As part of its December 31, 2003 Filing, FirstEnergy also included several changes to their market-based rate tariffs (e.g., revisions to the code of conduct and affiliate sales provisions). As discussed below, we reject these as beyond the scope of a previously-directed compliance filing. Furthermore, we put the industry on notice that, consistent with Commission precedent, any such market-based rate tariff revisions that are beyond the scope of Commission-directed compliance filings will be deemed automatically rejected at the time of filing.

6. In its December 31, 2003 Filing, FirstEnergy Companies also filed notices of cancellation for The Cleveland Electric Illuminating Company, (CEI) and The Toledo Edison Company (TE) stating that there are no sales of electricity currently being made pursuant to their tariffs as well as a notice of cancellation for JCP&L. FirstEnergy Companies stated that, as a result of commitments made by JCP&L at the time JCP&L, MetEd and Penelec were acquired by FirstEnergy Companies, JCP&L determined that it was desirable to sell power under a market-based power sales tariff separate from under which MetEd and Penelec sell power at market-based rates.⁵ The notices of cancellation of JCP&L, CEI and TE were accepted for filing on February 26, 2004 in Docket No. ER04-363-000.

7. On February 7, 2005, FirstEnergy Companies submitted an updated generation market power analysis pursuant to the Commission's order issued on May 13, 2004.⁶ The May 13 Order addressed the procedures for implementing the generation market power analysis announced on April 14, 2004 and clarified on July 8, 2004.⁷

⁵ On December 31, 2003, as amended on February 12, 2004, JCP&L filed in, a separate proceeding, a market-based rate tariff. The Commission accepted this market-based rate tariff for filing on March 16, 2004. *Jersey Central Power & Light Co.*, Docket Nos. ER04-366-001 (unpublished letter order). Similarly, on March 16, 2004 the Commission accepted a market-based rate tariff of MetEd and Penelec for filing. *Metropolitan Edison Company, Pennsylvania Electric Company*, Docket Nos. ER04-372-000 and ER04-372-001 (unpublished letter order).

⁶ *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004) (May 13 Order). On June 14, 2004, FirstEnergy Companies filed for clarification and/or rehearing of the May 13 Order. Specifically, FirstEnergy Companies argued that certain of its subsidiaries (JCP&L, MetEd, and Penelec) should not have been required to file a revised market power analysis pursuant to the May 13 Order. As described above, FirstEnergy Companies included all of its public utility subsidiaries, including JCP&L, Met Ed, and Penelec, in its February 7, 2005 Market Power Update.

⁷ *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

Notice of Filing

8. Notice of FirstEnergy Companies' updated generation market power analysis was published in the *Federal Register*⁸ with interventions, comments, and protests due on or before February 28, 2005. None was filed.

Discussion

Market-Based Rate Authorization

9. 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.⁹

10. As discussed below, the Commission concludes that, subject to the Commission's acceptance of the compliance filing directed herein, FirstEnergy Companies satisfy the Commission's standards for market-based rate authority.¹⁰

Generation Market Power

11. In the April 14 Order, the Commission adopted two indicative screens for assessing generation market power, the pivotal supplier screen and the wholesale market share screen. FirstEnergy Companies have prepared both the pivotal supplier and the wholesale market share screens for the Midwest ISO and PJM markets.

12. As the Commission noted in the April 14 Order, once Midwest ISO becomes a single market and performs functions such as a central commitment and dispatch with Commission-approved market monitoring and mitigation, Midwest ISO presumptively would be considered a single geographic market for purposes of our generation

⁸ 70 Fed. Reg. 8,357 (2005).

⁹ See, e.g., *Progress Power Marketing, Inc.*, 76 FERC ¶ 61,155 at 61,919 (1996); *Northwest Power Marketing Co., L.L.C.*, 75 FERC ¶ 61,281 at 61,899 (1996); *accord Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223 at 62,062-63 (1994).

