

121 FERC ¶ 61,260
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 35

(Docket No. RM04-7-003)

Market-Based Rates for Wholesale Sales of Electric Energy, Capacity, and
Ancillary Services by Public Utilities

(Issued December 14, 2007)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Order Clarifying Final Rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is clarifying: (1) the effective date for compliance with the requirements of Order No. 697; (2) which entities are required to file updated market power analyses for the Commission's regional review; (3) the data required for the horizontal market power analyses; and (4) what constitute "seller-specific terms and conditions" that sellers may list in their market-based rate tariffs in addition to the standard provisions listed in Appendix C to Order No. 697.

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SUPPLEMENTARY INFORMATION:

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

Market-Based Rates for Wholesale Sales of Electric Energy, Capacity, and Ancillary Services by Public Utilities Docket No. RM04-7-003

ORDER CLARIFYING FINAL RULE

(Issued December 14, 2007)

I. Introduction

1. On June 21, 2007, the Commission issued Order No. 697,¹ in which the Commission revised and codified its market-based rate policy for public utilities. In the instant order, we make several clarifications. First, we clarify that, notwithstanding that Order No. 697 did not require market-based rate sellers to make immediate compliance filings amending their market-based rate tariffs, the Commission intended that all requirements and limitations applicable to market-based rate sellers set forth in Order No. 697 should become effective on September 18, 2007. Second, we clarify that transmission-owning utilities with market-based rate authority and their affiliates with market-based rate authority

¹ Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Order No. 697, 72 FR 39904 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252 (2007).

must file updated market power analyses for the Commission's regional review as discussed herein. Third, we clarify the data to be used in submitting the horizontal market power indicative screens and the Delivered Price Test (DPT) analysis.

This requirement will apply to new applications for market-based rate authorization and updated market power analyses, including the updated market power analyses that must be submitted for the Commission's regional review. As discussed below, for purposes of the market power analyses to be submitted in December 2007, we will extend the date for filing such analyses until 30 days after the date of issuance of this order. Fourth, we clarify that "seller-specific terms and conditions" that go beyond the standard provisions required in Appendix C of Order No. 697, and that sellers are permitted to list in their market-based rate tariffs, are those tariff provisions that are commonly found in power sales agreements, such as creditworthiness, force majeure, dispute resolution, billing, and payment provisions.

II. Background

2. In order to codify and revise its market-based rate policy for wholesale sellers of electric energy, capacity, and ancillary services, as well as streamline the administration of the market-based rate program, the Commission in Order No. 697 modified its regulations governing market-based rate authorization.

Order No. 697 became effective on September 18, 2007.

III. Discussion

3. In Order No. 697, the Commission determined that continuing to allow basic inconsistencies in market-based rate tariffs due to the lack of consistent form and content of certain key provisions was unjust and unreasonable under sections 205 and 206 of the Federal Power Act (FPA). As such, the Commission required that all market-based rate sellers revise their respective tariffs to contain standard required provisions.² Order No. 697 adopted two standard required provisions that each market-based rate seller must include in its tariff: (1) a provision requiring compliance with Commission regulations at 18 CFR Part 35, Subpart H; and (2) a provision identifying all limitations and exemptions regarding the seller's market-based rate authority.³ Order No. 697 also adopted a set of standard applicable provisions that must be included in a seller's market-based rate tariff to the extent that they are applicable based upon the services that are provided by a seller.⁴

A. Effective Date of Order No. 697

4. Rather than requiring sellers to make immediate compliance filings amending their market-based rate tariffs, Order No. 697 instead required sellers to amend their market-based rate tariffs to include the required standard provisions,

² Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 912-913.

³ Id. P 914-916.

