

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Duke Energy Morro Bay, LLC	Docket Nos. ER98-2681-006
Duke Energy Moss Landing, LLC	ER98-2680-006
Duke Energy South Bay, LLC	ER99-1785-005
Duke Energy Oakland, LLC	ER98-2682-006

ORDER ON REHEARING

(Issued May 6, 2005)

1. The People of the State of California, *ex rel.* Bill Lockyer, Attorney General (California AG) has timely requested rehearing of an unpublished delegated letter order issued on April 13, 2004.¹ The April 13 Letter Order accepted an updated market power analysis filed by the Duke Energy Entities,² including Duke Energy Morro Bay LLC, Duke Energy Moss Landing LLC, Duke Energy South Bay LLC, and Duke Energy Oakland LLC (collectively Duke California Companies). In this order, the Commission denies in part and dismisses in part the California AG's request for rehearing. This order

¹ Unpublished delegated letter order dated April 13, 2004, Docket No. ER99-3822-004, *et al.* (April 13 Letter Order).

² The Duke Energy Entities include several generating affiliates and a power marketing affiliate of Duke Energy Corporation, and are direct or indirect wholly-owned subsidiaries of Duke Energy North America, LLC, which itself is an indirect, wholly-owned subsidiary of Duke Energy Corporation. The California AG's request for rehearing is directed only to that portion of the updated market power analysis pertaining to generating affiliates Duke Energy Morro Bay LLC, Duke Energy Moss Landing LLC, Duke Energy South Bay LLC, and Duke Energy Oakland LLC.

will further protect customers from excessive rates and charges that may result from the exercise of market power.

Background

2. On January 5, 2004, the Duke Energy Entities submitted a joint triennial market power update. In that update, several of the Duke Energy Entities performed the Supply Margin Assessment (SMA) screen, as the Commission then required.³ The Duke California Companies stated in the update that they were exempt from the SMA screen because they made sales, including bilateral sales, into an Independent System Operator (ISO) with Commission-approved market monitoring and mitigation.⁴

3. On January 26, 2004, the California AG filed a motion to intervene, protest, and comments regarding the Duke California Companies' portion of the Duke Energy Entities' update. In its protest and comments, the California AG argued that the Duke California Companies possess market power in the California Independent System Operator Corporation (CAISO) control area, citing evidence from proceedings ongoing at the time regarding the Commission's California market investigations.

4. The April 13 Letter Order accepted the Duke Energy Entities updated market power analysis for filing, and mistakenly stated that "[n]o protests or adverse comments were filed."

Request for Rehearing

5. In its request for rehearing, the California AG argues that the April 13 Letter Order incorrectly stated that no protests or adverse comments were filed, and that the Commission failed to acknowledge its timely protest and comments. Additionally, the California AG contends that the Duke California Companies must comply with the Commission's April 14, 2004 Order in *AEP Power Marketing, Inc.*,⁵ which set forth new generation market power screens that replace the SMA screen, and that their January 5, 2004 joint triennial market power update does not comply with that order. The California AG also notes that the exemption relied upon by the Duke California Companies for

³ See *AEP Power Marketing, Inc.*, 97 FERC ¶ 61,219 (2001).

⁴ See Triennial Market Power Update of Duke Energy Entities at 22.

⁵ 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004).

entities selling into an ISO with Commission-approved market monitoring and mitigation no longer applies under the April 14 Order. Finally, the California AG asserts that the Commission should revoke the Duke California Companies' market-based rate authority until the Commission develops a "usable definitional measure of what constitutes unjust and unreasonable rates in a deregulated market."⁶

6. On May 26, 2004, the Duke California Companies submitted a motion for leave to file answer and answer to the California AG's request for rehearing.

Discussion

7. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure⁷ prohibits an answer to a request for rehearing unless otherwise ordered by the decisional authority. We are not persuaded to accept the Duke California Companies' answer and will, therefore, reject it.

8. On August 11, 2004, as amended on November 19, 2004, the Duke California Companies submitted their updated market power analysis in compliance with the April 14 Order.⁸ In an order issued on December 15, 2004, the Commission accepted the updated market power analysis for filing.⁹ In that order, the Commission noted that the Duke California Companies pass both the pivotal supplier and wholesale market share screens in the CAISO market. Accordingly, the Commission concluded that the Duke California Companies satisfy the Commission's market power standard for the grant of market-based rate authority. The Commission also found that the Duke California Companies satisfied the Commission's transmission market power standard for the grant of market-based rate authority, cannot erect barriers to entry, and satisfied the Commission's concerns with regard to affiliate abuse and reciprocal dealing. Given that the Duke California Companies have complied with the April 14 Order and satisfied the Commission's current standards for market-based rate authority, we find that the

⁶ Request for Rehearing of the California AG at 12.

⁷ 18 C.F.R. § 385.213(a)(2) (2004).

⁸ *See also Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004) (order regarding implementation of the requirements of the April 13 Order).

⁹ *Duke Power, a Division of Duke Power Corporation*, 109 FERC ¶ 61,270 (2004).

California AG's argument on rehearing that the Duke California Companies have not complied with the April 14 Order is now moot.

9. With regard to the California AG's assertion that the Commission should revoke the Duke California Companies' market-based rate authority until we develop a "usable definitional measure of what constitutes unjust and unreasonable rates in a deregulated market," we believe that these arguments are misplaced as they are beyond the scope of the April 13 Letter Order. In Docket No. RM04-7-000, however, the Commission has initiated a generic rulemaking proceeding to examine, among other things, whether the Commission should retain or modify the current four-prong analysis used to determine whether an applicant may charge market-based rates. Arguments such as those raised by the California AG are more appropriately addressed in that proceeding. Accordingly, we will deny the California AG's rehearing request on this issue.

The Commission orders:

The California AG's request for rehearing is hereby denied in part and dismissed in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.