

Related Definitions: N/A
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Kevin J. Wolf,
Assistant Secretary for Export Administration.
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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 35

[Docket No. RM04-7-008; Order No. 697-D]

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

Issued March 18, 2010.
AGENCY: Federal Energy Regulatory Commission.
ACTION: Final rule; order on rehearing and clarification.

SUMMARY: The Federal Energy Regulatory Commission is granting in part and denying in part the requests for rehearing and clarification of its determinations in Order No. 697-C, which granted rehearing and

clarification of certain revisions to Commission regulations and to the standards for obtaining and retaining market-based rate authority for sales of energy, capacity and ancillary services to ensure that such sales are just and reasonable.

DATES: *Effective Date:* This order on rehearing will become effective April 26, 2010.

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Before Commissioners: Jon Wellinghoff, Chairman; Marc Spitzer, Philip D. Moeller, and John R. Norris.

Order No. 697-D

Order on Rehearing and Clarification

I. Introduction

1. In this order, the Federal Energy Regulatory Commission (Commission) addresses requests for rehearing and clarification of Order No. 697-C.¹ Specifically, the Commission provides additional clarification on the requirement that sellers file a notification of change in status when they acquire sites for new generation capacity development.² The Commission denies the requests for rehearing of the tariff provision governing mitigated sales at the metered boundary and reaffirms its determination in Order No. 697-B to

¹ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009).

² 18 CFR 35.42.

revise the mitigated sales tariff provision in order to ensure that a mitigated seller making market-based rate sales at the metered boundary does not sell power into the mitigated market either directly or through its affiliates.³

II. Background

2. On June 21, 2007, the Commission issued Order No. 697,⁴ codifying and, in certain respects, revising its standards for obtaining and retaining market-based rates for public utilities. In order to accomplish this, as well as streamline the administration of the market-based

³ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008).

⁴ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252 (Order No. 697 or Final Rule), clarified, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 (2008); clarified, 124 FERC ¶ 61,055 (2008) (July 17 Clarification Order), *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).

rate program, the Commission modified its regulations at 18 CFR Part 35, subpart H, governing market-based rate authorization. Order No. 697 became effective on September 18, 2007.

3. The Commission issued an order clarifying four aspects of Order No. 697 on December 14, 2007.⁵ Specifically, that order addressed: (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 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.

⁵ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, 121 FERC ¶ 61,260 (2007) (December 14 Clarification Order).

4. On April 21, 2008, the Commission issued Order No. 697-A,⁶ which, in most respects, affirmed the determinations made in Order No. 697 and denied rehearing of the issues raised. However, with respect to several issues, the Commission granted rehearing or provided clarification.

5. On July 17, 2008, the Commission issued an order clarifying certain aspects of Order No. 697-A related to the allocation of simultaneous transmission import capability for purposes of performing the indicative screens.⁷

6. On December 19, 2008, the Commission issued Order No. 697-B⁸ in which it clarified and affirmed the determinations made in Order No. 697-A. Specifically, the Commission provided clarification regarding the allocation of seasonal and longer transmission reservations and also clarified that it will require a seller making an affirmative statement as to whether a contractual arrangement transfers control to seek a “letter of concurrence” from other affected parties identifying the degree to which each party controls a facility, and to submit these letters with its filing. The Commission denied the request that it clarify that only sites for which necessary permitting for a generation plant has been completed and/or sites on which construction for a generation plant has begun apply under the definition of “inputs to electric power production” in § 35.36(a)(4) of the Commission’s regulations. Order No. 697-B also revised the definition of “affiliate” in § 35.36(a)(9) of its regulations to delete the separate definition for exempt wholesale generators. The Commission also provided a number of other clarifications with regard to, among others, the pricing of sales of non-power goods and services and the tariff provision governing sales at the metered boundary.

7. On January 28, 2009, in response to Tampa Electric Company’s (Tampa Electric) request for extension of time to comply with the tariff provision on mitigated sales at the metered boundary as revised in Order No. 697-B, the Commission issued an order granting the extension requested by Tampa Electric until such time as the Commission issued an order on rehearing of Order No. 697-B.⁹ That

order clarified that affected entities must continue to comply with the mitigated sales tariff provision adopted in Order No. 697-A¹⁰ (which became effective on June 6, 2008), until the Commission acted on the requests for rehearing of Order No. 697-B.

8. On June 18, 2009, the Commission issued Order No. 697-C¹¹ in which it clarified the requirement that sellers file a notification of change in status when they acquire sites for new generation capacity development. The Commission denied the requests for rehearing of the tariff provision governing mitigated sales at the metered boundary and affirmed its determination in Order No. 697-B to revise the mitigated sales tariff provision in order to ensure that a mitigated seller making market-based rate sales at the metered boundary does not sell power into the mitigated market either directly or through its affiliates.

9. The American Wind Energy Association (American Wind), the Edison Electric Institute (EEI), and Progress Energy, Inc.¹² (Progress), and AES Corporation (AES) request rehearing and/or clarification of Order No. 697-C. American Wind, EEI and AES request clarification of the requirement to report the acquisition of sites for new generation capacity development. EEI and Progress request rehearing and clarification of the Commission’s determination in Order No. 697-C to deny the requests for rehearing of the mitigated sales tariff provision, and to affirm the Commission’s determination in Order No. 697-B to revise the mitigated sales tariff provision in order to ensure that a mitigated seller making market-based rate sales at the metered boundary does not sell power into the mitigated market either directly or through its affiliates.

III. Discussion

A. Vertical Market Power Other Barriers to Entry

Background

10. Order No. 697 adopted the proposal in the notice of proposed rulemaking (NOPR) to consider a seller’s ability to erect other barriers to entry as

Public Utilities, 126 FERC ¶ 61,072 (2009) (Order Granting Extension of Time to Comply).

¹⁰ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at Appendix C.

¹¹ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity, and Ancillary Services by Public Utilities*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009).

¹² Progress Energy, Inc. submits its request for rehearing and technical conference on behalf of its subsidiaries Carolina Power & Light Company, doing business as Progress Energy Carolinas, Inc., and Florida Power Corporation, doing business as Progress Energy Florida.

part of the vertical market power analysis, but modified the requirements when addressing other barriers to entry.¹³ It also provided clarification regarding which inputs to electric power production the Commission will consider as other barriers to entry, and modified the proposed regulatory text in that regard.¹⁴

11. On rehearing in Order No. 697-A, the Commission clarified that “inputs to electric power production” encompasses *physical* coal sources and ownership of or control over *who may access* transportation of coal via barges and railcar trains,¹⁵ and revised its definition of “inputs to electric power production” in § 35.36(a)(4) to reflect this clarification.¹⁶

12. In Order No. 697-B, with respect to the definition of “inputs to electric power production,” the Commission rejected the Electric Power Supply Association’s (EPSA) proposal that the term “sites for new generation capacity development” means only sites with respect to which permits for new generation have been obtained or where construction of new generation is underway, and not encompass land that could potentially be used for generation. The Commission clarified that “sites for new generation capacity development” should be construed to include ownership of land that could potentially be used for generation, not just sites for which permits for new generation have been obtained or where construction of new generation is under way. The Commission also clarified that “sites for new generation capacity development” does not include land that cannot be used for generation capacity development.¹⁷

13. In Order No. 697-C, in order to address the Commission’s regulatory concerns and the concerns of the American Wind, the Commission granted rehearing in order to revise the change in status reporting requirement in § 35.42 of its regulations to require market-based rate sellers to report the acquisition of control of sites for new generation capacity development on a quarterly basis instead of within 30 days of the acquisition. In particular, § 35.42(d) requires quarterly reporting of a seller’s acquisition of a site or sites for new generation capacity development for which site control has been demonstrated in the interconnection

¹³ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 440.

