

111 FERC ¶ 61,205  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

PacifiCorp and PPM Energy, Inc.

Docket Nos. ER97-2801-005  
ER03-478-004  
EL05-95-000

ORDER ON UPDATED MARKET POWER ANALYSIS,  
INSTITUTING SECTION 206 PROCEEDING AND  
ESTABLISHING REFUND EFFECTIVE DATE

(Issued May 9, 2005)

1. On February 14, 2005, PacifiCorp and PPM Energy, Inc. (PPM) (collectively, Applicants) submitted for filing an updated market power analysis pursuant to the requirements of the Commission's orders granting Applicants authority to sell capacity and energy at market-based rates.<sup>1</sup> The filing indicates that Applicants fail the pivotal supplier screen in the Idaho Power Company (Idaho) control area and the wholesale market share screen for each of the four seasons in the PacifiCorp East control area.<sup>2</sup>

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<sup>1</sup> *PacifiCorp*, 79 FERC ¶ 61,383 (1997); *PacifiCorp Power Marketing, Inc.*, 74 FERC ¶ 61,139 (1996). The Commission accepted Applicants' last updated market power analysis in 2002. *PacifiCorp Power Marketing, Inc.*, Docket No. ER95-1096-022 (June 11, 2002) (unpublished letter order). The Commission has previously accepted Applicants' revised market-based rate tariffs incorporating the Commission's market behavior rules. *See Acadia Power Partners, LLC*, Docket No. ER03-1372-001 (March 29, 2004) (unpublished letter order).

<sup>2</sup> PacifiCorp's analysis shows market shares as high as 26.5 percent.

2. In an order issued April 14, 2004,<sup>3</sup> the Commission stated that, where an applicant is found to have failed either generation market power screen, such failure provides the basis for instituting a proceeding under section 206 of the Federal Power Act (FPA)<sup>4</sup> and establishes a rebuttable presumption of market power in the section 206 proceeding. Accordingly, as discussed below, the Commission institutes a proceeding pursuant to section 206 of the FPA to determine whether Applicants may continue to charge market-based rates and establishes a refund effective date pursuant to the provisions of section 206. The instant section 206 proceeding, as well as any resulting mitigation or refunds, is limited to the Idaho and PacifiCorp East control areas because the filing indicates that these are the geographic markets for which Applicants fail the pivotal supplier or wholesale market share screens.

3. In addition, Applicants state that they pass the pivotal supplier and wholesale market share screens in PacifiCorp West and each of the other directly interconnected first-tier control areas examined, as well as for the Public Service Company of Colorado (Colorado), Alliant West, and Northern States Power Company (NSP) control areas. However, as discussed below, the Commission is unable to conclude that Applicants satisfy the Commission's generation market power standard for market-based rate authority in the directly interconnected first-tier control areas of PacifiCorp excluding Idaho, and in the control areas of Colorado, Alliant West, and NSP. Accordingly, in this order, the Commission directs Applicants to make a compliance filing within 30 days of the date of this order to revise its generation market power analysis for those control areas.

4. This order, including the refund effective date, will protect customers from excessive rates and charges that may result from the exercise of market power.

### **Background**

5. In the April 14 Order, as clarified by the July 8 Order, the Commission adopted two indicative screens for assessing generation market power: a pivotal supplier screen and a wholesale market share screen. The Commission stated that passage of both screens establishes a rebuttable presumption that the applicant does not possess generation market power, while failure of either screen creates a rebuttable presumption that the applicant has generation market power. The Commission further stated that applicants and intervenors may, however, rebut the presumption established by the results of the initial screens by submitting a Delivered Price Test. Alternatively, an applicant

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<sup>3</sup> *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

<sup>4</sup> 16 U.S.C. § 824e (2000).

may accept the presumption of market power or forego the generation market power analysis altogether and go directly to mitigation.<sup>5</sup>

6. On February 14, 2005, Applicants filed an updated market power analysis. In their filing, Applicants submitted the results of the two generation market power screens. As required, Applicants also provided information on the other three parts of the Commission's four-part analysis. Applicants state that they continue to be unable to exercise transmission market power, erect barriers to entry, or engage in affiliate abuse or reciprocal dealing.

