

125 FERC ¶ 61,074  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

FirstEnergy Operating Companies	Docket Nos.	ER01-1403-006 ER01-1403-007 ER01-1403-008
Pennsylvania Power Company	Docket Nos.	ER06-1443-002 ER06-1443-003 ER06-1443-004
Jersey Central Power & Light Company	Docket Nos.	ER04-366-005 ER04-366-006
FirstEnergy Solutions Corporation	Docket Nos.	ER01-2968-007 ER01-2968-008 ER01-2968-009
FirstEnergy Generation Corporation	Docket Nos.	ER01-845-006 ER01-845-007
FirstEnergy Nuclear Generation Corporation	Docket Nos.	ER05-1122-004 ER05-1122-005
FirstEnergy Generation Mansfield Unit 1 Corporation	Docket Nos.	ER08-107-001 ER08-107-002

ORDER ACCEPTING UPDATED MARKET POWER ANALYSIS,  
COMPLIANCE FILINGS, AND CHANGE  
IN STATUS FILING

(Issued October 17, 2008)

1. In this order, the Commission accepts an updated market power analysis filed by FirstEnergy Service Company on behalf of certain public utility subsidiaries of

FirstEnergy Corporation (FirstEnergy) with previously authorized market-based rate power sales tariffs.<sup>1</sup> These subsidiaries are: FirstEnergy Operating Companies,<sup>2</sup> Pennsylvania Power Company (Penn Power),<sup>3</sup> Jersey Central Power & Light Company (Jersey Central), FirstEnergy Solutions Corporation (Solutions), FirstEnergy Generation Corporation (Genco), FirstEnergy Nuclear Generation Corporation (Nuclear Genco), and FirstEnergy Generation Mansfield Unit 1 Corp. (Mansfield Unit) (collectively, Applicants).<sup>4</sup>

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<sup>1</sup> The Commission most recently accepted the market power analyses supporting the market-based rate tariffs of these subsidiaries on April 14, 2005. *First Energy Operating Cos. and FirstEnergy Solutions Corp.*, 111 FERC ¶ 61,032 (2005). The tariffs were subsequently amended on October 20, 2006. *FirstEnergy Service Co.*, 117 FERC ¶ 61,081 (2006).

<sup>2</sup> FirstEnergy Operating Companies consist of The Cleveland Electric Illuminating Company, Ohio Edison Company, and The Toledo Edison Company. The Commission authorized FirstEnergy Operating Companies to make market-based rate power sales on May 27, 1999. *See MEP Investments, LLC*, 87 FERC ¶ 61,209 (1999). *See also FirstEnergy Operating Cos.*, Docket No. ER01-1403-000 (November 30, 2001) (unpublished letter order).

<sup>3</sup> Penn Power consists of Pennsylvania Power Company, Metropolitan Edison Company and Pennsylvania Electric Company.

<sup>4</sup> The Commission authorized Penn Power to make market-based rate power sales on October 20, 2006. *FirstEnergy Service Co.*, 117 FERC ¶ 61,081 (2006). The Commission authorized Jersey Central to make market-based rate power sales on March 16, 2004. *Jersey Central Power & Light Co.*, Docket No. ER04-366-000 (March 16, 2004) (unpublished letter order). The Commission authorized Solutions to make market-based rate power sales on January 24, 2001. *FirstEnergy Services Corp.*, 94 FERC ¶ 61,052 (2001), *also FirstEnergy Solutions Corp.*, Docket Nos. ER01-2968-000 and ER01-2968-001 (October 24, 2001) (unpublished letter order). The Commission authorized Genco to make market-based rate power sales on February 22, 2001. *FirstEnergy Generation Corp.*, 94 FERC ¶ 61,177 (2001). The Commission authorized Nuclear Genco to make market-based rate power sales on September 29, 2005. *FirstEnergy Nuclear Generation*, Docket Nos. ER05-1122-000 and ER05-1122-001 (September 29, 2005) (unpublished letter order). The Commission authorized Mansfield Unit to make market-based rate power sales on December 10, 2007. *FirstEnergy Generation Mansfield Unit 1 Corp.*, Docket No. ER08-107-000 (December 10, 2007) (unpublished letter order).

2. As discussed below, the Commission concludes that Applicants satisfy the Commission's standards for market-based rate authority. The Commission also accepts Applicants' change in status filing and proposed revisions to their market-based rate tariffs that incorporate provisions as adopted in Order Nos. 697<sup>5</sup> and 697-A to be effective September 18, 2007 and June 6, 2008 respectively.

