

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Public Service Company of New Mexico Docket Nos. ER96-1551-013
ER96-1551-014
ER96-1551-015
ER01-615-009
ER01-615-010
ER01-615-011
EL05-2-000

ORDER ON MARKET-BASED RATES AND TERMINATING SECTION 206
PROCEEDING IN PART

(Issued April 21, 2006)

1. In this order, the Commission finds that Public Service Company of New Mexico (PNM) has rebutted the presumption of market power in the PNM control area and satisfies the Commission's generation market power standard during times when there are no binding transmission constraints. However, when transmission constraints bind, PNM's market-based rate authority continues to be conditioned on the restriction in its market-based rate tariff that sales be made at cost-based rates.¹ Accordingly, this order terminates the proceeding instituted in Docket No. EL05-2-000 pursuant to section 206 of the Federal Power Act (FPA)² with respect to the PNM control area.

¹ When PNM originally filed for market-based rate authority Plains Electric Generation & Transmission Cooperative (Plains) protested the application and the Commission set the application for hearing in *Public Service Co. of New Mexico*, 75 FERC ¶ 61,266 (1996). The parties to the proceeding reached settlement and the Commission approved the settlement by letter order dated April 6, 1999 in *Public Service Co of New Mexico*, 87 FERC ¶ 61,040 (1999). As part of the settlement PNM adopted a provision in its market-based rate tariff requiring PNM to charge cost-based rates during periods of binding transmission constraints.

² 16 U.S.C. § 824e (2000).

2. For the El Paso control area, based on record evidence raised by El Paso, the Commission finds that additional evidence is needed with respect to market conditions during transmission outages or other binding transmission constraints with respect to Path 47 and Path 48, to the extent that Path 48 limits imports into the El Paso control area. Therefore, the Commission will direct PNM to submit a revised Delivered Price Test (DPT) analysis within 60 days of the date of this order that analyzes PNM's potential to exercise market power in the El Paso control area during binding transmission constraints. The revised DPT analysis submitted for the El Paso control area should be conducted without considering imports to determine whether or not PNM has market power during times of binding transmission constraints. Alternatively, PNM may propose cost-based mitigation measures similar to those adopted to mitigate PNM's market power in the PNM control area for the El Paso control area, whereby PNM agrees to sell only at cost-based rates during binding transmission constraints.

3. In this order, the Commission also accepts for filing PNM's notices of change in status.

I. Background

A. December 20 Order

4. In an order issued on December 20, 2004, the Commission found that PNM failed the wholesale market share screen for PNM's control area and that the existing mitigation in PNM's market-based rate tariff was insufficient to rebut the presumption of market power established by PNM's failure of the wholesale market share screen.³ In addition, the Commission was unable to validate the results of PNM's generation market power analysis in the El Paso control area. We found that PNM failed to account for imports into the El Paso control area in compliance with the methodology set forth in the April 14 and July 8 Orders, and that our preliminary analysis indicated that, if PNM's calculations were performed as required by the April 14 Order, PNM could fail the market share screen in the El Paso control area in all four seasons.

5. Because PNM's filing indicated that it failed the wholesale market share screen in the PNM control area, and because the Commission's analysis indicated that PNM could fail in the El Paso control area if the screens were performed as required by the April 14

³ *Public Service Co. of New Mexico*, 109 FERC ¶ 61,296 (2004) (December 20 Order), *reh'g denied*, 111 FERC ¶ 61,038 (2005) (PNM Rehearing/Compliance Order). The December 20 Order applied the interim generation market power screens and mitigation policy announced on April 14, 2004, and clarified on July 8, 2004, in *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (2004) (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

Order, the Commission instituted a section 206 proceeding in the December Order to investigate generation market power in the PNM and the El Paso control areas.⁴

6. For the PNM control area, PNM was directed to: (1) file a DPT analysis; (2) file a mitigation proposal tailored to its particular circumstances that would eliminate the ability to exercise market power; or (3) inform the Commission that it would adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates.⁵

7. For the El Paso control area, PNM was directed to either: (1) file revised generation market power screens and a simultaneous transmission import capability study, which complies with the requirements of Appendix E of the April 14 Order; (2) file a DPT analysis; (3) file a mitigation proposal tailored to its particular circumstances that would eliminate the ability to exercise market power; or (4) inform the Commission that it will adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates.

