

111 FERC ¶ 61,413
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Reporting Requirement for Changes in Status
For Public Utilities With Market-Based Rate
Authority

Docket No. RM04-14-001

ORDER ON REHEARING

(Issued June 16, 2005)

1. In this order, the Commission grants in part and denies in part the requests for rehearing and clarification of Order No. 652.¹ In particular, we provide additional guidance on the types of contracts and events that could be reportable under Order No. 652. We also clarify that, in determining whether a given increase in generation is in excess of the materiality threshold of 100 MW, market-based rate sellers may net decreases against increases and specify the generic language that market-based rate sellers are to incorporate into their market-based rate tariffs.

Background

2. Since the Commission began allowing public utilities to make sales at market-based rates, it has required such market-based rate sellers to report any changes in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority. When the Commission first granted market-based rate authorizations, it required traditional utilities that satisfied the Commission's initial market power review to file an updated market power analysis every three years to allow the Commission to monitor competitive conditions and to determine whether the applicants still satisfied our market power concerns.² Power marketers, on the other

¹ *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).

² *See, e.g., Entergy Services, Inc.*, 58 FERC ¶ 61,234 (1992); *Louisville Gas & Electric*, 62 FERC ¶ 61,016 (1993).

hand, were required to promptly notify the Commission of changes in status.³ Subsequently, the Commission has allowed market-based-rate sellers to choose between promptly reporting changes in status, filing a three-year update in lieu of reporting changes in status as they occurred,⁴ or reporting such changes in conjunction with the updated market analysis.⁵

3. On October 6, 2004, the Commission issued a Notice of Proposed Rulemaking (NOPR) that proposed to standardize and clarify market-based rate sellers' reporting requirement for changes in status.⁶ The Commission proposed to impose uniform standards on all market-based rate sellers by eliminating the option to delay reporting changes in status until submission of the triennial review, or to file a triennial review in lieu of reporting changes in status as they occur. Acting pursuant to section 206 of the Federal Power Act (FPA),⁷ the Commission proposed to amend its regulations and to modify the market-based rate authority of current market-based rate sellers to include the requirement to 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 no later than 30 days after the change in status occurs. The Commission also proposed that this reporting requirement be incorporated into the market-based rate tariff of each entity that is currently authorized to make sales at market-based rates, as well as that of all future applicants.

4. On February 10, 2005, the Commission issued Order No. 652, which, among other things: imposed uniform standards on all market-based rate sellers by eliminating the option to delay reporting changes in status until submission of the triennial review or to file a triennial review in lieu of reporting changes in status as they occur; specifically refers to "control" of generation or transmission facilities as a trigger which could result in the obligation to make a change in status filing; provides guidance as to the "characteristics" the Commission relies on in evaluating whether to grant market-based

³ See, e.g., *Citizens Power & Light Corp.*, 48 FERC ¶ 61,210 (1989); *Enron Power Marketing*, 65 FERC ¶ 61,305 (1993); *InterCoast Power Marketing Co.*, 68 FERC ¶ 61,248 (1994).

⁴ See, e.g., *Morgan Stanley Capital Group, Inc.*, 69 FERC ¶ 61,175 (1994).

⁵ See, e.g., *AEP Power Marketing, Inc.*, 76 FERC ¶ 61,307 at 62,516 (1996); *Montaup Electric Co.*, 85 FERC ¶ 61,313 at 62,232 (1998); *Sithe/Independence Power Partners*, 101 FERC ¶ 61,210 at 61,907 (2002).

⁶ *Reporting Requirement for Changes in Status For Public Utilities With Market-Based Rate Authority*, 109 FERC ¶ 61,021 (2004) (NOPR).

⁷ 16 U.S.C. § 824e (2000).

rate authority; provides guidance as to the form, content, and timing of a change in status filing; and incorporates into all market-based rate tariffs the standards discussed herein.

