

**Final Rule**  
**Market-Based Rates for Wholesale Sales**  
**Of Electric Energy, Capacity and**  
**Ancillary Services by Public Utilities**  
**RM04-7-000 (Item E-1)**  
**June 21, 2007**

**For the first time, codifies market-based rate regulations**

**1. Collapses 4-pronged analysis into 2-pronged horizontal and vertical market power analysis.**

<b>Old Analysis</b>	<b>New Analysis</b>
<b>1. Generation Market Power</b>	<b>Horizontal Market Power</b>
<b>2. Transmission Market Power</b>	<b>Vertical Market Power</b>
<b>3. Other Barriers to Entry</b>	<b>Vertical Market Power</b>
<b>4. Affiliate Abuse</b>	<b>Affiliate restrictions codified in regulations</b>

**2. Horizontal Market Power**

- Two indicative screens: market share and pivotal supplier. Rebuttable presumption of market power if entity fails either.
- Changes the native load proxy under the market share screen from the minimum native load peak demand for the season to the average of the daily native load peaks for the season.
- Independent power producers may deduct their short-term sales to franchised utilities if they can demonstrate that the power will be used by the utilities to meet native load.
- In measuring the capacity of generators, the final rule revises policy to allow use of either nameplate capacity or seasonal capacity. No mixing.
- Retains the “snapshot in time” approach, based on most recent historical data for both indicative screens and delivered price test studies.
- Elimination of the sec. 35.27 exemption for generation built after July 1996.
- Generation control is determined on a case-specific basis. No bright-line test of

what determines control. Sellers must make an affirmative statement as to whether any contractual arrangements result in the transfer of control of any assets. Sellers must specify the party or parties they believe has control of generation facilities and to what extent each party holds control.

- Continued examination of both Economic Capacity (EC) and Available Economic Capacity (AEC) measures in the delivered price test.

### **3. Default Relevant Geographic Markets**

- Continues existing approach with regard to the default relevant geographic market for traditional (non-RTO/ISO) markets but adopts use of the term “balancing authority area” instead of “control area.” .
- Continues to use the entire RTO/ISO footprint as default relevant geographic market if RTO/ISO has sufficient market structure and a single energy market.
- Where the Commission has made a specific finding that there is a submarket within an RTO/ISO, the submarket becomes the default relevant geographic market.

### **4. Vertical Market Power**

- Requires a Commission-approved open access transmission tariff (OATT) to be on file before a seller, or any of its affiliates, that owns, operates, or controls transmission facilities will be granted market-based rate authority.
- If the Commission finds a nexus between the specific facts relating to an OATT violation and the seller’s market-based rate authority, the Commission may revoke market-based rate authority (or subject the seller to other remedies the Commission may deem appropriate, such as disgorgement of profits or civil penalties).
- If a transmission provider loses market-based rate authority as a result of an OATT violation, there is a rebuttable presumption that all affiliates in the market do so as well.

### **5. Other Barriers to Entry**

- Now part of the vertical market power analysis.
- No showings required regarding natural gas and oil supply, interstate natural gas transportation (including interstate natural gas storage), and oil transportation. There is a rebuttable presumption that sellers cannot erect barriers to entry with regard to the ownership or control of, or affiliation with an entity that owns or controls, intrastate natural gas transportation, intrastate natural gas storage or distribution facilities, sites for generation capacity development, and sources of coal supplies and the transportation of coal supplies such as barges and rail cars.

The seller must describe its ownership, control, or affiliation in this regard and make an affirmative statement that it has not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.

## **6. Affiliate Abuse**

- Affiliate restrictions are now codified in regulations and must be satisfied on an ongoing basis as a condition of obtaining and retaining market-based rate authority.
- There are no power sales allowed between a franchised public utility with captive customers and any market-regulated power sales affiliates without first obtaining Commission approval.
- Requirements previously known as the market-based rate code of conduct are codified, as revised in the final rule.

Definition of market information revised and clarified.

## **7. Mitigation**

- Retains existing policy on default cost-based mitigation (incremental plus 10%; embedded cost “up to” rate reflecting costs of the unit(s) expected to provide the service; long-term sales on an embedded cost of service basis filed with the Commission for review and approval prior to commencement of service) and discounting.
- Retains existing policy allowing mitigated sellers to propose case-specific mitigation tailored to their particular circumstances, including alternative cost-based rates. Will permit sellers to submit alternative non-cost-based mitigation proposals for consideration on a case-by-case basis.
- Institutes in a concurrent order issued in Docket No. EL07-69-000 a section 206 investigation into whether the Western Systems Power Pool Agreement ceiling rate is just and reasonable for a public utility seller in markets in which such seller has been found to have market power or is presumed to have market power.
- Does not impose a generic must-offer requirement. Will be examined on a case-specific basis.
- Retains current policy and limits mitigation to the market in which the seller has been found to possess, or chosen not to rebut the presumption of, market power.
- Mitigated sellers will be allowed to make market-based rate sales at the metered boundary between a mitigated balancing authority area and a balancing authority area in which the seller has market-based rate authority provided that: (i) legal title of the power sold transfers at the metered boundary of the balancing authority area where the seller has market-based rate authority; (ii) power sold is not intended to serve load in the mitigated seller’s mitigated market, and (iii) no affiliate of the mitigated seller will sell the same power back into the mitigated

seller's mitigated market. Mitigated sellers making such sales must retain, for a period of five years from the date of the sale, all data and information related to the sale that demonstrates compliance with these requirements.

## **8. Implementation Process**

- Final rule establishes two categories of market-based rate sellers.
  - Category 1: wholesale power marketers and 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. Category 1 sellers will not be required to file regularly scheduled updated market power analyses.
  - Category 2: all others. Must continue to file regularly scheduled updated market power analyses.
- Adopts regional review approach for updated market power analyses; six regions identified; two regions file each year.
- Final rule does not adopt NOPR proposal to require a standardized market-based rate tariff or require all sellers in a corporate family to be under the same tariff.
- Instead, adopts two standard "required" tariff provisions that all sellers must have in their market-based rate tariffs. Adopts a set of standard "applicable provisions" that must be included in a seller's market-based rate tariff to the extent that they are applicable based on the services provided by the seller.
- No more posting requirement for third-party sellers of ancillary services at market-based rates.
- There will be a uniform reporting format for sellers to use in submitting the results of their indicative screen analyses.
- There will be a mandatory, uniform standard form for sellers to show all generation and transmission assets, and natural gas intrastate pipelines and gas storage facilities owned by applicant and its affiliates, by balancing authority area. This will help the Commission and market participants know the presence of each corporate family in each market, and ensure consistency of data.