B. Description of Filings

8. On July 6, 2005, PNM submitted a change in status report (July 6 Change in Status filing) related to an acquisition approved by the Commission on March 2, 2005.⁶ PNM states that as a result of the acquisition,⁷ PNM now has an affiliated jurisdictional utility, Texas New Mexico Power Company (TNMP). PNM states that TNMP is a transmission provider, but does not own any generation. PNM states that TNMP submitted a notice of cancellation of its market-based rate authority on June 28, 2005.⁸ As an affiliated public utility, PNM states that its relationship with TNMP will be governed by the provisions of PNM's market-based rate tariff which forbid it to sell power to an affiliate with a franchised service territory without prior Commission authorization. PNM states that the acquisition represents no departure from the characteristics relied upon in granting PNM's market-based rate authority.

⁴ See April 14 Order, 107 FERC ¶ 61,018 at P 201 (“Failure of a screen will provide the basis for instituting a section 206 proceeding and will establish a rebuttable presumption of market power in the section 206 proceeding.”).

⁵ *Id.* at P 201, 207-09.

⁶ *PNM Resources Inc.*, 110 FERC ¶ 61,204 (2005).

⁷ The acquisition was consummated on June 6, 2005.

⁸ The Commission accepted TNMP's notice of cancellation in *Alliance Power Marketing Inc.*, 112 FERC ¶ 61,175 (2005).

9. On July 15, 2005, PNM submitted a DPT analysis (July 15 DPT Filing) for the PNM and El Paso control areas.⁹ Although PNM's DPT analyses show PNM market shares in excess of 20 percent during certain periods in the PNM control area, and show that Herfindahl-Hirschman Index (HHI) market concentration statistics for the El Paso control area destination market exceed 2,500 in all periods, PNM states that it nonetheless lacks generation market power in those markets.

10. However, PNM also proposes mitigation measures should the Commission conclude that PNM possesses generation market power in the PNM control area and/or the El Paso control area. PNM's proposed mitigation incorporates price caps based upon prevailing market prices. PNM states that its proposed market prices are based on prices at well-recognized and liquid trading hubs and rely on pricing mechanisms contained in the Western Systems Power Pool (WSPP) Agreement. PNM explains that its lowest-cost generation costs are consistent with the charges set forth in the WSPP Agreement. PNM states that it is therefore appropriate to rely upon these Commission-approved WSPP rates as a cap to mitigate against any exercise of market power by PNM in the relevant control areas.

11. On January 10, 2006, PNM submitted a change in status report (January 10 Change in Status filing) to inform the Commission that it was beginning test operations and to provide advanced notice of commercial operation for the Luna generation facility, which is located in the PNM control area. PNM states that commercial operation is expected to commence in March 2006 and that PNM owns a one-third interest (or 197 MW of nameplate capacity) in the facility. PNM states that although its share of the Luna facility exceeds 100 MW, other changes have occurred since PNM filed its most recent market power update. PNM states that the quantity of capacity controlled by PNM in 2004 has actually increased only 89 MW during the summer period and has decreased by between 77 and 172 MW in other seasons.

12. As part of its January 10 Change in Status filing, PNM conducted a pivotal supplier and a wholesale market share screen analysis for the PNM control area and for all first-tier control areas to reflect the change in status conditions. PNM states that it fails the wholesale market share screen analysis in the PNM control area. PNM also submitted a DPT analysis for the PNM control area which it states parallels the DPT analysis filed in the July 15 DPT Filing. PNM conducted a pivotal supplier and a

⁹ As noted above, the December 20 Order gave PNM the option to file revised generation market power screens and a revised simultaneous transmission import capability study for the El Paso control area, using the methodology set forth in the April 14 Order. However, in the PNM Rehearing/Compliance Order, the Commission found that PNM's revised generation market power analysis was insufficient to rebut the presumption of market power established by its failure of the wholesale market share screen.

wholesale market share screen analysis for all first-tier control areas to PNM. PNM states that it passes the pivotal supplier and wholesale market share screen analysis in all first-tier control areas.

13. On March 10, 2006 (March 10 Filing), PNM amended its July 15 DPT Filing. In the March 10 Filing, PNM submitted a new DPT for the PNM control area that uses 2004 historical data and new indicative screens for the El Paso control area that also use 2004 historical data. PNM states that the new DPT and indicative screens demonstrate that it lacks generation market power. PNM also states that in light of the Commission's orders in *KCPL*¹⁰ and *Acadia II*,¹¹ the analyses submitted with its March 10 Filing demonstrate that PNM satisfies the Commission's generation market power standard. PNM states that its amended DPT results for the PNM control area are similar to the results submitted in the July 15 DPT Filing.