5. Requests for rehearing and/or clarification of Order No. 652 were submitted by the Constellation Energy Group (Constellation), the Edison Electric Institute and the Alliance of Energy Suppliers (EEI), the Electric Power Supply Association (EPSA), and Reliant Energy (Reliant).

General

Rehearing Requests

6. EEI requests rehearing of Order No. 652 on the ground that the rule is impermissibly vague. EEI contends that the open-ended language that the Commission has adopted is so ambiguous as to raise serious concerns as to whether full compliance is possible without more specific guidelines or extraordinarily burdensome or unnecessary filings.⁸

Commission Determination

7. We reject EEI's request for rehearing on the ground that Order No. 652 is impermissibly vague for the same reasons we rejected similar arguments in Order No. 652.⁹ EEI has not provided any evidence to convince us otherwise on rehearing. As we have explained, Order No. 652 does not impose a new reporting requirement on market-based rate sellers, but rather standardizes and clarifies their pre-existing obligation to report changes in status. In our experience of administering the changes in status reporting requirement, we have not found that market-based rate sellers consider the reporting obligations to be overly broad or vague, and Order No. 652 offers further guidance to market-based rate sellers on compliance with their obligation. Furthermore, preparation of the changes in status report – which will consist of a transmittal letter describing the change in status and explaining whether or not it reflects a departure from the characteristics that the Commission relied on in originally granting market-based rate authority – will normally impose a minimal burden on market-based rate sellers.

⁸ EEI Rehearing Request at 3.

⁹ Order No. 652, FERC Stats. & Regs. ¶ 31,175 at P 25.

Triggering Events

Rehearing Requests

8. EEI requests that the Commission clarify the events that trigger the change in status reporting obligation by including an illustrative list of triggering events. EEI notes that, despite the requests from numerous commenters to include an illustrative list of specific events for clarity purposes, the Commission stated in Order No. 652 that it does not believe that commenters have provided sufficient support for their contention that the inclusion of an illustrative list would in fact increase regulatory certainty. EEI contends that this contrasts with the Commission's decision to include an illustrative list of the types of contracts that trigger a reportable event. EEI thus urges the Commission to adopt the defined categories of specific events proposed in EEI's initial comments.¹⁰ There, EEI urged the Commission to establish a reasonable definition of what constitutes a material change and proposed that the following types of events be excluded from the change in status reporting requirement: (i) changes in status that have already been taken into account in a prior Commission market-based rate review; (ii) changes in status subject to a filing requirement under section 203 of the FPA; (iii) changes in status below EEI's proposed materiality thresholds for generation and transmission facilities, production inputs, changes in affiliation status, and long-term contracts; and (iv) changes in status that are not within the applicant's control.¹¹

Commission Determination

9. We will grant in part and deny in part EEI's requests that we adopt the specific exclusions from the change in status reporting requirement that EEI proposed in its comments on the NOPR. We clarify that market-based rate sellers need not report changes in status that the Commission has already taken into account in an initial application for market-based rate authority or in a subsequent triennial review. With regard to EEI's remaining requests for exclusions from the change in status reporting requirement, we note that in Order No. 652, we rejected the requests by EEI and others to exempt from the reporting requirement changes in status that are the subject of a section 203 application, but we clarified that a market-based rate seller may incorporate by reference in its notice of change in status any filings regarding the change in status made pursuant to other reporting requirements.¹² Similarly, in response to proposals from EEI and a number of other commenters concerning materiality thresholds, we adopted a cumulative threshold of 100 MW for generation increases, and we provide additional

¹⁰ EEI Rehearing Request at 3-4.

¹¹ EEI Comments on NOPR at 3-11.

