

112 FERC ¶ 61,320  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

AEP Power Marketing, Inc.	Docket Nos. ER96-2495-025
AEP Service Corporation	ER97-4143-013
CSW Power Marketing, Inc.	ER97-1238-020
CSW Energy Services, Inc.	ER98-2075-019
Central and South West Services, Inc.	ER98-542-015
	EL04-131-001
	(Not Consolidated)

ORDER DENYING REHEARING

(Issued September 20, 2005)

1. In this order, the Commission denies rehearing of the order issued on December 17, 2004,<sup>1</sup> on AEP's<sup>2</sup> updated market power analysis, which instituted a proceeding pursuant to section 206 of the Federal Power Act (FPA)<sup>3</sup> to investigate generation market power issues in the AEP-Southwest Power Pool, Inc. control area (AEP-SPP).<sup>4</sup>

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<sup>1</sup> *AEP Power Marketing, Inc.*, 109 FERC ¶ 61,276 (2004) (December Order).

<sup>2</sup> "AEP" includes the following entities: AEP Power Marketing, Inc., AEP Service Corporation, on behalf of the American Electric Power operating companies, CSW Power Marketing, Inc., CSW Energy Services, Inc., and Central and South West Services, Inc.

<sup>3</sup> 16 U.S.C. § 824e (2000).

<sup>4</sup> The AEP-SPP control area is comprised of AEP's service territories in Arkansas, Louisiana, Oklahoma, and Texas.

## **Background**

2. On August 9, 2004, as amended on August 10, 2004, September 16, 2004, and November 19, 2004, AEP submitted for filing the generation market power screens in compliance with the Commission's orders issued on April 14, 2004 and July 8, 2004,<sup>5</sup> and the Commission's data request issued on October 29, 2004.<sup>6</sup> AEP's filing indicated that AEP passed the pivotal supplier screen and the wholesale market share screen in the PJM Interconnection, L.L.C. market (PJM).<sup>7</sup> AEP also stated that it passed both screens in the Electric Reliability Council of Texas (ERCOT).<sup>8</sup> AEP stated that, in AEP-SPP, AEP passed the pivotal supplier screen but failed the wholesale market share screen for each of the four seasons considered.<sup>9</sup> The filing indicated that in each of the control areas directly interconnected to AEP-SPP, AEP passed the pivotal supplier screen and the wholesale market share screen. Intervenors filed protests alleging that AEP has generation market power in the AEP-SPP control area and requesting customer protection.

3. As the Commission stated in the April 14 Order, where an applicant is found to have failed either generation market power screen, such failure provides the basis for instituting a proceeding under section 206 and establishes a rebuttable presumption of market power in the section 206 proceeding. Accordingly, because of AEP's failure of the wholesale market share screen in the AEP-SPP control area, in the December Order, the Commission instituted a section 206 proceeding to investigate generation market power issues in the AEP-SPP control area.

4. In addition, the Commission found in the December Order that AEP satisfied the Commission's concerns regarding the other three parts of the Commission's analysis for

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<sup>5</sup> *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

<sup>6</sup> On October 29, 2004, the Director, Division of Tariffs and Market Development – South, acting pursuant to delegated authority, issued a data request seeking additional information relating to Entergy's submittal.

<sup>7</sup> AEP's service territory in PJM is referred to as "AEP East".

<sup>8</sup> AEP's service territory in ERCOT is referred to hereinafter as "AEP-ERCOT".

<sup>9</sup> AEP's market share percentages in AEP-SPP range from 36 to 42 percent.

market power - *i.e.*, transmission market power, barriers to entry and affiliate abuse or reciprocal dealing and, therefore, the Commission did not include those issues in the section 206 proceeding instituted therein. The Commission noted that several parties had expressed concerns that AEP's filing failed to satisfy the standards for these three parts but concluded that such arguments would be more appropriately raised in a separate complaint proceeding.