14. For the El Paso control area, PNM states that it passes the market share and pivotal supplier screens in the El Paso control area when using 2004 test year data. PNM states that this fact creates a rebuttable presumption that PNM lacks generation market power in this market. PNM states that the most recent analysis uses 2004 data and presents a more up-to-date view of PNM's market position in the El Paso control area.

II. Notice of Filing and Responsive Pleadings

15. Notice of the July 6 Change in Status filing was published in the *Federal Register*, 70 Fed. Reg. 41,215 (2005), with interventions or protests due on or before July 27, 2005. None was filed.

16. Notice of the July 15 DPT Filing was published in the *Federal Register*, 70 Fed. Reg. 44,092 (2005), with interventions or protests due on or before August 5, 2005. On August 12, 2005, El Paso submitted comments. El Paso argues that the DPT analysis submitted by PNM for the El Paso control area is flawed and that PNM has failed to demonstrate that it lacks market power in southern New Mexico when transmission paths (particularly Path 47) are constrained, as well as during periods of local generation outages. El Paso points to three flaws in PNM's analysis. El Paso states that the flaws, if corrected, would increase PNM's market share from 16 percent in the summer extreme peak period to 33 percent, causing PNM to exceed the threshold in this one season. El Paso states that PNM failed to accurately model relevant transmission constraints into southern New Mexico. Additionally, El Paso argues that market prices PNM used in the DPT for the El Paso control area are too low for the summer extreme peak period. El Paso argues that the price based on summer 2003 experience should be in the \$80/MWh-\$100/MWh range, not the \$71/MWh PNM used as the base case El Paso price.

¹⁰ *Kansas City Power and Light Co.*, 113 FERC ¶ 61,074 (2005) (*KCPL*).

¹¹ *See Acadia Power Partners, LLC*, 113 FERC ¶ 61,073 (2005) (*Acadia II*).

17. Further, El Paso states that the El Paso market is a particularly vulnerable load pocket because the El Paso control area is adjacent to non-synchronous regions on the south (Mexico) and east (Electric Reliability Council of Texas (ERCOT)). El Paso argues that a DPT analysis is not necessary to conclude that when there are transmission constraints from the north to south and into the El Paso control area, PNM's market shares will increase making El Paso vulnerable to market power during these periods. Finally, El Paso requests that the Commission impose the mitigation proposed by PNM.

18. On August 29, 2005, PNM submitted a motion for leave to answer and answer to El Paso's comments and on September 2, 2005, El Paso submitted an objection to PNM's answer.

19. Notice of the January 10 Change in Status filing was published in the *Federal Register*, 71 Fed. Reg. 3839 (2006), with interventions or protests due on or before January 31, 2006. El Paso submitted comments. In its comments, El Paso states that the market power concerns it raised in its August 12, 2005 comments remain unresolved, and with the addition of the Luna facility, as reported in PNM's January 10 Change in Status filing, the proposed mitigation measures are more crucial than ever to assure that the wholesale market remains competitive.

20. El Paso states that PNM's updated market power analysis submitted in the January 10 Change in Status filing continues to use incorrect geographic markets and should study the southern New Mexico portion of PNM's control area separately due to the transmission constraints on Path 47, and/or local generation outages that limit the amount of uncommitted capacity in the market. El Paso reiterates that when Path 47 is constrained, southern New Mexico becomes a load pocket and is entirely cut off from any additional resources. El Paso states that the underestimation of PNM's market shares in the El Paso control area, caused by not recognizing southern New Mexico as a relevant geographic market, is even more pronounced in the January 10 Change in Status filing (compared to the July 15 DPT Filing) given that the Luna plant, which is co-owned by PNM, is physically located inside southern New Mexico.

21. On February 15, 2006, PNM submitted a motion for leave to answer and answer to El Paso's comments.

22. Notice of the March 10 Filing was published in the *Federal Register*, 71 Fed. Reg. 14,507 (2006), with interventions or protests due on or before March 31, 2006. None was filed.

III. Discussion

A. Procedural Matters

23. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

24. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2005), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We will accept PNM's answers because they have provided information that assisted us in our decision-making process.