⁴ Id. P 916.

as well as the required applicable provisions, at the earliest of: (1) the next time they file any other amendment to their market-based rate tariffs; (2) when they report a change in status; or (3) when they file their updated market power analyses.⁵

5. As the Commission stated in Order No. 697, regardless of the date on which market-based rate sellers make their compliance filings, the tariff provision providing that failure to abide by the regulations will constitute a tariff violation is considered part of each seller's current market-based rate tariff as of the effective date of Order No. 697, September 18, 2007.⁶ Notwithstanding that Order No. 697 did not require sellers to make immediate compliance filings amending their market-based rate tariffs,⁷ the Commission intended that all requirements and limitations applicable to market-based rate sellers set forth in Order No. 697 should become effective on September 18, 2007. To the extent that some sellers may not be aware that, effective September 18, 2007, provisions in their market-based rate tariffs that are inconsistent with the requirements of Order No. 697 are no longer in effect, we provide this clarification. While we do not attempt in this order to provide an exhaustive list of all of the applicable requirements of Order No. 697, we do provide a number of examples below for illustrative purposes.

⁵ Id. P 924.

⁶ Id.

⁷ Id.

6. For example, the Commission adopted in § 35.39(d) of the affiliate restrictions codified in Order No. 697 a two-way information sharing restriction.⁸ The Commission recognized that some sellers may need to adjust their activities to comply with the two-way information restriction. The Commission stated that any sellers whose activities had been governed by a code of conduct with a one-way information restriction will be deemed to have adopted a two-way information restriction as of the effective date of Order No. 697.⁹

7. Similarly, in Order No. 697, the Commission concluded that adequately protecting customers from the potential exercise of market power required that it continue to apply mitigation to *all* of a seller's sales in the balancing authority area in which a seller is found, or presumed, to have market power.¹⁰ In this regard, the Commission rejected proposals that it limit mitigation to sales that "sink" in the balancing authority area where the mitigated seller is found, or presumed, to have market power.¹¹ Some mitigated sellers have tariff language that is inconsistent with the Commission's current policy as set forth in Order No. 697.

⁸ 18 CFR 35.39(d) (2007).

⁹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 588.

¹⁰ *Id.* P 817. Although the Commission used the term "mitigated market" in Order No. 697, we believe that "balancing authority area in which a seller is found, or presumed, to have market power" is a more accurate way to describe the area in which a seller is mitigated. Accordingly, we use that phrase herein.

¹¹ *Id.* P 818.

These mitigated sellers' tariffs currently only prohibit sales at market-based rates that "sink" in a balancing authority area in which the mitigated seller has been found, or presumed, to have market power. We clarify that, although the Commission may have previously accepted these sellers' provisions, effective September 18, 2007, all sellers are subject to the requirements of Order No. 697 and thus may not limit mitigation to sales that "sink" in the balancing authority area where the mitigated seller has been found, or presumed, to have market power. Rather, such sellers are required to comply with the mitigation policy as stated in Order No. 697.

8. Accordingly, we clarify that, effective September 18, 2007, provisions in a seller's previously-approved market-based rate tariff that are inconsistent with the requirements of Order No. 697 are no longer in effect. However, we will not pursue any violations that resulted from the new requirements in Order No. 697 that were inconsistent with a seller's previously-approved market-based rate tariff prior to 30 days after the issuance of this clarification order.

B. Entities Required to File Updated Market Power Analyses for the Commission's Regional Review

9. In Order No. 697, the Commission determined that it would conduct a regional review of updated market power analyses and set forth in Appendix D the schedule for such review.¹² The first round of updated market power analyses, for

¹² Id. P 882.

the Northeast, are due in December 2007. Order No. 697 states that “[t]he transmission-owning utilities, which have the information necessary to perform [simultaneous import limit] studies, will be required to file their updated market power analyses first.”¹³ Appendix D of Order No. 697 lists “Transmission Operators” as filing updated market power analyses in the regional reviews. Because there may be confusion concerning which entities are required to file updated market power analyses as a result of the use of the term “transmission operators” in Appendix D of Order No. 697, we clarify that transmission-owning utilities with market-based rate authority and their affiliates with market-based rate authority must file the updated market power analyses for the Commission’s regional review. Accordingly, the term “Transmission Operators” in Appendix D should instead be “Transmission Owners.” A revised version of the relevant table in Appendix D is attached.