3. Additionally, as discussed below, Applicants meet the criteria for Category 2 sellers in the Northeast and Central regions and Category 1 sellers in the Southeast, Southwest, Northwest, and Southwest Power Pool regions and are so designated. For those regions where Applicants have been designated Category 2 sellers, Applicants' next updated market power analysis must be filed according to the regional schedule adopted in Order No. 697.<sup>6</sup>

### **I. Background**

4. On January 14, 2008, as supplemented on April 1, 2008 and September 2, 2008, Applicants filed an updated market analysis for the PJM Interconnection, L.L.C. (PJM) market, the PJM-East submarket, and the Midwest Independent Transmission System Operator, (Midwest ISO) market. In accordance with the regional reporting schedule adopted in Order No. 697, only the Northeast region analysis is due at this time.<sup>7</sup>

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<sup>5</sup> *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 914-18, *clarified*, 121 FERC ¶ 61,260 (2007) (Order Clarifying Final Rule), *order on reh'g*, Order No. 697-A, 73 Fed. Reg. 25,832 (May 7, 2008), FERC Stats. & Regs. ¶ 31,268 (2008).

<sup>6</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 882-93, app. D; Order Clarifying Final Rule, 121 FERC ¶ 61,260 at P 9-10, app. D-1; Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at apps. D, D-1, and D-2.

<sup>7</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 882. The Commission stated that "both the Commission and market participants will benefit from greater data consistency that will result from regional examination of updated market power analyses and a methodical study of all sellers in the same region. This will give the Commission a more complete view of market forces in each region and the opportunity to reconcile conflicting submissions, enhancing our ability to ensure that sellers' rates remain just and reasonable." *See also* Order Clarifying Final Rule, 121 FERC ¶ 61,260 at P 13.

Therefore, we have not considered the Midwest ISO analysis.<sup>8</sup> Applicants also submitted revised tariff sheets to incorporate the required provisions adopted by the Commission in Order Nos. 697 and 697-A.<sup>9</sup>

5. On April 4, 2008, the Director, Division of Tariffs and Market Development – West, acting under delegated authority, requested additional information in relation to the updated market power analyses filed by numerous filers within the PJM footprint (the PJM RTO Filers). Specifically, the request noted that the identified PJM RTO Filers had failed to provide a Simultaneous Import Limitation (SIL) study with their updated market power analyses as required by the Commission in Order No. 697. The April 4, 2008 request for information directed the PJM RTO Filers to provide a SIL study consistent with the requirements of Order No. 697 or, in the alternative, to provide a SIL study done by PJM that adequately addresses the Order No. 697 principles for how to measure transmission import capability.

6. On April 30, 2008, the PJM RTO Filers submitted a partial response to the April 4, 2008 request for information, stating that PJM was submitting a SIL study for the PJM market at the request of the PJM RTO filers, and requested an extension of time to file their individual responses to the April 4, 2008 request for information.

7. Also on April 30, 2008, PJM filed a motion to intervene out-of-time in the above-captioned dockets and a SIL Study for the entire PJM region (PJM SIL Study). On June 2, 2008, as amended on July 14, 2008, PJM filed a SIL Study for the PJM-East submarket (PJM-East SIL Study). On August 6, 2008, the Commission found, in *PSEG Energy Resources & Trade LLC*, 124 FERC ¶ 61,147 (2008) (PJM SIL Order),<sup>10</sup> that the PJM SIL Study and PJM-East SIL Study meet the Commission's requirements for SIL studies as discussed in Appendix E of the April 14 Order<sup>11</sup> and Order No. 697. In the

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<sup>8</sup> As discussed below, in Order No. 697-A, the Commission denied the Applicants' request for rehearing of Order No. 697 to allow sellers to file a single triennial for all regions.

<sup>9</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 914-18; Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 391. The tariff sheets were revised on July 10, 2008, July 25, 2008, July 31, 2008 and September 11, 2008.

<sup>10</sup> The entire history and findings relating to the PJM SIL Study and the PJM-East SIL Study are detailed in the PJM SIL Order and are not repeated here.

<sup>11</sup> *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018, *order on reh'g*, 108 FERC ¶ 61,026 (2004) (April 14 Order).

