IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 07-73256 and 07-73547 (Consolidated)

MONTANA CONSUMER COUNSEL, *ET AL.*,
PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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GLOSSARY

Br.	Petitioners' Brief
DPT	Delivered Price Test
EOR	Petitioners' Excerpts of Record
EQR	Electric Quarterly Report
FERC or Commission	Federal Energy Regulatory Commission
FPA	Federal Power Act
HHI	Hirschman-Herfindahl Index (measuring market concentration)
MW	megawatt
MWh	megawatt-hour
OASIS	Open Access Same-Time Information System
Order No. 697	*Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, 119 FERC ¶ 61,295 (2007)
PPL Rates Order	*PPL Montana, LLC*, 115 FERC ¶ 61,204 (2006), EOR 19
RFP	Request for Proposals
Rehearing Order	*PPL Montana, LLC*, 120 FERC ¶ 61,096 (2007), EOR 1
Screen Failure Order	*PPL Montana, LLC*, 112 FERC ¶ 61,237 (2005)

GLOSSARY

Screens Order	*AEP Power Mktg., Inc.*, 107 FERC ¶ 61,018 (2004)
Screens Rehearing Order	*AEP Power Mktg., Inc.*, 108 FERC ¶ 61,026 (2004)
WECC	Western Electricity Coordinating Council

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BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission ("Commission" or "FERC") reasonably determined that a wholesale supplier of electric energy had rebutted the presumption of market power in the relevant control area and satisfied the Commission's generation market power standard for the grant of market-based rate authority.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

This case concerns the Commission's decision to allow a wholesale seller of electric energy in Montana to continue to charge negotiated, market-based rates. Petitioners Montana Consumer Counsel ("Montana Counsel") and Montana Public Service Commission ("Montana Commission," and collectively "Montana"), on behalf of electricity consumers, insist on cost-based rates. In support, Montana raises broad challenges to market-based rates in general and to the Commission's policy for determining whether to grant such authority to a given applicant.

The instant case began with the filing by three affiliated generation suppliers[1] (collectively, "PPL" or "PPL Companies"), as required by the Commission's rules, to continue their previously-granted authority to charge market-based rates. In an initial order, not on review before this Court, the Commission determined that PPL failed one of the Commission's preliminary market power screens, establishing a rebuttable presumption that PPL had the ability to exercise market power and thus should not be afforded continued market-based rate authority. Therefore, the Commission instituted a proceeding in which

[1] The applicants were PPL Montana, LLC ("PPL Montana"), PPL Colstrip I, LLC, and PPL Colstrip II, LLC.

PPL submitted a more comprehensive study, performed in accordance with the Commission's requirements, to demonstrate that it lacked market power.

In the orders challenged here, the Commission concluded, over Montana's objections concerning the design and results of the market power study, that PPL had rebutted the presumption of generation market power and satisfied the Commission's generation market power standard for the grant of market-based rate authority. *PPL Montana, LLC*, FERC Docket Nos. ER99-3491, *et al.*, 115 FERC ¶ 61,204 (2006) ("PPL Rates Order"), EOR 19, *reh'g denied*, 120 FERC ¶ 61,096 (2007) ("Rehearing Order"), EOR 1.[2]

This appeal followed.

II. STATEMENT OF FACTS

A. Statutory and Regulatory Background

Section 201 of the Federal Power Act ("FPA"), 16 U.S.C. § 824, gives the Commission jurisdiction over the rates, terms and conditions of service for the transmission and sale at wholesale of electric energy in interstate commerce. *See* 16 U.S.C. §§ 824(a)-(b). This grant of jurisdiction is comprehensive and exclusive. *See generally New York v. FERC*, 535 U.S. 1 (2002). All rates for or in connection with jurisdictional sales and transmission services are subject to FERC

[2] "EOR" refers to the Excerpts of Record filed by Montana. "P" refers to the internal paragraph number within a FERC order. "Br." refers to Petitioners' Initial Brief.

review to assure they are just and reasonable, and not unduly discriminatory or preferential. FPA §§ 205(a), (b), (e), 16 U.S.C. §§ 824d(a), (b), (e). Courts addressing the issue, including this one, have consistently concluded that market-based rates, as well as cost-based rates, can satisfy the statutory standards. *See California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1013 (9th Cir. 2004), *cert. denied sub nom. Coral Power, L.L.C., v. California ex rel. Brown*, 2007 U.S. LEXIS 7865 (U.S. June 18, 2007); *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998); *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870-71 (D.C. Cir. 1993); *see generally infra* pages 20-21.

A utility must obtain approval prior to making FERC-jurisdictional sales at market-based rates, by filing an initial market-based rate tariff in accordance with 18 C.F.R. § 35.12, and showing that it lacks market power. *See, e.g., AEP Power Mktg., Inc.*, 97 FERC ¶ 61,219 at p.61,969 (2001). *See also El Paso Elec. Co.*, 105 FERC ¶ 61,131 at P 27 (2003) (once FERC has granted market-based rate authority, "the individual transactions (which occur at market-driven prices) are [deemed] reasonable because the Commission has determined that the utility seller does not possess market power.").

To qualify for market-based rate authority, the Commission must first determine that the applicant passes the Commission's market-based rate test: the company must lack both generation and transmission market power, and not be

able to erect barriers to entry or engage in affiliate abuse. *See, e.g., Consumers Energy Co. v. FERC*, 367 F.3d 915, 917 (D.C. Cir. 2004); *see generally Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, 119 FERC ¶ 61,295 at P 7 (2007) ("Order No. 697"), *reh'g pending*.[3] Once an entity has obtained authorization to sell electric energy at market-based rates, it is required to file (in addition to Electric Quarterly Reports on individual market-based transactions and reports on changes in status) an updated market analysis every three years. *See* Order No. 697 at P 1110 (reaffirming and codifying triennial review requirement for large sellers). The Commission uses the triennial review process to monitor the individual seller's market power and ensure that, consistent with the Federal Power Act, the originally approved market-based rates continue to fall within the zone of reasonableness. *See AEP Power Mktg., Inc.*, 107 FERC ¶ 61,018 at P 200 (Apr. 14, 2004) ("*Screens Order*"), *on reh'g*, 108

[3] In Order No. 697, the Commission prospectively modified the analysis, replacing the four-prong approach with a focus on horizontal market power and vertical market power, and removing the separate prong of affiliate abuse because affiliate restrictions have been separately codified in the Commission's regulations. Order No. 697 at PP 12-23. In the instant case, however, PPL's application to continue its market-based rate authority was considered under the then-extant four-prong analysis.

