

155 FERC ¶ 61,186  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Cheryl A. LaFleur, Tony Clark,  
and Colette D. Honorable.

Nevada Power Company  
Sierra Pacific Power Company  
PacifiCorp

Docket Nos. ER15-2281-001  
ER15-2282-002  
ER15-2283-001

ORDER DENYING REHEARING AND GRANTING CLARIFICATION

(Issued May 19, 2016)

1. In this order, we deny Nevada Power Company's and Sierra Pacific Power Company's (collectively, NV Energy), and PacifiCorp's (together with NV Energy, Berkshire EIM Sellers)<sup>1</sup> request for rehearing of the Commission's November 19, 2015 order accepting, subject to condition, Berkshire EIM Sellers' market-based rate tariff revisions to reflect their participation in the Energy Imbalance Market (EIM) administered by the California Independent System Operator Corporation (CAISO), as expanded to include NV Energy.<sup>2</sup> We also grant Truckee Donner Public Utility District's (Truckee Donner) request for clarification. Finally, we provide clarification regarding the market power analysis requirements for new entrants.

**I. Background**

2. In the November 19 Order, the Commission found that the Berkshire EIM Sellers' market power analyses of the expanded EIM footprint were deficient and failed to demonstrate a lack of market power in the expanded EIM. The Commission also outlined concerns regarding the ability of CAISO local market power mitigation to mitigate the Berkshire EIM Sellers' market power in the expanded EIM and, therefore,

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<sup>1</sup> NV Energy and its affiliate, PacifiCorp, are each subsidiaries of Berkshire Hathaway Energy Company.

<sup>2</sup> *Nevada Power Co.*, 153 FERC ¶ 61,206 (2015) (November 19 Order).

imposed the following two conditions on the Berkshire EIM Sellers' participation in the EIM at market-based rates: (1) the Berkshire EIM Sellers offer their units that are participating in the EIM at or below each unit's Default Energy Bid, and (2) the Berkshire EIM Sellers facilitate CAISO's enforcement of all internal transmission constraints in the PacifiCorp and NV Energy balancing authority areas.

3. Berkshire EIM Sellers filed a request for rehearing based on three specifications of error: (1) the Commission failed to explain or support its departure from precedent by failing to apply the rebuttable presumption that Commission-approved market power mitigation procedures are sufficient to address market power concerns; (2) the Commission did not provide a reasoned explanation for finding the Berkshire EIM Sellers' market power study deficient; and (3) the Commission failed to articulate an adequate basis for its requirement that the Berkshire EIM Sellers bid each unit at or below its Default Energy Bid.

4. Truckee Donner filed a timely request for rehearing and/or clarification of the November 19 Order with respect to a particular statement in paragraph 19 of that order. Puget Sound Energy, Inc. (Puget), Arizona Public Service Company (APS), and Portland General Electric Company (Portland General) filed late interventions and requests for rehearing and/or clarification.

## **I. Discussion**

### **A. Procedural Matters**

5. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention. Puget, Portland General, and APS have not met this higher burden of justifying late intervention.<sup>3</sup>

6. In light of our decision to deny Puget, Portland General and APS's late motions to intervene, we will dismiss their accompanying requests for rehearing and clarification. Because they are not parties to this proceeding, Puget, Portland General, and APS lack standing to seek rehearing or clarification of the November 19 Order under the Federal

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<sup>3</sup> See, e.g., *Midwest Indep. Transmission Sys. Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

Power Act and the Commission's regulations.<sup>4</sup> Nevertheless, we will provide clarification regarding the market power analysis requirements for new entrants into the EIM, as discussed below.

**B. Berkshire EIM Sellers' Rehearing Request**

**1. Rehearing Request**

7. The Berkshire EIM Sellers allege that the November 19 Order departed from well-established precedent by failing to rely on CAISO's market power mitigation procedures to address any market power an individual seller may have, especially in light of previous findings that such mitigation rules are just and reasonable. The Berkshire EIM Sellers make a number of arguments including: (1) market power in imbalance does not present the same concerns as market power in energy or capacity; (2) the questions in the November 19 Order concerning the efficacy of mitigation do not rebut the presumption that CAISO mitigation is sufficient; (3) the voluntary nature of the EIM has been accepted repeatedly; and (4) the adoption of the Available Balancing Capacity proposal further mitigates the lack of a must-offer requirement, and provides a basis for the Commission to grant rehearing.