PJM SIL Order, the Commission gave the PJM RTO Filers the following three options: (1) choose to rely on the PJM SIL Study and the PJM-East SIL Study; (2) conduct sensitivity studies on the PJM SIL Study and the PJM-East SIL Study, which they would submit along with the PJM SIL Study or PJM-East SIL Study; or (3) perform their own SIL studies.<sup>12</sup>

8. On July 10, 2008, as amended on July 31, 2008, FirstEnergy Operating Companies, Penn Power, and Solutions filed revised market-based rate tariffs providing for the sale of ancillary services at market-based rates in the market administered by the Midwest ISO.<sup>13</sup>

9. On July 25, 2008, as amended on September 11, 2008,<sup>14</sup> Applicants filed a change in status stating that Applicants have acquired a minority interest in Bull Mountain Coal Mining, Inc. and an associated rail-spur from the mine located near Roundup, Montana.<sup>15</sup>

10. On September 2, 2008, Applicants submitted revised pivotal supplier and market share screen analyses. Applicants state that their analyses for the PJM market and the PJM-East submarket have been revised, in part, to reflect SIL data from the PJM and PJM-East SIL Studies, submitted by PJM and addressed in the PJM SIL Order.<sup>16</sup>

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<sup>12</sup> PJM SIL Order, 124 FERC ¶ 61,147 at P 22.

<sup>13</sup> See *Midwest Indep. Sys. Operator, Inc.*, 123 FERC ¶ 61,297, at P 46 (2008).

<sup>14</sup> The September 11, 2008 filing amends tariffs filed on January 14, 2008, July 10, 2008, and July 25, 2008, and incorporates revisions required by Order No. 697-A.

<sup>15</sup> FirstEnergy Ventures, an affiliate of the Applicants, has entered into a joint venture with the Boich Companies, an unaffiliated entity, to acquire 80 percent of Bull Mountain Coal Mining, Inc. FirstEnergy Ventures will have a 45 percent interest in the joint venture.

<sup>16</sup> According to Applicants, their updated analyses contain the following other adjustments to their January 14, 2008 filing: (1) Applicants “moved” a 1,300 MW generating plant into PJM East to be consistent with the SIL studies submitted by PJM; (2) Applicants expanded the first-tier suppliers into the PJM market to include suppliers located in the NYISO footprint as well as those located in the Midwest ISO footprint; and (3) Applicants deducted “SIL capacity associated with import of capacity into PJM from generating facilities owned by the Ohio Valley Electric Corporation.”

11. Applicants and their affiliates own or control 2,597 MW of generation capacity in the PJM market, 751 MW of generation capacity in the PJM-East submarket, and 12,514 MW of generation capacity in the Midwest ISO market.<sup>17</sup> Each of the Applicants is an indirect, wholly-owned subsidiary of FirstEnergy. FirstEnergy Operating Companies, Penn Power, and Jersey Central serve customers within Ohio and Pennsylvania. Genco, Nuclear Genco, and Mansfield Unit own and/or operate generation facilities in the same states. Solutions is a power marketer engaged in the sale of electricity at market-based rates to customers in PJM and the Midwest ISO. Solutions is also the corporate parent of Genco and Nuclear Genco.

## **II. Notices and Responsive Pleadings**

12. Notice of the January 14, 2008 filing was published in the *Federal Register*, 73 Fed. Reg. 5,540 (2008), with interventions or protests due on or before March 14, 2008. The New Jersey Board of Public Utilities and the Public Utilities Commission of Ohio (the Ohio Commission) filed notices of intervention. Exelon Corporation and the PJM Industrial Customer Coalition (the PJM Industrial Customers) filed timely motions to intervene. American Municipal Power-Ohio, Inc. (AMP-Ohio) and the Ohio Energy Group (Ohio Energy) filed motions to intervene out-of-time. The Ohio Commission and the PJM Industrial Customers filed adverse comments. Ohio Energy endorsed the Ohio Commission's comments.

13. On March 31, 2008, Applicants filed an answer to the comments of the Ohio Commission and the PJM Industrial Customers (Applicants' March 31 Answer). On May 14, 2008, the Ohio Commission filed a response to Applicants' Answer (Ohio Commission's Response).

14. Notices of the July 10 and July 31 filings were published in the *Federal Register*, 73 Fed. Reg. 43,215 and 73 Fed. Reg. 47,144, with comments, protests or interventions due on or before July 31, 2008 and August 21, 2008, respectively. None was filed.

15. Notices of the July 25 and September 11 filings were published in the *Federal Register*, 73 Fed. Reg. 46,615 and 73 Fed. Reg. 58,218 (2008), with comments, protests or interventions due on or before August 21, 2008 and October 2, 2008, respectively. None was filed.

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<sup>17</sup> January 14, 2008 filing, Frame Aff., Att. 4 (PJM Balancing Authority Area), Att. 5 (PJM-East Submarket), and Att. 6 (Midwest ISO Area). The amounts represent, for each market, the sum of installed capacity and long-term firm purchases.