FERC ¶ 61,026 (July 8, 2004) ("*Screens Rehearing Order*").[4]

As part of its ongoing effort to refine market power assessment measures, in April 2004, the Commission modified, on an interim basis, its generation market power analysis and market power mitigation policy. *Screens Order* at P 1. The revised interim analytical framework required market-based rate applicants to use two indicative screens to assess generation market power: a pivotal supplier screen and a wholesale market share screen. *Id.*[5]

The pivotal supplier screen measures market power at peak times. It evaluates an applicant's potential to exercise market power based on the control area market's annual peak demand. *Id.* at P 71. A supplier is pivotal if its capacity is required to meet peak market demand. *Id.* at P 72. In contrast, the wholesale market share screen is applied on a seasonal basis and evaluates the applicant's size in relation to others in the market. *Screens Rehearing Order* at PP 79 & n.82, 88. This analysis addresses the applicant's potential to exercise market power

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[4] The FERC Orders challenged in this appeal referred to these as the "April 14 Order" and "July 8 Order," respectively. *See, e.g.*, PPL Rates Order at P 2 n.6, EOR 20. Throughout this Brief, to avoid confusion, the Commission will refer to various orders using descriptive terms rather than dates.

[5] On May 13, 2004, the Commission issued an order addressing the procedures for implementing the screens. *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004) (referenced below as the "May 13 Order"). *See* Rehearing Order at P 5 n.9, EOR 2.

during non-peak conditions by measuring the applicant's share of uncommitted capacity available to the market during those times. Applicants with a wholesale market share of less than 20 percent for all seasons pass this screen. *Id.* at P 80.

Together, therefore, the screens enable the Commission to measure generation market power at both peak and off-peak times and to assess the applicant's ability to exercise market power both unilaterally and in coordination with other sellers. *Id.* at P 88 (citing *Screens Order* at P 72). As the Commission explained, "the screens are conservatively designed to permit those applicants that clearly do not possess the potential to exercise market power to receive market-based rate authority and to identify the subset of applicants who require closer scrutiny." *Screens Rehearing Order* at P 25.

Passage of both screens creates a rebuttable presumption that the company lacks market power. *Screens Order* at P 37. While the potential for an applicant that passes both screens to exercise market power is "remote," *Screens Rehearing Order* at P 77, intervenors are allowed to present evidence to attempt to rebut this presumption. *Screens Order* at P 37. In contrast, failure to pass either screen provides the basis for instituting an investigation under Federal Power Act § 206, 16 U.S.C. § 824e, and creates a rebuttable presumption that the applicant *does* possess generation market power. *Screens Order* at PP 37, 201. The applicant then has three options: attempt to rebut the presumption; move directly to a

mitigation phase; or adopt cost-based rates. *Id.* at P 37. *See also Duke Power*, 111 FERC ¶ 61,506 (2005) (denying market-based rate authority to applicant that failed to rebut presumption); *Entergy Servs., Inc.*, 116 FERC ¶ 61,276 at P 4 (2006) (in previous order, applicant failed market share screen and Commission set hearing to consider whether applicant's analysis rebutted presumption of market power; applicant then withdrew application and submitted cost-based rates).

Concurrently with establishing the interim framework in the *Screens Order*, the Commission initiated a rulemaking proceeding to refine and codify the standards and procedures for considering whether to grant market-based rate authority. *See* Notice of Proposed Rulemaking, *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, 115 FERC ¶ 61,210 (2006). That rulemaking produced a Final Rule, Order No. 697, which largely reaffirmed and codified the agency's existing standards, as set forth in the *Screens Order*. *See* Order No. 697 at P 12; *see also infra* pages 22-23.[6]

[6] Because Order No. 697, issued in June 2007, postdated the PPL Rates Order in this case and applied only prospectively, it did not govern the Commission's consideration in this case. Nevertheless, the Commission, in the Rehearing Order, extensively cited Order No. 697's reaffirmation of the *Screens Order* standards. *See, e.g.*, Rehearing Order at P 10 (determinations in PPL Rates Order "also are consistent with the Commission's policy as recently adopted in the market-based rate Final Rule in Order No. 697"), EOR 3; *id.* at PP 21, 41, 48, 69, 79, 81, EOR 5, 9, 11, 14-15, 16-17.

Requests for rehearing of Order No. 697, including one filed by Montana Counsel, are currently pending before the Commission. *See infra id.*

B. The Commission Proceedings and Orders

1. Screen Failure Order

PPL first obtained authority to charge market-base rates in 1999. *See* Screen Failure Order (defined below) at P 3 n.5 (explaining background of authorization and various subsequent corporate name changes), EOR 448. In 2002, PPL filed an updated market power analysis in connection with the required triennial review. *Id.* at P 3. Following the subsequent issuance of the *Screens Order* and related procedures, PPL submitted an updated market power analysis in compliance with those procedures on November 9, 2004. *Id.* at P 1. Montana and NorthWestern Corporation ("NorthWestern"), the default supplier of electric service to retail customers in Montana,[7] intervened and protested the filing.

On September 1, 2005, the Commission issued its Order on Updated Market Power Analysis, Instituting [FPA] Section 206 Proceeding and Establishing Refund Effective Date, *PPL Montana, LLC*, FERC Docket Nos. ER990-3491, *et*

[7] NorthWestern purchases its electricity supplies from generators such as PPL Montana to serve its load. Answer of NorthWestern at 14 (filed Jan. 17, 2006), EOR 245. NorthWestern also is the transmission operator in the relevant region. *See* PPL Rates Order at P 51 n.62, EOR 29.

al., 112 FERC ¶ 61,237 (2005) ("Screen Failure Order"), EOR 448.[8] In that order, the Commission analyzed all four prongs of the market-based rate analysis, finding that PPL passed three of those prongs. *See id.* at PP 46-47 (transmission market power), 48 (barriers to entry), 49 (affiliate abuse), EOR 455. Notably, the Commission was "satisfied that Applicants cannot erect barriers to entry," based on PPL's unchallenged representations that its inability to erect barriers had not changed since the analysis for the initial authorization in 1999, and that PPL did not have control over potential generating sites or fuel supplies that competitors might require. *Id.* at P 48. The Commission noted that "[n]o intervenor has raised concerns regarding barriers to entry." *Id.*

The Commission concluded, however, that PPL failed the wholesale generation market share screen in the relevant geographic market. *Id.* at PP 1, 29-45, EOR 448, 452-55. Specifically, the Commission's analysis "indicated that PPL's share of uncommitted capacity in the NorthWestern control area exceeds 20 percent in at least one of the four seasons during the relevant time period." *Id.* at P 29, EOR 452; *see also id.* at P 1 n.3 ("The Commission's analysis shows market shares as high as 24.6 percent."), EOR 448. The Commission found PPL's own market share analysis flawed in several respects. *See id.* at PP 29-35, EOR 452-53.