¹⁴ *Id.*

¹⁵ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 176 (emphasis in original).

¹⁶ *Id.*

¹⁷ Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 at P 38.

⁶ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 (2008).

⁷ July 17 Clarification Order, 124 FERC ¶ 61,055.

⁸ Order No. 697-B, FERC Stats. & Regs. ¶ 31,285.

⁹ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity, and Ancillary Services by*

process and for which the potential number of megawatts that are reasonably commercially feasible on the site or sites for new generation capacity development is equal to 100 megawatts or more.¹⁸

14. Separate and apart from this reporting requirement, and in order to address its concern that sellers may acquire land that is not used for the development of new generation capacity, and that is instead acquired for the purpose of preventing new generation capacity from being developed on that land, in Order No. 697-C the Commission stated that a seller must also report any land it has acquired, taken a leasehold interest in, obtained an option to purchase or lease, or entered into an exclusivity or other arrangement to acquire for the purpose of developing a generation site and for which site control has not yet been demonstrated during the prior three years (triggering event), and for which the potential number of megawatts that are reasonably commercially feasible on the land for new generation capacity development is equal to 100 megawatts or more. The Commission stated that a seller must report each such triggering event in a single report by January 1 of the year following the calendar year in which the triggering event occurred.¹⁹ This reporting requirement is set forth in § 35.42(e).

15. On December 10, 2009, the Commission granted an extension of time to comply with the requirement to report sites for which site control has not been demonstrated during the prior three years, until 30 days after the Commission issues an order on the requests for clarification and rehearing of Order No. 697-C.²⁰

Requests for Clarification

16. On rehearing of Order No. 697-C, American Wind states that it applauds the Commission for modifying the change in status reporting requirements, but nevertheless seeks clarification on certain issues.²¹ In particular, American Wind requests clarification regarding the deadline for the first quarterly filing. American Wind points out that Order No. 697-C states that “quarterly filings must be submitted within 30 days of the end of each quarter” and it assumes that since Order No. 697-C becomes

effective on July 29, 2009, the first quarterly filings will be due by October 30, 2009 thirty days after the end of the first full quarter after the effective date. American Wind also asks whether the initial quarterly report must include only new site control changes from the prior quarter, or must include all changes since the prior triennial filing (or the initial market-based rate filing by the seller), and, because the new reporting requirement is taking effect in the middle of the triennial filing cycle, American Wind seeks clarification on the period that should be covered in the first quarterly report.

17. American Wind also seeks clarification regarding the interaction between the three-year triggering event reporting requirement and the quarterly reporting requirement. It requests that the Commission clarify that market-based rate sellers are not required to submit a quarterly report for a site that they have previously reported in accordance with the reporting requirement for sites for which site control has not been demonstrated during the prior three years. In support of this argument, American Wind argues that requiring sellers to submit a quarterly report upon demonstration of site control for a site that they may have previously reported in accordance with the reporting requirement for sites for which site control has not been demonstrated during the prior three years will not give the Commission any additional insight about the seller’s market power and could lead to the mistaken belief that a seller has more land under its control than is actually the case.²²

18. AES asks that the Commission clarify whether the first quarterly report submitted under revised § 35.42 of the Commission’s regulations (*i.e.*, the report for the third quarter of 2009) is “cumulative” and must address “all sites meeting the requisite criteria that were acquired by a seller and its affiliates in the prior periods (including the third quarter of 2009) and had not been previously reported to the Commission,” and whether all subsequent quarterly reports under § 35.42 are “limited to the incremental number of sites and potential capacity for development acquired during the quarter in question.”²³

19. Both American Wind and the EEI request that the date for reporting sites for which site control has not been demonstrated during the prior three years be changed from January 1 to

January 30 of the year following the calendar year in which the triggering event occurred.²⁴ American Wind and EEI argue that adjusting the deadline from January 1 to January 30 would reflect deadlines for other reports, and in particular, the Commission’s fourth quarter report for generation sites for which site control has been demonstrated in the interconnection process. They also state that the January 1 reporting date poses challenges given the end-of-year holiday schedules of employees. EEI states that companies must prepare a significant number of financial and operational reports at the end of each year, not only for submission to the Commission, but also for submission to state regulatory commissions, the Securities and Exchange Commission, and the Energy Information Administration, among others.

20. With respect to the requirement that a seller report any land it has acquired for the purpose of developing new generation capacity and for which site control has not yet been demonstrated during the prior three years, and for which the potential number of megawatts that is reasonably commercially feasible on the land for new generation capacity development is 100 megawatts or more, EEI seeks clarification of the term “reasonably commercially feasible” in the context of sites that are acquired for the purpose of developing a thermal generation facility, such as a natural gas plant, and for which site control has not yet been demonstrated in the interconnection process. EEI states that unlike wind and solar generating plants, where the size of a site will have a direct impact on the number of megawatts that may be commercially developable, a single site for a thermal generation plant could theoretically accommodate an almost infinite array of possible megawatts that might be commercially developable.²⁵ EEI argues that the Commission should clarify that a seller may base its determination on a planning horizon that is consistent with its state-regulated resource planning process (if it is subject to such a process), and should provide clarification by identifying some of the commercial and system factors that sellers can take into account such as current market prices, expected new regulatory requirements affecting the type of generation for which the site was acquired, and/or current system

¹⁸ Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 at P 18.

¹⁹ *Id.* P 20.

²⁰ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Docket No. RM04-7-006, December 10, 2009 Notice of Extension of Time.

²¹ American Wind July 20, 2009 Request for Clarification at 2-3.

²² *Id.* at 3-4.

²³ AES November 11, 2009 Request for Clarification at 2.

²⁴ American Wind July 20, 2009 Rehearing Request at 4-5; EEI July 20, 2009 Rehearing Request at 18.

²⁵ EEI July 20, 2009 Rehearing Request at 17.

conditions.²⁶ EEI states that providing these clarifications will ensure that the Commission is receiving adequate information to meet its needs, while also preserving Commission resources.

Commission Determination

21. In response to the requests for clarification regarding the requirement that a seller report on a quarterly basis the acquisition of a site or sites for new generation capacity development for which site control has been demonstrated in the interconnection process, we clarify that if no sites have been acquired during a quarter, then a seller should not file a report for that quarter.²⁷ As with other types of change in status filings, a seller need only submit a change in status notification with the Commission if there is a change that may affect the conditions relied upon by the Commission since it initially granted the seller market-based rate authorization, or since the Commission accepted a seller's updated market power analysis. Thus, a seller should *not* submit change in status reports to notify the Commission that it has *not* acquired any sites for new generation capacity development.

22. We also clarify that a seller is required only to report the acquisition of sites for new generation capacity development that have not previously been reported. That is, the change in status reporting obligation for sites for new generation capacity development is not cumulative; rather, only sites that have not been reported previously must be included in the quarterly reports.