16. Notice of the September 2, 2008 filing was published in the *Federal Register*, 73 Fed. Reg. 52,976 (2008), with interventions or protests due on or before September 23, 2008. In response, the Industrial Energy Users-Ohio filed a timely motion to intervene. The Office of the Ohio Consumers' Counsel (Ohio Consumers) filed a timely motion to intervene and a protest.

17. On October 7, 2008, Applicants filed a response to Ohio Consumers' protest (Applicants' October 7 Answer). On October 7, 2008, Ohio Consumers withdrew their protest based upon representations made by Applicants in their October 7 Answer.

### **III. Discussion**

#### **A. Procedural Matters**

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

19. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure 18 C.F.R. § 385.214, we will grant the motions to intervene out-of-time filed by AMP-Ohio and Ohio Energy given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.<sup>18</sup>

20. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008) prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Applicants' March 31 Answer or Ohio Commission's Response and will, therefore, reject them. However, we will accept the Applicants' October 7 Answer to Ohio Consumers' protest because it clarifies the basis for a proposed tariff provision, which assisted us in our decision-making process.

#### **B. Market-Based Rate Authorization**

21. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, horizontal and vertical market power.<sup>19</sup> As discussed below, the Commission concludes that Applicants satisfy the

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<sup>18</sup> As noted above, PJM filed a motion to intervene out of time in this proceeding. In the PJM SIL Order, the Commission granted PJM's late-filed motion to intervene.

<sup>19</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 62, 399, 408, 440.

Commission's standards for market-based rate authority for the PJM market and PJM-East submarket.

**1. Horizontal Market Power**

22. The Commission adopted two indicative screens for assessing horizontal market power, the pivotal supplier screen and the wholesale market share screen.<sup>20</sup>

23. As discussed below, applicants have prepared the pivotal supplier and wholesale market share screens for the PJM market and the PJM-East submarket, consistent with the requirements of Order No. 697.<sup>21</sup>

**a. PJM Market**

24. For the PJM Market, Applicants state that they revised their analysis, in part, to reflect SIL data from the PJM SIL Study.<sup>22</sup> We note that in preparing their horizontal analyses, Applicants reduced the PJM SIL Study values by 1,455 MW "to reflect the amount of transmission import capability that is used by market participants other than FirstEnergy to import into PJM their . . . percent of the output rights in two generating facilities owned by the Ohio Valley Electric Corporation."<sup>23</sup> Whether using the PJM SIL values from the PJM SIL Study or Applicant's values, we have determined that Applicants pass the pivotal supplier screen and the wholesale market share screen in the PJM market with market shares ranging by season from 2.6 to 3.4 percent.

25. Accordingly, the Commission finds that Applicants satisfy the Commission's requirements for market-based rates regarding horizontal market power in the PJM market.

**b. PJM-East Submarket**

26. For the PJM-East submarket, Applicants state that they rely on the PJM-East SIL Study. We note that in preparing their horizontal analyses, Applicants apparently use the initial SIL values that were submitted by PJM on June 2, 2008 rather than using the

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<sup>20</sup> *Id.* P 62.

<sup>21</sup> *Id.* P 235, 236.

<sup>22</sup> Adjustments that Applicants made are detailed above in n.16.

<sup>23</sup> FirstEnergy September 2, 2008 filing, Frame Aff. at P 9.

revised, lower SIL values submitted in the July 14, 2008 PJM-East SIL Study addressed by the Commission in the PJM SIL Order.<sup>24</sup> The Commission has reviewed Applicants' pivotal supplier screen and wholesale market share screen for the PJM-East submarket. Using Applicants' values, Applicants pass the pivotal supplier screen and pass the wholesale market share screen in PJM-East with market shares ranging by season from 3.8 to 4.8 percent. Using the PJM SIL values from the PJM-East SIL Study addressed in the PJM SIL Order, Applicants pass the pivotal supplier screen and pass the wholesale market share screen in PJM-East with market shares ranging by season from 3.9 to 4.9 percent.

27. Accordingly, the Commission finds that Applicants satisfy the Commission's requirements for market-based rates regarding horizontal market power in the PJM-East submarket.

## 2. Vertical Market Power

28. In cases where a public utility, or any of its affiliates, owns, operates, or controls transmission facilities, the Commission requires that there be a Commission-approved Open Access Transmission Tariff (OATT) on file before granting that utility or affiliate market-based rate authorization.<sup>25</sup>

29. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.<sup>26</sup> The Commission requires a seller to provide a description of its ownership or control of, or affiliation, with an entity that owns or controls: intrastate natural gas transportation, storage or distribution facilities; sites for generation capacity development; and sources of coal supplies and equipment for the transportation of coal supplies, such as barges and rail cars (collectively, inputs to electric power production).<sup>27</sup> The Commission also requires sellers to make an affirmative

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<sup>24</sup> Applicants apparently used SIL values of 12,900, 12,500, 13,600, and 14,000 MW, respectively, for the winter, spring, summer and fall seasons instead of SIL values from the PJM-East SIL Study of 11,830, 11,780, 12,070, and 13,050 MW, respectively for those seasons.