10. Further, we clarify that market-based rate sellers that are affiliated with transmission-owning utilities and are located in the same region¹⁴ as their transmission-owning utility affiliate (either physically located in that region such as a generation affiliate, or making sales in that region such as an affiliated power marketer) must file their updated market power analyses during the same review

¹³ Id. P 889.

¹⁴ In Order No. 697, the Commission identified six regions (Northeast, Southeast, Central, Southwest Power Pool, Southwest, and Northwest) for purposes of the regional market power update review process. Id. P 885.

period as their transmission-owning utility affiliate. For example, Order No. 697 stated that the first set of updated market power analyses (for the Northeast) would be filed in December 2007. This set of analyses should include transmission-owning utilities with market-based rate authority and all of their affiliates with market-based rate authority located in the same region (either physically located in that region such as a generation affiliate, or making sales in that region). The second set of updated market power analyses would include all other sellers in the Northeast and is due in June 2008.

C. Required Data for Horizontal Market Power Analyses

11. It has come to the Commission's attention that, for the purposes of the horizontal market power analysis, there may be confusion regarding whether market shares calculated for the market share screen and the DPT analysis should be based on the four quarters of the calendar year or the four seasons as defined in the April 14 Order.¹⁵ As a result, there may be confusion concerning which data and market share calculations must be submitted as part of sellers' updated horizontal market power analyses. As we explained in Order No. 697, the wholesale market share analysis measures for each of the four seasons whether a seller has a dominant position in the market based on the number of megawatts of uncommitted capacity owned or controlled by the seller as compared to the

¹⁵ AEP Power Marketing Inc., 107 FERC ¶ 61,018 at n.85 (April 14 Order), order on rehearing, 108 FERC ¶ 61,026 (2004).

uncommitted capacity of the entire relevant market.¹⁶ Order No. 697 states that the Commission will continue to require the use of historical data for both of the horizontal market power indicative screens and the DPT analysis in evaluating whether a seller may possess market power, and states that “in light of adopting a regional approach with regard to regularly scheduled updated market power analyses, we will require the use of the actual historical data for the previous calendar year.”¹⁷ However, the Commission’s April 14 Order, in describing the seasons for the DPT, defines the study periods (seasons) as: Summer (June/July/August); Fall (September/October/November); Winter (December/January/February); and Spring (March/April/May).¹⁸ We understand that some have interpreted Order No. 697 as revising the study periods to be the four quarters of the calendar year instead of the four seasons. This was not the intention of Order No. 697. Accordingly, we clarify that market shares calculated for the market share screen and the DPT analysis should continue to be based on the four seasons.¹⁹

¹⁶ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 34 (citing April 14 Order at P 100).

¹⁷ Id. P 298.

¹⁸ April 14 Order at n.85.

¹⁹ Summer (June/July/August); Fall (September/October/November); Winter (December/January/February); and Spring (March/April/May).

12. In addition, we also clarify that, as a general matter, the market share studies performed in market-based rate filings for both the preliminary screens and the DPT analysis should be based on the most recent available actual historical data for each full season. However, we recognize that it may be appropriate to allow exceptions to this general principle in certain limited circumstances. We describe below how this general principle should be applied to applicants making various types of market-based rate filings:

a. *Updated market power analyses (triennial reviews) for transmission-owning applicants:* Transmission-owning applicants filing *triennial reviews* in June or December should base their market share analysis on the actual historical data for the four seasons (winter (December – February), spring (March – May), summer (June – August) and fall (September – November)) ending November 30 of the previous calendar year consistent with Appendix D.²⁰

b. *Updated market power analyses for applicants that do not own transmission:* Applicants that do not own transmission should base their market share analysis in their triennial reviews on actual historical data using the same seasons that were used in the triennial reviews filed by the transmission owners in their region consistent with Appendix D. For example, for transmission owners in the Southeast filing triennial reviews in June of 2008, the seasonal analysis would be based on the following: December 2005, January 2006 and February 2006 for

²⁰ The relevant tables in Appendix D to Order No. 697 have been revised to reflect this clarification and are attached herewith.