### **Requests For Rehearing**

5. Timely requests for rehearing of the December Order were individually filed by Oklahoma Municipal Power Authority (OMPA) and Calpine Corporation (Calpine); and jointly filed by the American Public Power Association (APPA), Calpine, the Electricity Consumers Resource Council (ELCON), the National Rural Electric Cooperative Association (NRECA), Shell Trading Gas & Power Company, Tractebel Energy Marketing, Inc. (collectively Joint Parties), the Industrial Energy Users-Ohio and the PJM Industrial Customer Coalition (collectively Industrial Customers), and East Texas Electric Cooperative, Inc. and Northeast Texas Electric Cooperative, Inc. (collectively East Texas Cooperatives).

6. Petitioners contend that the Commission wrongly did not consider evidence and experiences of market participants that point to AEP's failure to satisfy the remaining three parts of the market-based rate analysis.<sup>10</sup> Petitioners generally argue that the Commission erred in the December Order by limiting the scope of the section 206 proceeding to an investigation of AEP's generation market power and without any inquiry into whether AEP satisfies the other three parts of the Commission's market-based rate analysis.<sup>11</sup> Petitioners argue that the Commission should not have directed concerns about the transmission market power, barriers to entry, and affiliate abuse prongs of the market power analysis to a separate complaint proceeding because all four prongs relate to each other and therefore should be considered together.<sup>12</sup> OMPA and Industrial Customers argue that a section 206 proceeding wrongly shifts the burden from

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<sup>10</sup> *See, e.g.*, Calpine Request for Reh'g at 2, 10-15; Joint Parties Request for Reh'g at 3, 5, 7; Industrial Customers Request for Reh'g at 5-7, 9-12.

<sup>11</sup> *See, e.g.*, Calpine Request for Reh'g at 1, 3, 6-10; OMPA Request for Reh'g at 1-4; Joint Parties Request for Reh'g at 2-3, 5, 8-9; Industrial Customers Request for Reh'g at 5-7, 13-15.

<sup>12</sup> *See, e.g.*, OMPA Request for Reh'g at 4.

the applicant to complainants.<sup>13</sup> Further, petitioners claim that requiring separate litigation for each part of the market power analysis is inefficient.<sup>14</sup>

7. The Industrial Customers argue that the Commission erred by finding that an investigation and hearing are not necessary to properly evaluate AEP's ability to exercise market power in the AEP-East region.<sup>15</sup> Specifically, the Industrial Customers assert that they presented evidence that AEP may have the potential to exercise market power in AEP-East during the period following the integration of AEP-East into PJM.

### **Cost-Based Rate Caps**

8. Following submission of the requests for rehearing in the instant case, AEP submitted a compliance filing in accordance with the December Order. In the compliance filing, AEP proposed revisions to its market-based rate tariffs for sales in the AEP-SPP control area that would provide for up to cost-based rates applicable to sales of electric power at wholesale that sink within the AEP-SPP control area. Noting that the Commission found in the December Order that AEP satisfied both of the indicative screens in all first-tier markets interconnected with the AEP-SPP control area, AEP stated that it would continue to use its market-based tariff to arrange capacity and energy sales transactions with entities that serve load outside the AEP control area in SPP and/or third parties on their behalf. The Commission accepted the proposed tariff revisions for filing, suspended them for a nominal period, made them effective March 6, 2005, subject to refund, and set them for hearing.<sup>16</sup>

### **Discussion**

9. As noted above, petitioners seek rehearing of the Commission's determinations in the December Order regarding transmission market power, barriers to entry and affiliate abuse. After careful consideration of the arguments raised on rehearing as to why the Commission should have addressed all four parts of the market power analysis in the

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<sup>13</sup> *See, e.g.*, OMPA Request for Reh'g at 4.

<sup>14</sup> *See, e.g.*, Joint Parties Request for Reh'g at 3, 9-10.

<sup>15</sup> Industrial Customers Request for Reh'g at 7-9; *accord* East Texas Cooperatives Protest at 11 n.13.