7. Applicants state that they pass the pivotal supplier screen in the PacifiCorp East and PacifiCorp West control areas and in each directly interconnected control area, other than Idaho, as well as in the Colorado, Alliant West, and NSP control areas. Applicants further state that they pass the wholesale market share screen in the Colorado, Alliant West, and NSP control areas and each directly interconnected control area to PacifiCorp, including Idaho, but fail the wholesale market share screen in the PacifiCorp East control area.

8. Applicants argue that, despite the screen failures, Applicants do not have market power because the screens are flawed and overstate the Applicants' market share. Applicants further state that the failure of the pivotal supplier screen in the Idaho control area is only due to an allocated share of import capability, and that it is not possible for an external supplier to withhold capacity inside a control area where it does not own generation.

### **Notice of Filing and Responsive Pleadings**

9. Notice of the filing of Applicants' updated market power analysis was published in the *Federal Register*, 70 Fed. Reg. 9,635 (2005), with interventions or protests due on or before March 4, 2005. On March 1, 2005, Black Hills Power, Inc. (Black Hills), filed a motion to intervene, stating that it reserves the right to file additional pleadings in the future, including a protest.

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<sup>5</sup> In addition, as the Commission stated in the April 14 Order, the applicant or intervenors may present evidence such as historical sales data to support whether the applicant does or does not possess market power. *See* April 14 Order, 107 FERC ¶ 61,018 at P 37.

## **Discussion**

### **Procedural Matters**

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the timely, unopposed motion to intervene of Black Hills serves to make it a party to this proceeding.

### **Market-Based Rate Authorization**

11. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. The Commission also considers whether there is evidence of affiliate abuse or reciprocal dealing.<sup>6</sup>

### **Generation Market Power**

12. Applicants state that PacifiCorp's share of uncommitted capacity in the PacifiCorp East control area exceeds 20 percent for each of the four seasons during the relevant time period. Consequently, Applicants fail the wholesale market share screen in the PacifiCorp East control area. Furthermore, Applicants state that PacifiCorp's uncommitted capacity is greater than net uncommitted supply in the Idaho control area. Consequently, Applicants fail the pivotal supplier screen in the Idaho control area. We note that Applicants' analysis shows that this failure is the result of a negative net uncommitted supply for the Idaho control area (and positive uncommitted capacity attributable to Applicants). However, the analysis on which Applicants state they rely,<sup>7</sup> submitted to the Commission by Idaho, the incumbent utility, shows Idaho passing the pivotal supplier screen due to a positive net uncommitted supply in the control area (and zero uncommitted capacity for Idaho). The Commission accepted Idaho's updated market power analysis, based on, among other things, Idaho's analysis which showed that it passed both the pivotal supplier and wholesale market share screens.<sup>8</sup> We further note that Idaho's analysis indicates, contrary to Applicants' assertion, that there is a positive net uncommitted supply in the Idaho control area. Under Idaho's analysis, Applicants

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<sup>6</sup> See, e.g., *Progress Power Marketing, Inc.*, 76 FERC ¶ 61,155 at 61,919 (1996); *Northwest Power Marketing Co., L.L.C.*, 75 FERC ¶ 61,281 at 61,899 (1996); accord *Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223 at 62,062-63 (1994).

<sup>7</sup> For example, Applicants state that they used the results of the simultaneous import capability study filed by Idaho Power Company in Docket No. ER97-1481-003.

<sup>8</sup> *Idaho Power Co.*, 110 FERC ¶ 61,219 (2005).

would pass the pivotal supplier screen and would fail with the wholesale market share screen. Although we do not necessarily agree with Applicants' analysis, it does indicate that, consistent with our analysis, Applicants fail the generation market power prong, albeit for a different reason.

13. As outlined in the April 14 Order, Applicants' failure of the pivotal supplier and wholesale market share screens provides the basis for the Commission to institute the instant section 206 proceeding, which is limited to the PacifiCorp East and Idaho control areas, to determine whether Applicants may continue to charge market-based rates and establishes a rebuttable presumption of market power. This order establishes a refund effective date in order to put in place the necessary procedural framework to promptly impose an effective remedy, in case the Commission determines that such a remedy is required. Our decision to establish a refund effective date does not constitute a determination that refunds will be ordered.