8. The Berkshire EIM Sellers argue that the mitigation imposed in the November 19 Order is out of proportion to the market power risks presented by imbalance energy, which they claim are lower due to the comparatively small amount of load served by imbalance. Further, the Berkshire EIM sellers maintain that they have no incentive to exercise market power because NV Energy and PacifiCorp are large consumers of imbalance energy and, therefore, are at a high potential for loss if the imbalance energy prices are too high. Additionally, the Berkshire EIM Sellers argue that the design of the intertie mitigation procedures answers the Commission's submarket problem and they maintain that full-time cost-based bidding is too sweeping a remedy and should not be part of the EIM design.

9. The Berkshire EIM Sellers also argue that the November 19 Order departed from precedent by failing to rely on the rebuttable presumption, as articulated by Order No. 697-A and reiterated in Order No. 816, that Commission-approved regional transmission organization (RTO) or independent system operator (ISO) market power mitigation procedures are sufficient to address any market power

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<sup>4</sup> See 16 U.S.C. § 8251(a) (2012); 18 C.F.R. § 385.713(b) (2015); and *Southern Co. Servs., Inc.*, 92 FERC ¶ 61,167 (2000).

concerns.<sup>5</sup> Moreover, they emphasize the Commission’s statement in Order No. 697-A that “to the extent the Commission has considered a challenge to existing mitigation and has found it to be adequate, any additional challenges must demonstrate a change in circumstances rather than just rearguing issues on which the Commission has already decided.”<sup>6</sup> According to the Berkshire EIM Sellers, the Commission previously found – over the objections of third parties – that the EIM market power mitigation rules are just and reasonable, even with EIM participation clearly voluntary.<sup>7</sup> The Berkshire EIM Sellers add that, if the Commission believes the EIM market power mitigation has *become* unable to ensure just and reasonable outcomes in the EIM, the Order No. 697-A policy would have required some sort of “change in circumstances,” which they claim are lacking here.<sup>8</sup>

10. The Berkshire EIM Sellers assert that the Commission’s concerns regarding internal constraints have already been resolved by the Commission’s directive to facilitate CAISO’s enforcement of transmission constraints in the PacifiCorp and NV Energy balancing authority areas. With respect to the Commission’s concern regarding physical withholding, the Berkshire EIM Sellers point out that the Commission has repeatedly approved the EIM design as voluntary, and that this has always been a fundamental component of the EIM design.<sup>9</sup> In addition, the Berkshire EIM Sellers argue that the adoption of the Available Balancing Capacity proposal further mitigates the lack of a must-offer requirement, and provides a basis for the Commission to grant

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<sup>5</sup> Berkshire EIM Sellers Rehearing Request at 10-11 (citing *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh’g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, at P 112, *clarified*, 124 FERC ¶ 61,055, *order on reh’g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh’g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh’g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *aff’d sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 26 (2012); *Refinements to Policies and Procedures for Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 816, FERC Stats. & Regs. ¶ 31,374, at P 28 (2015)).

<sup>6</sup> *Id.* at 10 (citing Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 112).

<sup>7</sup> *Id.* at 11-12 (citing *Cal. Indep. Sys. Operator Corp.*, 147 FERC ¶ 61,231, at PP 216, 217 (2014) (CAISO EIM Order)).

<sup>8</sup> *Id.* at 12.

<sup>9</sup> *Id.* at 14-16.

rehearing.<sup>10</sup> They state that the Available Balancing Capacity proposal “enhances EIM functionality so that it will automatically recognize and account for capacity an EIM Entity has available to maintain reliable operations in its own balancing authority area, but has not bid into the EIM.”<sup>11</sup> In particular, they state that the Available Balancing Capacity proposal reduces the potential for imbalance energy price spikes and ensures that units not offered as EIM participating resources are designated as Available Balancing Capacity, which ensure that withholding cannot trigger scarcity pricing.

11. The Berkshire EIM Sellers also maintain that their market power study was sufficient to justify market-based rate authority in the EIM and that the Commission erred in finding it deficient. The Berkshire EIM Sellers argue that their treatment of imports was reasonable. Specifically, they state that the Commission misstates the relationship between CAISO’s existing real-time market and the EIM. They argue that as long as external units can be dispatched in real time in the CAISO energy market, those units should properly be considered available to discipline a potential exercise of market power. The Berkshire EIM Sellers further state that acceptance of their study was not necessary for the Commission to grant them market-based rate authority for sales in the EIM and state that “the Commission has established a policy of looking past market shares, and focusing instead on the presence of established monitoring and mitigation measures when deciding to grant market-based rate authority.”<sup>12</sup>

## 2. Commission Determination

12. We disagree that the November 19 Order represents a departure from precedent by declining to rely on CAISO’s market power mitigation procedures to address any potential market power in the EIM. The sufficiency of Commission-approved market monitoring and mitigation to address market power concerns has never been invulnerable to challenge. The Commission stated in Order No. 697 that with respect to market concentration within RTO/ISO markets, it will consider any Commission-approved market monitoring and mitigation regime already in place within the RTO/ISO that provides for mitigation of the market.<sup>13</sup> In Order No. 697-A, the Commission adopted a rebuttable presumption that existing Commission-approved RTO/ISO marketing monitoring and mitigation is sufficient to address market power concerns.<sup>14</sup> However,

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<sup>10</sup> *Id.* at 16-18.