<sup>16</sup> *AEP Power Marketing, Inc.*, 112 FERC ¶ 61,947 (2005).

section 206 proceeding instituted in the December Order, we will deny the requests for rehearing. We dismiss these arguments as moot in so far as they relate to market-based rate sales within the AEP-SPP control area. In light of AEP's compliance filing proposing a cost-based rate cap for sales of energy that sink within AEP-SPP, AEP will not be making sales at market-based rates within AEP-SPP. On this basis, it is unnecessary to address here the rehearing requests challenging whether AEP satisfies the remaining three standards for market-based rate authority for sales in AEP-SPP. The Commission will deny the requests for rehearing as they relate to sales at market-based rates outside of AEP-SPP for the reasons discussed below.

### **Transmission Market Power**

10. In support of the argument that AEP possesses transmission market power, Calpine references its earlier affidavit, which alleges that: 1) AEP may be able to strategically dispatch its own generating units in order to limit competing generators' ability to gain sufficient transmission capacity with which to supply their wholesale customers; 2) as the owner of the transmission network, AEP may be in a position to exercise vertical market power by delaying specific transmission upgrades, thereby limiting competing generators' market access or raising the costs associated with such access; and 3) underinvestment in transmission upgrades could serve to foreclose competing generators from the market.<sup>17</sup> Petitioners also assert that the Commission's finding that AEP satisfies the transmission market power analysis by having a Commission-approved OATT is erroneous because it ignores substantial information that, at a minimum, calls into question whether the existence of AEP's OATT adequately mitigates transmission market power.<sup>18</sup>

11. The affidavit submitted by Calpine also relates a complaint, contained in OMPA's protest, arguing that AEP has insisted that cost responsibility for upgrades is not covered by the AEP OATT, but rather by the not-yet specified rules governing the SPP tariff. For example, OMPA filed a complaint against AEP in which OMPA alleged that AEP's transmission system was inadequate and accused AEP of taking advantage of that inadequacy to impair competition.<sup>19</sup> In that complaint, OMPA charged that AEP did not

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<sup>17</sup> See, e.g., Calpine Request for Reh'g at 16.

<sup>18</sup> See Calpine Request for Reh'g at 15-18; see also Joint Parties Request for Reh'g at 5-8; East Texas Cooperatives' Request for Reh'g at 7-11; OMPA Request for Reh'g at 4-8.

<sup>19</sup> See Calpine Affidavit of DeRamus at P 74 and OMPA Request for Reh'g at 5-6.

work with OMPA to build upgrades, but instead “dragged its feet” and refused to file an unexecuted service agreement with the Commission. On March 4, 2005, the Commission granted OMPA’s complaint.<sup>20</sup> In addition, OMPA lists several transmission limitations that, OMPA claims, demonstrate the difficulty of competing generation accessing the AEP-SPP market.<sup>21</sup> OMPA cites as an example, a transaction in which it had purchased 15 MW of firm power from AEP but AEP terminated the sale. OMPA states that it has been unable to enter into a replacement scheduling capacity purchase from AEP on comparable, commercially reasonable terms.<sup>22</sup>

12. Although petitioners have raised concerns regarding the issue of transmission market power, the Commission notes that the concerns raised relate to lack of transmission capacity and impediments to independent competitors obtaining access to transmission to bring their supplies to market. This is the type of evidence that the April 14 and July 8 Orders anticipated would be considered as part of the Commission’s examination of generation market power (prong 1).<sup>23</sup> Moreover, as noted above, AEP

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<sup>20</sup> See *Oklahoma Mun. Power Auth.*, 110 FERC ¶ 61,228 (2005).