14. The Commission's decision to institute the instant section 206 proceeding does not constitute a definitive finding by the Commission that Applicants have market power in the PacifiCorp East and Idaho control areas. As discussed in the April 14 and July 8 Orders, the screens are conservatively designed to identify the subset of applicants who require closer scrutiny. Accordingly, Applicants will have 60 days from the date of issuance of this order finding a screen failure to: (1) file a Delivered Price Test 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 will adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates.<sup>9</sup> In addition, as the Commission stated in the April 14 Order, the applicant or intervenors may present evidence such as historical sales data to support whether Applicants do or do not possess market power.<sup>10</sup>

15. In cases where, as here, the Commission institutes a section 206 proceeding on its own motion, section 206(b) requires that the Commission establish a refund effective date that is no earlier than 60 days after publication of notice of the initiation of the Commission's proceeding in the *Federal Register*, and no later than five months subsequent to the expiration of the 60-day period. In order to give maximum protection to customers, and consistent with Commission precedent,<sup>11</sup> the Commission will establish a refund effective date at the earliest date allowed. This date will be 60 days from the

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<sup>9</sup> See April 14 Order, 107 FERC ¶ 61,018 at P 201, 207-209.

<sup>10</sup> *Id.* at P 37.

<sup>11</sup> See, e.g., *Canal Electric Company*, 46 FERC ¶ 61,153, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

date on which notice of the initiation of the proceeding in Docket No. EL05-95-000 is published in the *Federal Register*. In addition, section 206 requires that, if no final decision has been rendered by that date, the Commission must provide its estimate as to when it reasonably expects to make such a decision. Given the times for filing identified in this order, and the nature and complexity of the matters to be resolved, the Commission estimates that it will be able to reach a final decision by September 30, 2005.

16. The filing indicates that Applicants pass the pivotal supplier screen and the wholesale market share screen in PacifiCorp West, each of the directly interconnected first-tier control areas examined other than Idaho, and the Colorado, Alliant West, and NSP control areas. However, the Commission is unable to find here that Applicants satisfy the Commission's generation market power standard for market-based rate authority in those control areas without a compliance filing, as discussed below. The Applicants' submittal is incomplete, contains inappropriate assumptions, and in some cases Applicants fail to adequately support the inputs in their screens. Therefore, the Commission cannot conclude that Applicants pass the indicative screens in the markets not subject to the instant 206 proceeding.

17. For example, Applicants state that since nameplate capacity does not incorporate a deduction for station use, station use was added to PacifiCorp's load when conducting the screens. Applicants did not explain why deducting station use was necessary and appropriate even though it is not provided for in the methodology set forth in the April 14 Order<sup>12</sup>, nor did Applicants support the level of station use calculated for the deduction. Applicants also state that they assumed that none of the long-term purchases and sales transactions of competing suppliers involved a conveyance of operational control of generation, hence no adjustments were made to other suppliers' capacity amounts to account for long-term contracts, *i.e.*, zero capacity was added and zero capacity subtracted from suppliers' total capacity. The April 14 Order stated that uncommitted capacity is determined by adding the total nameplate capacity of generation owned or controlled through contract and firm purchases, less operating reserves, native load commitments and long-term firm requirements sales.<sup>13</sup> To the extent Applicants were making a simplifying assumption, it is not an appropriate assumption, as it could overstate the amount of capacity competing with Applicants' capacity, making Applicants' market shares smaller. Appropriate simplifying assumptions are those assumptions that do not affect the underlying methodology utilized by these screens.<sup>14</sup>

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<sup>12</sup> See April 14 Order, 107 FERC ¶ 61,018 at P 91-92, 95.

<sup>13</sup> *Id.* at P 95.

<sup>14</sup> *Id.* at P 117.

Furthermore, Applicants' witness states that they used data from the Western Electricity Coordinating Council (WECC), then adjusted that data for Applicants' generators based on information provided by the Applicants. It is not clear what type of adjustments were made to the WECC data. Regardless, the Commission has stated that adjustments to historical data are not permitted.<sup>15</sup>

18. In addition, Applicants did not submit a generation market power analysis for Portland General Electric (Portland), a directly interconnected first-tier control area of PacifiCorp West. Applicants argue that while directly interconnected, the use of Bonneville Power Administration's transmission system is required in order to supply energy to Portland from PacifiCorp West. The Commission stated in the April 14 Order that the default relevant market for a transmission-owning utility is the control area where the applicant is physically located and the control areas directly interconnected to the applicant's control area.<sup>16</sup> An applicant can submit evidence, such as additional sensitivity runs, that the relevant market is broader or smaller than a particular control area. Applicants did not provide sufficient evidence that Portland is not part of the relevant market for PacifiCorp West.