<sup>25</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 408.

<sup>26</sup> *Id.* P 440.

<sup>27</sup> *Id.* P 447. In Order No. 697-A, the Commission revised the definition of inputs to electric power production to include "physical coal supply sources and ownership of or control over who may access transportation of coal supplies." Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 176.

statement that they have not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.<sup>28</sup>

30. Applicants state that operational control over transmission facilities owned by Applicants and their affiliates within PJM has been transferred to PJM, and that non-discriminatory transmission service over those facilities is available pursuant to rates, terms and conditions established in the PJM OATT.<sup>29</sup>

31. Applicants state, in their January 14, 2008 filing, that they and their affiliates do not own or control any entity that owns or controls any natural gas transportation, intrastate natural gas storage or distribution facilities, or sources of coal supplies. Other than leasing rail sets for the purpose of delivering coal to their coal-fired generating plants, they do not otherwise own or lease facilities for the transportation of coal such as barges and rail cars.<sup>30</sup>

32. Subsequently, Applicants submitted a change in status filing regarding their acquisition of a minority interest in Bull Mountain Coal Mining, Inc. and an associated rail-spur from the mine located near Roundup, Montana. Applicants state that this acquisition does not affect the conditions that the Commission relied upon when granting Applicants market-based rate authority.<sup>31</sup>

33. The Commission has adopted a rebuttable presumption that the ownership or control of, or affiliation with any entity that owns or controls, inputs to electric power production does not allow a seller to raise entry barriers but will allow intervenors to demonstrate otherwise.<sup>32</sup>

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<sup>28</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447.

<sup>29</sup> January 14, 2008 filing (citing *FirstEnergy Operating Companies*, 111 FERC ¶ 61,032 (2005)). See also *Pennsylvania-New Jersey-Maryland Interconnection*, 81FERC ¶ 61,257 (1997).

<sup>30</sup> January 14, 2008 filing at 4.

<sup>31</sup> “The acquisition of a minority interest in the Bull Mountain Coal Mine by an affiliate of the FirstEnergy Companies will not result in a material change in the facts on which the FERC relied when they were granted market-based rate authority.” July 25, 2008 Filing at 2-3.

<sup>32</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 446.

34. Applicants affirmatively state that they and their affiliates have not erected and will not erect barriers to entry into the relevant markets. Based on Applicants' representations, Applicants satisfy the Commission's requirements for market-based rates regarding vertical market power in the PJM market and the PJM-East submarket.

### **3. Other Matters**

35. As noted above, the Ohio Commission and the PJM Industrial Customers filed adverse comments or protests in this proceeding.<sup>33</sup> Their arguments are addressed below.

#### **a. Ohio Commission**

36. The Ohio Commission's comments concern the horizontal market power analysis that Applicants filed for the Midwest ISO market in the Central region. However, although Applicants filed updated market-power analyses for both the PJM market, which is in the Northeast region, and the Midwest ISO market, which is in the Central region, the only region before the Commission in this proceeding is the Northeast region, which includes the PJM market. On rehearing of Order No. 697, Applicants objected to the regional filing approach and requested instead that all entities within the same corporate family that have market-based rate authority and operate in adjacent geographic markets should be allowed to file a single, updated triennial market power analysis during a three-year filing cycle. In Order No. 697-A, the Commission denied FirstEnergy's request to file one triennial update for both regions.<sup>34</sup> In its denial of Applicants' request to file a single triennial update, the Commission required Applicants to re-file their analysis for the Central region at the appropriate time in accordance with the regional schedule.

37. On this basis, we find that the Ohio Commission's arguments involving the Midwest ISO market are not relevant to our analysis of the Northeast region. The Ohio Commission may present arguments relating to Applicants' potential market power in the Midwest ISO market for the Commission's consideration when Applicants file their updated market power analysis for the Central region.

#### **b. PJM Industrial Customers**

38. PJM Industrial Customers repeat arguments they raised on rehearing of Order No. 697, that the Commission fails to answer a threshold question of whether the PJM

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<sup>33</sup> Ohio Energy endorsed the Ohio Commission's comments.