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[8] The Rehearing Order referred to this as the "September 1 Order." *See, e.g.*, Rehearing Order at P 5 & n.10, EOR 2.

The Commission also rejected PPL's effort to establish a broader regional area for purposes of the market share analysis. The Commission's policy defines the default relevant geographic market as the control area where the applicant is physically located (for PPL, the NorthWestern control area), but allows applicants to present evidence that the relevant market is broader. *Id.* at P 36 (citing *Screens Order* at PP 73, 75), EOR 453. Thus, PPL contended that the broader regional market of the Northwest Power Pool, covering the Pacific Northwest portion of the United States, was a more appropriate geographic market. *Id.* at PP 9, 36-37, EOR 449, 453. The Commission found that PPL had not demonstrated that the broader market was appropriate, and therefore declined to rely on PPL's indicative screen analysis based on that market. *Id.* at PP 36, 38-41, EOR 453-54.

Because PPL failed the wholesale generation market share screen, the Commission instituted a proceeding under FPA § 206, 16 U.S.C. § 824e, "to determine whether Applicants may continue to charge market-based rates[,]" with a rebuttable presumption that PPL did have market power. Screen Failure Order at P 2, EOR 448. The Commission directed PPL to: (1) file an analysis using the Delivered Price Test ("DPT"), the Commission's longstanding methodology for analyzing market power, (2) file a proposal to mitigate market power, or (3) inform the Commission that it would adopt cost-based rates. *Id.* at ordering para. (D), EOR 456. It further specified that the FPA § 206 proceeding was limited to the

NorthWestern control area, because that was the geographic market in which PPL failed the screen. *Id.* at P 2, EOR 448.

The Screen Failure Order is relevant to the subsequent orders challenged in this appeal, but is not itself before the Court on review.[9]

2. PPL Rates Order

On November 14, 2005, PPL submitted a DPT analysis for 2004 and a separate DPT analysis for 2006 that was based on projected data. Montana and Northwestern intervened and protested the filing. On May 18, 2006, after receiving several rounds of comments, protests, and responses from the parties, including alternative DPT analyses submitted by NorthWestern and Montana, the Commission issued its Order on Market-Based Rates, Terminating Section 206 Proceeding and Dismissing Rehearing, *PPL Montana, LLC*, FERC Docket Nos. ER99-3491, *et al.*, 115 FERC ¶ 61,204 (2006) ("PPL Rates Order"), EOR 19.[10]

In that Order, as discussed more fully in the Argument section, *infra*, the Commission discussed the design and purpose of its DPT analysis (*id.* at PP 31-37, EOR 25-26), then considered PPL's DPT study (*id.* at PP 38-46, EOR 26-27) and

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[9] Only PPL requested rehearing of the Screen Failure Order; the Commission dismissed the request as moot when it subsequently granted PPL market-based rate authority. *See* PPL Rates Order at PP 66-67, EOR 31.

[10] The Rehearing Order referred to this as the "May 18 Order." *See, e.g.*, Rehearing Order at P 1 n.1, EOR 1.

the protestors' challenges thereto, including their alternative DPT analyses (*id.* at PP 47-56, EOR 27-30). The Commission concluded, "[a]fter weighing all of the relevant factors, . . . that, on balance, based on PPL's 2004 DPT analysis in the NorthWestern control area, PPL companies have rebutted the presumption of generation market power and satisfy the Commission's generation market power standard for the grant of market-based rate authority." *Id.* at P 41, EOR 26; *accord, id.* at PP 30, 65, EOR 25, 31. The Commission also considered the results of NorthWestern's summer 2004 Request for Proposals ("RFP") to supply its load requirements. *Id.* at PP 25, 57-60, EOR 24, 30. Finally, the Commission addressed the protestors' arguments about potential barriers to entry, an alternative pivotal supplier screen, and alleged violations of antitrust laws. *Id.* at PP 61-64, EOR 30-31.

3. Rehearing Order

Montana timely filed a request for rehearing of the PPL Rates Order ("Montana Rehearing Request"). EOR 82. On July 27, 2007, the Commission issued its Order Denying Request for Rehearing, *PPL Montana, LLC*, FERC Docket Nos. ER99-3491, *et al.*, 120 FERC ¶ 61,096 (2007) ("Rehearing Order"), EOR 1. As discussed more fully in the Argument, *infra*, the Commission fully addressed Montana's arguments and denied rehearing. The Commission reaffirmed its findings that PPL does not have market power and that the market to

serve customers in Montana is unconcentrated. *Id.* at P 2, EOR 1-2. The Commission explained that it had considered the adjusted and alternative market analyses prepared by Montana, but found them "flawed and otherwise inconsistent with our precedents[]"; nevertheless, the Commission found that, even if it adopted many of the adjustments proposed by Montana, PPL's market shares would still be too low to raise competitive concerns. *Id.* "In sum, although we are sensitive to the impact of rising prices on Montana customers, we have no basis for concluding that they reflect the exercise of market power, and instead they appear to reflect changes in wholesale markets over the past ten years." *Id.*

Montana Counsel and the Montana Commission timely filed petitions for review in this Court.

SUMMARY OF ARGUMENT

The Commission reasonably concluded that PPL had rebutted the presumption of generation market power and satisfied the Commission's standard for granting market-based rate authority. In so doing, the Commission reasonably relied on its well-established test for analyzing market power and on its policy determinations, as set forth in the earlier *Screens Order* and the ongoing Order No. 697 rulemaking. That certain of Montana's preferred approaches might also be reasonable provides no basis for this Court, under applicable standards of review, to upset the agency's informed choices.

The Commission has determined that, where a wholesale seller of electric energy lacks the ability to exercise market power, its sales at market-based rates are deemed just and reasonable, subject to ongoing Commission oversight through periodic market power analyses and reporting requirements. The general permissibility of market-based rates, and their consistency with the Commission's obligations under the Federal Power Act, have been settled by both courts to address the issue (including this Court) and are outside the scope of this proceeding.

