

124 FERC ¶ 61,274
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

AEP Power Marketing, Inc.	Docket Nos. ER96-2495-030
AEP Service Corporation	ER97-4143-018
AEP Energy Partners, Inc.	ER07-1130-001
CSW Energy Services, Inc.	ER98-2075-024
Central and South West Services, Inc.	ER98-542-020

ORDER ACCEPTING UPDATED MARKET POWER ANALYSIS AND
CONDITIONALLY ACCEPTING ORDER NO. 697 COMPLIANCE FILING

(Issued September 19, 2008)

1. In this order, the Commission accepts the updated market power analysis filed by AEP Power Marketing, Inc. (AEP Power), AEP Service Corporation (AEP Service), AEP Energy Partners, Inc. (AEP Energy), CSW Energy Services, Inc. (CSW Energy), and Central and South West Services, Inc. (CSW Services) (collectively, Applicants). As discussed below, the Commission concludes that Applicants satisfy the Commission's standards for market-based rate authority. The Commission also conditionally accepts, subject to a further compliance filing, proposed market-based rate tariff revisions filed by Applicants, which incorporate provisions as adopted in Order No. 697.¹

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 914-18, *clarified*, 121 FERC ¶ 61,260 (2007) (Order Clarifying Final Rule), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 (2008).

2. Additionally, the Commission finds that Applicants meet the criteria for a Category 2 seller and are so designated. Applicants will be required to file their next updated market power analysis according to the regional schedule adopted in Order No. 697.²

I. Background

3. On January 14, 2008, as amended January 15, 2008, Applicants filed an updated market analysis in accordance with the regional reporting schedule adopted in Order No. 697.³ Applicants also filed proposed revisions to the market-based rate tariffs of AEP Operating Companies,⁴ AEP Power Marketing, AEP Energy Partners, the CSW Operating Companies,⁵ and CSW Energy Services, Inc. in compliance with Order No. 697.⁶

4. Applicants state that they and several affiliates known as the AEP East Companies⁷ own transmission and generation facilities in the PJM Interconnection, L.L.C. (PJM).

² Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 882-93, App. D; Order Clarifying Final Rule, 121 FERC ¶ 61,260 at P 9, 10, App. D-1.

³ Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 882. The Commission stated that “both the Commission and market participants will benefit from greater data consistency that will result from regional examination of updated market power analyses and a methodical study of all sellers in the same region. This will give the Commission a more complete view of market forces in each region and the opportunity to reconcile conflicting submissions, enhancing our ability to ensure that sellers’ rates remain just and reasonable.” *See also* Order Clarifying Final Rule, 121 FERC ¶ 61,260 at P 13.

⁴ The AEP Operating Companies include Appalachian Power Company, Columbus Southern Power Company (Columbus Southern), Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company (Ohio Power), and Wheeling Power Company.

⁵ The CSW Operating Companies include AEP Texas Central Company, AEP Texas North Company, Public Service Company of Oklahoma, and Southwestern Electric Power Company.

⁶ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 914-18.

⁷ The AEP East Companies include the AEP Operating Companies as well as AEP Generating Company.

5. According to Applicants' filing, they own or control approximately 28,439 megawatts (MW) in and around PJM,⁸ and provide retail electric service in seven states. Applicants also operate to serve wholesale load within PJM. They have submitted a market power analysis for the PJM market.

II. Notice and Responsive Pleadings

6. Notice of Applicants' filing was published in the *Federal Register*, 73 Fed. Reg. 5540 (2008), with interventions and protests due on or before March 14, 2008. Exelon Corporation (Exelon) filed a motion to intervene. West Virginia Energy Users Group and Industrial Energy Users-Ohio (West Virginia and Ohio Industrial Customers) and PJM Industrial Customer Coalition filed timely motions to intervene and protests. The Public Utilities Commission of Ohio (Ohio Commission) filed a notice of intervention and protest. Ohio Energy Group filed a late motion to intervene. American Municipal Power filed a motion for intervention out-of-time. On March 31, 2008, Applicants filed an answer. On May 30, 2008, the Ohio Commission filed an answer to Applicants' answer. On June 16, 2008, Applicants filed an answer to the Ohio Commission's answer.

III. Discussion

A. Procedural Matters

7. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

8. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2008), the Commission will grant Ohio Energy Group's and American Municipal Power's late-filed motions to intervene given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

9. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept the answers of Applicants and the Ohio Commission because they have provided information that assisted us in our decision-making process.