<sup>11</sup> *Id.* at 16.

<sup>12</sup> *Id.* at 3 (citing Order No. 816, FERC Stats. & Regs. ¶ 31,374 at P 28).

<sup>13</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at PP 240-41, 290.

<sup>14</sup> Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 111.

the Commission also stated that “intervenors may challenge the effectiveness of that mitigation” and that they bear the burden of proof.<sup>15</sup>

13. In the November 19 Order, the Commission considered such challenges brought by Truckee Donner and Powerex and ultimately concluded that that CAISO’s market monitoring and mitigation is not sufficient to mitigate the Berkshire EIM Sellers’ potential market power in the EIM.<sup>16</sup> The Commission described two concerns with the effectiveness of CAISO’s mitigation as applied to the EIM: (1) Since the EIM was developed and approved as a voluntary market, a market participant could engage in physical withholding, which would not be addressed through CAISO’s mitigation; and (2) mitigation is premised on CAISO having the necessary data to enforce constraints.<sup>17</sup> Although the Berkshire EIM Sellers explain that they have turned over all the data necessary to enforce constraints, the first concern remains. Moreover, that concern is not to be overlooked simply because imbalance energy is a small part of an EIM Entity’s reliability and load serving obligations.<sup>18</sup>

14. Prior to this proceeding, the Commission applied the rebuttable presumption only to RTO/ISO energy and capacity markets, which include must-offer requirements.<sup>19</sup> Despite the Commission’s finding in the CAISO EIM Order that it was just and reasonable to extend CAISO’s existing real-time local market power mitigation to the EIM footprint,<sup>20</sup> the Commission did not address any challenge to the rebuttable

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<sup>15</sup> *Id.*

<sup>16</sup> November 19 Order, 153 FERC ¶ 61,206 at P 51.

<sup>17</sup> *Id.* PP 48-50.

<sup>18</sup> *See* CAISO Tariff, Appendix A (“An EIM Entity is a balancing authority that represents one or more EIM Transmission Service Providers and that enters into an EIM Entity Agreement with the CAISO to enable the operation of the Real-Time Market in its Balancing Authority Area.”).

<sup>19</sup> *See NRG Power Marketing LLC*, 150 FERC ¶ 61,011 (2015) (finding that the market monitoring and mitigation in PJM Interconnection, L.L.C. are sufficient to address market power concerns in that market); *Dynegy Marketing and Trade*, 125 FERC ¶ 61,270 (2008) (finding that market monitoring and mitigation in ISO New England Inc., New York Independent System Operator, Inc. and CAISO are sufficient to address market power concerns in those markets).

<sup>20</sup> *See Cal. Indep. Sys. Operator Corp.*, 153 FERC ¶ 61,207, at P 19 (2015) (citing CAISO EIM Order, 147 FERC ¶ 61,231 at PP 216-217).

presumption in that proceeding. Rather, the Commission considered such a challenge for the first time in the instant proceeding. Therefore, we reject the Berkshire EIM Sellers' argument that there must be a "change in circumstance" to justify the Commission's finding that CAISO's mitigation is not sufficient to address market power concerns in the EIM. Consistent with precedent, the rebuttable presumption as to the sufficiency of market power mitigation in the EIM was in fact rebutted based on concerns regarding physical withholding, as discussed in the November 19 Order.

15. Further, we find that the rebuttable presumption as to the sufficiency of market power mitigation in the EIM remains rebutted. We disagree that the Commission's recent determination as to the Available Balancing Capacity proposal provides a basis for rehearing. The purpose of the Available Balancing Capacity proposal is to enhance EIM functionality by helping CAISO's systems to recognize and account for capacity that an EIM Entity has available, but has not bid into the EIM. Although this may provide transparency, it does not cure the physical withholding concern that served as the basis for the Commission's condition that the Berkshire EIM Sellers bid each unit at or below its Default Energy Bid. We uphold this condition and find that the Commission provided adequate support for it in the November 19 Order.<sup>21</sup> In addition, we are unpersuaded by the argument that the Berkshire EIM Sellers lack an incentive to exercise market power in the EIM; the *ability* to exercise market power provides adequate justification to impose mitigation.<sup>22</sup>

16. As to the deficiency of the Berkshire EIM Sellers' market power study, we find that the Commission provided a reasoned explanation for its findings in the November 19 Order.<sup>23</sup> However, we take this opportunity to clarify our comments regarding imports. We did not intend that a study of the EIM could not consider generating units external to the CAISO market. Rather, the Berkshire EIM Sellers' failed to demonstrate that the

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<sup>21</sup> November 19 Order, 153 FERC ¶ 61,206 at PP 48-49.