B. The Delivered Price Test

25. In the April 14 Order, we stated that an applicant's failure of one or more of the indicative screens establishes a rebuttable presumption of market power. If such an applicant chooses not to proceed directly to mitigation, it must either present a more thorough analysis using the Commission's DPT or forgo its market-based rate authority.¹² The DPT is used to analyze the effect on competition for transfers of jurisdictional facilities in section 203 proceedings,¹³ using the framework described in Appendix A of the Merger Policy Statement and revised in Order No. 642.¹⁴ The DPT is a well established test that has been used routinely to analyze market power in the merger context for many years, and its use as a method for measuring market power has been affirmed by the courts.¹⁵

26. The DPT defines the relevant market by identifying potential suppliers based on market prices, input costs, and transmission availability, and calculates each supplier's

¹² April 14 Order, 107 FERC ¶ 61,018 at P 105-12.

¹³ 16 U.S.C. § 824b (2000).

¹⁴ *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, 61 Fed. Reg. 68,595 (1996), FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,044 (1996), *order on reh'g*, Order No. 592-A, 62 Fed. Reg. 33,341 (1997), 79 FERC ¶ 61,321 (1997) (Merger Policy Statement); *see also Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, 65 Fed. Reg. 70,984 (2000), FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 66 Fed. Reg. 16,121 (2001), 94 FERC ¶ 61,289 (2001).

¹⁵ *See, e.g., Wabash Valley Power Assoc., Inc. v. FERC*, 268 F. 3d 1105 (D.C. Cir. 2001).

economic capacity and available economic capacity for each season/load period.¹⁶ The results of the DPT can be used for pivotal supplier, market share and market concentration analyses. A detailed description of the mechanics of the DPT is provided in the April 14 Order.¹⁷

27. Using the economic capacity for each supplier, applicants should provide pivotal supplier, market share and market concentration analyses. Examining these three measures with the more robust output from the DPT will allow applicants to present a more complete view of the competitive conditions and their positions in the relevant markets.

28. Under the DPT, to determine whether an applicant is a pivotal supplier in each of the season/load periods, applicants should compare the load in the destination market to the amount of competing supply (the sum of the economic capacities of the competing suppliers). The applicant will be considered pivotal if the sum of the competing suppliers' economic capacity is less than the load level (plus a reserve requirement that is no higher than state and regional reliability council operating requirements for reliability) for the relevant period. The analysis should also be performed using available economic capacity to account for applicants' and competing suppliers' native load commitments. In that case, native load in the relevant market would be subtracted from the load in each season/load period. The native load subtracted should be the average of the actual native load for each season/load period.

29. Each supplier's market share is calculated based on economic capacity (the DPT's analog to installed capacity). The market shares for each season/load period reflect the costs of the applicant's and competing suppliers' generation, thus giving a more complete picture of the applicant's ability to exercise market power in a given market. For example, in off-peak periods, the competitive price may be very low because the demand can be met using low-cost capacity. In that case, a high-cost peaking plant that would not be a viable competitor in the market would not be considered in the market share calculations, because it would not be counted as economic capacity in the DPT. Applicants must also present an analysis using available economic capacity (the DPT's analog to uncommitted capacity) and explain which measure more accurately captures conditions in the relevant market.

¹⁶ Super-peak; peak; off-peak for Winter, Shoulder, and Summer periods; and an additional highest super-peak for the Summer.

¹⁷ See April 14 Order, 107 FERC ¶ 61,018 at Appendix F. See also Merger Policy Statement, at Appendix A and Order No. 642.

30. Under the DPT, applicants must also calculate the market concentration using the Hirschman-Herfindahl Index (HHI) based on market shares.¹⁸ HHIs are usually used in the context of assessing the impact of a merger or acquisition on competition. However, as noted by the U.S. Department of Justice in the context of designing an analysis for granting market-based pricing for oil pipelines, concentration measures can also be informative in assessing whether a supplier has market power in the relevant market.¹⁹

31. A showing of an HHI less than 2,500 in the relevant market for all season/load periods for applicants that have also shown that they are not pivotal and do not possess more than a 20 percent market share in any of the season/load periods would constitute a showing of a lack of market power, absent compelling contrary evidence from intervenors. Concentration statistics can indicate the likelihood of coordinated interaction in a market. All else being equal, the higher the HHI, the more firms can extract excess profits from the market. Likewise, a low HHI can indicate a lower likelihood of coordinated interaction among suppliers and could be used to support a claim of a lack of market power by an applicant that is pivotal or does have a 20 percent or greater market share in some or all season/load periods. For example, an applicant with a market share greater than 20 percent could argue that that it would be unlikely to possess market power in an unconcentrated market (HHI less than 1,000).²⁰

32. As with our initial screens, applicants and intervenors may present evidence such as historical wholesale sales data, which can be used to calculate market shares and market concentration and to refute or support the results of the DPT. We encouraged applicants to present the most complete analysis of competitive conditions in the market as the data allow. We have used actual data in our analysis of mergers and other section 203 jurisdictional transactions to supplement or support the analysis of the effect of such transactions on competition. As we stated in Order No. 642:

¹⁸ The HHI is the sum of the squared market shares. For example, in a market with five equal size firms, each would have a 20 percent market share. For that market, $HHI = (20)^2 + (20)^2 + (20)^2 + (20)^2 + (20)^2 = 400 + 400 + 400 + 400 + 400 = 2,000$.