⁸ See Application, Exhibit No. JDP 2 - Page 1 of 2. Of the approximately 28,439 MW that Applicants own or control, Applicants state that approximately 1088 MW is controlled through long-term contract rights with other suppliers. See also *id.*, Affidavit of Joe D. Pace at 4.

B. Market-Based Rate Authorization

10. 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.⁹ As discussed below, the Commission concludes that Applicants satisfy the Commission's standards for market-based rate authority.

C. Horizontal Market Power

11. The Commission adopted two indicative screens for assessing horizontal market power, the pivotal supplier screen and the wholesale market share screen.¹⁰

12. Applicants have prepared the pivotal supplier and wholesale market share screens for the PJM market consistent with the requirements of Order No. 697.¹¹

13. We address below concerns raised by protesters regarding the relevant geographic market, Applicants' use of historical data, and whether the Commission should require Applicants to submit a delivered price test (DPT).

1. Relevant Geographic Market**a. Protests and Answers**

14. The Ohio Commission argues that the relevant market is not the entirety of the PJM footprint, but rather is a subset of the generation in that footprint. The Ohio Commission states that it believes that there is an error in the Applicants' filing in that their analysis assumes that all uncommitted generation in PJM is available and deliverable to compete with Applicants' uncommitted generation. The Ohio Commission in particular argues that a portion of the uncommitted generation in the PJM footprint will be unavailable or undeliverable to compete with Applicants' uncommitted generation during certain time periods and at certain prices.

15. The Ohio Commission alleges that transmission constraints in PJM limit the amount of AEP generation that can serve load in eastern PJM, and further claims that "not all of the uncommitted capacity behind the principal constraints in PJM . . . was

⁹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 62, 399, 408, 440.

¹⁰ *Id.* P 62.

¹¹ *Id.* P 235.

deliverable or available to serve load that AEP could serve”¹² The Ohio Commission states that “AEP needs to subtract the amount of other uncommitted generation that serves load that its generation cannot serve from the universe of uncommitted generation in the PJM footprint.”¹³

16. The Ohio Commission argues that the relevant geographic market for Applicants, and really all sellers in the western area of PJM, should not include anything in the transmission constrained eastern portion of PJM.¹⁴ The Ohio Commission made changes to Applicants’ market share analysis to account for a portion of the uncommitted non-AEP generation being unavailable and undeliverable because it cannot compete with Applicants’ generation on the basis of price or during specific times. According to the Ohio Commission, if one-third of the non-AEP uncommitted capacity in PJM cannot compete with AEP’s uncommitted capacity, AEP would fail the market share screen in summer and fall.¹⁵

17. Applicants note that no individual analysis was undertaken by the Ohio Commission, no study was referenced other than the one that Applicants had previously submitted, and no engineering or operational basis was provided to support the reduction in competing uncommitted generation. Applicants further state that the Ohio Commission failed to acknowledge and account for the conservative assumptions made in Applicants’ analysis. Applicants state that they initially conservatively disregarded competing imports into PJM. They state that when competing imports are included in the analysis, even assuming it was appropriate to reduce the uncommitted generation as suggested by the Ohio Commission, Applicants’ market shares remain under the 20 percent threshold and Applicants would not fail the market power screens.

¹² Ohio Commission May 30, 2008 Answer at 3-4 (“The principal constraints, Bedington – Black Oak and the 5004/5005 interface, together accounted for 45 [percent] of total PJM congestion costs in 2007. Bedington – Black Oak was binding for 63 [percent] of the hours of the year in the day-ahead market, while the 5004/5005 interface was binding for 20 [percent] of the hours in the day-ahead market.”)

¹³ Ohio Commission May 30, 2008 Answer at 11.

¹⁴ Specifically, the Ohio Commission wants to remove from the default PJM relevant geographic market those resources to the east of the Bedington – Black Oak interface and the 5004/5005 interface because they believe that there is direct evidence that two separate markets exist.

¹⁵ Ohio Commission May 30, 2008 Answer at 3-4.

18. Applicants state that the Ohio Commission does not provide evidence that there are persistent transmission constraints that limit imports into the AEP East area.¹⁶ Applicants conversely state that the PJM Market Monitoring Unit's 2007 State of the Market Report shows that the AEP East area is predominately export, not import, limited, and that the data does not in any way suggest that deliveries into the AEP East area are restricted by transmission limitations within PJM.

19. In arguing that the entire PJM footprint is not the appropriate relevant geographic market for Applicants to study, the Ohio Commission further states that generation located in eastern PJM should not be factored into the analysis because it is simply not competitive with Applicants' generation on the basis of price.