winter, March 2006, April 2006 and May 2006 for spring; June 2006, July 2006 and August 2006 for summer; September 2006, October 2006 and November 2006 for fall (because at the time of filing these months had the most recently available actual historical data for each of those complete seasons). All other applicants in the Southeast should base their studies on these same seasons when they file their triennials six months later in December 2008.²¹

c. *Transmission-owning applicants for initial market-based rate authorization or submission of a change in status filing:* Transmission-owning applicants filing applications for *initial* market-based rate authorization, or those submitting a change in status filing, should rely on the most recent available actual historical data for each complete season of: winter (December – February), spring (March – May), summer (June – August) and fall (September – November).

d. *All other applicants:* All other applicants filing applications for *initial* market-based rate authorization or submitting change in status filings and, which have to rely on other studies because they do not have access to all the needed data, should rely on the same vintage data that were used in the triennial reviews filed by the transmission owners in their region within the past year.²² If

²¹ As set forth in Order No. 697, Applicants that do not own transmission are required to file their triennials six months after the transmission owners in that region filed their triennials. Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 889.

²² Applicants in this category include those that do not own transmission or do not have affiliates that own transmission, as well as those that file a market power study as part of their change in status filing. Although applicants do not

triennial reviews were not filed by the transmission owners in their region within the past year, then the applicants covered under this part may base their market share analysis on either (i) the most recently available actual historical data for each complete season of: winter (December – February), spring (March – May), summer (June – August) and fall (September – November, or (ii) the same seasons in their market share studies that were used in the most recently filed triennial studies submitted by the transmission owners in their region, provided that the non-transmission owning applicant shows what its market shares would have been in each season based on those studies, and states whether there would be a significant increase in the market shares during any season if more recent data had been used (as well as the basis for this claim).²³

13. In light of these clarifications, we will extend the deadline for filing the first set of regional triennial studies that we directed in Order No. 697 from December 2007 to 30 days after the date of issuance of this order. Furthermore, we will not require those entities that have already submitted their updated market power

typically submit market power studies as part of their change in status filings, sometimes they do, and at other times the Commission may require the submission of a market power study at the time of a change in status filing.

²³ We note that the Commission reserves the right to require an updated market power analysis at any time and may request the applicant to use the most recently available actual historical data for each complete season of: winter (December – February), spring (March – May), summer (June – August) and fall (September – November).

studies for the December filing period to file revisions to those studies if they were based on calendar year quarters, rather than the approach set forth in (a) above.

D. Seller-specific Terms and Conditions

14. In Order No. 697, the Commission required that all sellers include in their respective market-based rate tariffs certain standard required provisions and standard applicable provisions to the extent that they are applicable based on the services provided by the seller.²⁴ The Commission also explained that it would permit sellers to list in their market-based rate tariffs additional terms and conditions that go beyond the standard provisions set forth in Appendix C.²⁵ The Commission stated that it recognized benefits to both sellers and customers of having terms and conditions relevant to the seller's market-based rate power sales available in one document.

15. In order to ensure full compliance with the tariff requirements set forth in Order No. 697, we clarify that "seller-specific terms and conditions" are those provisions that are commonly found in power sales agreements, such as creditworthiness, force majeure, dispute resolution, billing, and payment provisions. As the Commission noted in Order No. 697, it has been our practice not to evaluate these types of terms and conditions once the seller is authorized to

²⁴ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 914-917. These standard provisions are listed in Appendix C to Order No. 697.

²⁵ Id. P 919, 927.

sell power at market-based rates, but to allow them to be included in the market-based rate tariff that is on file with the Commission. We clarify, however, that we did not intend that “seller-specific terms and conditions” include other “services” offered by the seller beyond those set forth in Appendix C.