23. With respect to EEI's request for clarification of the term "reasonably commercially feasible" in the context of sites acquired for the purpose of developing a thermal generation facility and for which site control has *not* yet been demonstrated in the interconnection process, we appreciate the concerns raised by EEI regarding the difficulty sellers may have in providing information on the potential number of megawatts that are reasonably commercially feasible on such sites, and we believe that some of the same concerns may arise with respect to the requirement that a seller report any land it has acquired, taken a leasehold interest in, obtained an option to purchase or lease, or entered into an exclusivity or other arrangement to acquire for the purpose of developing a

generation site and for which site control has *not* yet been demonstrated during the prior three years (triggering event), and for which the potential number of megawatts that are reasonably commercially feasible on the land for new generation capacity development is equal to 100 megawatts or more. In addition, as American Wind points out, because sellers are required to submit a quarterly report with the Commission for sites for new generation capacity development for which site control has been demonstrated in the interconnection process, also requiring the report for sites for which site control has *not* been demonstrated during the prior three years could lead to the mistaken belief that a seller has more land under its control than is actually the case. Further, since the issuance of Order No. 697-C, two rounds of quarterly reports have been filed with the Commission. These quarterly reports provide the Commission and interested entities with information to evaluate a seller's ability to erect barriers to entry through its acquisition of sites for new generation capacity development. Given the filing of the quarterly reports, and in light of EEI's request for clarification of the term "reasonably commercially feasible" in the context of sites acquired for the purpose of developing a thermal generation facility and for which site control has *not* yet been demonstrated in the interconnection process, we recognize the difficulty of determining the potential number of megawatts that are reasonably commercially feasible on sites for which site control has *not* yet been demonstrated in the interconnection process, and we have reconsidered the basis for the requirement imposed in § 35.42(e) that a seller report any land it has acquired, taken a leasehold interest in, obtained an option to purchase or lease, or entered into an exclusivity or other arrangement to acquire for the purpose of developing a generation site and for which site control has *not* yet been demonstrated during the prior three years (triggering event), and for which the potential number of megawatts that are reasonably commercially feasible on the land for new generation capacity development is equal to 100 megawatts or more. We have assessed the difficulty and burden of complying with this reporting requirement for both the industry and the agency against the Commission's need to obtain the information necessary to evaluate a seller's ability to erect barriers to entry, and have concluded that it is reasonable to gain more experience with regard to the quarterly filings before requiring the

additional filing for sites for which site control has not been demonstrated during the prior three years. After careful consideration, we conclude that elimination of this reporting requirement is reasonable, and we therefore will revise § 35.42 of our regulations to remove subsection (e). Should we determine based on experience over a number of quarterly cycles that the quarterly reports may not be providing sufficient information, we can reconsider our determination here. In any event, the Commission always reserves the right to require additional information, including an updated market power analysis, from a seller. As a result, if there is a concern that a particular seller may be acquiring land for the purpose of preventing new generation capacity from being developed on that land, the Commission can request additional information from the seller at any time.

24. Because we are eliminating the reporting requirement for sites for which site control has not been demonstrated during the prior three years, EEI's request for clarification of the term "reasonably commercially feasible" in the context of sites that are acquired for the purpose of developing a thermal generation facility, such as a natural gas plant, and for which site control has *not* yet been demonstrated in the interconnection process is moot. The requests of American Wind and EEI that the deadline for the reports under § 35.42(e) be moved from January 1 to January 30 of each year to coincide with the filing date for the quarterly reports required under § 35.42(d) is similarly rendered moot by virtue of the elimination of the three-year triggering event reporting requirement.

B. Mitigation

Protecting Mitigated Markets

Sales at the Metered Boundary Background

25. The Commission explained in Order No. 697 that it would continue to apply mitigation to all sales in the balancing authority area in which a seller is found, or presumed, to have market power. However, the Commission explained that it would permit mitigated sellers to make market-based rate sales at the metered boundary between a balancing authority area in which a seller is found, or presumed, to have market power and a balancing authority area in which the seller has market-based rate authority, under

²⁶ *Id.*

²⁷ Because the first quarterly report was due October 30, 2009 (30 days after the end of the first full quarter following the effective date of Order No. 697-C), American Wind's request for clarification regarding the deadline for the first quarterly filing is now moot.

certain circumstances.²⁸ The Commission also adopted a requirement that mitigated sellers wishing to make such market-based rate sales at the metered boundary maintain sufficient documentation and include a specific mitigated sales tariff provisions.²⁹

26. In Order No. 697–A, after considering comments regarding the difficulty of determining and documenting intent, the Commission decided to eliminate the intent element of the mitigated sales tariff provision, which stated that “any power sold hereunder is not intended to serve load in the seller’s mitigated market.” In eliminating the seller’s intent requirement, the Commission modified this provision to require that “the mitigated seller and its affiliates do not sell the same power back into the balancing authority area where the seller is mitigated.”³⁰ In this regard, the Commission noted that “[t]o provide additional regulatory certainty for mitigated sellers, the Commission clarified that once the power has been sold at the metered boundary at market-based rates, the mitigated seller and its affiliates may not sell that same power back into the mitigated balancing authority area, whether at cost-based or market-based rates.”³¹ The Commission also stated that because it was eliminating the intent requirement, it need not address issues raised regarding documentation necessary to demonstrate the mitigated seller’s intent.

27. Further, in response to a request for clarification submitted by the Pinnacle West Companies (Pinnacle), the Commission reiterated in Order No. 697–A³² that an affiliate of a mitigated seller is prohibited from selling power that was purchased at a market-based rate at the metered boundary back into the balancing authority area in which the seller has been found, or presumed, to have market power. The Commission

explained that to the extent that the mitigated seller or its affiliates believe that it is not practical to track such power, they can either choose to make no market-based rate sales at the metered boundary or limit such sales to sales to end users of the power, thereby eliminating the danger that they will violate their tariff by re-selling the power back into a balancing authority in which they are mitigated.³³

28. In Order No. 697–B, in response to the rehearing request of E.ON U.S. LLC (E.ON), the Commission explained that it appreciated concerns regarding the difficulty of defining the term “same power” that it introduced in Order No. 697–A. For this reason, the Commission revised the mitigated sales tariff provision to state that “if the Seller wants to sell at the metered boundary of a mitigated balancing authority area at market-based rates, then neither it nor its affiliates can sell into that mitigated balancing authority area from the outside.” The Commission explained that this revised tariff language prohibits a mitigated seller making market-based rate sales at the metered boundary from selling power into the mitigated market through its affiliates. The Commission again explained that sellers may either refrain from making market-based rate sales at the metered boundary, or limit such sales to end users of the power.³⁴

29. In Order No. 697–C, the Commission denied the requests for rehearing concerning the revised mitigated sales tariff provision. However, the Commission agreed with E.ON that the tariff provision should be revised to state “if the Seller sells” instead of “if the Seller wants to sell * * *.” The Commission clarified that it is not the seller’s intent, but rather the seller’s action that triggers the limitation set forth in the mitigated sales tariff provision. The Commission also affirmed its determination to revise the mitigated sales tariff provision in Order No. 697–B in order to ensure that a mitigated seller making market-based rate sales at the metered boundary does not re-sell power into the mitigated market either directly or through its affiliates.³⁵ The Commission also denied petitioners’ requests that the Commission return to the intent-based concept first used in Order No. 697.³⁶

³³ *Id.* P 336.

³⁴ Order No. 697–B, FERC Stats. & Regs. ¶ 31,285 at P 77 (citing Order No. 697–A, FERC Stats. & Regs. ¶ 31,268 at P 336).