¹² Order No. 652, FERC Stats. & Regs. ¶ 31,175 at P 34.

clarification as to the applicable materiality thresholds below.¹³ Finally, we adopted EEI's proposal that the reporting obligation should extend only to changes in circumstances within the knowledge and control of the applicant.¹⁴

10. In an effort to provide additional guidance and in response to EEI's request for rehearing, we clarify that the following constitute reportable events pursuant to Order No. 652: contracts such as those that result in a change of control of generation or transmission facilities; cumulative generation increases of 100 MW or more "up-rates" in generation; the testing of new generation facilities (subject to the 100 MW cumulative threshold); acquisitions of ownership or control of intrastate natural gas facilities or storage facilities. We believe that the inclusion of a non-exclusive illustrative list as described above provides adequate guidance to the industry while preserving the Commission's ability to consider the ever-changing nature of the contractual arrangements.

Exemptions

Rehearing Requests

11. EEI also requests that the Commission clarify that a number of specific events are exempted from the change in status reporting requirement. First, EEI seeks clarification that, like financial contracts, contracts for a fixed quantity of delivered energy (i.e., "energy-only" contracts) do not transfer control and do not constitute a reportable change in status.¹⁵ Second, EEI requests clarification that the signing of contracts for construction need not be reported, at least until the facilities become operational.¹⁶ Third, EEI argues that an increase in transmission facilities that enhances total transfer capability (TTC) does not increase generation market power and should not be reportable as a change in status.¹⁷

¹³ *Id.* at P 68.

¹⁴ *Id.* at P 27.

¹⁵ EEI Rehearing Request at 5. Reliant also requests that the Commission clarify that it does not consider energy-only purchases to constitute control of capacity because such transactions do not transfer any control, in the form of dispatch or other unit-specific rights, over capacity or generation. Reliant Rehearing Request at 10.

¹⁶ EEI Rehearing Request at 6.

¹⁷ *Id.* at 6.

Commission Determination

12. In response to EEI's requests for clarification above, we clarify that, to the extent that a contract for a fixed quantity of delivered energy does not confer control, it need not be reported. We are unwilling, however, to grant a generic exemption because such contracts could conceivably give the buyer control, e.g., by allowing the buyer to determine when such power is to be dispatched or delivered or whether to withhold power from the market. With respect to construction contracts, we clarify that the change in status reporting requirement is not triggered until test power is generated (subject to the 100 MW cumulative threshold). Given the long lead times and financial and regulatory hurdles of constructing facilities, it is not certain at the time the construction contract is signed whether or when the facility will actually be placed into service. Order No. 652 states that change in status reports must be filed no later than 30 days after the legal or effective date of the change in status (i.e., the change in control or ownership), which would normally not occur at least until the facility in question becomes operational. However, we note that market-based rate sellers are free to file reports of prospective changes in status report when they enter into such construction contracts, provided that this filing contains the same information as a report filed after the change in status.¹⁸ Finally, we will grant EEI's request for clarification that increases in transmission facilities that enhance TTC need not be reported to the extent that such increases are due solely to a public utility's upgrades of its own network or construction of new facilities. However, we are unwilling to make a blanket statement that increases in transmission facilities can never constitute a reportable change in status where such increases are due to changes of ownership or control over third parties' transmission facilities.

Control

Rehearing Requests

13. A number of entities have requested that the Commission clarify the definition of control in Order No. 652. Constellation requests that the Commission clarify that the concept of control refers to circumstances in which a market-based rate applicant obtains operational control and further that operational control should be defined as "the ability of the market-based rate seller by ownership, contract or otherwise to direct at its discretion the physical dispatch of a generating facility."¹⁹ Constellation contends that this definition is appropriate because it reflects the fact that for an applicant to exercise control it must have the ability to direct generation output and the authority to unilaterally determine such direction. According to Constellation, this definition of control would

¹⁸ Order No. 652, FERC Stats. & Regs. ¶ 31,175 at P 106.