<sup>34</sup> Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 368.

market rules and structure result in a competitive market for electric energy and capacity. The PJM Industrial Customers thus assert that Order No. 697 is unlawful and, therefore, the approval or continuation of a seller's market-based rate authority is unlawful. They further assert that, unless and until the Commission identifies the characteristics of a competitive market and finds that such a market actually exists, the Commission cannot approve the instant request for authorization to continue making sales at market-based rates.

39. We find that the PJM Customers' arguments are improper in this proceeding. The Commission recently addressed the PJM Customers' arguments on rehearing of Order No. 697. Specifically, in Order No. 697-A, the Commission rejected the argument that Order No. 697 does not reflect reasoned decision-making because the Commission did not find the existence of a competitive market before relying on market-based rate authority.<sup>35</sup> Thus, we reject the PJM Industrial Customers' arguments here.

### C. Affiliate Restrictions

40. Applicants state that provisions incorporating restrictions on affiliate sales have been removed from their market-based rate tariffs because the affiliate restrictions have been codified in 18 C.F.R. § 35.39 (2008). In addition, in order to comply with the requirement in Order No. 697 directing sellers to include in their market-based rate tariffs a provision identifying any waivers from the affiliate sales restrictions, if applicable, Applicants' market-based rate tariffs include proposed provisions listing previously-received authorizations regarding affiliate sales.

41. Specifically, FirstEnergy Operating Companies propose to include a provision in their market-based rate tariffs that states "[s]eller has been authorized to sell power to FirstEnergy Generation Corp. and to FirstEnergy Nuclear Generation Corp., each of which is a market-regulated power sales affiliate. *FirstEnergy Corp.*, Docket No. ER96-1386-000, . . . letter order issued October 4, 2006." Penn Power propose to include a provision in their market-based rate tariffs that states: "[s]eller has been authorized to sell power to FirstEnergy Solutions Corp., which is a market-regulated power sales affiliate. *Pennsylvania Power Company*, . . . Docket No. ER07-434-000, letter order issued March 21, 2007." Solutions proposes to include a provision in its market-based rate tariff that states "[s]eller has been authorized to sell power to Jersey Central Power & Light Company, Metropolitan Edison Company, Pennsylvania Electric Company, and Pennsylvania Power Company, each of which is a franchised public utility with which it is affiliated. *Pennsylvania Power Company*, . . . Docket No. ER07-434-000, letter order issued March 21, 2007. Seller has also been authorized to sell power to The Cleveland

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<sup>35</sup> *Id.* P 407-12.

Electric Illuminating Company, Ohio Edison Company, and The Toledo Edison Company, each of which is also a franchised public utility with which it is affiliated. *FirstEnergy Solutions Corp.*, 117 FERC ¶ 61, 278 (2006).”<sup>36</sup>

42. Applicants state that retail electric service customers in each of the states in which FirstEnergy Operating Companies, Penn Power, and Jersey Central provide retail electric service are permitted by state law to purchase electricity either from these utilities or from competing electric services providers. Therefore, according to Applicants, the retail customers in these states are not considered to be “captive customers” for purposes of the affiliate restrictions. Applicants note, however, that because the FirstEnergy Operating Companies sell power at wholesale pursuant to rates that were established under a cost-based paradigm, they still require prior Commission approval for sales to their market-regulated affiliates.<sup>37</sup>

43. Applicants’ October 7 Answer clarifies that the FirstEnergy Operating Companies are not seeking, for the FirstEnergy Operating Companies and their affiliates, affiliate waivers similar to those granted to their franchised utility affiliates in New Jersey and Pennsylvania. Applicants explain that the tariff language in Solutions’ tariff stating that Solutions is authorized to sell power to the FirstEnergy Operating Companies “was made solely to comply with Order No. 697, and was not intended to relieve the FirstEnergy Operating Companies of the obligation to comply with the FERC’s restrictions on wholesale power sales transactions among FirstEnergy’s Ohio affiliates.”<sup>38</sup> Applicants note that the January 14, 2008 filing recognized that “notwithstanding the proposed tariff change, ‘prior Commission approval continues to be required for transactions between [FirstEnergy Operating Companies] and their market-regulated power sale affiliates.’”<sup>39</sup> Applicants state that if and when FirstEnergy and Solutions file for a waiver of the affiliate restrictions when engaging in sales of electricity between Solutions and the Ohio affiliates, they will make a separate application to the Commission and will serve copies of the application on Ohio Consumers and the Ohio Commission. Applicants state that, consistent with Commission requirements, Solutions will file for prior authorization of

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<sup>36</sup> January 14, 2008 filing revised tariff sheets.

<sup>37</sup> January 14, 2008 filing at 6-7.