³⁵ Order No. 697–C, FERC Stats. & Regs. ¶ 31,291 at P 42 (citing Order No. 697–A, FERC Stats. & Regs. ¶ 31,268 at P 336).

³⁶ *Id.* P 44.

Requests for Rehearing

30. EEI and Progress (collectively, Petitioners) request rehearing and clarification of the Commission’s determination in Order No. 697–C to deny the requests for rehearing of the mitigated sales tariff provision, and to affirm the Commission’s determination in Order No. 697–B to revise the mitigated sales tariff provision in order to ensure that a mitigated seller making market-based rate sales at the metered boundary does not sell power into the mitigated market either directly or through its affiliates. EEI requests that the Commission grant rehearing, clarification and/or a technical conference on the mitigated sales tariff provision, and requests that the Commission grant its motion for extension of time to delay the deadline for complying with the mitigated sales tariff provision until the Commission issues an order responding to EEI’s request for rehearing of Order No. 697–C, or following a technical conference if the Commission intends to retain the constraints contained in the mitigated sales tariff provision.³⁷ Progress supports EEI’s request for rehearing, clarification and/or technical conference, and motion for an extension of time.³⁸

31. EEI contends that the final tariff language adopted in Appendix C to Order No. 697–C prohibits mitigated sellers who make market-based rate sales at the metered boundary, and their affiliates, from selling power back into the mitigated market, and that this constraint will require mitigated sellers to reform their participation in markets substantially.³⁹ EEI requests that the Commission grant rehearing or clarification, and reconsider the need for and scope of any constraints placed on mitigated sellers who make market-based rate sales at the metered boundary. It argues that mitigated sellers should be permitted to make sales at the metered boundary without subsequent restrictions on the mitigated seller’s ability to make sales into the balancing authority area in which it is mitigated.⁴⁰ It asserts that if the Commission believes that some additional constraints are needed on border sales by mitigated sellers, the Commission should grant rehearing and/or clarification to ensure that constraints imposed are reasonable, focus narrowly on the underlying

²⁸ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 817 (citing North American Electric Reliability Corporation) *Glossary of Terms Used in Reliability Standards* at 2 (2007), available at ftp://www.nerc.com/pub/sys/all_updl/standards/rs/Glossary_02May07.pdf.

²⁹ *Id.* P 830.

³⁰ Order No. 697–A, FERC Stats. & Regs. ¶ 31,268 at P 334. In Order No. 697–A, the Commission revised the tariff language governing market-based rate sales at the metered boundary to conform with the discussion in the December 14 Clarification Order regarding use of the term “mitigated market.” The Commission stated that, as explained in the December 14 Clarification Order, “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. *Id.* P 333.

³¹ *Id.* n.464.

³² *Id.* P 335.

³⁷ EEI July 20, 2009 Rehearing Request at 3, 15.

³⁸ Progress July 20, 2009 Rehearing Request at 2.

³⁹ *Id.* at 14.

⁴⁰ EEI July 20, 2009 Rehearing Request at 12.

problem, and do not prevent legitimate transactions.⁴¹

32. EEI argues that if the Commission “intends to retain constraints on mitigated sellers and/or their affiliates in the wake of a market-based rate sale at the metered boundary between a mitigated market and a non-mitigated market, beyond a requirement that the original market-based rate sale involve title transfer to an unaffiliated entity,” the Commission should hold a technical conference to address these issues so that the ultimate constraints are appropriate.⁴² Progress argues that a technical conference on this issue is needed to “provide the Commission and the industry with a forum to test its views as to what the specific market power concerns are” and it asserts that such a technical conference should address the following questions: (1) Should the market power concern regarding a market-based rate sale at the metered boundary of a mitigated balancing authority be limited to the concern that the seller or its affiliate will obtain or re-obtain title to that same power and re-sell it at market-based rates into the mitigated balancing authority area; (2) if the seller makes a market-based rate sale at the metered boundary, is there a market power concern if the seller or affiliate resells that same power back into the mitigated market under a Commission-approved system operating agreement or cost-based agreement that the Commission has determined to be just and reasonable; and (3) if the seller makes a market-based rate sale at the metered boundary, is there a market power concern if the seller or affiliate resells different power back into the mitigated market under a Commission-approved system operating agreement or cost-based agreement that the Commission has determined to be just and reasonable.⁴³

33. EEI contends that the Commission has not clearly articulated the problem that the current metered boundary tariff text is intended to address, nor demonstrated the need for a ban on all sales by a mitigated seller and its affiliates into a mitigated market from outside following any market-based rate sale at the metered boundary. Progress argues that the text of the mitigated sales provision is arbitrary and capricious because it is not premised on specific statements of the harm to be prevented, is not tailored to prevent those harms, and would prohibit many

legitimate transactions.⁴⁴ Specifically, Progress asserts that under the mitigated sales tariff provision, as soon as its subsidiaries Progress Energy Carolinas, Inc. and Progress Energy Florida, Inc. sell capacity and energy at market-based rates at the metered boundary to a third party, they would be precluded from selling capacity and energy to each other under their Commission-approved system operating agreement, and therefore would be required to choose between making sales under Progress’ system operating agreement and making sales at market-based rates at the metered boundary. Progress states that the Commission in Order No. 697–C “appears to respond to this concern by stating that entities, like [Progress Energy Carolinas, Inc. and Progress Energy Florida, Inc.], would simply choose not to make market-based sales at the metered boundary so that they would continue [to] have the right to make sales into the mitigated balancing authority.”⁴⁵ Progress argues that the Commission fails to explain why such a choice is necessary to prevent the exercise of market power, *i.e.*, why a market-based rate seller or its affiliate’s sales into the mitigated balancing authority area under a Commission-approved system operating agreement or a cost-based tariff suddenly are unjust and unreasonable as a result of a seller making a market-based rate sale at the metered boundary.⁴⁶

34. Similarly, EEI asserts that the Commission has not explained why such sales by a mitigated seller, when title transfers to an unaffiliated entity at the metered boundary, need to be further constrained at all.⁴⁷ EEI also argues that the Commission has not explained why, if a seller is mitigated in a given market, it should not be permitted to sell into that market at the seller’s mitigated rates from outside simply because the seller has engaged in a market-based rate sale at the metered boundary.⁴⁸

35. EEI contends that the tariff text’s prohibition on subsequent sales by a mitigated seller are overbroad and over-inclusive, and will have unreasonable negative consequences for mitigated sellers, their customers, and competitive markets. According to EEI, the tariff provision is overbroad because: (1) The prohibition does not clearly apply only if the seller is originally selling from within the mitigated market at the metered boundary; and (2) the

prohibition does not include any temporal or other limits to ensure that the subsequent prohibited sales into the mitigated market are linked to the original outbound border sales.⁴⁹

36. EEI argues that this prohibition on subsequent sales could interfere with the ability of mitigated sellers to meet their obligations under reliability arrangements, and would unnecessarily restrict their ability to transact for the benefit of customers and ensure reliability during peak-demand periods or under emergency conditions. EEI contends that where must-offer requirements apply, companies must post available capacity on a daily basis, and that “if companies subject to these obligations are not permitted to make sales into a mitigated area or are effectively prohibited from making sales at border points because they have made a single market-based rate border sale, must-offer postings may be less effective because companies may have to withhold available generation from their listings as a result of these constraints on sales in certain areas, including areas that may be resource-deficient in peak load months.”⁵⁰ EEI also alleges that this prohibition could prevent companies from entering into Commission-approved purchased power agreements to provide load-following service to wholesale customers within mitigated markets, resulting in potential negative impacts on markets and reliability during periods of high demand when the purchaser’s load may outstrip the seller’s ability to serve it without using purchased power.⁵¹ Further, EEI contends that companies will be forced to either pancake another transmission wheel for any market-priced power transaction in order to move it beyond the border, “adding costs that will ultimately be borne by customers, or simply to sell at cost-based rates at the metered boundary, reducing the availability of power competing at market-based rates at the border.”⁵²

37. EEI argues that because the tariff provision effectively prohibits a mitigated seller and its affiliates from making other sales that bring power from outside the mitigated area to the border, the mitigated seller and its affiliates would not be able to compete in the adjacent market, which could lower market liquidity and increase price volatility in the adjacent non-

⁴⁴ *Id.* at 2.