¹⁹ *See Comments of the United States Department of Justice in response to Notice of Inquiry Regarding Market-Based Ratemaking for Oil Pipelines*, Docket No. RM94-1-000 (January 18, 1994) (“The Department and the Commission staff have previously advocated an HHI threshold of 2,500, and it would be reasonable for the Commission to consider concentration in the relevant market below this level as sufficient to create a rebuttable presumption that a pipeline does not possess market power.”)

²⁰ April 14 Order, 107 FERC ¶ 61,018 at P 111.

If sales data indicate that certain participants actually have been able to reach the market in the past, it is appropriate to consider whether they are likely candidates to be included in the market in the future. It is for this reason that we will require a “trade data check” as part of the competitive analysis test.^[21]

PNM’s Delivered Price Test

1. PNM Control Area

33. In the December 20 Order, the Commission rejected PNM’s argument that it should retain its market-based rate authority because market power could arise only when transmission constraints on Path 48 prevent customers from importing power from outside the PNM control area. PNM asserted that, in such circumstances, its market-based rate tariff already provides that PNM is required to charge cost-based rates to affected customers.²² In the December 20 Order and the PNM Rehearing/Compliance Order, the Commission found that PNM’s mitigation was insufficient to rebut the presumption of market power indicated by PNM’s failure of the wholesale market share screen. PNM’s mitigation is effective only during times of binding transmission constraints. The Commission’s finding was based on the wholesale market share screen failure that revealed market power potential during non-constrained times, during which the mitigation conditions already in PNM’s market-based rate tariff would not apply.²³ As the Commission explained in the PNM Rehearing/Compliance Order, PNM’s wholesale market share screen failure reflects periods of potential generation market power before and up to the transmission limits determined by the simultaneous transmission import capability study.²⁴ In addition, the April 14 Order states that the failure of a screen in and of itself provides the basis for instituting a section 206 proceeding, establishes a rebuttable presumption of market power, and shifts to the applicant the burden of presenting evidence to rebut the presumption of market power.²⁵

34. For the PNM control area, PNM’s amended DPT analysis submitted on March 10, 2006, using 2004 historical data, yields similar results to the DPT submitted on July 15, 2005. However, the amended DPT was unsupported and the Commission cannot rely on

²¹ Order No. 642 at n.41.

²² December 20 Order, 109 FERC ¶ 61,296 at P 23.

²³ *Id.* at P 24 and PNM Rehearing/Compliance Order, 111 FERC ¶ 61,038 at P 16 and 17.

²⁴ PNM Rehearing/Compliance Order, 111 FERC ¶ 61,038 at P 19.

²⁵ *Id.* at P 17.

the results.²⁶ PNM's July 15 DPT analysis, using 2003 historical data, indicates that the results for the pivotal supplier and market concentration analyses for the available economic capacity measure are below the thresholds set forth in the April 14 Order for all ten season/load periods under study.²⁷ PNM's market share is above 20 percent in two seasons. All other season/load periods are below 20 percent, PNM is not a pivotal supplier in any season/load period, and the HHIs are all below 2,500 in all season/load periods.

35. When the economic capacity measure is used, PNM's market shares and the HHIs are higher than the results for available economic capacity (which is not unexpected for a traditional utility in its own control area). The economic capacity measure indicates that PNM exceeds the thresholds set forth in the AEP Order for the market share analysis in all ten season/load periods. PNM is not a pivotal supplier in any season/load period, and the HHIs are all below 2,500 in all season/load periods.

36. In summation, the pivotal supplier and market concentration analyses under the available economic capacity measure indicate the results are below the thresholds set forth in the April 14 Order for all ten season/load periods under study. Using the economic capacity measure, PNM's market shares are above 20 percent in all periods in both DPT analyses, but PNM is not a pivotal supplier and the HHIs are all below 2,500 in all season/load periods.