IV. Conclusion

16. In sum, to the extent that it was not clear in the Final Rule that all requirements and limitations of Order No. 697 became effective on September 18, 2007, we hereby clarify that sellers are required to comply with all of the requirements of Order No. 697 as of the effective date of the Final Rule, even if sellers have previously-approved tariff provisions to the contrary. Thus, any sales made after September 18, 2007 are expected to be in compliance with the requirements of Order No. 697. We also clarify that both transmission-owning utilities with market-based rate authority and their affiliates with market-based rate authority are required to file updated market power analyses for the Commission’s regional review as discussed herein. We clarify that we will require use of the actual historical data through November of the previous calendar year, including data from December of the prior year, for both of the horizontal market power screens and the DPT analysis as discussed herein. Additionally, we clarify that “seller-specific terms and conditions” are those tariff provisions that are commonly found in power sales agreements, such as creditworthiness, force majeure, dispute resolution, billing, and payment provisions. “Seller-specific

terms and conditions” do not, however, include other “services” offered by the seller.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Regional Review Schedule for Sellers Filing Triennial Reviews
Appendix D – 1

Schedule for Transmission Owning Utilities with Market-Based Rate Authority
and their Affiliates in the Same Region

Entities Required to File	Filing Period (Anytime During the Month)	Study Period
Northeast Transmission Owners	December, 2007	Dec. 1, 2005 - Nov. 30, 2006
Southeast Transmission Owners	June, 2008	Dec. 1, 2005 - Nov. 30, 2006
Central Transmission Owners	December, 2008	Dec. 1, 2006 - Nov. 30, 2007
SPP Transmission Owners	June, 2009	Dec. 1, 2006 - Nov. 30, 2007
Southwest Transmission Owners	December, 2009	Dec. 1, 2007 - Nov. 30, 2008
Northwest Transmission Owners	June, 2010	Dec. 1, 2007 - Nov. 30, 2008
Northeast Transmission Owners	December, 2010	Dec. 1, 2008 - Nov. 30, 2009
Southeast Transmission Owners	June, 2011	Dec. 1, 2008 - Nov. 30, 2009
Central Transmission Owners	December, 2011	Dec. 1, 2009 - Nov. 30, 2010
SPP Transmission Owners	June, 2012	Dec. 1, 2009 - Nov. 30, 2010
Southwest Transmission Owners	December, 2012	Dec. 1, 2010 - Nov. 30, 2011
Northwest Transmission Owners	June, 2013	Dec. 1, 2010 - Nov. 30, 2011

Appendix D – 2

Schedule for All Other Entities

Entities Required to File	Filing Period (Anytime During the Month)	Study Period
All others in Northeast that did not file in December including all power marketers that sold in the Northeast.	June, 2008	Dec. 1, 2005 - Nov. 30, 2006
All others in Southeast that did not file in June including all power marketers that sold in the Southeast and have not already been found to be Category 1 sellers.	December, 2008	Dec. 1, 2005 - Nov. 30, 2006
All others in Central that did not file in December including all power marketers that sold in the Central and have not already been found to be Category 1 sellers.	June, 2009	Dec. 1, 2006 - Nov. 30, 2007
All others in SPP that did not file in June including all power marketers that sold in SPP and have not already been found to be Category 1 sellers.	December, 2009	Dec. 1, 2006 - Nov. 30, 2007

All others in Southwest that did not file in December including all power marketers that sold in the Southwest and have not already been found to be Category 1 sellers.	June, 2010	Dec. 1, 2007 - Nov. 30, 2008
All others in Northwest that did not file in June including all power marketers that sold in the Northwest and have not already been found to be Category 1 sellers.	December, 2010	Dec. 1, 2007 - Nov. 30, 2008
Others in Northeast that did not file in December and have not been found to be Category 1 sellers.	June, 2011	Dec. 1, 2008 - Nov. 30, 2009
Others in Southeast that did not file in June and have not been found to be Category 1 sellers.	December, 2011	Dec. 1, 2008 - Nov. 30, 2009
Others in Central that did not file in December and have not been found to be Category 1 sellers.	June, 2012	Dec. 1, 2009 - Nov. 30, 2010
Others in SPP that did not file in June and have not been found to be Category 1 sellers.	December, 2012	Dec. 1, 2009 - Nov. 30, 2010
Others in Southwest that did not file in December and have not been found to be Category 1 sellers.	June, 2013	Dec. 1, 2010 - Nov. 30, 2011
Others in Northwest that did not file in June and have not been found to be Category 1 sellers.	December, 2013	Dec. 1, 2010 - Nov. 30, 2011