19. Also, Applicants relied on a variety of sources for determining import capability. For the PacifiCorp West control area, Applicants state they estimated simultaneous transmission import capability. However, Applicants did not state that it was estimated in accordance with the methodology laid out in the April 14 Order, nor did Applicants submit data or work papers supporting the import capability. For the Arizona Public Service (APS) and Northwestern-Montana (Northwestern) control areas, Applicants utilized the results of simultaneous transmission import capability studies submitted to the Commission by APS and PPL Montana.<sup>17</sup> However, the studies submitted by APS and PPL Montana were found to be deficient and have not been accepted by the Commission. For the Sierra Pacific control area, Applicants used an estimate of 1,000 MW from Sierra Pacific's Open Access Same-Time Information System (OASIS). For the Nevada Power (Nevada) control area, Applicants used an estimate contained in Nevada's resource plan. Similarly, Applicants provided no support that these were

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<sup>15</sup> *Id.* at P 118.

<sup>16</sup> *Id.* at P 73-76.

<sup>17</sup> Applicants state that they relied upon the study submitted by APS, in Docket No. ER00-2268-005 on August 11, 2004, for the APS control area; and by PPL Montana, in Docket No. ER99-3491-003 on November 9, 2004, for the Northwestern control area.

estimated according to the methodology laid out in the April 14 Order or were based on conservative assumptions.

20. Therefore, for the reasons stated above, Applicants are directed to revise their generation market power analysis, for all relevant control areas not subject to the instant 206 proceeding, within 30 days of the date of this order.<sup>18</sup> Applicants are also directed, within 30 days of the date of this order, to file a generation market power analysis for Portland. Applicants are reminded that they may make appropriate simplifying assumptions, such as only considering the control area's incumbent utility as a competitor when conducting the screens.<sup>19</sup> Applicants are further directed to file simultaneous transmission import capability studies, including data and work papers supporting the studies, consistent with the requirements set forth in Appendix E of the April 14 Order, for the PacifiCorp West, APS, Northwestern, Sierra Pacific, and Nevada control areas within 30 days of the date of this order. In the PacifiCorp West control area, if Applicants' revised analysis continues to indicate zero uncommitted generating capacity attributable to Applicants, or if considering imports from competitors is not required to pass the screens, Applicants may forego this requirement. With regard to any of the simultaneous transmission import capability studies directed above, Applicants may propose proxy amounts for transmission limits.<sup>20</sup> Such proposals will be considered on a case-by-case basis, and should not understate Applicants' market share nor overstate competing supply.

21. The Commission finds that Applicants conditionally satisfy the generation market power standard with respect to all control areas considered in the instant filing except PacifiCorp East and Idaho, pending Commission acceptance of the compliance filings directed above.

### **Transmission Market Power**

22. When a transmission-owning public utility seeks market-based rate authority, the Commission has required the public utility to have an open access transmission tariff (OATT) on file before granting such authorization. Applicants state that PacifiCorp has

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<sup>18</sup> Although Applicants' analysis is similarly flawed for the PacifiCorp East and Idaho control areas, Applicants are only directed to revise the analysis for those markets where Applicants claim they pass the two indicative screens.

<sup>19</sup> *Id.* at P 117.

<sup>20</sup> *See* April 14 Order, 107 FERC ¶ 61,018 at P 85.



an OATT on file with the Commission.<sup>21</sup> Further, no intervenor has raised transmission market power concerns. The Commission finds that Applicants satisfy the Commission's transmission market power standard for the grant of market-based rate authority.