Commission Determination – PNM Control Area

37. After weighing all of the relevant factors, including the provision in PNM's market-based rate tariff that requires sales be made at cost-based rates rather than market-based rates during times of binding transmission constraints, the Commission concludes that, on balance, based on PNM's July 15 DPT analysis in its control area, PNM has rebutted the presumption of generation market power.²⁸ The Commission finds that based on PNM's existing mitigation that covers generation market power potential during times of binding transmission constraints and PNM's DPT analysis that rebuts the presumption of generation market power during unconstrained periods, PNM satisfies the Commission's generation market power standard for the grant of market-based rate authority in the PNM control area.²⁹

²⁶ PNM did not provide sufficient factual information, including the study, workpapers, and underlying data to support the amended DPT and provided only the results of the DPT analysis.

²⁷ AEP Order, 107 FERC ¶ 61,018 at P 111.

²⁸ April 14 Order, 107 FERC ¶ 61,018 at P 111.

²⁹ *Id.*

38. As noted above, the results of PNM's DPT analysis for the PNM control area vary depending on whether the economic capacity or available economic capacity measure is used. As the Commission has stated, the DPT does not function like the initial screens – *i.e.*, failure of either the economic capacity or available economic capacity analyses does not result in an automatic failure of the test as a whole. Neither measure is definitive and the Commission weighs the results of both the economic capacity and the available economic capacity analyses and considers the arguments of the applicant and intervenors.³⁰

39. The Commission has recognized that not all generation capacity is available all of the time to compete in wholesale markets and that some accounting for native load requirements is warranted.³¹ In the DPT analysis, available economic capacity accounts for native load requirements. PNM's DPT analysis, using the available economic capacity measure indicates that PNM lacks market power in its control area.

40. While available economic capacity reflects native load obligations when assessing the potential for market power in generation, the Commission has noted a clear distinction between generation serving native load and generation competing for wholesale load.³² The Commission therefore also considers economic capacity in assessing generation market power. While the market share results for the economic capacity measure indicates that PNM exceeds the threshold in all season/load periods (ranging between 35 and 41 percent), the HHIs using the economic capacity measure are below the 2,500 threshold for all of the season/load periods and the pivotal supplier results indicate that PNM is not pivotal in any season/load period.

41. In addition, PNM's DPT indicates that the market shares using the available economic capacity measure are below 20 percent in all season except for two (23 and 26 percent in winter off-peak and shoulder off-peak seasons). The HHIs using the available economic capacity measure are all below 2,500 (the lowest being 1,357 in the winter super-peak and the highest being 2,191 in the summer super-peak, a season/load period for which PNM has zero percent market share), and PNM is not pivotal in any season/load period.

42. As discussed earlier, utilities with a native load obligation are obligated to secure and devote resources to serve that native load. Depending on load conditions, some or all of those resources are not available to the wholesale market and the available economic capacity measure accounts for that. In short, the Commission determines, based on the record, what the DPT is indicating and, in particular, whether the evidence in the record

³⁰ July 8 Order, 108 FERC ¶ 61,026 at P 26.

³¹ April 14 Order, 107 FERC ¶ 61,018 at P 67.

³² *Id.*

supports a finding of market power in generation.³³ Accordingly, after weighing all of the relevant factors, including the mitigation in PNM's market-based rate tariff regarding binding constraints, the Commission concludes that, on balance, based on PNM's existing mitigation and its DPT analysis in the PNM control area, PNM has rebutted the presumption of generation market power and satisfies the Commission's generation market power standard for the grant of market-based rate authority.

2. El Paso Control Area

43. PNM's DPT analysis for the El Paso control area indicates that the results for the pivotal supplier and market share analyses under the available economic capacity and economic capacity measures are below the thresholds set forth in the April 14 Order for all ten season/load periods under study.³⁴ Under both measures, PNM's market shares are below 20 percent in all season/load periods, and it is not a pivotal supplier in any season/load period.

44. The market concentration analysis shows HHIs greater than 2,500 in all season/load periods using the economic capacity measure and in seven season/load periods using the available economic capacity measure. Under the economic capacity measure, PNM's market share is six percent or less in all seasons/load periods. Under the available economic capacity measure, PNM's market share is between zero and nineteen percent in the seasons that show an HHI of greater than 2,500.

45. PNM states that HHIs greater than 2,500 should not be viewed as evidence that PNM possesses generation market power because El Paso itself has a large share of economic capacity accessible in its control area. PNM states that the high HHIs should be assigned no weight because: (a) the economic capacity measure results highlight the fact that El Paso owns or controls most generation resources in or deliverable to its control area since it is the only significant load-serving entity there; and (b) El Paso, as the holder of most economic capacity supplies, would have no incentive to coordinate with PNM to withhold supplies of economic capacity and raise market prices in the El Paso control area since El Paso itself would bear the brunt of the increased prices.