¹⁹ Constellation Rehearing Request at 3, 5.

exclude contracts where an entity is acting as an agent in providing scheduling and dispatch services to a generator for another party or where it is brokering or marketing the output of a generator on behalf of another party.²⁰ Constellation also argues that this approach is consistent with the definition of control in the April 14 and July 8 Orders.²¹ Finally, Constellation contends that the standard used in *El Paso Electric Co.*,²² namely, “a quantum of control” should not be the deciding factor in a generation market power analysis because it requires applicants to make a subjective determination and could lead to multiple market-based rate applicants having control over the same generation resources.²³

14. EPISA requests that the Commission clarify that, in order for an entity to have control under a given arrangement, it must have the ability to take more than ministerial actions under the arrangement. Specifically, for an entity to have control, it must have full decision-making authority over the capacity reaching the relevant market under a particular arrangement.²⁴

15. Finally, Reliant requests clarification of the Commission’s definition of control as applied to tolling agreements, capacity credits and master agreements. With respect to tolling agreements or long-term contracts that provide to the purchaser scheduling and dispatch rights to output from a designated generating facility, Reliant urges the Commission to clearly state that, whether or not a purchaser of capacity dispatches the capacity, as between the seller and the purchaser, the purchaser has control over the capacity/generation that is the subject of the agreement.²⁵ Reliant also suggests that, to the extent that dispatch rights are not conferred on purchasers of capacity credits, the Commission should clarify that purchases of capacity credits/regulatory capacity do not confer control of generation.²⁶ Finally, Reliant seeks clarification as to the proper

²⁰ *Id.* at 8.

²¹ *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh’g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

²² 108 FERC ¶ 61,071 (2004), *reh’g pending (El Paso)* (the Commission found that Enron “at times had a quantum of control and operated El Paso Electric’s assets during certain off-peak periods”).

²³ Constellation Rehearing Request at 7.

²⁴ EPISA Rehearing Request at 6.

²⁵ Reliant Rehearing Request 9.

²⁶ *Id.* at 10.

treatment of master agreements with integration clauses to the effect that the master agreement and transactions entered into thereunder constitute a single integrated agreement. Reliant recommends that the Commission provide guidance that, notwithstanding integration clauses in master agreements, the one-year term requirement be evaluated on an individual transaction basis.²⁷

Commission Determination

16. We believe that the Commission has given adequate specificity as to what constitutes control in Order No. 652 and the body of Commission precedent on this subject, and we will not further define or narrow the definition. While Constellation's proposal may be appropriate in some circumstances, the issue of control is complex, fact-specific, and dependent on the specific terms and conditions of the contract in question. As we stated in Order No. 652, "control" refers to arrangements, contractual or otherwise, granting control of generation or transmission facilities, just as effectively as they could through ownership. In short, if an applicant has control over certain capacity such that the applicant can affect the ability of that capacity to reach the relevant market, then that capacity should be attributed to the applicant when performing the generation market power screens. The capacity associated with contracts that confer operational control of a given facility to an entity other than the owner must be assigned to the entity exercising control over that facility, rather than to the entity that is the legal owner of the facility. On this basis, it is not possible to predict every contractual agreement that could result in a change of control of an asset. Moreover, as the Commission further stated in Order No. 652 that, to the extent parties wish to propose specific definitions or clarifications to the Commission's historical definition of control, they may do so in the course of the market-based rate rulemaking in Docket No. RM04-7-000.²⁸

17. Moreover, we note that Constellation's criticisms of our definition of control are misplaced. We reject Constellation's contention that in *El Paso* and Order No. 652 we adopted a broader definition based on a lesser standard of control, i.e., "quantum of control". Rather, we emphasized in both that control is present where an entity controls the decision-making authority over sales of electric energy, including discretion as to how, when and to whom it could sell power generated by these facilities.²⁹ In *El Paso*, we further found that, under the contractual arrangement at issue there, Enron entered into contracts for El Paso Electric at Enron's sole discretion, that Enron at times took title to El Paso Electric's power, and that Enron had direct control over the quantity, availability and pricing of wholesale power by a competitor, including the power to

²⁷ *Id.* at 7.