¹⁰ Accordingly, the June 14, 2004 request for rehearing will be dismissed as moot.

dominance screens.¹¹ The Commission has reviewed FirstEnergy companies' generation market power screen analyses for the Midwest ISO market and has determined that FirstEnergy Companies have passed the screens in that market. Accordingly, the Commission finds that FirstEnergy Companies satisfy the Commission's generation market power standard for the grant of market-based rate authority based on the Midwest ISO becoming a single market and performing these functions with Commission-approved market monitoring and mitigation. The Commission also finds that FirstEnergy Companies pass the Commission's screens for generation market power in the PJM market. Accordingly, the Commission finds that FirstEnergy Companies satisfy the Commission's generation market power standard for the grant of market-based rate authority.

Transmission Market Power

13. When a transmission-owning public utility seeks market-based rate authority, the Commission has required the public utility to have an Open Access Transmission Tariff (OATT) on file before granting such authorization. FirstEnergy Companies state that both the Midwest ISO and PJM are Commission-approved RTOs with OATTs on file with the Commission and are independent of all market participants, including FirstEnergy Companies. The Midwest ISO and PJM's control of transmission facilities owned by FirstEnergy Companies assures that the amount of transmission capacity over those facilities will be determined objectively and that transmission service is available to all potential transmission customers on a non-discriminatory basis. Based on FirstEnergy Companies' representations, we find that FirstEnergy Companies satisfy the Commission's transmission market power standard for the grant of market-based rate authority.

Other Barriers to Entry

14. FirstEnergy Companies state that, at the time FirstEnergy Companies were originally authorized to sell power at market-based rates, the Commission concluded that they each lacked the ability to erect such barriers to entry. FirstEnergy Companies state that there has been no change in circumstances since those determinations were made that might warrant a different conclusion. Based on FirstEnergy Companies' representations, the Commission is satisfied that FirstEnergy Companies cannot erect barriers to entry.

¹¹ Because the Midwest ISO became a single market and began performing the central commitment and dispatch functions with Commission-approved market monitoring and mitigation on April 1, 2005, we have used the Midwest ISO market as the geographic market for purposes of analyzing FirstEnergy Companies' generation market power screens.

Affiliate Abuse

15. In its February 7, 2005 Filing, FirstEnergy Companies referred to their December 31, 2003 Updated Market Power Analysis Filing which they submit showed that FirstEnergy Companies had adopted codes of conduct designed to preclude affiliate abuse and reciprocal dealing. However, FirstEnergy Companies' December 31, 2003 Filing does not address the affiliate abuse prong of the Commission's market-based rate authorization. In that filing, FirstEnergy Companies state that they "(a)[do] not have market power in any relevant wholesale power market, (b) [have] adequately mitigated potential transmission market power by transferring control over its transmission facilities to Commission-approved RTOs, and (c) [lack] the ability to erect barriers to entry by potential competitors," but make no reference to the affiliate abuse prong.¹² Accordingly, FirstEnergy Companies are directed, within 30 days of the date of issuance of this order, to submit a compliance filing to address the Commission's concerns with regard to affiliate abuse.

Reporting Requirements

16. 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 greater) market-based power sales during the most recent calendar quarter.¹³ Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.¹⁴

¹² December 31, 2003 Updated Market Power Analysis, pp. 5-6.

¹³ *Revised Public Utility Filing Requirements, Order No. 2001*, 67 Fed. Reg. 31,043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002). Required data sets for contractual and transaction information are described in Attachments B and C of Order No. 2001. The Electric Quarterly Report must be submitted to the Commission using the EQR Submission System Software, which may be downloaded from the Commission's website at <http://www.ferc.gov/docs-filing/eqr.asp>.

¹⁴ The exact filing dates for these reports are prescribed in 18 C.F.R. §35.10b (2004). Failure to file an Electric Quarterly Report (without 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.