<sup>21</sup> See OMPA Request for Reh’g at 5-6. Examples include: (1) inability of 3,120 MW of generation capacity in AEP-SPP to secure firm transmission service; (2) Oversubscription of the ERCOT East DC Tie for imports into SPP; (3) TLRs called on OMPA’s non-firm imports from outside AEP-SPP into AEP-SPP, causing OMPA not only to lose the value of the short-term purchase but also subjecting OMPA to AEP’s \$100/MWh Energy Imbalance penalty; (4) hundreds of TLRs identified by AEP that likely limited the extent to which wholesale loads could reach non-AEP generation. OMPA also alleges that “transmission capability throughout SPP is deficient, prompting SPP to try to extinguish transmission customer roll-over rights and to propose multi-million dollar transmission upgrades for even very small, routine firm transmission requests.” OMPA provides as an example of this a request for transmission for additional Oklahoma power, in response to which AEP asserted that the cost responsibility is subject to the as-yet undetermined pricing debate within SPP, rather than under the AEP Tariff under which OMPA states the request was made. See OMPA Protest at 4-5, 12-13; OMPA Request for Reh’g at 6.

<sup>22</sup> See OMPA Protest at 3.

<sup>23</sup> See April 14 Order, 107 FERC ¶ 61,108 at P 102, 119; July 8 Order, 108 FERC ¶ 61,026 at n. 84 (explaining that the type of evidence to be considered is historical sales and/or access to transmission to move supplies within, out of, and into a control area).

proposes to mitigate its generation market power in AEP-SPP, and its proposal to do so through the use of up to cost-based rates is the subject of a hearing before an administrative law judge.

### **Barriers to Entry**

13. In the context of requesting rehearing of the Commission's decision that AEP satisfies the Commission's barriers to entry standard, Calpine argues that transmission constraints within and into AEP-SPP constitute a significant barrier to entry to independent generation.<sup>24</sup> Specifically, Calpine cites its earlier affidavit which alleges that inadequate transmission presents a barrier to entry in the AEP-SPP control area<sup>25</sup> and that independent generators would participate in the AEP-SPP wholesale market in the absence of transmission constraints.<sup>26</sup> Calpine also alleges that data available on the SPP Open Access Same-Time Information System (OASIS) site provides evidence of numerous unsuccessful attempts by independent generator participants to secure transmission service into the AEP-SPP control area, and that independent generators would participate in the AEP-SPP wholesale market in the absence of transmission constraints.<sup>27</sup>

14. The East Texas Cooperatives challenge AEP's claim that it cannot impose barriers to entry by pointing to Opinion No. 442.<sup>28</sup> East Texas Cooperatives state that in Opinion No. 442, the Commission responded to competitive concerns about the AEP-CSW

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<sup>24</sup> See Calpine Request for Reh'g at 18-19.

<sup>25</sup> See Calpine Affidavit of DeRamus at P 53-62.

<sup>26</sup> See *id.* at P 59. Calpine's affidavit similarly alleges that there is chronic underinvestment in the transmission system (P 57), the cost of transmission upgrades would be prohibitively costly for customers submitting the requests (P 55), competing generation has been unsuccessful in securing transmission service in the AEP-SPP control area (P 56), and transmission costs for competing generation located outside of the AEP-SPP control area are high, relative to such costs for generation located within the AEP-SPP control area (P 61).

<sup>27</sup> See Calpine Request for Reh'g at 19.

<sup>28</sup> American Electric Power Co., 90 FERC ¶ 61,242, at 61,788-90 (2000), petition for review denied, *Wabash Valley Power Assoc., Inc. v. FERC*, 268 F.3d 1105 (D.C. Cir. 2001).

merger by conditioning its approval upon the adoption of mitigation measures to remedy transmission and generation market power. The mitigation required the applicants to transfer operational control of their transmission facilities to a Commission-approved regional transmission organization (RTO).<sup>29</sup>

15. To the extent that these concerns relate to the ability of independent competitors to obtain access to transmission and include evidence of historical transmission and sales data,<sup>30</sup> such concerns are considered as part of the generation market power analysis when determining which competitors are “in the market”. These concerns, however, are not the types of concerns that fall within the “other barriers to entry” prong. As the Commission has previously stated, when evaluating other barriers to entry, the Commission considers, *e.g.*, a power producer’s ownership of building sites, and affiliation with or ownership of engineering and construction firms, and local natural gas distribution systems. *See, e.g., Heartland Energy Servs., Inc.*, 68 FERC ¶ 61,223 at 62,062 (1994).