²⁸ Order No. 652, FERC Stats. & Regs. ¶ 31,175 at P 47.

²⁹ *El Paso*, 108 FERC ¶ 61,071 at P 14.

withhold it from the market.³⁰ Thus, the definition of control in both *El Paso* and Order No. 652 is consistent with the criteria for control that Constellation suggests because Enron was empowered to unilaterally determine at times how, when and to whom El Paso Electric's output would be sold.³¹

18. We are also not persuaded by Constellation's argument that the definition of control in Order No. 652 may inappropriately cover contracts where an entity is acting as an agent providing scheduling and dispatch services or where it is brokering or marketing the output. An agent or a broker acts on behalf of a client, and the client ultimately decides whether to enter a transaction and the price. Thus, to the extent that a contract does not give an entity, such as an agent or a broker, control over the capacity such that the agent or broker can affect the ability of the capacity to reach the relevant market, the agent or broker under such a contract would not be deemed to have control for purposes of the change in status reporting requirement. Because the relationship between Enron and El Paso Electric did not have these characteristics, the Commission specifically found in *El Paso* that Enron was not acting as an agent or as a broker.³² Finally, contrary to Constellation's assertion, we explained in Order No. 652 that the definition of control there is fully consistent with the notion of operational control in the April 14 and July 8 Orders.³³

19. We also reject EPSA's request for clarification because it is unclear as to what would constitute "full decision-making authority" and how this compares with the definition of control that the Commission has established in Order No. 652, and in related orders such as the April 14 and July 8 Orders and the Merger Policy Statement. As EPSA notes, there are a wide range of commercial arrangements in the energy industry, and new types of arrangements are constantly being developed. Thus, it is not possible to predict every contractual agreement that could result in a change of control of an asset. To fulfill our statutory market oversight duties, we must retain the flexibility to adapt our rules to this rapidly-evolving market. The change in status reporting requirement allows the Commission to gather information on the prevalence of these new types of contractual arrangements to aid us in our assessment of their competitive effects. After the Commission has gained greater familiarity with these arrangements, we will be in a

³⁰ *Id.* at P 8, 16.

³¹ Constellation states that the definition of control must include: (i) the ability of the market-based rate applicant to direct generation output; and (ii) the authority of the market-based rate applicant to unilaterally determine such direction. Constellation Rehearing Request at 8.

³² *Enron Power Marketing, Inc.*, 104 FERC ¶ 63,010 at P 46, 48 (2003).

³³ Order No. 652, FERC Stats. & Regs. ¶ 31,175 at P 47-48.

position to determine which types of arrangements are problematic and, if appropriate, to exempt from the reporting requirement classes of agreements that are not.

20. We will grant in part and reject in part Reliant's request for clarification as to the treatment of tolling agreements, energy-only purchases, capacity credits and master agreements. First, in Order No. 652, we rejected requests that we take a laundry list approach to reportable arrangements by designating that all contracts or arrangements in certain categories must be reported, while other categories need not be. The decisive factor is whether the contract or other arrangement constitutes a change in control. In addition, with regard to Reliant's request that the Commission clarify that the purchaser of generation capacity who had a contractual right to call on the generation capacity has control over the generation regardless of whether it chooses to exercise its rights, Reliant has not provided sufficient information to so clarify. Such a determination would depend on the specific facts and the terms and conditions of the particular contract. However, we will clarify that such a contract would be reportable under Order No. 652 to the extent that it transfers control of jurisdictional facilities. With respect to capacity credits as described by Reliant, the contracts or arrangements would not be reportable to the extent that they do not confer control on the purchaser.