20. The Ohio Commission, in its argument that there are two distinct markets within PJM, presents cost evidence that it believes could give Applicants the opportunity to extract inframarginal rents. The Ohio Commission claims that approximately 95 percent of Applicants' generation resources cost less than the marginal cost of production of units in PJM, giving Applicants an opportunity to exercise market power and extract inframarginal rents. Further, because of the inability of relatively expensive generation in PJM to compete with Applicants' inexpensive generation and the fact that the default parameters for the indicative screens obfuscate this mismatch of competitiveness, the Ohio Commission believes that the Commission should consider shrinking the relevant market to eliminate some, if not all, of the uncommitted generation and load in eastern PJM.

21. Applicants respond that the Ohio Commission improperly mixes the concepts of earning inframarginal rents and exercising market power. Applicants maintain that there is nothing wrong with earning rents above marginal costs and that the Commission has never limited what low-cost generators can earn in the single, market-clearing price environment that the Commission has approved for many organized energy markets.

22. To support its claim that there are two distinct markets, the Ohio Commission also argues that there is a lack of price correlation within differing areas of PJM. The Ohio Commission conducted a correlation analysis of prices in the hour-ahead market for two pricing points in PJM for all hours in the most recent year available.¹⁷ This analysis indicates that only 68 percent of the change in price at one location in PJM can be

¹⁶ The AEP East area includes the AEP East Companies' service territories in Indiana, Kentucky, Michigan, Ohio, Tennessee, Virginia, and West Virginia and is not currently a recognized submarket. *See Applicants' March 31, 2008 Answer at 2.*

¹⁷ These points were the AEP zone and the Jersey City Power & Light zone for the time period between May 9, 2007 and May 6, 2008.

explained by a change in the price at the other point in PJM; thus, according to the Ohio Commission, the prices at the two points in PJM are not very highly correlated with each other. Through this, the Ohio Commission argues that the price data shows that there are two distinct markets that exist in PJM.

b. Commission Determination

23. We find Applicant's use of the PJM footprint as the relevant geographic market to be appropriate. In Order No. 697, the Commission stated that it would continue the practice of using the seller's balancing authority area or RTO/ISO region as the default relevant geographic market.¹⁸ Although the Commission also stated that it would consider submarkets as the relevant geographic market in certain instances, we do not find it appropriate to do so here. As stated in Order No. 697, where the Commission has made a specific finding that there is a submarket within an RTO/ISO, that submarket will be considered as the default relevant geographic market.¹⁹ Here, no such finding has been made. And although the Commission stated in Order No. 697 that it would allow sellers and intervenors to present evidence on a case-by-case basis to show that some other geographic market should be considered as the relevant market in a particular case,²⁰ we are not persuaded that some other relevant market should be considered here.

24. The Commission has stated that "[a]ny proposal to use an alternative geographic market (i.e., a market other than the default geographic market) must include a demonstration regarding whether there are frequently binding transmission constraints during historical seasonal peaks examined in the screens and at other competitively significant times that prevent competing supply from reaching customers within the proposed alternative geographic market."²¹ The requirement to address transmission constraints was found to be a "necessary condition" for those advocating adoption of an alternative geographic market.²² The Ohio Commission has not made a showing that

¹⁸ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 231.

¹⁹ *Id.* P 236.

²⁰ *Id.* P 233 ("[W]e will allow sellers and intervenors to present additional sensitivity runs as part of their market power studies to show that some other geographic market should be considered as the relevant market in a particular case.").

²¹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 268. *See also Boralex Livermore Falls LP*, 122 FERC ¶ 61,033, *order on reh'g*, 123 FERC ¶ 61,279, at P 25 (2008).

²² Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 268.

binding transmission constraints exist that would support a finding of a separate geographic market for the AEP East area. Any binding transmission constraints in PJM are west to east, rather than east to west.²³

25. The Ohio Commission also provided some data on generation costs and an analysis showing the lack of high price correlation between two points within the PJM market to support its claim that the entire PJM footprint is not the relevant geographic market.²⁴ While a lack of price correlation can indicate that a different market may exist, it can also be problematic to use a lack of price correlation between points as the basis for a finding that they are submarkets. The lack of a high correlation between prices could be used to support an argument for a submarket in a case where there are persistent binding transmission constraints, but as discussed above, that is not the case here because the binding constraints in PJM are west to east, rather than east to west. Correlation can be affected by any number of variables and it would be inappropriate to find that there are separate markets without more robust evidence. Regarding the arguments pertaining to Applicants' generation being less expensive than competing alternatives, we note that the Commission does not consider generation costs in the indicative screens.