⁴⁵ *Id.* at 4.

⁴⁶ *Id.* at 3–4.

⁴⁷ EEI July 20, 2009 Rehearing Request at 6.

⁴⁸ *Id.* at 7.

⁴⁹ *Id.*

⁵⁰ *Id.* at 8.

⁵¹ *Id.* at 9.

⁵² *Id.*

⁴¹ *Id.*

⁴² *Id.* at 14.

⁴³ Progress July 20, 2009 Rehearing Request at 4–5.

mitigated markets.⁵³ In addition, EEI contends that the mitigated sales tariff provision could potentially enable non-mitigated competitors to purchase from mitigated sellers at capped day-ahead rates, and then to sell the power back to the mitigated sellers the following day at higher prices when loads are higher than expected or power or transmission is in short supply, resulting in the mitigated sellers' wholesale and retail ratepayers incurring higher costs, given the pass-through feature of typical fuel adjustment clauses.⁵⁴

38. In addition, EEI asserts that the Commission should affirmatively authorize types of transactions that are clearly independent of market-based rate sales at the metered boundary, such as blocks of power to be delivered at dates and times other than the metered boundary sale block of power, power made available under must-offer requirements, and load-following power.⁵⁵ EEI also argues that in order to protect reliability, the Commission should clarify that limitations on sales at the metered boundary do not require a mitigated seller or its affiliate, if otherwise precluded from selling power into the mitigated area from the outside, to withhold making those sales during times at which the seller or its affiliates are called on to act to maintain system reliability. In addition, EEI requests clarification that these limitations will not prevent sales that are otherwise authorized by the Commission, either generically or on a case-by-case basis. Further, with respect to the Commission's statement in Order No. 697-C reiterating that "mitigated sellers may choose to make no market-based rate sales at the metered boundary, or to limit such sales to end users, thereby eliminating the risk that they will re-sell power back to the balancing authority area where they are mitigated"⁵⁶ EEI requests that the Commission clarify that end users include load-serving entities such as investor-owned utilities, municipalities, and cooperatives that service retail load.⁵⁷

39. EEI also argues that the tariff text, which provides that if a mitigated seller "sells at the metered boundary of a mitigated balancing authority area at market-based rates, then neither it nor its affiliates can sell into that mitigated balancing authority area from the outside" is effectively limitless in that the prohibition is not limited to the

quantity, date, and time-of-day of the power or services originally sold, but extends to all subsequent sales by the mitigated seller and its affiliates, and that it applies to all subsequent sales by the mitigated seller and its affiliates into the mitigated area, even at mitigated rates which are typically cost-based and pre-approved by the Commission.

40. Further, EEI argues that the Commission's statements in paragraphs 42 and 43 of Order No. 697-C should be incorporated in the tariff text in Appendix C to Order No. 697-C. Specifically, EEI states that the Commission's statement at the end of paragraph 42 that "mitigated sellers may choose to make no market-based rates sales at the metered boundary, or to limit such sales to end users, thereby eliminating the risk that they will re-sell power back to the balancing authority area where they are mitigated"⁵⁸ should be incorporated in the tariff text in Appendix C. EEI also argues that the Commission's statement in paragraph 43 that "[a] mitigated seller can perform each of the above-enumerated functions either by selling at cost-based rates within its restricted balancing authority area, selling at cost-based rates at the metered boundary of its restricted balancing authority area, or by selling at market-based rates at the metered boundary as long as it makes sure that title to the power sold transfers at or beyond the metered boundary"⁵⁹ should be incorporated in the tariff text. The Commission's statement in this regard was made in response to petitioners' concerns that the mitigated sales tariff provision interferes with must-offer and reliability requirements, reserve sharing agreements, and cost-based requirement contracts. EEI asserts that the tariff text as written does not allow mitigated sellers to exercise these "options," which, according to EEI, "allow market-based rate sales by a mitigated seller at the metered boundary without such subsequent constraints, provided title transfers to the power or service sold at or beyond the metered boundary, or the power or service is sold to an end user" and that, as a result, the tariff text does not address the concerns that paragraphs 42 and 43 appear to address.⁶⁰ EEI therefore concludes that the tariff text and paragraphs 42 and 43 of the preamble are in direct conflict, "creating ambiguity and nullifying the options that the Commission purports to provide mitigated sellers who make

market-based rate sales at the metered boundary."⁶¹ EEI therefore requests that the Commission modify the mitigated sales tariff provision to include the options it alleges are set forth in paragraphs 42 and 43.⁶²

41. EEI references the Commission's statement in paragraph 43 that the "restrictions on sales at the border only apply to new agreements that the seller enters into prospective from the date that Order No. 697-B became effective. No existing agreements are upset or need to be revised in any way provided that the seller abides by our restrictions on any new agreements that it enters into prospectively." EEI asserts that "[w]hile some of these agreements already exist * * *, sales under such agreements are not executed until there is a requirement for such service."⁶³ EEI states that "[i]f these sales are permitted because the agreement already exists, by the same logic, any sales under the WSPP tariff, for example would be permitted because the agreement already exists and the sales are executed under it."⁶⁴ EEI therefore requests "that the Commission clarify whether such sales would be permitted in the mitigated area after a market-based rate border sale occurred[,] and "[i]f not, which sales were the Commission referring to that would be permitted because the agreements already existed."⁶⁵

Commission Determination

42. On rehearing of Order No. 697-C, petitioners have not provided any new arguments that persuade us that the Commission should permit mitigated sellers making market-based rate sales at the metered boundary to sell power into the mitigated market, either directly or through their affiliates. Petitioners repeat many of the same arguments in their requests for rehearing that the Commission responded to in Order Nos. 697-B and 697-C. For the reasons discussed below, we deny petitioners' requests that mitigated sellers be permitted to make sales at the metered boundary without subsequent restrictions on a mitigated seller's ability to make sales into the balancing authority area in which it is mitigated,⁶⁶ and we re-affirm the Commission's determination to revise the mitigated sales tariff provision in Order No. 697-B to ensure that mitigated sellers making market-based rate sales at the

⁵³ *Id.* at 10.

⁵⁴ *Id.*

⁵⁵ *Id.* at 13.

⁵⁶ Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 at P 42 (citing Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 336).

⁵⁷ EEI July 20, 2009 Rehearing Request at 13-14.

⁵⁸ Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 at P 42 (citing Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 336).

⁵⁹ *Id.* P 43.

⁶⁰ EEI July 20, 2009 Rehearing Request at 5.