21. We will also reject Reliant's request that each transaction entered into under a master agreement, which is effectively a single, integrated agreement, may be treated separately for the purposes of determining the duration of the agreement. Reliant has provided no support for its contention that such agreements that allow for multiple transactions, each with a duration of less than a year, under a single, integrated agreement should be treated any differently than a contract with the same total duration and economic effects that is structured as a single transaction.³⁴ Furthermore, Reliant's suggestion would simply provide market-based rate sellers with the incentive to structure otherwise reportable contracts to avoid Order No. 652's reporting requirements, distorting the market and undermining the Commission's ability to perform its statutory duty of market oversight. We do, however, recognize that the duration of such agreements is inherently uncertain. Accordingly, we clarify that, for the purposes of Order No. 652's reporting requirement, the duration of the agreement is the maximum period contemplated by the agreement. If the duration is unspecified or indefinite, then

³⁴ See, e.g., *Clarksdale Public Utilities Commission v. Entergy Services, Inc.*, 85 FERC ¶ 61,268 at 62,078-79 (1998) (the Commission noted that its then-existing filing requirement for long-term contracts, which applied to contracts of a year or more, "is determined by the actual length of the transaction, *i.e.*, the substance of the power supply arrangement, and not the number of agreements used to document the transaction. Documenting one three-year agreement in three, separate one-year agreements does not alter the fact that long-term power sales agreements must be filed with the Commission.").

the duration of the master agreement should be treated as a year or more and thus reportable, provided that it satisfies the other requirements of Order No. 652 (e.g., change in control). However, we note that discrete transactions are to be treated separately, provided that they are not merely a series of back-to-back trades and do not constitute a single, integrated transaction.

Other Reportable Arrangements

Rehearing Requests

22. With respect to Order No. 652's discussion of other reportable arrangements, EEI notes that the Commission appears to have inadvertently included fuel supply as a reportable item.³⁵ EEI seeks clarification that, consistent with the Commission's earlier determination in Order No. 652 to exclude the reporting of fuel supplies, the inclusion of the phrase "fuel supply" under other reportable arrangements was an error and that changes relating to fuel supply are not a reportable change in status.³⁶

Commission Determination

23. We clarify that the inclusion of "fuel supply" arrangements as an example of other reportable arrangements was intended and was not an error. Fuel supply arrangements were included in the list of agreements that are subject to the change in status reporting requirement to the extent that they allow for a transfer of control of jurisdictional assets.³⁷ In fact, as EEI correctly notes, we explicitly stated that fuel supply agreements, just like any other type of contractual arrangement, are reportable to the extent that they transfer control over jurisdictional facilities. Accordingly, agreements relating to fuel supplies

³⁵ EEI cites Order No. 652, FERC Stats. & Regs. ¶ 31,175 at P 83:

Therefore, we clarify that agreements that relate to operation (including scheduling and dispatch), maintenance, fuel supply, risk management, and marketing that transfer the control of jurisdictional assets are subject to the change in status reporting requirement.

³⁶ EEI Rehearing Request at 7-8.

³⁷ Order No. 652, FERC Stats. & Regs. ¶ 31,175 at P 83. As the Commission stated, "[t]hese types of arrangements have been referred to as energy management agreements, asset management agreements, tolling agreements, and scheduling and dispatching agreements." In the July 8 Order, we noted that "if an applicant has control over certain capacity such that the applicant can affect the ability of that capacity to reach the relevant market, then that capacity should be attributed to the applicant when performing the screens." July 8 Order, 108 FERC ¶ 61,026 at P 65.

(e.g., tolling agreements) that are structured in such a way that they transfer control over a jurisdictional facility to the supplier would be reportable, regardless of how they are characterized.³⁸ Thus, our decision in Order No. 652 not to expand the definition of what constitutes an input to electric power production to include fuel supplies was not intended to imply that fuel supply agreements are never reportable.³⁹