Montana's arguments in this case are rooted in its fundamental disagreement with the Commission's policy assessments. In particular, Montana disputes the Commission's decision to evaluate the existence of market power by analyzing

conditions in short-term electric energy markets, rather than by focusing specifically on long-term, firm capacity. Montana further objects to the Commission's "snapshot" approach, which requires market studies to use unadjusted historical data, rather than future projections. The Commission has responded fully to Montana's arguments, both in the orders challenged here and in the agency's comprehensive rulemaking proceeding, which remains active as the Commission considers Montana's and other parties' requests for rehearing.

Specifically, the Commission has long employed a Delivered Price Test designed to analyze market power under a wide range of system conditions in all time periods. If that test shows an applicant lacks market power in short-term markets, then it is reasonable to presume that the applicant likewise will not have market power in long-term markets, provided there are no barriers to entry. The Commission also explained that historical data have been proven to be more objective, readily available, and less subject to manipulation than future projections. In addition, the "snapshot in time" approach makes sense because a grant of market-based rate authority is subject to ongoing review that enables the Commission to consider changes in the factors upon which that authorization was based.

Applying its policy in the instant case, the Commission reasonably concluded that the market study submitted by PPL complied with the

Commission's required methodology and demonstrated that (1) PPL is not a pivotal supplier, (2) PPL does not have market power, and (3) the market to serve customers in Montana is unconcentrated. The Commission also pointed to additional substantial record evidence that confirmed the existence of competing power supplies and the absence of barriers to entry.

The Commission also thoroughly considered the arguments and alternative studies submitted by the protestors, concluding that they were flawed and otherwise inconsistent with FERC's policy and precedents. In any event, the Commission found that, even if it adopted many of the proposed adjustments, PPL's market shares would still be too low to raise competitive concerns.

ARGUMENT

I. STANDARD OF REVIEW

Under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), the Court reviews FERC's orders to determine whether they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See, e.g.*, *City of Fremont v. FERC*, 336 F.3d 910, 914 (9th Cir. 2003). "If the record reflects that the decision was based on a consideration of relevant factors, and there was no clear error of judgment, FERC's decision is not arbitrary and capricious." *Cal. Dep't of Water Res. v. FERC*, 489 F.3d 1029, 1035 (9th Cir. 2007) (internal quotation marks and citation omitted).

The Commission's decisions regarding rate issues are entitled to broad deference, because of "the breadth and complexity of the Commission's responsibilities." *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968); *see also Pub. Utils. Comm'n v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001) ("Because issues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission, our review of whether a particular rate design is just and reasonable is highly deferential.") (internal quotation marks and citations omitted). The Commission's policy assessments are similarly owed "great deference." *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 702 (D.C. Cir. 2000), *aff'd*, *New York v.*

FERC, *supra*; *see Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260, 1263 (9th Cir. 1996) ("We defer to the specific policy decisions of an administrative agency unless they are arbitrary, capricious, or manifestly contrary to statute.").

The Commission's factual findings are conclusive if supported by substantial evidence. FPA § 313(b), 16 U.S.C. § 825*l*(b). Substantial evidence "'means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. If the evidence is susceptible of more than one rational interpretation, we must uphold [FERC's] findings.'" *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1076 (9th Cir. 2003) (quoting *Eichler v. SEC*, 757 F.2d 1066, 1069 (9th Cir. 1985)) (alteration in original); *California ex rel. Lockyer v. FERC*, 329 F.3d 700, 714 (9th Cir. 2003); *see also Sierra Pac. Power Co. v. FERC*, 793 F.2d 1086, 1088 (9th Cir. 1986) (Commission's "conclusions on conflicting engineering and economic issues" must be upheld "so long as its judgment is reasonable and based on the evidence").

II. THE GENERAL PERMISSIBILITY OF MARKET-BASED RATES AND THE REASONABLENESS OF THE COMMISSION'S POLICY ARE NOT BEFORE THIS COURT

A. Market-Based Rates Are Consistent With The Federal Power Act If Sellers Lack Market Power And There Is Meaningful Oversight

At its core, Montana's argument is a fundamental challenge to the Commission's market-based rates policy — that is, the Commission's determination that where a seller lacks the ability to exercise market power, its

sales under a blanket grant of market-based rate authority can be presumed to be just and reasonable, subject to ongoing Commission oversight. Indeed, Montana frequently returns to its theme that PPL's market-based rates must be judged by reference to actual costs. *See* Br. 26-27, 65-66; *see also infra* pp. 37, 63-64. Montana also suggests that the FPA requires the Commission prospectively to analyze and approve each particular sale or contract in which the applicant may engage under market-based rate authority. *See, e.g.*, Br. 20, 25 (arguing FERC may not depart from cost-based rates "without ensuring that rates will *in fact* be 'just and reasonable[]'") (emphasis in original). *But cf. Colorado Office of Consumer Counsel v. FERC*, 490 F.3d 954, 956 (D.C. Cir. 2007) (rejecting claim that FPA's "just and reasonable" mandate requires Commission, having adjudicated specific issues for which it instituted § 206 proceeding, to go on to "fix" all aspects of market-based rate).

Montana's cramped view of the Commission's statutory obligations, however, is at odds not only with the Commission's market-based rates policy but also with decisions consistently upholding that policy as a permissible exercise of the Commission's discretion. This Court has held that the Commission meets its statutory FPA obligations with respect to market-based rates if it finds that the applicant lacks market power and if there is meaningful subsequent oversight. *See Lockyer*, 383 F.3d at 1013 (rejecting facial challenge to market-based tariffs); *see*

also Pub. Util. Dist. No. 1 of Snohomish County v. FERC, 471 F.3d 1053, 1081 (9th Cir. 2006) (confirming that market-based rate authority satisfies FERC's statutory duty under FPA "insofar as FERC implements and uses an effective oversight mechanism *after* the market-based rate authorization is initially granted[]"), *cert. granted sub nom. Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. 1 of Snohomish County*, 2007 U.S. LEXIS 9070 (U.S. Sept. 25, 2007) (Nos. 06-1457, *et al.*) (oral argument scheduled for Feb. 19, 2008). Other courts have reached the same conclusion. *See supra* p. 4 (citing D.C. Circuit cases similarly upholding the Commission's market-based rate program as consistent with its statutory obligations).

Furthermore, the Commission broke no new ground here; rather, as discussed in the next section, it merely applied the analysis that it had previously adopted for the purpose of identifying market power. The Commission left broader questions about its policy and methodology to be considered thoroughly, with the input of all interested parties, in the generic rulemaking proceeding.