2. Historical Data

a. Protests and Answers

26. The West Virginia and Ohio Industrial Customers object to Applicants' use of 2005/2006 data, as required by Order No. 697 and Order No. 697-A. They argue that the December 2005-December 2006 study period data provided by Applicants in compliance with Order No. 697 does not provide an accurate picture of the current and near-future regulatory environment and generation peak load requirements for Applicants' utilities in Ohio. They contend that the conditions in this historical period have no necessary relationship to current or future conditions. They argue that the 2005/2006 study period is unjust and unreasonable given existing legal requirements in Ohio that will impact the native load obligations in the near future of the AEP Operating Companies' Ohio-based operating companies, Columbus Southern and Ohio Power.²⁵ They state that under

²³ See Applicants' March 31, 2008 Answer at 5, *citing* 2007 PJM State of the Market Report, Volume 2: Detailed Analysis, at 308 (Mar. 11, 2008), <http://www.pjm.com/markets/market-monitor/som.html>.

²⁴ The Commission has identified particular RTO/ISO submarkets that the Commission to date has found to constitute a separate market. *Id.* P 246.

²⁵ They also argue that the impact of market-based rate authority on customers at the retail level imposes a higher duty on the Commission to ensure that the exercise of its authority meets the letter and spirit of the Federal Power Act. As discussed below, in

(continued...)

current Ohio law, Columbus Southern and Ohio Power have an opportunity to establish “market-based” retail prices for default generation supply obtained through a competitive bidding process for service rendered on or after January 1, 2009. They submit that the load the Ohio Power and Columbus Southern was serving during the December 2005-December 2006 study period may become “uncommitted” as a result of the procurement processes required by Ohio law and thus the corresponding amount of Applicants’ generation may also become “uncommitted.” They further state that even if Applicant-owned generation is used to meet the supply needs of its “native load” retail customers in Ohio on and after January 1, 2009, Applicants’ ability under Ohio law to charge retail customers market-based prices requires the Commission to treat this portion of Applicants’ generation supply as “uncommitted” because it is no longer subject to traditional cost-based pricing regulation.

27. The West Virginia and Ohio Industrial Customers argue that, although required by the Commission, Applicants’ use of a December 2005-December 2006 study period in the face of known and probable changes to Applicants’ native load obligation and related changes to their uncommitted capacity is unjust and unreasonable. In light of Applicants’ failure to anticipate, model, and address this imminent, likely, and material change in circumstances, the Commission should reject Applicants’ filing. Alternatively, they submit that the Commission make clear that, prior to Applicants’ participation in any procurement process for the Ohio Power and Columbus Southern loads, or provision of power to these loads at “market” prices, Applicants must submit an updated market power analysis that accounts for these changes.

28. With regard to the West Virginia and Ohio Industrial Customers’ arguments regarding future market conditions, Applicants maintain that the extent of Applicants’ native load obligations in 2009 and beyond is still undetermined and if there are material changes, Applicants will submit a change in status filing.

b. Commission Determination

29. With respect to Applicants’ use of 2005/2006 data, we note that in Order Nos. 697 and 697-A, the Commission considered the use of historical data. After consideration of the comments received in the rulemaking proceeding, the Commission chose to continue the use of historical data for both the indicative screens and the DPT and rejected requests to require sellers to reflect imminent changes that are known and measurable. The Commission stated:

granting market-based rate authorization, the Commission thoroughly examines an applicant’s market power and requires market-based rate sellers’ ongoing compliance with the Commission’s requirements, which are designed to ensure that market-based rates charged by public utilities are just and reasonable.

First, as we explained in the Final Rule, historical data are more objective, readily available, and less subject to manipulation by applicants than future projections. If the Commission were to allow applicants to submit studies based on their future projections or that reflect “imminent changes,” then sellers would be able to selectively “cherry pick” those changes that benefited the seller in obtaining market-based rate authorization while ignoring other equally likely future changes that would undermine the seller’s chances for obtaining such authorization. Second, this approach benefits customers, state commissions and other affected intervenors because it requires the use of a consistent methodology that can be replicated by intervenors, rather than allowing sellers to submit customized market power studies that, due to myriad selective adjustments, are difficult to analyze and can hide the presence of market power. Third, it is important to note that the “snapshot in time” approach does not preclude the Commission from considering future changes in market conditions; rather, the Commission’s grant of market-based rate authority is conditioned, among other things, on the seller’s obligation to inform the Commission of any change in status from the circumstances the Commission relied upon in granting it market-based rate authority. Accordingly, the market-based rate change in status reporting requirement allows the Commission to evaluate changes when they actually happen rather than relying on projections, making it unnecessary and redundant for the Commission to allow sellers to account for predicted changes in the DPT for market-based rate purposes.²⁶