Materiality Threshold

Rehearing Request

24. With respect to the materiality threshold adopted in Order No. 652, various entities urge the Commission to clarify that the reporting requirement is triggered only by net, rather than gross, increases in generation capacity of 100 MW or more. For example, EPSA suggests that capacity decreases associated with changes in generation capacity or expiration of capacity under long-term purchase contracts should be netted against generation capacity increases to determine whether the 100 MW materiality threshold has been reached.⁴⁰ Reliant asserts that the netting approach is appropriate because a threshold calculation based purely on increases in controlled capacity that does not take into account corresponding decreases (for example, re-sales of purchased capacity) does

³⁸ For example, under a tolling arrangement, a gas supplier could receive the output of a gas-fired generator as payment for the gas it supplies to the generator. If the gas supplier is the only supplier to that generator, then the gas supplier could effectively control the generator. *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, 65 Fed. Reg. 70,983 (2000), FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,111 at 31,877 n. 17 (2000), *order on reh'g*, Order No. 642-A, 66 Fed. Reg. 16,121 (2001), 94 FERC ¶ 61,289 (2001).

³⁹ In Order No. 652, we noted that the Commission's general practice has been to require market-based rate sellers to submit a change in status report when they obtained ownership of new inputs to electric power production, other than fuel supplies. Although we proposed in the NOPR to eliminate the exclusion of fuel supplies, after careful consideration of the comments, we decided to not to make any changes to our precedent as to what constitutes an input to electric power production, including expanding the definition to include fuel supplies. Instead, we said we would provide interested parties an opportunity to propose modifications to this approach in the generic rulemaking proceeding in Docket No. RM04-7-000. Order No. 652, FERC Stats. & Regs. ¶ 31,175 at P 58.

⁴⁰ EPSA Rehearing Request at 5.

not accurately quantify the capacity sellers control.⁴¹ EEI argues that de-rates and up-rates should also be netted prior to determining whether reporting is required.⁴²

Commission Determination

25. We will grant the requests above to adopt a netting approach in determining whether the materiality threshold has been reached, subject to the cumulative 100 MW threshold.

Inclusion of Reporting Requirement in Market-Based Rate Tariffs

Rehearing Requests

26. With respect to Order No. 652's requirement that all market-based rate sellers incorporate into their market-based rate tariffs the change in status reporting requirement, EPSA and Reliant request that the Commission provide specific language. Reliant asserts that adopting specific language to be used by all sellers will eliminate uncertainty associated with compliance and will create uniformity and eliminate the administrative burden on Commission Staff associated with analyzing hundreds of differently-worded attempts at compliance with Order No. 652.⁴³

Commission Determination

27. We will grant the clarification regarding *pro forma* tariff language requested by EPSA and Reliant. Market-based rate sellers satisfy their obligation in this regard by incorporating into their market-based rate tariff the following provision, which we have directed market-based rate sellers to include in their tariff in orders issued after the effective date of Order No. 652:

[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

⁴¹ Reliant Rehearing Request at 4.

⁴² EEI Rehearing Request at 6.

⁴³ Reliant Rehearing Request at 12.

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.⁴⁴

Reporting Period/Timing

Rehearing Requests

28. A number of entities sought clarification as to the reporting period for filing the change in status reports. EEI and Reliant seek clarification as to whether a change in control over generation capacity associated with a wholesale power sales contract or a contract providing for future commencement of delivery occurs becomes reportable on the date of physical delivery, i.e., the commencement date, rather than the execution date.⁴⁵ According to EEI, this clarification would be consistent with the Commission's treatment of contracts under the Electric Quarterly Report requirements.⁴⁶

29. EEI also notes that, due to the restrictions on sharing market information under the code of conduct, until such time as the traditional utility affiliate submits its own change in status filing, the merchant affiliate will not know that this type of non-public change in status event has occurred. EEI thus requests clarification that the reporting deadline applicable to the merchant affiliate is thirty days from the date that the traditional utility submits a change in status filing to the Commission.⁴⁷

30. EPSA and Reliant both seek clarification that a market-based rate seller is only required to file a change in status report upon the occurrence of a triggering event that occurs after the effective date of Order No. 652.⁴⁸

Commission Determination

31. In response to the request of EEI and EPSA, we reiterate here that a change in status in which control over generation facilities is transferred must be reported within 30 days after the legal or effective date of the contract by which control is transferred.⁴⁹

⁴⁴ See, e.g., *Delta Energy Center, LLC*, 111 FERC ¶ 61,023 (2005); *First Energy Operating Companies*, 111 FERC ¶ 61,032 (2005).