B. Both The Commission's Development Of Its Market-Based Rates Policy And Its Oversight Of Individual Sellers Are Ongoing

The Commission has dealt with market-based pricing in the electricity context for at least two decades. The Commission began considering proposals for market-based pricing of wholesale power sales as early as 1988. *See* Order No. 697 at P 7; *see also, e.g., Heartland Energy Servs., Inc.*, 68 FERC ¶ 61,223 at

pp.62,060-62 (1994) (explaining Commission's standards for market-based rates). As noted above, in April 2004 the Commission announced an interim policy in the *Screens Order*, which was in effect and thus was applied in the proceeding at issue here.

The standards and procedures established in the *Screens Order* were expressly intended to be applied on an interim basis. *Screens Order* at P 2. The Commission simultaneously initiated a formal rulemaking to amend its regulations governing market-based rate authorizations for wholesale power sales. *See Market-Based Rates for Public Utilities*, 107 FERC ¶ 61,019 (2004). That rulemaking proceeding, in which Montana Counsel and the Montana Commission each filed comments,[11] culminated in the June 2007 issuance of Order No. 697, which largely reaffirmed the standards developed in the *Screens Order*, and which the Commission frequently cited in the Rehearing Order in the instant case. *See, e.g.*, Rehearing Order at P 10, EOR 3.

That rulemaking proceeding is still ongoing; the Commission is now considering numerous requests for rehearing of Order No. 697, including a request filed by Montana Counsel that raises many of the same issues raised in the instant

[11] Comments of the Montana Public Service Commission, FERC Docket No. RM04-7 (filed Mar. 14, 2005); Comments of the Montana Consumer Counsel, FERC Docket No. RM04-7 (filed Mar. 16, 2005).

case.[12] Therefore, neither the *Screens Order* nor the instant orders represent the Commission's last word on the standards for granting market-based rate authority. To the extent Montana challenges the Commission's market-based rates policy in general, its applicability to smaller regional markets in particular, or specific aspects of the indicative screens or the Delivered Price Test, that rulemaking — in which numerous parties on all sides have participated — is the appropriate forum in which the Commission has addressed and continues to consider those arguments on a prospective basis.

Nor are the challenged orders the last word on PPL's market-based rate authority. As the Commission noted below, PPL remains subject to the Commission's monitoring, through the mandatory triennial review (next occurring in 2010[13]), Electric Quarterly Reports ("EQRs"), and the required reporting of changes in status. *See* Rehearing Order at P 15, EOR 4; *cf. Lockyer*, 383 F.3d at 1013 (finding authorization of market-based tariffs permissible under FPA based on "the dual requirement of an ex ante finding of the absence of market power *and* sufficient post-approval reporting requirements"). The Commission views the

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[12] Request for Rehearing and Clarification of the Montana Consumer Counsel, FERC Docket No. RM04-7 (filed July 23, 2007).

[13] *See* Order No. 697, Appendix D (establishing schedule for market power updates, by region).

triennial review as particularly important to its oversight responsibilities:

> Competitiveness of markets is continuing to change and, therefore, we are reluctant to rely only on initial market power analyses, change in status filings, and section 206 complaints in all cases. . . . [S]ubmission of periodic updated market power analyses enhances Commission oversight and public confidence in the regulatory process. . . . Through regularly scheduled updated market power analyses . . . , the Commission is better able to evaluate the ongoing reasonableness of those sellers' charges and to provide for an ongoing assessment of their ability to exercise market power. . . .
>
> . . .
>
> In this regard, . . . the Commission retains the tools necessary to ensure that all rates are just and reasonable, including initial market power evaluations, and ongoing monitoring by the Commission.

Order No. 697 at PP 852, 854.

Indeed, the Commission has revoked the market-based rate authority of sellers who failed to submit updated market power analyses or EQRs. *See, e.g., 3E Technologies, Inc.*, 113 FERC ¶ 61,124 (2005) (revoking authority for failure to submit updated market power analyses); *Electric Quarterly Reports*, 115 FERC ¶ 61,073 (2006) (revoking authority for four sellers who failed to submit EQRs); *Electric Quarterly Reports*, 114 FERC ¶ 61,171 (2006) (same, for eight sellers).

Moreover, PPL's rates, including those set forth in its 2007 contract with NorthWestern, remain subject to the enforcement and complaint procedures available pursuant to FPA § 206, 16 U.S.C. § 824e. *See, e.g.*, Order No. 697 at

PP 333 n.324, 955, 967.[14] In June 2007, the Commission observed that during the preceding three years, it had initiated more than 20 investigations under FPA § 206 because of concerns of possible market power; "[s]everal of those investigations led to the revocation or voluntary relinquishing of market-based rate authority and the ordering of refunds by sellers." *Id.* at P 3 n.3.

III. THE COMMISSION REASONABLY APPLIED ITS MARKET-BASED RATE POLICY IN THIS CASE

Most of Montana's particular criticisms of the Commission's Delivered Price Test analysis in the instant case stem from a fundamental critique of the underlying Commission policy. Montana contends that the Commission's policy for granting market-based rate authority is not appropriate for a market that Montana defines as long-term, firm capacity in Montana. In particular, Montana challenges the Commission's analysis in two respects: (1) its assessment of market power in short-term, rather than long-term, markets; and (2) the "snapshot" approach, based on historical data, which does not take into account projected data.

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[14] Montana filed a short complaint with the Commission in September 2007, seeking, by its own account, only to preserve a refund effective date "as a protective matter," in the event that this Court reverses the FERC orders in the instant case. *See Montana Consumer Counsel v. PPL Montana, LLC*, 121 FERC ¶ 61,127 at P 4 (2007). The complaint raised no specific allegations regarding NorthWestern's contracts with PPL. The Commission dismissed the complaint as unnecessary, because the Commission would have authority to issue refunds, if appropriate. *Id.* at P 1.

A. The Commission Appropriately Analyzed Short-Term Markets In The NorthWestern Control Area

Montana contends that the Commission failed to consider the relevant market, which Montana would narrowly define as "the NorthWestern control area market for the sale of firm, long-term power for the post-June, 2007 time period." Br. 28. But the Commission's focus on analyzing market power in short-term markets is based on longstanding economic and policy determinations.

1. The Commission Has Long Held That Lack Of Market Power In Short-Term Markets Can Establish Lack Of Market Power In Long-Term Markets

The Commission's analytical focus on short-term markets is appropriate, even though market-based rate authority, once granted, may be exercised with regard to long-term sales.