46. El Paso states in its August 12, 2005 filing that the DPT analysis submitted by PNM for the El Paso control area is flawed and that PNM has failed to demonstrate that it lacks the ability to exercise market power in southern New Mexico when Path 47 is constrained and during periods of local generation outages. El Paso states that based on its independent DPT analysis, PNM's market share exceeds the threshold under the available economic capacity measure in the summer extreme peak period with a market share of 33 percent in the El Paso control area.

³³ *KCPL*, 113 FERC ¶ 61,074 at P 35.

³⁴ April 14 Order, 107 FERC ¶ 61,018 at P 111.

47. Further, as noted above, El Paso argues that it is situated in a particularly vulnerable load pocket because of its geographic location. El Paso states that it owns generation at two liquid hubs, Palo Verde and Four Corners. El Paso states that it relies on import capability on Path 47 from the north and west to import energy from Palo Verde and Four Corners to serve its native load. El Paso states that other than Path 47, it depends on import capability over one other transmission path interconnection, the Eddy County direct current line, plus its local generation, to meet its native load obligations. El Paso argues that because PNM is the second largest supplier, after El Paso, and the largest economic supplier that has market-based rate authority in the El Paso control area, PNM has the ability to potentially exercise market power when there are local generation outages (increasing El Paso's need for imports) or transmission outages (limiting import capability from outside the control area). Finally, El Paso requests that the Commission impose the mitigation proposed by PNM.

48. In its August 29 filing, PNM responds that the overall effect of the adjustments to its DPT analysis proposed by El Paso is that the PNM market share for the available economic capacity measure would be in excess of twenty percent in a single season -- the summer extreme peak period. PNM states that even if El Paso's analysis were accepted, El Paso has shown only that PNM could exercise generation market power in the summer extreme peak period. PNM states that El Paso's claims that mitigation should apply at all times, regardless of the potential for PNM to exercise generation market power, is overreaching and should be rejected. PNM further states that El Paso's criticisms of PNM's DPT analysis for the El Paso control area are without foundation.

Commission Determination – El Paso Control Area

49. The Commission finds that PNM's July 15 DPT results for the El Paso control area could rebut the presumption of market power. However, the Commission needs additional information with respect to market conditions when Path 47 and Path 48, to the extent that Path 48 limits imports into the El Paso control area, transmission constraints bind. Because El Paso defines itself as a load pocket and because El Paso relies on imports from the north through the PNM control area and then over Path 47 into the El Paso control area, the Commission is concerned that during transmission outages PNM may be able to exercise market power in the El Paso control area. PNM has not adequately addressed El Paso's concerns that because PNM is the largest economic supplier that has market-based rate authority in the El Paso control area, PNM could exert market power during binding transmission constraints or transmission outages. However, the Commission rejects El Paso's argument that PNM must demonstrate that it lacks the ability to exercise market power in southern New Mexico when El Paso's own generation may be curtailed. PNM's market-based rate authority should not be subject to circumstances controlled by El Paso with respect to local generation. To hold otherwise would potentially allow El Paso to curtail its own generation when its own cost of producing power would exceed the mitigated cost of the power provided by PNM.

50. Because the DPT analysis submitted by PNM does not adequately address PNM's market power in the El Paso control area during conditions of binding transmission constraints over Path 47 and Path 48, to the extent that Path 48 limits imports into the El Paso control area, the Commission directs PNM to submit a DPT analysis within 60 days of the date of this order that evaluates PNM's potential to exercise market power in the El Paso control area during binding transmission constraints or other transmission outages over Path 47 and Path 48, to the extent that Path 48 limits imports into the El Paso control area. In this regard, the revised DPT analysis submitted for the El Paso control area should be conducted without considering imports. Alternatively, PNM may choose to propose cost-based mitigation measures similar to those currently in place in the PNM control area during times of binding transmission constraints. Thus, any market power that PNM may exercise in El Paso during times of binding transmission constraints would be mitigated by the requirement that PNM charge cost-based rates during times of binding transmission constraints.

C. PNM's Proposed Mitigation

51. In its July 15 DPT Filing, PNM proposed mitigation in the event that the Commission concludes that PNM possesses generation market power. PNM's mitigation proposal incorporates price caps, based upon prevailing market prices at the Palo Verde and Four Corners trading hubs, and upon pricing mechanisms contained in the WSPP Agreement. We reject PNM's proposed mitigation.