⁴⁵ Reliant Rehearing Request at 6.

⁴⁶ EEI Rehearing Request at 5.

⁴⁷ *Id.* at 8-9.

⁴⁸ EPSA Comment at 3; Reliant Rehearing Request at 8.

⁴⁹ Order No. 652, FERC Stats. & Regs. ¶ 31,175 at P 106.

It is irrelevant for the purposes of compliance with the reporting obligation if the effective date on which control is transferred occurs prior to the date on which the purchaser is contractually bound to commence physical delivery. Parties are, of course, free to file reports of prospective changes.

32. We will reject as misplaced EEI's request for clarification regarding the reporting obligations of merchant affiliates. In Order No. 652, we stated that the various affiliates within a corporate family may submit a single notice for the corporate family as a whole for each reportable change in status that occurs, listing all affiliated companies holding market-based rate authority in such notice.⁵⁰ Consequently, the merchant affiliates in the situation described by EEI would not be obligated to separately report the traditional utility's change in status.

33. We will reject EPSA and Reliant's request for clarification that a market-based rate seller is only required to file a change in status report upon the occurrence of a triggering event that occurs after the effective date of Order No. 652. Market-based rate sellers were already subject to the change in status reporting obligation prior to the issuance of Order No. 652. However, since Order No. 652 introduced the requirement that such changes be reported within 30 days after the occurrence of the change in status, we will clarify that changes in status occurring before the effective date of Order No. 652 are not subject to the 30-day reporting requirement. Instead, with respect to such changes in status, market-based rate sellers are subject to their pre-existing reporting obligations. Furthermore, as discussed above, market-based rate sellers need not report changes in status that the Commission has already been taken into account in an initial application or in a subsequent triennial review.

Other Issues: Barriers to Entry

Rehearing Requests

34. Finally, Reliant request clarification as to whether the Commission considers capacity held by a Seller on an interstate or intrastate pipeline to be a potential barrier to entry, and, if so, whether there is a materiality threshold below which reporting of such capacity is not required. Reliant argues that the capacity held on interstate pipelines should not be reportable because the Commission's rules, which require posting of unused capacity, prevent withholding or other market abuse.⁵¹

⁵⁰ *Id.* at P 51.

⁵¹ Reliant Rehearing Request at 11.

Commission Determination

35. Natural gas pipelines have traditionally been treated as inputs to electric power production, and Order No. 652 did not change their treatment. Accordingly, where a market-based rate seller acquires ownership or control over such inputs or becomes affiliated with an entity that owns or controls intrastate natural gas pipelines or storage facilities, this is a reportable change in status.⁵² The mere acquisition of capacity on a pipeline that is owned or controlled by a non-affiliated entity does not constitute a reportable change in status. Further, acquisition of ownership or control or affiliation with an interstate natural gas pipeline would not be a reportable change in status. As the Commission has explained, affiliation with an interstate natural gas pipeline does not raise market power concerns because the pipeline is subject to the Commission's open access requirements for natural gas pipelines.⁵³

The Commission orders:

The requests for rehearing and clarification of Order No. 652 are hereby granted in part and denied in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

⁵² See, e.g. *Louisville Gas & Electric Co.*, 62 FERC ¶ 61,106 at 61,148 (1993)

⁵³ See *Vantus Energy Corporation*, 73 FERC ¶ 61,099 (1995); *Enron Power Marketing, Inc.*, 65 FERC ¶ 61,305 (1993).