<sup>38</sup> Applicants’ October 7 Answer at 2.

<sup>39</sup> *Id.*

any such electricity sales until the Commission grants waiver of the affiliate restrictions or otherwise relieves Solutions of this requirement.<sup>40</sup>

44. We acknowledge Applicants' clarification that they are not seeking a waiver of the affiliate restrictions in connection with sales between Solutions and the FirstEnergy Operating Companies and accept their commitment to file for prior authorization of any electricity sales between Solutions and the FirstEnergy Operating Companies until the Commission grants waiver of the affiliate restrictions or otherwise relieves Solutions of this requirement.<sup>41</sup> Further, we accept the tariff provisions listing previously-granted authorizations allowing FirstEnergy Operating Companies to make limited sales to their affiliates Genco and Nuclear Genco and allowing Solutions to make limited sales to its affiliates, FirstEnergy Operating Companies.

45. However, we note that Penn Power's and Solutions' tariffs also reference previous authorizations to make affiliate sales granted in *Pennsylvania Power*, Docket No. ER07-434-000 (March 21, 2007) (unpublished letter order). The Commission directed in Order No. 697 that sellers that have previously been found not to have captive customers and, therefore, received a waiver of the affiliate restrictions "will be required to demonstrate that they continue to lack captive customers in order to support a continued waiver of the affiliate restrictions in the regulations."<sup>42</sup> In Order No. 697-A, the Commission further explained that if a seller has wholesale customers, the seller should explain why those customers are adequately protected against affiliate abuse.<sup>43</sup>

46. Applicants reference the existence of retail choice in the respective states and state that Jersey Central "does not sell power to any wholesale customers under cost-based regulation."<sup>44</sup> However, to support a continued waiver of the affiliate restrictions, they also need to address whether Penn Power have wholesale customers and if they do, how their customers are protected.

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<sup>40</sup> *Id.* at 3.

<sup>41</sup> We note that Ohio Consumers withdrew its protest in this proceeding based on FirstEnergy Operating Companies' representation in that regard.

<sup>42</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 551.

<sup>43</sup> Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 201

<sup>44</sup> Jan. 14 filing at 6-7.

47. In light of the foregoing, we conditionally accept the proposed revisions to Penn Power's and Solutions' market-based rate tariffs reflecting previously-granted waivers of the affiliate restrictions, subject to a compliance filing addressing the wholesale customer issue in accordance with Order Nos. 697 and 697-A.

**D. Order Nos. 697 and 697-A Compliance Filings**

48. In Order No. 697, the Commission adopted two standard required provisions that each seller must include in its market-based rate tariff: a provision requiring compliance with the Commission's regulations and a provision identifying any limitations and exemptions regarding the seller's market-based rate authority.<sup>45</sup> In addition to the required tariff provisions, the Commission adopted a set of standard provisions that must be included in a seller's market-based rate tariff to the extent that they are applicable.<sup>46</sup> In Order No. 697-A, the Commission also required that each seller include in its market-based rate tariff a provision identifying which category of seller it qualifies as in each region.<sup>47</sup>

49. Applicants' revised market-based rate tariffs<sup>48</sup> include the Commission's two required provisions and, where applicable, standard provisions regarding sales of

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<sup>45</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 914.

<sup>46</sup> *Id.* P 917.

<sup>47</sup> Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 391-93.

<sup>48</sup> FirstEnergy Service Company, FERC Electric Tariff, Second Revised Volume No. 2, Substitute First Revised Sheet Nos. 16 and 17 (Superseding Original Sheet Nos. 16 and 17), Substitute Second Revised Sheet Nos. 32 and 33 (Superseding First Revised Sheet Nos. 32 and 33), Substitute Second Revised Sheet Nos. 34, 35, 38, 39 and 79 - 81 (cancels First Revised Sheet Nos. 34, 35, 38, 39 and 79 - 81), Pennsylvania Power Company, et al., FERC Electric Tariff, Original Volume No. 1, Substitute Third Revised Sheet No. 1 (Superseding Second Revised Sheet No. 1), and Substitute Second Revised Sheet Nos. 2, 3 - 6 (Superseding First Revised Sheet Nos. 2, 3 - 6), Jersey Central, FERC Electric Tariff, Original Volume No. 1, Substitute Third Revised Sheet Nos. 1 and 2 (Superseding Second Revised Sheet Nos. 1 and 2), Solutions, FERC Electric Tariff, First Revised Volume No. 1, Substitute Second Revised Sheet No. 1 (Superseding First Revised Sheet No. 1), Original Sheet No. 1 - A, (cancels Original Sheet No. 1 - A), First Revised Sheet No. 2 (Superseding Original Sheet No. 2) and Substitute First Revised Sheet Nos. 3 and 4 (Superseding Original Sheet Nos. 3 and 4), Genco, FERC Electric Tariff, First Revised Volume No. 1, Substitute First Revised Sheet Nos. 1, 2 - 5

(continued...)

ancillary services in various markets as well as sales of ancillary services as a third-party provider. These provisions satisfy the requirements of Order No. 697. Additionally, Applicants tariffs include the required provisions concerning sellers categories and therefore satisfy the requirements of Order No. 697-A.