30. Additionally, the Commission went on to state that accounting for “imminent changes” would be excessively burdensome because a review of all expiring contracts and all contracts being negotiated in the relevant market and the seller’s first-tier markets might be necessary. Also, a long-term contract may be expiring in a year, but until it expires, it often can be renewed. However, we recognize that the Commission, in Order No. 697-A, stated that it would review, on a case-by-case basis, evidence presented by sellers and intervenors that seek to demonstrate that certain changes in the market have taken place and should be recognized in the analysis. The Commission stated that it will address countervailing factors that affect whether the seller will have the ability to exercise market power.²⁷ We emphasize that the Commission stated that the evidence presented must be clear and compelling. However, in this proceeding, since the protestors argue of changes that “may” happen, we do not find it appropriate to reconsider the use of the 2005/2006 study period. Rather, if such changes do happen, Applicants would be obligated to inform the Commission of any change in status from

²⁶ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 125 (footnotes omitted).

²⁷ *Id.* P 130.

the circumstances on which the Commission relied in granting them market-based rate authority in accordance with 18 C.F.R. § 35.42 (2008). In light of this, and based on the reasons outlined in Order No. 697-A, we find that the use of historical data is more appropriate than relying on possible future changes.

3. Delivered Price Test

a. Protests and Answers

31. The Ohio Commission argues that the Applicants' market power analysis is inadequate because they ignore the known facts that would significantly change the results of Applicants' analysis and requests that the Commission require Applicants to conduct a DPT since it is the only market power screen that accounts for time differentiation and for generation price differentials.

32. Because the Ohio Commission's analysis, which decreased the amount of competing generation by one third, shows that Applicants would fail the market share screen in two periods, the Ohio Commission asks that the Commission require Applicants to conduct a DPT, which explicitly accounts for time differentiation. Alternatively, the Ohio Commission asks that the Commission require Applicants to prepare indicative screens that account for the decrease of PJM generation available and deliverable to compete with Applicants' generation.

33. In their June 16 answer, Applicants present an analysis showing that they pass the indicative screens using the Ohio Commission's assumption that one third of the non-AEP uncommitted capacity is unavailable to compete with AEP. In that analysis, Applicants conservatively assumed that only 2,000 MWs of non-AEP capacity was imported into PJM. Applicants' analysis shows that market shares were less than 20 percent in all periods and AEP was not a pivotal supplier.

b. Commission Determination

34. We will not require Applicants to submit a DPT analysis. A DPT analysis provides market-based rate sellers with an opportunity to present evidence demonstrating that, despite a screen failure, they do not have market power, or for other parties to a proceeding to present evidence that a seller does have market power. In this case, the Ohio Commission has chosen not to file a DPT study, and since Applicants pass the initial screens in the PJM market they had no need to file a DPT study. We find it inappropriate to require Applicants to perform a DPT when they pass the initial screens. In explaining the rationale behind retaining the screens, the Commission, in Order No. 697-A, stated, "The Commission explained that a conservative approach at the indicative screen stage of the proceeding is warranted because, if a seller passes both of the indicative screens, there is a rebuttable presumption that it does not possess horizontal

market power.”²⁸ We thus view the Ohio Commission’s protest as a collateral attack on the indicative screens and the Commission’s rulemaking proceeding.

35. In Order No. 697, the Commission stated that sellers and intervenors may present alternative evidence such as a DPT study or historical sales and transmission data to support or rebut the results of the indicative screens.²⁹ Here, the Ohio Commission has not presented a DPT study or historical sales data to rebut the results of the screens. Rather, the Ohio Commission has arbitrarily asserted, with no evidence in support, that one third of the generation in PJM is not available to compete in the western portion of PJM. Moreover, as discussed above, the Ohio Commission has not provided adequate evidence that there are persistent transmission constraints that limit imports into the AEP East area or another alternative area in the western portion of PJM.

36. Moreover, as Applicants indicate in their June 16 answer, even using the Ohio Commission’s arbitrary assumption that one third of the non-AEP uncommitted generation capacity is unavailable to compete with AEP, Applicants state that they would pass the indicative screens using only 2,000 MWs of non-AEP imports into PJM.³⁰

4. Conclusion

37. As discussed above, the Commission has fully addressed Protestors’ arguments regarding the relevant geographic market, the use of historical data, and the request that Applicants conduct a DPT. The Commission has reviewed Applicants’ pivotal supplier screen and wholesale market share screen and has determined that Applicants pass the

²⁸ *Id.* P 16 (footnotes omitted).