17. FirstEnergy Companies 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.¹⁵ Order No. 652 requires that the change in status reporting requirement be incorporated into the market-based rate tariff of each entity authorized to make sales at market-based rates. Accordingly, FirstEnergy Companies are required, within 30 days of the date of issuance of this order, to revise their market-based rate tariffs to incorporate the following provision:

[insert Market-based rate seller name] 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. A change in status includes, but is not limited to, each of the following: (i) ownership or control of generation or transmission facilities or inputs to electric power production other than fuel supplies, or (ii) affiliation with any entity not disclosed in the application for market-based rate authority that owns or controls generation or transmission facilities or inputs to electric power production, or affiliation with any entity that has a franchised service area. Any change in status must be filed no later than 30 days after the change in status occurs.

18. FirstEnergy Companies are directed to file an updated market power analysis within three years of the date of this order, and every three years thereafter. The Commission also reserves the right to require such an analysis at any intervening time.

Policy on Issues Outside the Scope of Market-Based Rate Tariff Compliance Filings

19. The filing of updated market power analyses pursuant to Commission orders, as well as the filing of revisions to the utility's market-based rate tariff to incorporate the Commission's market behavior rules, the change in status reporting requirement, and compliance with Order No. 614, constitute compliance filings. As stated above, in the December 31, 2003 Compliance Filing, FirstEnergy Companies provided an updated market power analysis pursuant to the Commission's orders granting them market-based rate authority as well as tariff revisions to incorporate the Commission's market behavior rules. However, FirstEnergy Companies also included in its compliance filing several other changes to their market-based rate tariffs that go beyond the scope of that compliance filing (e.g., revisions to the code of conduct and affiliate sales provisions). In

¹⁵ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005); FERC Stats. & Regs. ¶ 31,175 (2005).

this regard, we note that FirstEnergy Companies' transmittal fails to inform the Commission of those proposed changes.

20. 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.¹⁶ In this instance, FirstEnergy Companies identified their December 31, 2003 Filing as a triennial updated market power analysis and stated that they had submitted this analysis pursuant to the various orders granting FirstEnergy Companies market-based rate authorization; however, they included with the updated market power analysis changes to their market-based rate tariffs not directed by the underlying orders. Therefore, the Commission will reject these proposed changes to the FirstEnergy Companies' market-based rate tariffs submitted with the December 31, 2003 Updated Market Power Analysis Filing as outside the scope of that compliance filing. We reaffirm that compliance filings must only provide the changes directed by the Commission. Accordingly, market-based rate tariff revisions that are beyond the scope of a Commission-directed compliance filing will be deemed automatically rejected at the time of filing.

The Commission orders:

(A) FirstEnergy Companies' updated generation market power analysis is hereby accepted for filing, subject to Commission acceptance of the compliance filing directed in Ordering Paragraph (B), as discussed in the body of this order.

(B) FirstEnergy Companies are directed, within 30 days of the date of issuance of this order, to submit a compliance filing to address whether FirstEnergy Companies satisfy the Commission's concerns with regard to affiliate abuse, as discussed in the body of this order.

(C) FirstEnergy Companies' next updated market power analysis is due within three years of the date of this order.

(D) FirstEnergy Companies' revised tariff sheets (e.g. revising the code of conduct and affiliate sales provision), with the exception of those discussed in Ordering Paragraph (F) below, are rejected, as discussed in the body of this order.

¹⁶ *Pacific Gas and Electric Company*, 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 Company*, 80 FERC ¶ 61,376 at 62,271 (1997); *Delmarva Power & Light Company*, 63 FERC ¶ 61,321 at 63,160 (1993).

(E) FirstEnergy Companies are directed, within 30 days of the date of issuance of this order, to revise their market-based rate tariffs to include the change in status reporting requirement adopted in Order No. 652.

(F) FirstEnergy Companies' revised tariff sheet(s) incorporating the Commission's market behavior rules are accepted for filing, effective December 17, 2003.

(G) FirstEnergy Companies' June, 2004, request for rehearing is dismissed as moot.

(H) The Secretary is hereby directed to publish a copy of this order in the Federal Register.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.