⁶¹ *Id.* at 10.

⁶² *Id.* at 13.

⁶³ *Id.* at 11.

⁶⁴ *Id.* at 11-12.

⁶⁵ *Id.* at 12.

⁶⁶ *See id.*

metered boundary do not subsequently sell power into the mitigated market either directly or through their affiliates.

43. We disagree with petitioners' arguments that the Commission has not clearly articulated the problem that the tariff text governing sales at the metered boundary is intended to address, and that the tariff text is not tailored to address the harms the mitigated sales tariff provision seeks to prevent. Contrary to petitioners' arguments in this regard, the Commission has explained repeatedly why mitigated sellers and their affiliates are prohibited from making market-based rate sales anywhere within the balancing authority area in which the seller is mitigated. Specifically, in Order No. 697 the Commission explained that:

Allowing market-based rate sales by a seller that has been found to have market power, or has so conceded, in the very market in which market power is a concern is inconsistent with the Commission's responsibility under the FPA to ensure that rates are just and reasonable and not unduly discriminatory. While we generally agree that it is desirable to allow market-based rate sales into markets where the seller has not been found to have market power, we do not agree that it is reasonable to allow a mitigated seller to make market-based rate sales anywhere within a mitigated market. It is unrealistic to believe that sales made anywhere in a balancing authority area can be traced to ensure that no improper sales are taking place. Such an approach would also place customers and competitors at an unreasonable disadvantage because the mitigated seller has dominance in the very market in which it is making market-based rate sales.⁶⁷

Thus, the Commission prohibited mitigated sellers and their affiliates from selling power at market-based rates in the balancing authority area in which the seller is found, or presumed, to have market power, and, because sales cannot be traced to ensure that no improper sales are taking place, the Commission placed restrictions on mitigated sellers' market-based rate sales at the metered boundary.⁶⁸

44. We also reject petitioners' assertions that the Commission has failed to explain why, as a result of a mitigated seller making market-based rate sales at the metered boundary, such seller or its affiliate's sales into the mitigated balancing authority area under a Commission-approved cost-based tariff are unjust and unreasonable. As explained in Order Nos. 697-B and 697-C, petitioners' arguments on rehearing of Order No. 697-A effectively

conceded that they cannot guarantee that market-based rate sales at the metered boundary ultimately serve load beyond the balancing authority area where the seller is mitigated.⁶⁹ Not only is it unrealistic to believe that power sold by mitigated sellers at the metered boundary can be traced,⁷⁰ these petitioners have failed to explain or demonstrate how the Commission could effectively monitor to ensure that power sold by a mitigated seller at cost-based rates into the mitigated balancing authority area did not originate from that mitigated seller's sale at market-based rates at the metered boundary. Therefore, in order to ensure that mitigated sellers are not making market-based rate sales anywhere within a balancing authority area in which they are mitigated, once a mitigated seller sells power at the metered boundary at market-based rates, the mitigated seller and its affiliates may not sell power into the balancing authority area in which the seller is found, or presumed, to have market power, whether at cost-based or market-based rates.⁷¹ As the Commission has explained, this prohibition is necessary to ensure that no improper sales are taking place, and to enable the Commission to ensure market power is not being exercised in the balancing authority area in which a seller is mitigated.

45. We deny petitioners' request that we modify the mitigated sales tariff provision to include the options in paragraphs 42 and 43, and their request that the Commission clarify that the tariff text governing sales at the metered boundary "will not prevent sales that are otherwise authorized by the Commission, either generically or on a case-by-case basis in individual agreements."⁷² Petitioners' arguments that the tariff text governing sales at the metered boundary does not allow mitigated sellers to exercise the options discussed in paragraphs 42 and 43 of Order No. 697-C, and that paragraphs 42 and 43 are therefore in direct conflict with the tariff text, is premised on a misreading of paragraphs 42 and 43.

⁶⁹ Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 at P 66-67, 69; E.ON May 21, 2008 Rehearing Request at 12-14, Pinnacle May 21, 2008 Rehearing Request at 4-6. See also *Westar Energy, Inc. v. FERC*, 568 F.3d 985, 988 (DC Cir. 2009) (stating that in Order No. 697 the Commission concluded that "it 'is unrealistic to believe that' such sales 'can be traced to ensure that no improper sales are taking place.'" (citation omitted); Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 321.

⁷⁰ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 818 and n.963 (citing to utility comments critical of tagging for monitoring market transactions).

⁷¹ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at n.464.

⁷² EEI July 20, 2009 Rehearing Request at 13.

Petitioners are incorrect that paragraphs 42 and 43 "purport to allow market-based rate sales at the metered boundary without [the] subsequent constraints [contained in the tariff text], provided title transfers to the power or service at or beyond the metered boundary, or the power or service is sold to an end user."⁷³ The Commission's statement at the end of paragraph 42 that "mitigated sellers may choose to make no market-based rates sales at the metered boundary, or to limit such sales to end users, thereby eliminating the risk that they will re-sell power back to the balancing authority area where they are mitigated"⁷⁴ does not conflict with the mitigated sales tariff provision, which states that "if the Seller sells at the metered boundary of a mitigated balancing authority area at market-based rates, then neither it nor its affiliates can sell into that mitigated balancing authority area from the outside."⁷⁵ Because a mitigated seller making market-based rate sales at the metered boundary and its affiliates cannot make sales into the mitigated balancing authority area from the outside under the options provided in paragraph 42, both options in paragraph 42 are consistent with the text of the mitigated sales tariff provision.

46. We further reject petitioners' argument that the options set forth in paragraph 43 of Order No. 697-C are in conflict with the tariff text. In responding to petitioners' arguments that the mitigated sales tariff provision interferes with must-offer and reliability requirements, reserve sharing agreements, and cost-based requirement contracts, the Commission explained at paragraph 43 that "if a mitigated seller does not make *market-based rate* sales at the border, either that mitigated seller or its affiliates may make sales at *cost-based rates* into the balancing authority area in which it is mitigated."⁷⁶ The Commission stated that "[a] mitigated seller can perform each of the above-enumerated functions either by selling at cost-based rates within its restricted balancing authority area, selling at cost-based rates at the metered boundary of its restricted balancing authority area, or by selling at market-based rates at the metered boundary as long as it makes sure that title to the power sold transfers at or beyond the metered boundary."⁷⁷

⁷³ *Id.* at 5.

⁷⁴ Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 at P 42 (citing Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 336).

⁷⁵ *Id.* at Appendix C.

⁷⁶ Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 at P 43 (emphasis in original).

⁷⁷ *Id.* (emphasis added).

⁶⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 819.

⁶⁸ *Id.* P 821; see also Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 335.

Thus, the mitigated seller can fulfill any obligations it has under must-offer and reliability requirements, reserve sharing agreements, and cost-based requirement contracts by making sales at cost-based rates into the balancing authority area in which it is mitigated, as long as a mitigated seller does not make market-based rate sales at the metered boundary. It could also fulfill such obligations by selling at cost-based rates at the metered boundary of its restricted balancing authority area. Or, the mitigated seller could fulfill such obligations by making sales at the metered boundary of a mitigated balancing authority area at market-based rates, as long as neither it nor its affiliates sell into that mitigated balancing authority area from the outside.