²⁹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 75.

³⁰ We note that on April 30, 2008, PJM submitted a simultaneous import limitation (SIL) study for PJM that included 3,300 MW to 13,600 MW of import capability, depending upon the season. Applicants’ updated market power analysis references 382 MW of generation AEP owns in the Midwest Independent System Operator area that is deliverable to AEP East; that 382 MW owned by AEP was the only import into PJM included in Applicants’ January 14, 2008 updated market power analysis, which did not include competing imports. *See* Application at 2 and Affidavit of Joe E. Pace at P 6. Applicants claim that they will pass the screens even under the Ohio Commission’s scenario assuming at least 2,000 MW of import capability available to non-AEP generation, which is a conservative assumption because even in the season with the lowest SIL, there are more than 2,000 MWs of competing supply available for import. (3,300 MW SIL– 382 MW AEP imports = 2,918 MW import available for non-AEP generation).

pivotal supplier screens and the wholesale market share screens in the PJM market. Applicants' market share is less than 16 percent in each of the four seasons. Accordingly, the Commission finds that Applicants satisfy the Commission's requirements for market-based rates regarding horizontal market power in the PJM market.

D. Vertical Market Power

38. 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 a seller market-based rate authorization.³¹

39. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.³² 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 sources of coal supplies and equipment for the transportation of coal supplies, such as barges and rail cars (collectively, inputs to electric power production).³³ 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.³⁴

40. Applicants state that all AEP East Companies' transmission facilities in PJM have been turned over to the operational control of PJM, which has an OATT on file with the Commission.³⁵

³¹ *Id.* P 408.

³² *Id.* P 440.

³³ *Id.* P 447. In Order No. 697-A, the Commission revised the definition of inputs to electric power production to include "physical coal supply sources and ownership of or control over who may access transportation of coal supplies." Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 176.

³⁴ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447.

³⁵ *Pennsylvania-New Jersey-Maryland Interconnection*, 81 FERC ¶ 61,257 (1997).

41. Further, Applicants state that they do not own or control, and are not affiliated with any entity that owns or controls, any intrastate natural gas transportation, storage, or distribution facilities. Applicants further state that they presently own or have options on six sites for development of generation capacity and explain that in PJM they own coal reserves in the Appalachian Basin, which are used mainly to fuel Applicants' generation stations. Lastly, Applicants state that they own and control lignite mines and reserves in Louisiana and Texas, and have lease agreements on a fleet of coal rail cars for private use.

42. 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.³⁶

43. Applicants affirmatively state that neither they nor their affiliates have erected barriers to entry into the relevant market and that they will not erect barriers into the relevant market.

44. Based on Applicants' representations we find that Applicants satisfy the Commission's requirements for market-based rates regarding vertical market power.

E. Competitive Markets

1. Protests and Answers

45. West Virginia and Ohio Industrial Customers and PJM Industrial Customer Coalition argue generally that Order No. 697 failed to answer the threshold question of whether the PJM market rules and structure result in a competitive market for electric energy and capacity. West Virginia and Ohio Industrial Customers reference the request for rehearing of Order No. 697 that they filed together with six other industrial customer groups in which they argue that before the Commission can declare any use of market-based rate authority to be just and reasonable, the Commission must find that a competitive market exists. They contend that unless and until the Commission identifies the characteristics of a competitive market and finds that such a market exists, the Commission cannot approve market-based rate authority for Applicants. They argue that neither Order No. 697 nor Applicants has shown that the organized wholesale market produces just and reasonable rates.

46. In their answer, Applicants state that these arguments are a challenge to Order No. 697 and the Commission's rules; they do not challenge whether Applicants complied

³⁶ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 446.

with the requirements of Order No. 697 or performed the analysis correctly. Applicants state that the challenge to Order No. 697 is improper in this proceeding.

2. Commission Determination

47. We agree with Applicants and find that their updated market power analysis is not the appropriate proceeding in which to address the broader question of whether the Commission must find the existence of a competitive market before relying on market-based rate authority. The Commission recently addressed this issue on rehearing of Order No. 697. Specifically, in Order No. 697-A, the Commission rejected the argument that Order No. 697 does not reflect reasoned decision-making because the Commission did not find the existence of a competitive market before relying on market based-rate authority. The Commission stated:

Under the FPA, the Commission is not bound to a particular ratemaking methodology in setting rates as long as rates fall within a zone of reasonableness, i.e., the rates are neither less than compensatory to the seller nor excessive to the consumer. In addition, the “zone of reasonableness” may take into account all relevant public interests, both existing and foreseeable. These public interests may appropriately include non-cost factors, such as the need to stimulate additional investment. In permitting market-based rates in its regulation of electric markets, there are two approaches the Commission has used to ensure that rates are just and reasonable: either a finding that an individual seller and its affiliates lack or have mitigated market power in a particular market; or a finding that a particular market is competitive or yields competitive results. Since the mid-1980’s, the Commission’s approach in the electric area has been primarily to rely on an analysis of individual seller market power, as was recently affirmed in the Final Rule. In addition, with regard to rates for sales within RTO/ISOs, even if sellers have been found to lack market power on an individual seller basis, the Commission has relied on a blend of market and cost-based elements, e.g., some form of cost cap or mitigated bids, to ensure just and reasonable rates.³⁷

48. We conclude that prices will be just and reasonable so long as Applicants continue to satisfy the requirements for continued market-based rate authorization. In particular, this means following the Commission’s regulations governing market-based rate authorization (18 C.F.R. part 25, subpart H), demonstrating that they do not have market power or that they have procedures in place to mitigate market power, and submitting certain required filings to the Commission such as notices of change in status as well as electric quarterly reports (EQRs).

³⁷ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 425 (footnotes omitted).

F. Order No. 697 Compliance Filing

49. In Order No. 697, the Commission adopted two standard required provisions that each seller must include in its market-based rate tariff: a provision requiring compliance with the Commission's regulations and a provision identifying any limitations and exemptions regarding the seller's market-based rate authority.³⁸ In addition to the required tariff provisions, the Commission adopted a set of standard provisions that must be included in a seller's market-based rate tariff to the extent that they are applicable.³⁹

50. Applicants' revised market-based rate tariffs include the Commission's two standard required provisions and a set of standard provisions with regard to sales of certain ancillary services in the markets administered by PJM, New York Independent System Operator, Inc., ISO New England Inc., and California Independent System Operator, Inc., as well as a provision regarding sales of ancillary services as a third-party provider. Applicants' proposed tariffs are accepted, subject to Commission acceptance of the compliance filing directed herein, as discussed below.

51. AEP Power's, AEP Operating Companies', CSW Energy's, and CSW Operating Companies' proposed market-based rate tariff designations do not comply with Order No. 614.⁴⁰ Each of the proposed market-based rate tariffs includes improper tariff sheet designations. Applicants are directed to file revised market-based rate tariffs for AEP Power, AEP Operating Companies, CSW Energy, and CSW Operating Companies in compliance with Order No. 614 within 30 days of the date of this order.

52. In addition, in Order No. 664 the Commission stated that it no longer intends to grant waivers of the full requirements of Part 45 in its orders granting market-based rate authority. Rather, persons seeking to hold interlocking positions will be required to comply with the full requirements of Part 45.⁴¹ Thus, consistent with Order No. 664,

³⁸ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 914.

³⁹ *Id.* P 917.

⁴⁰ *Designation of Electric Rate Schedule Sheets*, Order No. 614, FERC Stats. & Regs. ¶ 31,096 (2000).

⁴¹ *Commission Authorization to Hold Interlocking Positions*, Order No. 664, FERC Stats. & Regs. ¶ 31,194, at P 34 (2005), *order on reh'g*, Order No. 664-A, 114 FERC ¶ 61,142 (2006). The Commission stated that, with respect to an individual who currently is authorized to hold interlocking positions, that individual will not need to refile under the full requirements of Part 45 to continue to hold such interlocking positions (unless and until that individual assumes different or additional interlocking positions). *Id.* P 36.

AEP Power, AEP Energy, and CSW Energy are therefore directed to remove any reference to an exemption from the full requirements of Part 45 from the Limitations and Exemptions provisions in their market-based rate schedules within 30 days of the date of this order.

53. Also, the Commission has stated that the requirements of Part 46 regarding interlocking directors are statutory in nature and may not be waived.⁴² Accordingly, Applicants are required to comply with the full requirements of Part 46. AEP Energy is therefore ordered to remove any reference to an exemption from the full requirements of Part 46 from the Limitations and Exemptions provisions in its market-based rate schedule within 30 days of the date of this order.

54. The Commission in Order No. 697 provided specific language for a required mitigated sales provision.⁴³ Applicants have included in each of the proposed market-based rate tariffs a provision regarding mitigated sales that is inconsistent with the language provided in Order No. 697. Additionally, on June 6, 2008, subsequent to the date on which Applicants filed their updated market power analysis and compliance filing, Order No. 697-A became effective. In Order No. 697-A the Commission adopted a revised mitigated sales provision.⁴⁴ Thus, Applicants are directed to include the revised mitigated sales provision from Order No. 697-A in each market-based rate tariff within 30 days of the date of this order.