### **Other Barriers to Entry**

23. Applicants state that they are unaware of any barriers to entry that they may impose. Applicants state that neither PacifiCorp, PPM, nor any of their affiliates, owns any natural gas pipelines or distribution facilities within the WECC. PPM does own certain intrastate natural gas pipeline facilities. Applicants state that because these facilities are not located in the WECC nor in any control area in which Applicants own generation, these assets cannot be used to harm competitors. Applicants further state that neither PacifiCorp, PPM, nor any of their affiliates is engaged in the manufacture of electric equipment, has the ability to hinder siting of generation plants, or owns or controls resources that could impede potential competitors from gaining access to alternative generation suppliers. No intervenor has raised concerns regarding barriers to entry. Based on Applicants' representations, the Commission is satisfied that Applicants cannot erect barriers to entry. However, should Applicants or any of their affiliates deny, delay or require unreasonable terms, conditions or rates for natural gas service to a potential electric competitor in bulk power markets, that electric competitor may file a complaint with the Commission that could result in the suspension of Applicants' authority to sell power at market-based rates.<sup>22</sup>

### **Affiliate Abuse**

24. Applicants state that they continue to be committed not to engage in prohibited affiliate relationships or reciprocal dealing, and that they are subject to the codes of conduct on file in their market-based rate tariffs. Furthermore, we note that Applicants' market-based rate tariffs contain prohibitions on transactions with affiliates. In addition, no intervenor has raised concerns regarding affiliate abuse. Based on these representations, the Commission finds that Applicants satisfy the Commission's concerns with regard to affiliate abuse.

### **Reporting Requirements**

25. Consistent with the procedures the Commission adopted in Order No. 2001, 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

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<sup>21</sup> *Pacific Gas & Electric Co.*, 77 FERC ¶ 61,025 (1996).

<sup>22</sup> *See, e.g., Louisville Gas & Electric Co.*, 62 FERC ¶ 61,016 (1993).

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 greater) market-based power sales during the most recent calendar quarter.<sup>23</sup> Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.<sup>24</sup>

26. 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>25</sup> Order No. 652 requires that the change in status reporting requirement be incorporated in the market-based rate tariff of each entity authorized to make sales at market-based rates. Accordingly, Applicants are directed, within 30 days of the date of issuance of this order, to revise their market-based rate tariffs to incorporate the following provision:

[insert market-based rate seller name] must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority. A change in status includes, but is not limited to, each of the following: (i) ownership or control of generation or transmission facilities or inputs to electric power production other than fuel supplies, or (ii) affiliation with any entity not disclosed in the application for market-based rate authority that owns or controls generation or transmission facilities or inputs to electric power production, or affiliation with any entity that has a franchised service

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<sup>23</sup> *Revised Public Utility Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31,043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002). Required data sets for contractual and transaction information are described in Attachments B and C of Order No. 2001. The Electric Quarterly Report must be submitted 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>24</sup> The exact dates for these reports are prescribed in 18 C.F.R. § 35.10b (2004). 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.

<sup>25</sup> *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175 (2005).

area. Any change in status must be filed no later than 30 days after the change in status occurs.

The Commission orders:

(A) Applicants are directed, within 30 days of the date of issuance of this order, to revise their generation market power analysis for the relevant control areas other than PacifiCorp East and Idaho, as discussed in the body of this order.

(B) Applicants are directed, within 30 days of the date of issuance of this order, to file simultaneous transmission import capability studies for the PacifiCorp West, APS, Northwestern, Sierra Pacific, and Nevada control areas, revising their generation market power analysis as necessary and appropriate, as discussed in the body of this order.

(C) Applicants are directed, within 30 days of the date of issuance of this order, to file a generation market power analysis for the Portland control area, as discussed in the body of this order.

(D) Applicants' updated market power analysis for all relevant markets not subject to the section 206 proceeding instituted herein is hereby conditionally accepted for filing, pending Commission acceptance of the compliance filings directed in Ordering Paragraphs (A), (B), and (C), as discussed in the body of this order.

(E) Applicants are directed, within 30 days of the date of issuance of this order, to revise their market-based rate tariffs to incorporate the change in status reporting requirement adopted in Order No. 652.

(F) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and by the FPA, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R., Chapter I), the Commission hereby institutes a proceeding in Docket No. EL05-95-000 concerning the justness and reasonableness of Applicants' market-based rates in the PacifiCorp East and Idaho control areas, as discussed in the body of this order.

(G) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of the proceeding under section 206 of the FPA in Docket No. EL05-95-000.

(H) The refund effective date established pursuant to section 206(b) of the FPA will be 60 days following publication in the *Federal Register* of the notice discussed in Ordering Paragraph (G) above.

(I) For the PacifiCorp East and Idaho control areas, Applicants are directed, within 60 days from the date of issuance of this order, to: (1) file a Delivered Price Test 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 will adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates, as discussed in the body of this order.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.