### **E. Reporting Requirements**

50. Consistent with the procedures the Commission adopted in Order No. 2001,<sup>49</sup> an entity with market-based rates must file electronically with the Commission an Electric Quarterly Report containing: (1) a summary of the contractual terms and conditions in every effective service agreement for market-based power sales; and (2) transaction information for effective short-term (less than one year) and long-term (one year or longer) market-based power sales during the most recent calendar quarter.<sup>50</sup> Public utilities must file Electric Quarterly Reports no later than 30 days after the end of the reporting quarter.<sup>51</sup>

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(Superseding Original Sheet Nos. 1, 2- 5), Nuclear Genco, FERC Electric Tariff, Original Volume No. 1, Substitute First Revised Sheet Nos. 1 and 2 (Superseding Original Sheet Nos. 1 and 2) and Substitute First Revised Sheet Nos. 3 – 5 (cancels Original Sheet Nos. 3 – 5) and Mansfield Unit, FERC Electric Tariff, Original Volume No. 1, Substitute First Revised Sheet No. 1 (Superseding Original Sheet No. 1).

<sup>49</sup> *Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127, *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reh'g denied*, Order No. 2001-B, 100 FERC ¶ 61,342, *order directing filing*, Order No. 2001-C, 101 FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001-D, 102 FERC ¶ 61,334 (2003).

<sup>50</sup> Attachments B and C of Order No. 2001 describe the required data sets for contractual and transaction information. Public utilities must submit Electric Quarterly Reports to the Commission using the EQR Submission System Software, which may be downloaded from the Commission's website at <http://www.ferc.gov/docs-filing/eqr.asp>.

<sup>51</sup> The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2008). Failure to file an Electric Quarterly Report (without an appropriate request for extension), or failure to report an agreement in an Electric Quarterly Report, may result in forfeiture of market-based rate authority, requiring filing of a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

51. Applicants must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.<sup>52</sup>

52. Additionally, in Order No. 697, the Commission created two categories of sellers.<sup>53</sup> Category 1 sellers are not required to file regularly scheduled updated market power analyses. Category 1 sellers are wholesale power marketers and wholesale power producers that own or control 500 MW or less of generation in aggregate per region; that do not own, operate, or control transmission facilities other than limited equipment necessary to connect individual generation facilities to the transmission grid (or have been granted waiver of the requirements of Order No. 888); that are not affiliated with anyone that owns, operates or controls transmission facilities in the same region as the seller's generation assets; that are not affiliated with a franchised public utility in the same region as the seller's generation assets; and that do not raise other vertical market power issues.<sup>54</sup> Sellers that do not fall into Category 1 are designated as Category 2 and are required to file regularly scheduled updated market power analyses.<sup>55</sup>

53. Based on Applicants' representations, we find that Applicants meet the criteria for Category 2 sellers in the Northeast and Central regions and are so designated. Additionally Applicants meet the criteria for Category 1 sellers in the Southeast, Southwest, Northwest and Southwest Power Pool regions and are so designated. Applicants must file an updated market power analysis in compliance with the regional reporting schedule adopted in Order No. 697 for those regions in which they are a designated category 2 seller.<sup>56</sup> The Commission also reserves the right to require such an analysis at any intervening time.

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<sup>52</sup> See *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31.175, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

<sup>53</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 848.

<sup>54</sup> 18 C.F.R. § 35.36(a)(2) (2008).

<sup>55</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 850.

<sup>56</sup> *Id.* P 882.

The Commission orders:

(A) Applicants' January 14, 2008 updated market power analysis, as revised on September 2, 2008, is hereby accepted for filing.

(B) Applicants' revisions to their market-based rate tariff sheets are hereby accepted for filing, effective September 18, 2007 and June 6, 2008, subject to a compliance filing to be submitted within 30 days of the date of this order as discussed in the body of this order.

(C) Applicants are hereby directed to file updated market analyses for those regions where they are designated as Category 2 sellers according to the regional reporting schedule adopted in Order No. 697.

(D) Applicants' notice of change in status filing is hereby accepted, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.