<sup>22</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 70 ("market-based rate assessments are used to determine the *ability to exercise*, not the *exercise of*, market power." (emphasis in original)). *See also Westar Energy Inc.*, 123 FERC ¶ 61,123, at P 22 (2008) (rejecting the argument that the Commission's market power analysis for market-based rate authority is concerned with the ability *and* incentive to exercise market power); *BE Louisiana, LLC*, 132 FERC ¶ 61,118, at P 28 (2010) (noting that the Commission's analysis in the market-based rate context focuses on the ability to exercise market power, not the incentive to do so).

<sup>23</sup> *Id.* PP 16-24.

11,811 MW of presumed imports are capable of meeting the eligibility requirements for EIM Participating Resources in section 29.4(d) of the CAISO tariff.<sup>24</sup>

17. Further, given known scheduling limit constraints, it is unlikely that the reported 11,811 megawatts of imports into the CAISO portion of the EIM could reach all areas of the EIM. The EIM is a unique market consisting of separate balancing authority areas. CAISO and the EIM Entities, such as NV Energy, have acknowledged the existence of inter-balancing authority area scheduling limit constraints.<sup>25</sup> Therefore, any import estimation should consider scheduling limit constraints.

18. Also, the simultaneous transmission import limit (SIL) values from which the import numbers in the study were derived were from the December 2010 – November 2011 study year. Since 2011, there have been changes that affect CAISO's SIL values. For these reasons, it is unclear whether Berkshire EIM Sellers' study provides an accurate measure of the potential imports into the EIM, and thus the indicative market power screens fail to demonstrate a lack of market power in the EIM.

### **C. Truckee Donner's Requested Clarification**

#### **1. Clarification Request**

19. Truckee Donner requests clarification of the Commission's statement in the November 19 Order that "the required use of the Default Energy Bids only needs to remain in place until the Berkshire EIM Sellers demonstrate that they do not have market power in the 4-BAA EIM footprint." Truckee Donner believes that the words "and any submarket" should be added to the end of the sentence.

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<sup>24</sup> CAISO Tariff, section 29.4(d)(1)(B) ("is capable of delivering Energy, Curtailable Demand, Demand Response Services, or similar services within the time specified by Section 29 for the Real-Time Market in which its EIM Participating Resource Scheduling Coordinator will submit Bids").

<sup>25</sup> See CAISO Petition for Market Power Mitigation Authority, Docket No. ER15-2272-000 at 6-8 (filed July 24, 2015) (identifying EIM scheduling constraints, i.e., the maximum amount of the scheduling limits between EIM balancing authority areas that may be incorporated in the EIM); NV Energy Proposed Amendments To Its Open Access Transmission Tariff To Provide For Voluntary Participation In The Energy Imbalance Market With The California Independent System Operator, Docket No. ER15-1196-000 at 27 (filed Mar. 6, 2015) (identifying the expected maximum capacity available for EIM transfers).

20. Truckee Donner is concerned that, as drafted, the order allows for the Berkshire EIM Sellers to be relieved of the Default Energy Bid requirement by demonstrating that they do not have, or that mitigation sufficiently addresses, market power in the EIM, even if market power concerns exist within EIM submarkets. Therefore, Truckee Donner asks the Commission to clarify that the Berkshire EIM Sellers would need to demonstrate that they lack or have adequately mitigated market power concerns in the 4-BAA EIM footprint and any submarkets or grant rehearing of the statement. Truckee Donner further argues that any demonstration should include an assessment by CAISO of the frequency and degree to which transmission constraints limit the flow of energy from CAISO to NV Energy or PacifiCorp-East, and the percentage of instances when those constraints arise too late to trigger local market power mitigation.