16. Petitioners also broadly object to the Commission’s conclusion that AEP is unable to erect barriers to entry, and argue that the December Order ignores information that demonstrates the potential for AEP to erect such barriers.<sup>31</sup> The Joint Parties claim, for example, that the Commission erred in accepting AEP’s representation that AEP does not control natural gas transportation facilities, gas production facilities, coal transportation facilities, or coal production facilities that could be used to block entry by potential competitors.<sup>32</sup> However, Petitioners have failed to persuade the Commission on rehearing that the December Order’s finding was in error. For instance, Joint Parties fail to provide any facts that counter AEP’s representations in this matter or identify examples that support Joint Parties’ argument here. On this basis, the Commission will deny the requests for rehearing on this issue.

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<sup>29</sup> *See* Opinion No. 442, 90 FERC ¶ 61,242, at 61,788.

<sup>30</sup> *See, e.g.,* Calpine Affidavit of DeRamus at P 8, 53-54

<sup>31</sup> *Compare, e.g.,* Joint Parties Request for Reh’g at 8-9; East Texas Cooperatives Request for Reh’g at 11 (text accompanying n.13) (addressing barriers to entry) *with* East Texas Cooperatives Request for Reh’g at 10 (text accompanying n.12); Calpine Request for Reh’g at 18-19 (addressing transmission market power arguments posed as barriers to entry).

<sup>32</sup> *See* Joint Parties Request for Reh’g at 8.

### **Affiliate Abuse**

17. Petitioners argue that the Commission erred in accepting AEP's representations that it satisfies the Commission's affiliate abuse concerns.<sup>33</sup> The Joint Parties argue that the Commission should not have accepted AEP's representation that its codes of conduct are sufficient to demonstrate that AEP does not engage in affiliate abuse.<sup>34</sup> Calpine asserts through an affidavit submitted with its protest, referenced in its request for rehearing, that AEP may be able, and has the incentive, to foreclose competing generators from the AEP-SPP control area by preferential dispatch of its own generation instead of purchasing lower-cost power from more efficient competing generators, despite such availability.<sup>35</sup> Calpine supports this argument by drawing on the affidavit's allegations that: AEP's actual capacity factors for its less efficient plants are higher than those of more efficient competing generators (inferring that AEP's generating plants are being dispatched out-of-merit); the state regulator of AEP's retail activities in Oklahoma (part of the AEP-SPP control area) has faulted AEP for not entering into power purchase contracts with more efficient, lower cost third-party generators; and AEP's refusal of an offer by Calpine that, according to Calpine, would have saved AEP "tens of millions" of dollars.<sup>36</sup> Calpine concludes that AEP's refusal to purchase from independent generators can effectively foreclose competing generators from the wholesale market and is a form of anti-competitive affiliate preference.<sup>37</sup>

18. The Commission will deny rehearing of its decision that AEP satisfies the Commission's concerns regarding affiliate abuse. Calpine's affidavit simply alleges that AEP may be able to foreclose competing generators by preferential dispatch; while the

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<sup>33</sup> See, e.g., Joint Parties Request for Reh'g at 8-9, Calpine Request for Reh'g at 20-21.

<sup>34</sup> Joint Parties Request for Reh'g at 8. Joint Parties substantiate this argument only by stating that the Commission did not give "full and due consideration to the countervailing representations and factual presentations of other parties showing that [AEP can] . . . engage in affiliate abuse." *Id.* at 9.

<sup>35</sup> See Calpine Request for Reh'g at 20.

<sup>36</sup> Calpine Request for Reh'g at 20-21.