The Delivered Price Test analyzes market power under a wide range of system conditions in all time periods. PPL Rates Order at P 27, EOR 6. Though Montana derides the analysis as examining markets only "for selected days" (Br. 28), the Commission chose ten specific season/load periods to be used in the DPT because they are the most susceptible to the exercise of market power through withholding or collusion.[15] Rehearing Order at P 28, EOR 6. The market shares

[15] The season/load periods are super-peak, peak, and off-peak for each of Winter, Shoulder, and Summer periods, with an additional highest super-peak for the Summer. *Screens Order* at P 106 n.94; *id.* Appendix F.

for each season/load condition reflect the costs of the applicant's and competing suppliers' generation, thereby providing a more complete picture of an 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 (explained *infra* at pp. 39-40) in the DPT. Rehearing Order at P 28, EOR 6; *accord*, *Screens Order* at P 109.

Though the DPT examines market power in short-term markets, the analysis is not, as Montana claims (Br. 28), "irrelevant" to the question of competition in long-term markets. The Commission has long and consistently held that, if the DPT study shows that an applicant does not have market power in short-term markets under a variety of conditions, it likewise will not have market power in long-term markets, provided there are no barriers to entry. *See* Rehearing Order at P 27 & n.31 (citing precedents). This is because, over the long run, the applicant will face competition not only from existing generating plants (which are evident in analyses of short-term markets) but also from new entry of additional generation supplies. This concept dates back to one of the earliest cases in which the Commission approved market-based rates. *See Kansas City Power & Light Co.*,

67 FERC ¶ 61,183, at p.61,552-53 (1994) (over the long term, "the prospect of entry by other suppliers will check the seller's ability to sustain monopoly prices").

In its comprehensive rulemaking, the Commission revisited this issue (in response to comments by Montana Counsel, among others) and reaffirmed its view: "As the Commission has stated in the past, absent entry barriers, long-term capacity markets are inherently competitive because new market entrants can build alternative generating supply." Order No. 697 at P 122 (declining to alter the indicative screens or the DPT to allow different product analyses for short-term or long-term power; "There is no reason to generically require that the horizontal analysis consider those products that are affected by entry barriers."). *See generally Tenn. Gas Pipeline Co. v. FERC*, 400 F.3d 23, 27 (D.C. Cir. 2005) ("The court properly defers to policy determinations invoking the Commission's expertise in evaluating complex market conditions.").

2. As Applied Here, The Commission Reasonably Found That The Long-Term Market Would Be Competitive

As explained in Part IV.A, *infra*, the Commission reasonably found that PPL does not have market power during any of the season/load periods. The Commission further found that there are no barriers to entry in the NorthWestern control area. PPL Rates Order at P 61, EOR 31; Rehearing Order at PP 29, 44, EOR 6, 10.

Indeed, at the initial stage of the proceeding, when the Commission applied the indicative screens in accordance with its policy, no party — despite both Montana's and NorthWestern's active participation opposing PPL's filing — disputed PPL's claim that it was not able to erect barriers to entry by competitors. *See* Screen Failure Order at P 48 ("No intervenor has raised concerns regarding barriers to entry."), EOR 455, *cited in* PPL Rates Order at P 61, EOR 31. In the subsequent PPL Rates Order, the Commission found there was no new evidence that PPL could erect such barriers. *Id.*

On rehearing, the Commission considered Montana's argument that PPL's participation in state regulatory proceedings constituted a barrier to potential competitors' entry. *See* Br. 38-40. The Commission found Montana's claims to be unsubstantiated, notwithstanding the vague and conclusory allegations set forth in its affidavit. Rehearing Order at 44, EOR 9-10; *see* Fourth Wilson Affidavit, EOR 318-19. In sum, the purported "barriers to entry," in Montana's view, appear to be (1) ordinary state regulatory approval processes, and (2) PPL's appearance as a party in such processes. *See* Br. 39 ("Any bids that involve new plant, if accepted, would face regulatory and other constraints . . . .") (citing Fourth Wilson Affidavit).

The Commission correctly rejected Montana's claims of unspecified obstruction. The Commission noted there was no evidence of what PPL had

purportedly done, or how its actions might have been inappropriate. Rehearing Order at P 44, EOR 10. Indeed, even now, Montana does not suggest that PPL's participation was in any way improper. *See* Br. 39 (suggesting that PPL "exercised influence over the process," apparently by merely participating in regulatory proceedings). PPL, like any other interested party, had a clear right to participate and express opinions in a public proceeding before a state agency. Even more important, though, the Commission observed that the Petitioner Montana Commission itself (or any other relevant state agency) "is responsible for ensuring the integrity of its own processes, including preventing parties from manipulating those processes by developing 'procedural roadblocks' to the detriment of customers." Rehearing Order at P 44, EOR 10.

Furthermore, the Commission did not stop at presuming that the long-term market would be competitive. To the contrary, the Commission went beyond the DPT analysis to consider additional evidence. Specifically, as discussed more fully below in Part IV.B.1, the Commission examined actual record evidence regarding the generator bids in response to NorthWestern's RFP in the summer of 2004, which demonstrated that NorthWestern "had numerous credible alternatives to PPL" (Rehearing Order at P 43, EOR 9) for its long-term power supplies:

> In contrast to [Montana's] unsubstantiated claims of the existence of barriers to entry, there is ample evidence in the record of new market entrants in the 2004 time period who were willing to compete to build new generation supply to become available in 2007. . . . This

> evidence supports a conclusion that there were no barriers to entry in this time period.

Id. at P 29, EOR 6. The Commission further considered, as discussed more fully below in Part IV.B.2, EQR data filed by participants in the region, which indicated that PPL is "one of many suppliers into the NorthWestern control area." *Id.* at P 33, EOR 7.

B. The Commission's Policy Reasonably Requires The Market Power Analysis To Be Based On Actual, Unadjusted Data Instead Of Future Projections

Central to Montana's argument is that the Commission, in considering (in 2005-2006) whether PPL had market power, should have considered data projected for 2007, when NorthWestern's contract with PPL was to expire. Br. 22-23, 28-30. The Commission, however, limited its analysis to data from 2004, rejecting even PPL's own projections. PPL Rates Order at P 7 n.14, EOR 21; Rehearing Order at P 51, EOR 11. Notwithstanding Montana's arguments that reliance on actual data rendered the market power analysis irrelevant (Br. 28-32), the Commission's decision not to rely on projected data was reasonable and consistent with its policy.