## 2. Commission Determination

21. We grant Truckee Donner's clarification request. In the NV Energy EIM Order, the Commission stated that, to participate in the EIM at market-based rates, NV Energy was required to submit a market power analysis demonstrating a lack of market power in the EIM, which includes the NV Energy balancing authority area.<sup>26</sup> Further, in the November 19 Order, the Commission stated, citing the NV Energy EIM Order: "the Commission provided certain guidelines for completing the study, including how to define the sellers, and to take into account whether the existence of frequently binding transmission constraints could create a separate relevant geographic submarket which must also be studied."<sup>27</sup> We agree that any future market power analysis must also consider scheduling limit constraints and whether there are submarkets; to the extent submarkets exist within the EIM footprint, Berkshire EIM Sellers would need to demonstrate that they do not have, or mitigation sufficiently addresses, their market power in the EIM, including any submarkets within the EIM.

### D. Market Power Analysis Requirements for New Entrants in the EIM<sup>28</sup>

22. We take this opportunity to clarify some of the market power analysis requirements for new entrants in the EIM. First, we clarify that all new EIM participants – regardless of whether they currently have market-based rate authority in their respective

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<sup>26</sup> *Nevada Power Co.*, 151 FERC ¶ 61,131, at P 201 (2015) (NV Energy EIM Order).

<sup>27</sup> November 19 Order, 153 FERC ¶ 61,206 at P 10 (citing NV Energy EIM Order, 151 FERC ¶ 61,131 at P 201 and n.384).

<sup>28</sup> Most of this guidance will also apply when existing EIM participants begin studying the EIM as part of their triennial updated market power analyses.

home balancing authority areas or otherwise – are required to submit a market power study prior to joining the EIM. This requirement ensures that the Commission will be able to address any market power concerns presented by new entrants to the EIM before such sales begin.

23. This clarification is consistent with the direction in the PacifiCorp EIM Order that sellers should submit a change in status when joining the EIM, as well as the requirement in the NV Energy EIM Order that the Berkshire EIM Sellers file a market power study prior to their participation in the expanded EIM at market-based rates.<sup>29</sup> In both instances the Commission required a seller to study the EIM to show that it does not have market power.<sup>30</sup>

24. Further, in the November 19 Order, the Commission stated that it would not require any sellers to begin studying the EIM as part of their updated market power analyses until December 2018.<sup>31</sup> We clarify that this language does not mean that we do not expect any EIM participants to study the EIM prior to December 2018. Instead it refers to the triennial market power analyses that Category 2 sellers are required to submit to retain their market-based rate authority. In other words, the Commission did not intend for EIM sellers that are Category 2 transmission owners in the Southwest region to study the EIM in their Southwest triennial updated market power analyses that they were required to submit by December 31, 2015.<sup>32</sup>

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<sup>29</sup> *PacifiCorp*, 147 FERC ¶ 61,227, at P 160 (2014) (*PacifiCorp EIM Order*); *NV Energy EIM Order*, 151 FERC ¶ 61,131 at P 201.

<sup>30</sup> Although in the *PacifiCorp EIM order* the Commission delayed the submission of the study for nine months, it was because it did not believe that there would be sufficient data available to perform a study on this market until that time. *PacifiCorp EIM Order*, 147 FERC ¶ 61,227 at n.332.

<sup>31</sup> November 19 Order, 153 FERC ¶ 61,206 at P 52 (reminding EIM participants who are Category 2 sellers in one or more EIM balancing authority areas that they should study the EIM when submitting updated market power analyses in accordance with the schedule in Order No. 697, but specifying that this requirement will not apply until December 2018).

<sup>32</sup> Southwest transmission owners will study the EIM as part of their triennial market power analyses due in December 2018. Northwest transmission owners and Southwest non-transmission owners will study the EIM as part of their triennial market power analyses due in June 2019.

25. We note that the requirement to submit a market power analysis in advance of joining the EIM will not be limited to EIM Entities, but will extend to *all* EIM participants, including new sellers in CAISO. With respect to sellers that are already participants in the EIM, we will not require notice of change in status filings or market power analyses when the EIM footprint changes. However, we expect that existing participants' next triennial updated market power analyses will reflect the EIM footprint as it exists at the time of the update.

26. We note that any market power analysis of the EIM should account for the EIM's specific characteristics in establishing the relevant geographic market<sup>33</sup> and the relevant product market (balancing energy). These characteristics include a specific determination of EIM supply (e.g., generation that is registered, and is both available and dispatchable); EIM demand (e.g., the accumulated net differences between scheduled and actual EIM balancing authority area load); and a measure of import capability between all EIM balancing authority areas, i.e., scheduling limit constraints.

The Commission orders:

(A) The Berkshire EIM Sellers' request for rehearing is hereby denied, as discussed in the body of this order.

(B) Clarification of the November 19 Order is hereby granted, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>33</sup> As noted above, studies of the EIM should consider the scheduling limit constraints between EIM balancing authority areas.