52. In *MidAmerican*,³⁵ the Commission rejected MidAmerican's price cap proposal, which would be subject to a ceiling rate based on locational marginal prices at the PJM Interconnection, LLC-MidAmerican interface. The Commission stated that the April 14 Order and July 8 Order contemplate that any mitigation proposals will be based on cost-based rates.³⁶ The Commission determined that where an applicant's proposed mitigation does not eliminate its ability to exercise market power, then the applicant's market-based rate authority will be revoked in geographic areas where market power is found, and the applicant will be subject to cost-based default rates *or other cost-based rates* that the applicant proposes and the Commission approves.³⁷ Accordingly, in the event PNM proposes mitigation for the El Paso control area, we will require PNM to base its mitigation on either the default cost-based rate, or a different cost-based rate (together with cost-support), consistent with Commission precedent.

53. We note that, on March 10, 2006, PNM filed supplemental information in the form of a revised wholesale market share and pivotal supplier analysis for the El Paso control

³⁵ *MidAmerican Energy Co.*, 114 FERC ¶ 61,280 (2006) (*MidAmerican*).

³⁶ *MidAmerican*, 114 FERC ¶ 61,280 at 43.

³⁷ *Id.*

area. However, PNM has already complied with the Commission's December 20 Order and the PNM Rehearing/Compliance Order directing PNM to file a DPT. The supplemental information in PNM's March 10 Filing is not relevant at this stage of the proceeding because PNM has a presumption of market power in the El Paso control area by virtue of its failure of the wholesale market share screen that it initially submitted, and a DPT analysis is required to rebut the presumption of market power.³⁸ PNM's DPT analysis for the El Paso control area is previously discussed herein. Accordingly, PNM's March 10 Filing of revised indicative screens is beyond the scope of this proceeding.

D. Change in Status Filings

54. In the July 6 Change in Status filing, PNM reported its acquisition of TNMP. PNM states that its relationship with TNMP will be governed by the provisions of PNM's market-based rate tariff which forbids it to sell power to an affiliate with a franchised service territory without prior Commission authorization. The Commission's review of PNM's market-based rate tariff reveals that the tariff does not state that PNM will not make sales to an affiliate with a franchised service territory "without first receiving" Commission authorization of the transaction under section 205 of the FPA. Therefore, consistent with Commission precedent, PNM is directed to make a compliance filing within 30 days of the date of issuance of this order to revise its market-based rate tariff to include such language.³⁹ Based on PNM's representations, and subject to the tariff revision we direct herein, the Commission accepts for filing PNM's notice of change in status submitted on July 6, 2005.

55. In the January 10 Change in Status filing, PNM informed the Commission of the beginning of test operations and provided advanced notice of commercial operation of the Luna generation facility. PNM also included an updated generation market power analysis for the El Paso control area. Based on PNM's representations, the Commission accepts for filing PNM's notice of change in status submitted on January 10, 2006.

E. Reporting Requirements

56. PNM is directed to file an updated market power analysis within three years of the date of this order. The Commission also reserves the right to require such an analysis at any time.

³⁸ See April 14 Order, 107 FERC ¶ 61,018 at P 37; PNM Rehearing/Compliance Order, 111 FERC ¶ 61,038 at P 32, 34.

³⁹ *Aquila Inc.*, 101 FERC ¶ 61,331 at P 12 (2002).

F. Docket No. EL05-2-000

57. The Commission terminates the section 206 proceeding in Docket No. EL05-2-000 with respect to the PNM control area. That proceeding was established to investigate generation market power issues in the PNM and El Paso control areas. Based on the above findings with regard to the PNM control area, the Commission finds that there is no further need for that proceeding with respect to the PNM control area.

The Commission orders:

(A) For the PNM control area, PNM's updated market power analysis is accepted for filing, as discussed in the body of this order.

(B) PNM is directed to file an updated market power analysis within three years of the date of this order.

(C) For the El Paso control area, PNM is directed within 60 days of the date of this order to file a revised DPT analysis, as discussed in the body of this order. Alternatively, PNM may choose to propose similar cost-based mitigation measures for the El Paso control area that PNM currently has in effect for the PNM control area, as discussed in the body of this order.

(D) The section 206 proceeding for the PNM control area in Docket No. EL05-2-000 is terminated, as discussed in the body of this order.

(E) PNM is directed, within 30 days of the date of issuance of this order, to revise the affiliate sales prohibition language in its tariff, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.