<sup>37</sup> *Id.* at 21 (citing Calpine Affidavit of DeRamus at P 63).

affidavit presents capacity factor data, it provides no examples of actual affiliate abuse.<sup>38</sup> Similarly, damages are characterized as being in the tens of millions, but the allegations lack substantiation or examples of transactions in which money was actually lost.<sup>39</sup>

### **Other Issues**

19. Petitioners raise a number of other issues on rehearing challenging AEP's generation market power screens in AEP-SPP. For example, OMPA argues that the Commission ignored evidence challenging AEP's simultaneous import capability study in AEP-SPP, which OMPA argues should have been rejected based at least in part on OMPA's protests.<sup>40</sup> In its protest, OMPA claims that AEP likely overstated import capability.<sup>41</sup>

20. East Texas Cooperatives argue that the Commission erred by merely finding that AEP's truncated market share analysis "may be inconsistent" with earlier orders, and that the Commission instead should have rejected the alternative analysis as inconsistent with earlier orders on the issue.<sup>42</sup> Relatedly, East Texas Cooperatives point out that the July 8 and April 14 Orders stated that "the Delivered Price Test is the only market power study applicants may submit".<sup>43</sup>

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<sup>38</sup> See Calpine Affidavit of DeRamus at P 66-72.

<sup>39</sup> Generally, the Commission has set affiliate abuse issues for hearing only after an intervenor has challenged a proposed sales agreement between affiliates. We also note that the Commission is re-examining in a generic rulemaking proceeding the factors it considers to determine whether affiliate abuse exists. See *Market-Based Rates for Public Utilities*, 107 FERC ¶ 61,019 (2004).

<sup>40</sup> See OMPA Request for Reh'g at 8-10.

<sup>41</sup> See OMPA Protest at 11-12.

<sup>42</sup> See East Texas Cooperatives Request for Reh'g at 6-7.

<sup>43</sup> *Id.* at 7.

21. The Commission will deny these requests for rehearing. As discussed above, further consideration of generation market power issues in AEP-SPP is obviated by AEP's compliance filing, in which AEP offers to implement up-to cost-based rates for sales of electric power at wholesale that sink in SPP.

22. The East Texas Cooperatives also argue that the Commission does not provide a reasoned basis for concluding that SPP's market monitoring and mitigation plan will adequately mitigate AEP's market power.<sup>44</sup> Contrary to the East Texas Cooperatives' assertion, the Commission did not conclude in the December Order that SPP's market monitoring and mitigation plan necessarily will adequately mitigate AEP's market power. The Commission stated that once the Commission approves SPP's market monitoring and mitigation plan, utilities could point to such mitigation rules as evidence that any market power has been adequately mitigated.<sup>45</sup> As already explained, the Commission will consider such arguments on a case-by-case basis.<sup>46</sup> Accordingly, the Commission will deny the East Texas Cooperatives' request for rehearing.

### **Generation Market Power – AEP-East**

23. The Industrial Customers argue that the Commission erred by finding that AEP passes the generation market power screens after AEP-East's integration into PJM.<sup>47</sup> Specifically, they argue that an evidentiary hearing process is required to determine whether AEP controls such a large quantity of baseload generation in electrically defined areas within PJM that AEP can dictate the price of power during off-peak hours. The Commission will deny the Industrial Customers' request for rehearing in this regard. In the December Order, the Commission reviewed AEP's pivotal supplier screen and wholesale market share screens for the PJM market and found that AEP passes the generation market power screens for that market.<sup>48</sup> Further, as the Commission stated in the April 14 and July 8 Orders, the Commission believes that RTOs such as PJM with

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<sup>44</sup> *Id.* at 4-6.

<sup>45</sup> *See* December Order, 109 FERC ¶ 61,276 at P 21.

<sup>46</sup> *Id.*

<sup>47</sup> *See* Industrial Customers Request for Reh'g at 7-9.