47. Because a mitigated seller can fulfill any obligations it has under must-offer and reliability requirements, reserve sharing agreements, and cost-based requirement contracts under one of these options, we reject petitioners' argument that the tariff text's prohibition on subsequent sales by a mitigated seller are overbroad and over-inclusive. To the contrary, the mitigated sales tariff provision enables the Commission to ensure that no improper sales are taking place, and thereby enables the Commission to ensure market power is not being exercised in the balancing authority area in which a seller is mitigated. Moreover, the Court of Appeals for the District of Columbia Circuit recently confirmed that "a wholesaler * * * can easily comply with the [Commission] rule and still make sales into other regions at market-based rates. A wholesaler simply needs to ensure that title passes at or beyond the metered boundary between the mitigated and non-mitigated areas, instead of inside a mitigated area."⁷⁸ Thus, we reject EEI's argument that the tariff text's prohibition on subsequent sales by a mitigated seller are overbroad and over-inclusive.

48. Petitioners' argument that the tariff provision is overbroad because it does not clearly apply only if the seller is originally selling from within the mitigated market at the metered boundary and because it does not include any temporal or other limits to ensure that the subsequent prohibited sales into the mitigated market are linked to the original outbound border sales⁷⁹ was previously raised in the requests for rehearing of Order No. 697–

B.⁸⁰ The Commission rejected that argument in Order No. 697–C and affirmed its determination to revise the mitigated sales tariff provision in Order No. 697–B to ensure that a mitigated seller making market-based rate sales at the metered boundary does not sell power into the mitigated market either directly or through its affiliates.⁸¹ In addition, petitioners' requests that the Commission: (1) Clarify whether end users include load-serving entities such as investor-owned utilities, municipalities, and cooperatives that service retail load; (2) authorize "sales of blocks of power to be delivered at dates and times other than the border sale block of power, power made available under must offer requirements, and load-following power", and (3) "clarify that the border sale constraints do not require a mitigated seller or its affiliate, if otherwise precluded from selling power into the mitigated area from the outside, to withhold making those sales during times at which the seller or affiliates are called on to maintain system reliability"⁸² were also previously raised by EEI in its request for rehearing of Order No. 697–B as part of its argument that the Commission should return to the intent-based concept adopted in Order No. 697, wherein EEI identified five types of transactions that it suggested should be permitted without first needing to demonstrate intent, even if a mitigated seller does make market-based rate sales at the metered boundary.⁸³ The Commission responded to this argument

⁸⁰ Order No. 697–C, FERC Stats. & Regs. ¶ 31,291 at P 28 (stating that "E.ON contends that the revised tariff provision is overbroad and prohibits legitimate transactions" and "E.ON argues that the mitigated sales tariff provision should contain a 'temporal limitation' so that it cannot be read to prohibit a mitigated seller or its affiliates from ever selling from the outside into the mitigated balancing authority area.")

⁸¹ *Id.* P 42.

⁸² EEI July 20, 2009 Rehearing Request at 13–14.

⁸³ Order No. 697–C, FERC Stats. & Regs. ¶ 31,291 at P 36. Specifically, EEI argued that the Commission should permit sales to load-serving entities such as investor-owned utilities, municipalities, and cooperatives that serve retail load outside the mitigated market, even if those entities may at times need to sell power back into the mitigated market if their supply is too great. EEI January 22, 2009 Corrected Rehearing Request at 7–9. It also argued that the Commission should permit other types of transactions that are independent of the border sales, such as sales of blocks of power to be delivered at dates and times other than the border sale block of power, power made available under must offer requirements, and load-following power, and should clarify that the border sale constraints do not require a mitigated seller or its affiliates, which otherwise would be precluded from selling power into the mitigated area from the outside, to withhold making those sales during times at which the seller or affiliates are called on to maintain system reliability. EEI January 22, 2009 Corrected Rehearing Request at 8–9.

in Order No. 697–C, explaining that it would not return to the intent based concept as requested by EEI because, as it stated in Order No. 697–A, the Commission agreed with petitioners that it would be difficult to determine and document intent, and therefore decided to eliminate the intent element of the tariff provision.⁸⁴ The Commission does not allow rehearing of an order denying rehearing.⁸⁵ Therefore, we dismiss petitioners' argument that the tariff provision is overbroad, and their requests that the Commission authorize mitigated sellers to make the same types of sales that EEI previously asked the Commission to permit, as these arguments are an attempt to re-litigate the determinations made by the Commission in Order No. 697–C.

49. In response to petitioners' request that the Commission clarify whether end users include load-serving entities such as investor-owned utilities, municipalities, and cooperatives that service retail load, we clarify that for the purposes of the mitigated sales tariff provision adopted in this rulemaking proceeding, end users of power could include, but are not limited to, buyers that serve end-use customers, which as suggested by EEI, could include load serving entities serving their retail load, such as investor-owned utilities, municipalities, and cooperatives. However, end users do not include entities that sell power into the balancing authority area in which the seller is mitigated.⁸⁶

50. With respect to petitioners' request for clarification concerning the applicability of the mitigated sales tariff provision, as the Commission explained in Order No. 697–C, the restrictions on market-based rate sales at the metered boundary only apply to new agreements that the seller enters into prospectively from the date that Order No. 697–B became effective, and no existing agreements are upset or need to be revised in any way provided that the seller abides by our restrictions on any

⁸⁴ Order No. 697–C, FERC Stats. & Regs. ¶ 31,291 at P 44.

⁸⁵ *Southwestern Public Service Co.*, 65 FERC ¶ 61,088, at 61,533 & n.14 (1993).

⁸⁶ See Order No. 697–C, FERC Stats. & Regs. ¶ 31,291 at P 36 (summarizing the argument in EEI's request for rehearing of Order No. 697–B that, even if a mitigated seller does engage in border sales, the Commission should permit "sales to load-serving entities such as investor-owned utilities, municipalities, and cooperatives that serve retail load outside the mitigated market, even if those entities may at times need to sell power back into the mitigated market if their supply is too great (since the timing and occurrence of such excess-power sales back into the mitigated market will be beyond the control of the mitigated seller)") (citing EEI January 22, 2009 Corrected Rehearing Request at 8–9).

⁷⁸ *Westar Energy, Inc. v. FERC*, 568 F.3d 985, 988 (DC Cir. 2009) (citation omitted).

⁷⁹ EEI July 20, 2009 Rehearing Request at 7.

new agreements that it enters into prospectively.⁸⁷ EEI's interpretation that if "sales [under existing agreements] are permitted because the agreement already exists" then the mitigated sales tariff provision does not apply to "any sales under the WSPP tariff, for example * * * because the agreement already exists and the sales are executed under it[.]"⁸⁸ is incorrect. Although EEI fails to describe the specific circumstances that give rise to its concerns, as EEI acknowledges, sales under such agreements are not executed until there is a requirement for service. Thus, the terms and conditions of an agreement executed under a generally applicable tariff are subject to the Commission's rules and regulations in force at the time that such an agreement is executed. Accordingly, the mitigated sales tariff provision applies to sales under the WSPP tariff that are entered into prospectively from July 29, 2009, the date that Order No. 697-B became effective. We therefore clarify that the restrictions in the mitigated sales tariff provision apply to agreements and transactions pursuant to them, that a seller enters into prospectively from July 29, 2009, the date that Order No. 697-B became effective.⁸⁹

51. We deny petitioners' request that the Commission hold a technical conference to address issues related to the mitigated sales tariff provision. The Commission has provided extensive opportunity for comment on this issue, and has considered four rounds of comments, including the petitioners' requests for rehearing of Order No. 697-C. As discussed above, contrary to petitioners' argument that the Commission has not articulated the problem that this tariff provision is intended to address, the Commission explained in Order Nos. 697-B and 697-C that the tariff text adopted in Order No. 697-B enables the Commission to ensure that mitigated sellers, once they have made a market-based rate sale at the metered boundary of the mitigated balancing authority area, are not making such sales anywhere within a balancing authority area in which they are mitigated.