In the *Screens Order* (at P 118), the Commission established that applicants must prepare all screens as designed, and must use historical data from the most recent unadjusted 12 months as a "snapshot" in time. PPL Rates Order at P 45, EOR 27; *see also Southern Co. Energy Mktg., Inc.*, 112 FERC ¶ 61,054 at PP 33,

54, 59, 63 (2005) (rejecting use of projected data and reaffirming that DPT should be based on historical data), *cited in* PPL Rates Order at P 45 & n.52, EOR 27.

In the PPL Rates Order, the Commission explained that historical data have been proven to be more objective, readily available, and less subject to manipulation than future projections; for that reason, the Commission permits no adjustments to the data. PPL Rates Order at P 45, EOR 27; *accord*, *Screens Order* at P 118. On rehearing, the Commission further explained that its snapshot approach benefits customers and public interest, for several reasons. Rehearing Order at P 15, EOR 4.

First, if the Commission allowed applicants to rely on future projections, they would be able to "cherry-pick" projected changes that benefit their market power analyses, while ignoring other, equally likely projections that would undermine them. *Id.*; *see also id.* at P 50 ("It would not help customers, or otherwise be administratively feasible, to allow applicants or intervenors to pick and choose the years for which market power studies are calculated. Otherwise, each would no doubt choose the year that best suits its objectives, as well as the assumptions it found most favorable."), EOR 11. Indeed, the Commission noted that, while it declined to rely on projections for 2007 urged by Montana and NorthWestern, the Commission likewise rejected PPL's alternative studies based on projected 2006 data. Rehearing Order at PP 15, 51, EOR 4, 11; PPL Rates

Order at P 7 n.14, EOR 21. For example, PPL's alternative DPT study using projected data for 2006 included recently added alternative supplies in the NorthWestern control area and excluded PPL's forward delivery obligations (both of which would lower PPL's market share calculations). *See* Affidavit of Cavicchi and Kalt at 7, EOR 405a.

Second, the Commission's approach benefits customers, state commissions, and other intervenors in FERC proceedings because it requires a consistent methodology that can be replicated by other parties, instead of customized studies that lack transparency. Rehearing Order at P 15, EOR 4.

Third, this "snapshot in time" approach does not preclude the Commission from considering future changes in market conditions; indeed, market-based rate authorization is conditioned on the seller's obligation to notify the Commission of any change in the circumstances on which the Commission granted such authority.[16] *Id.*; *see also supra* p. 23. That reporting requirement allows the Commission to evaluate changes when they happen — in addition to the required triennial review — so the Commission considers it "unnecessary and redundant" to

[16] The Commission noted that this change-in-status reporting requirement is triggered by the acquisition of a net increase of 100 MW or more of generation, and must be filed within 30 days after the date of that change in status. *Id.* n.18.

allow sellers to account for predicted changes in the DPT analysis. Rehearing Order at P 15, EOR 4; *accord*, Order No. 697 at P 301.

In the Notice of Proposed Rulemaking issued in May 2006, the Commission proposed to allow parties, in preparing DPT studies, to account for changes in the market "that are known and measurable at the time of filing." 115 FERC ¶ 61,210 at PP 10, 64 (noting that proposal "mirror[ed] the Commission's approach in connection with its merger analysis"). It cited, as specific examples of such changes, "new long-term contracts" and "expiration of [existing] long-term contracts." *Id.* at P 64. The Commission sought comments on what types of changes it should allow, and what limitations and requirements it should impose. *Id.*

After receiving and considering various comments, however, the Commission decided to retain its existing policy allowing only historical data for *both* the indicative screens and the DPT in market-based rate cases. Order No. 697 at P 298. The Commission again noted that "historical data are more objective, readily available, and less subject to manipulation than future projections." *Id.* at P 299.

The Commission further explained its decision by distinguishing its approach in market-based rate cases from its practice in considering mergers (where the DPT is required to account for known and measurable changes). The

merger analysis, by its very nature, must be forward-looking to identify what effect, if any, the consummation of the merger will have on competition. *Id.* at P 300. Also, because it is difficult and costly to undo a merger, the Commission needs to determine whether to put any necessary mitigation in place prior to consummation. *Id.* In contrast, updated reporting and continuing oversight of market-based rates justifies the "snapshot in time" approach:

> [T]he Commission's market-based rate program is designed to require sellers to report, and enable the Commission to examine, changes in facts and circumstances on an ongoing basis. . . . Accordingly, the market-based rate change in status reporting requirement allows the Commission to evaluate changes when they actually happen rather than relying on projections, making it unnecessary and redundant for the Commission to allow sellers to account for known and measurable changes in the DPT for market-based rate purposes.

Id. at P 301.

In its Brief, Montana continues to insist upon a "known and measurable changes" exception. Br. 43-44 (arguing that expiring contracts are not speculative; citing expert witnesses' opinions). Regardless, the Commission in its Order No. 697 rulemaking has fully considered the matter and justified its policy choice. The fact that Montana would prefer a different approach does not render the Commission's policy choice arbitrary and capricious. Moreover, in the instant case, the Commission appropriately adhered to its consistent, longstanding policy that was in effect at the time, and accordingly declined to consider projected post-2004 data from Montana and PPL alike.

C. Increases In Market-Based Rates Over Time Do Not Necessarily Indicate That Those Rates Are Not Just And Reasonable

Montana also points to increased prices as evidence of the Commission's failure to require just and reasonable rates. *See* Br. 64-66. In particular, Montana alleges that PPL's prices under its new contract with NorthWestern, which became effective in June 2007, rose by 42 percent compared to the prices under the previous contracts, which began in 2002. Br. 65; *see* Answer and Comments of NorthWestern at 7 (filed May 6, 2005), EOR 478.[17] The Commission recognized that PPL's rates had increased, but, having found no basis to conclude that PPL has market power, the Commission had "no basis for concluding that [the higher prices] reflect the exercise of market power." Rehearing Order at P 3, EOR 2. Moreover, the Commission noted that the increases are "consistent with both regional and national trends," and "appear to reflect changes in wholesale markets over the past ten years." *Id.* & n.4 (citing the Commission's Summer Energy Market Assessment 2007). In other words, it is not surprising that market forces have affected market-based rates. Indeed, prices for power "have risen in virtually every region of the country due to a number of factors, including increasing fuel costs and rising demand[,]" with increases ranging from 20-30 percent nationally

[17] By NorthWestern's own account, the expected impact on typical residential electric bills was an increase of about 7 percent, and the new contract was priced at a significant discount to market prices. *See* Rehearing Order at P 3, EOR 2.

and, specifically, by 23 percent in the Northwest region over the previous year. *Id.*

Montana disputes this point, arguing that, because PPL generates power sold to NorthWestern from coal and hydroelectric resources, its rates should not be affected by rising natural gas costs. Br. 65-66. (In focusing on natural gas supplies, Montana does not address whether coal and hydroelectric costs have changed over the years, nor does it discuss the impact of rising demand for electricity, as noted by the Commission.) Put differently, Montana argues that it cannot be just and reasonable for PPL to charge rates that are not tied to its costs, notwithstanding wholesale market trends or competing demand — which is simply an attack on the permissibility of market-based rates in general.