<sup>48</sup> *See* December Order, 109 FERC ¶ 61,276 at P 18.

Commission-approved market monitoring and mitigation provide a check on the exercise of generation market power.<sup>49</sup>

24. The Industrial Customers also assert that market power detection and mitigation are based on a flawed model, resulting in the inability of PJM to adequately protect customers. The Industrial Customers request that the Commission conduct an investigation into the ability of prevailing models to detect and remedy exercises of market power.<sup>50</sup> The Industrial Customers specifically argue that because supply function equilibriums are difficult to calculate, current market modeling methods are, as a general matter, incapable of reliably identifying market power. These arguments are misplaced, as they are beyond the scope of this case. The instant proceeding concerns AEP's market power analysis, which AEP has submitted in support of its market-based rate authorization. The Commission's generation market power analysis was adopted following a comprehensive proceeding in which all interested persons were provided an opportunity to participate.<sup>51</sup> Whether the Commission should revise its approach for granting market-based rate authority to any market participant is more appropriately raised in the generic rulemaking proceeding in Docket No. RM04-7-000.<sup>52</sup>

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<sup>49</sup> April 14 Order, 107 FERC ¶ 61,018 at P 190-91 (explaining that the creation of fungible tradable electricity products facilitates the development of a competitive market for each of the subcomponents). *See generally* PJM Open Access Transmission Tariff, Attachment M (PJM Market Monitoring Plan); PJM Operating Agreement, Schedule 1 (PJM Interchange Energy Market).

<sup>50</sup> In addition, the Industrial Customers claim that certain opinions from the U.S. Court of Appeals for the District of Columbia Circuit have eroded the Commission's ability to comprehensively monitor markets. Industrial Customers Request for Reh'g at 11. The Industrial Customers mischaracterize the case involving automated mitigation procedures (AMP) in New York; in an order clarifying the matter, the court wrote that the FERC orders under review were vacated "only insofar as they apply to the [AMP] outside of New York City." *Edison Mission Energy, Inc. v. FERC*, No. 03-1228 (D.C. Cir. Mar. 24, 2005).

<sup>51</sup> *See* April 14 Order, 107 FERC ¶ 61,018 (2004).

<sup>52</sup> *See also, e.g., Duke Energy Morro Bay, LLC*, 110 FERC ¶ 61,344 at P 9 (2005); *Sempra Energy Res.*, 110 FERC ¶ 61,344 at P 21 (2005).

25. In addition, the Industrial Customers argue that, as a general matter, market-based rates are adversely impacting retail customers.<sup>53</sup> The Industrial Customers state that the Commission erred by failing “to take reasonable measures to counteract the negative impact that wholesale market experiments are having on retail customers.”<sup>54</sup> As an example, the Industrial Customers cite a retail rate case pending before the Public Utilities Commission of Ohio in which AEP is seeking to increase retail rates.<sup>55</sup> These arguments made by the Industrial Customers are beyond the scope of this proceeding. In the instant proceeding the Commission is considering AEP’s updated market power analysis and not market-based rates for wholesale electricity sales as a general matter.

26. East Texas Cooperatives also assert that the Commission failed to respond to concerns raised in the Industrial Customers’ September, 2004, protest.<sup>56</sup> In that protest the Industrial Customers argue that because AEP has “lower-cost generation units that have realized years of depreciation and typically have lower operating costs” AEP, through lower prices, is able to “undercut competitiveness of new generation considering to enter a service territory.”<sup>57</sup> Without further evidence or analysis presented by East Texas Cooperatives or the Industrial Customers, it is unclear why AEP’s lower operating costs would allow AEP to charge unjust and unreasonable rates.

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<sup>53</sup> *See* Industrial Customers Request for Reh’g at 15-18.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 16.

<sup>56</sup> *See* East Texas Cooperatives Request for Reh’g at 11 n.13.

<sup>57</sup> *Id.*

The Commission orders:

The requests for rehearing are denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.