55. Also, Applicants' current tariffs include cost-based rate elements in the portion of each tariff identified as Schedule A, which limits the prices that may be charged by each seller in an area in which it is mitigated. Because the Commission has specified that cost-based rate elements should not be included in a market-based rate tariff,⁴⁵ Applicants are directed to revise their market-based rate tariffs to remove these cost-based provisions, identified as Schedule A, within 30 days from the date of this order. Additionally, to the extent that each applicant wishes to make sales in an area in which it

⁴² *Enron Power Marketing, Inc.*, 65 FERC ¶ 61,305 (1993), *order on reh'g*, 66 FERC ¶ 61,244 (1994).

⁴³ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 830.

⁴⁴ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 339.

⁴⁵ See *Public Service Company of New Mexico*, 123 FERC ¶ 61,033, at P 14 (2008); *Niagara Mohawk Power Corp.*, 121 FERC ¶ 61,275, at P 21 (2007); *Deseret Generation & Transmission Co-operative, Inc.*, 115 FERC ¶ 61,306, at P 13 (2006), *order on reh'g*, 120 FERC ¶ 61,139 (2007); *Northern States Power Co.*, 83 FERC ¶ 61,293 (1998).

is mitigated and does not currently have a cost-based tariff on file under which it can enter into those sales, Applicants should file new cost-based tariffs separate from their market-based rate tariffs to do so.

56. Applicants also include in their filing a list of assets, as required by Order No. 697.⁴⁶ While the filing identifies generation assets, transmission assets, natural gas intrastate pipelines and gas storage facilities owned or controlled by Applicants and their affiliates, it is not in the form the Commission specified in Order No. 697.⁴⁷ The Commission clarified what was required in this asset appendix in Order No. 697-A.⁴⁸ Applicants are directed to file an asset appendix in compliance with Order No. 697 and Order No. 697-A within 30 days of the date of this order.

G. Reporting Requirements

57. 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.⁴⁹ Public utilities must file Electric Quarterly Reports no later than 30 days after the end of the reporting quarter.⁵⁰

⁴⁶ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 894-95.

⁴⁷ *Id.* P 894-96.

⁴⁸ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 379-81.

⁴⁹ *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 Report 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>.

⁵⁰ The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2008). 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
(continued...)

58. Applicants 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.⁵¹

59. Additionally, in Order No. 697, the Commission created two categories of sellers.⁵² Category 1 sellers are not required to file regularly scheduled updated market power analyses. Category 1 sellers are wholesale power marketers and wholesale power producers that own or control 500 MW or less of generation in aggregate per region; that do not own, operate or control transmission facilities other than limited equipment necessary to connect individual generation facilities to the transmission grid (or have been granted waiver of the requirements of Order No. 888); that are not affiliated with anyone that owns, operates or controls transmission facilities in the same region as the seller's generation assets; that are not affiliated with a franchised public utility in the same region as the seller's generation assets; and that do not raise other vertical market power issues.⁵³ Sellers that do not fall into Category 1 are designated as Category 2 and are required to file an updated market power analysis.⁵⁴

60. Based on Applicants' representations, we find that they meet the criteria for a Category 2 seller and are so designated based on their ownership of generation totaling greater than 500 MW of capacity and because they own transmission in the PJM market.⁵⁵ Thus, Applicants must file an updated market power analysis in compliance

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.

⁵¹ *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.

⁵² Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 848.

⁵³ 18 C.F.R. § 35.36(a)(2).

⁵⁴ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 850.

⁵⁵ In Order No. 697-A, the Commission required that each seller include in its market-based rate tariff a provision identifying the category of the seller as defined in 18 C.F.R. § 35.36(a). Applicants are directed to include this provision in their market-based rate tariffs as part of the compliance filing that we direct herein. Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 391.

with the regional reporting schedule adopted in Order No. 697.⁵⁶ The Commission also reserves the right to require such an analysis at any intervening time.

The Commission orders:

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

(B) Applicants' revisions to its market-based rate tariff sheets are hereby accepted for filing, subject to Commission acceptance of the compliance filing directed in Ordering Paragraph (C), effective September 18, 2007, as requested, as discussed in the body of this order.

(C) Applicants are hereby directed, within 30 days of the date of this order, to submit a compliance filing, as discussed in the body of this order.

(D) Applicants are hereby directed to file updated market analyses according to the regional reporting schedule adopted in Order No. 697.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁵⁶ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 882.