52. We also deny petitioners' request that the Commission delay the deadline for compliance with the mitigated sales

tariff provision until the Commission issues an order responding to EEI's request for rehearing of Order No. 697-C, or following a technical conference. The Commission has already granted an extension of time to comply with the revised mitigated sales tariff provision in response to the requests for rehearing of Order No. 697-B.⁹⁰ In its January 28, 2009 order granting an extension of time to comply, the Commission explained that it was granting an extension of time to comply with the mitigated sales tariff provision as set forth in Order No. 697-B "until such time as the Commission issues an order on rehearing of Order No. 697-B."⁹¹ Accordingly, we find that entities affected by the mitigated sales tariff provision as revised in Order No. 697-B have been on notice since January 28, 2009 that they should be prepared to comply with this tariff provision upon the issuance of the Commission's order on rehearing of Order No. 697-B. Moreover, petitioners have not provided any basis for a further extension of time to comply with the mitigated sales tariff provision; rather, petitioners repeat the same arguments in their requests for rehearing that the Commission responded to in Order Nos. 697-B and 697-C.

IV. Information Collection Statement

53. The Office of Management and Budget (OMB) regulations require that OMB approve certain information collection requirements imposed by an agency.⁹² The Final Rule's revisions to the information collection requirements for market-based rate sellers were approved under OMB Control Nos. 1902-0234. While this order clarifies aspects of the existing information collection requirements for the market-based rate program, it does not add to these requirements. Accordingly, a copy of this order will be sent to OMB for informational purposes only.

V. Document Availability

54. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (<http://www.ferc.gov>) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. Eastern time) at 888 First Street, NE., Room 2A, Washington, DC 20426.

⁹⁰ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity, and Ancillary Services by Public Utilities*, 126 FERC ¶ 61,072 (2009) (Order Granting Extension of Time to Comply).

⁹¹ *Id.*

⁹² 5 CFR 1320.11.

55. From FERC's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

56. User assistance is available for eLibrary and the FERC's Web site during normal business hours from FERC Online Support at 202-502-6652 (toll free at 1-866-208-3676) or e-mail at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659. E-mail the Public Reference Room at public.referenceroom@ferc.gov.

VI. Effective Date

57. Changes adopted in this order on rehearing will become effective April 26, 2010.

List of Subjects in 18 CFR Part 35

Electric power rates, Electric utilities, Reporting and recordkeeping requirements.

By the Commission.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

■ In consideration of the foregoing, the Commission amends Part 35 Chapter I, Title 18, *Code of Federal Regulations*, as follows:

PART 35—FILING OF RATE SCHEDULES AND TARIFFS

■ 1. The authority citation for Part 35 continues to read as follows:

Authority: 16 U.S.C. 791a-825r, 2601-2645; 31 U.S.C. 9701; 42 U.S.C. 7101-7352.

■ 2. Section 35.42 is revised to read as follows:

§ 35.42 Change in status reporting requirement.

(a) As a condition of obtaining and retaining market-based rate authority, a Seller must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority. A change in status includes, but is not limited to, the following:

(1) Ownership or control of generation capacity that results in net increases of 100 MW or more, or of inputs to electric power production, or ownership, operation or control of transmission facilities, or

(2) Affiliation with any entity not disclosed in the application for market-based rate authority that owns or

⁸⁷ Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 at P 43.

⁸⁸ EEI July 20, 2009 Rehearing Request at 11-12.

⁸⁹ In this regard, we note that in accepting a utility's proposed mitigation, the Commission explained that such mitigation is accepted on a prospective basis, and that it is appropriate for existing long-term agreements to remain in effect until terminated pursuant to their terms. See *South Carolina Electric and Gas Co.*, 114 FERC ¶ 61,143, at P 18 (2006).

controls generation facilities or inputs to electric power production, affiliation with any entity not disclosed in the application for market-based rate authority that owns, operates or controls transmission facilities, or affiliation with any entity that has a franchised service area.

(b) Any change in status subject to paragraph (a) of this section, other than a change in status submitted to report the acquisition of control of a site or sites for new generation capacity development, must be filed no later than 30 days after the change in status occurs. Power sales contracts with future delivery are reportable 30 days after the physical delivery has begun. Failure to timely file a change in status report constitutes a tariff violation.

(c) When submitting a change in status notification regarding a change that impacts the pertinent assets held by a Seller or its affiliates with market-based rate authorization, a Seller must include an appendix of assets in the form provided in Appendix B of this subpart.

(d) A Seller must report on a quarterly basis the acquisition of control of a site or sites for new generation capacity development for which site control has been demonstrated in the interconnection process and for which the potential number of megawatts that are reasonably commercially feasible on the site or sites for new generation capacity development is equal to 100 megawatts or more. If a Seller elects to make a monetary deposit so that it may demonstrate site control at a later time in the interconnection process, the monetary deposit will trigger the quarterly reporting requirement instead of the demonstration of site control. A notification of change in status that is submitted to report the acquisition of control of a site or sites for new generation capacity development must include:

- (1) The number of sites acquired;
- (2) The relevant geographic market in which the sites are located; and
- (3) The maximum potential number of megawatts (MW) that are reasonably commercially feasible on the sites reported.

(e) For the purposes of paragraph (d) of this section, "control" shall mean "site control" as it is defined in the Standard Large Generator Interconnection Procedures (LGIP).

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R05-OAR-2007-1043; FRL-9129-5]

Approval and Promulgation of Air Quality Implementation Plans; Michigan; PSD Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to convert a conditional approval of specified provisions of the Michigan State Implementation plan (SIP) to a full approval. The revisions consist of requirements of the prevention of significant deterioration (PSD) construction permit program under the Federal Clean Air Act (CAA). This program affects major stationary sources in Michigan that are subject to or potentially subject to the PSD construction permit program. EPA is converting its prior conditional approval to full approval because the Michigan Department of Environmental Quality (MDEQ) submitted corrections to the rules that satisfy the conditions listed in EPA's conditional approval. As part of this direct final rule, EPA is rescinding Michigan's delegation of authority for implementing the Federal PSD regulations. This action is being taken under section 110 of the CAA.

DATES: This direct final rule will be effective May 24, 2010, unless EPA receives adverse comments by April 26, 2010. If adverse comments are received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R05-OAR-2007-1043, by one of the following methods:

- <http://www.regulations.gov>: Follow the on-line instructions for submitting comments.
- *E-mail:* blakley.pamela@epa.gov.
- *Fax:* (312) 692-2450
- *Mail:* Pamela Blakley, Chief, Air Permits Section, (AR-18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
- *Hand Delivery:* Pamela Blakley, Chief, Air Permits Section, (AR-18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Deliveries are only accepted during the regional office normal hours of operation, and special arrangements should be made for

deliveries of boxed information. The regional office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m. excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA-R05-OAR-2007-1043. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov> or e-mail. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment.

If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov>, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Laura Cossa, Environmental Engineer, at (312) 886-0661 before visiting the Region 5 office.