IV. THE COMMISSION THOROUGHLY EXAMINED THE RECORD EVIDENCE AND REASONABLY DETERMINED THAT PPL SATISFIED THE STANDARD FOR MARKET-BASED RATE AUTHORITY

A. The Commission Reasonably Accepted PPL's Delivered Price Test Analysis

1. PPL's Study Properly Applied The Commission's Delivered Price Test

Where, as here, an applicant for market-based rate authority fails one of the indicative screens and elects to try to rebut the presumption of market power (rather than proceed directly to mitigation or adopt cost-based rates), the Commission requires the applicant to present an analysis using the Delivered Price Test. PPL Rates Order at P 31 (citing *Screens Order* at PP 105-12), EOR 25.

The DPT is well-established in Commission precedent, having been used routinely to analyze market power in the merger context for over a decade. *Id.*; *see Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, 77 FERC ¶ 61,263, Appendix A (1996) ("*Merger Policy Statement*"); *Wabash Valley Power Ass'n, Inc. v. FERC*, 268 F.3d 1105, 1110 (D.C. Cir. 2001) (discussing Appendix A analysis). The Commission has consistently used the DPT in determining whether to grant market-based rate authority since 2004 and recently codified its use for that purpose in its Order No. 697 rulemaking. *See* Rehearing Order at P 21, EOR 5; *see also id.* at PP 23 n.25 (citing FERC cases), 24 n.27 (citing Order No. 697 at PP 13, 104), EOR 5; *Duke Power*, 111 FERC ¶ 61,506 (concluding, based on DPT analysis, that applicant had failed to meet standard for market-based rates); *Pinnacle West Capital Corp.*, 122 FERC ¶ 61,035 at PP 3-6 (2006) (Commission had revoked market-based rate authority for failure to perform market power study properly, then reinstated authority based on revised studies, but required refunds as mitigation for sales made while authority was revoked).

Montana has not directly challenged the Commission's reliance on the DPT[18]; indeed, Montana relies on its own alternative DPT analysis. *See, e.g.*,

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[18] Before the Commission, Montana raised a vague objection that the Commission wrongly assumed that the results of a DPT are definitive as to (continued…)

Br. 66 (citing Montana's DPT analysis at EOR 332-41). Nevertheless, before addressing Montana's specific challenges to PPL's DPT study, we offer a brief overview of the DPT purpose and design.

The DPT defines the relevant market "by identifying potential suppliers based on market prices, input costs, and transmission availability, and calculates each supplier's economic capacity and available economic capacity for each [of the ten] season/load period[s]." PPL Rates Order at P 32, EOR 25; *see supra* note 15 (describing season/load conditions). **Economic capacity** is the DPT's analog to installed capacity; **available economic capacity** is its analog to uncommitted capacity. *Id.* at P 34, EOR 25. In determining whether an applicant has sufficiently demonstrated its lack of market power, "[n]either measure is definitive" — the Commission weighs the results of both and also considers the arguments of the parties. *Id.* at P 43, EOR 27.

The DPT can be used to analyze the pivotal supplier, market share, and market concentration measures. *Id.* at P 32, EOR 25. Examining those measures with the more robust output from the DPT allows applicants to present a more

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whether the Commission may grant market-based rate authority. *See* Montana Rehearing Request at 11, EOR 92; Rehearing Order at P 19, EOR 4. Assuming that Montana meant to challenge the Commission's use of the DPT, the Commission responded by explaining the test's methodology and benefits, as set forth herein. *Id.*; *see id.* at PP 21-24, EOR 5.

complete view of the competitive conditions and their positions in the relevant markets. *Id.* The Commission offered a detailed description of the DPT methodology in Appendix F of the *Screens Order* (which in turn refers to more detailed explanations in earlier orders concerning mergers, including Appendix A of the *Merger Policy Statement*). PPL Rates Order at P 32.

Pivotal Supplier. To use the DPT for the pivotal supplier measure in each of the season/load periods, an applicant compares the load in the destination market to the amount of competing supply (the sum of the economic capacities of the competing suppliers). PPL Rates Order at P 33, EOR 25. 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) for the relevant period. *Id.* The applicant also should perform the analysis using available economic capacity to account for the applicant's and competing suppliers' native load commitments. In that case, native load in the relevant market (using the average of the actual native load) is subtracted from the load in each season/load period. *Id.*

Market Share. Each supplier's market share is calculated based on economic capacity. PPL Rates Order at P 34, EOR 25. For each season/load period, market shares reflect the costs of the applicant's and competing suppliers' generation, affording a more complete picture of the applicant's ability to exercise market power in a particular market. *Id.* For example, in off-peak periods, when

the competitive price may be very low because the demand can be met using low-cost capacity, a high-cost peaking plant that would not be a viable competitor would not be counted as economic capacity in the DPT, and thus would not be considered in the market share calculations. *Id.* The applicants must also present an analysis using available economic capacity and explain which measure more accurately captures conditions in the relevant market. *Id.*

Market Concentration. The third piece of the DPT is a calculation of market concentration using the Hirschman-Herfindahl Index ("HHI") based on market shares. PPL Rates Order at PP 8, 35, EOR 21, 25. The HHI, which is the sum of squared market shares (*id.* at P 8 n.17[19]), is usually used in the context of assessing the impact of a merger or acquisition on competition. *Id.* at P 35. But the Commission, like the U.S. Department of Justice, believes that concentration measures can also aid in assessing whether a supplier has market power. *Id.* at P 35, EOR 25-26.

For this purpose, concentration statistics can indicate the likelihood of coordinated interaction in a market. *Id.* at P 36, EOR 26. All else being equal, the higher the HHI, the more a firm can extract excess profits from the market;

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[19] "For example, in a market with five equal size firms, each would have a 20 percent market share. For that market, HHI = $(20)^2 + (20)^2 + (20)^2 + (20)^2 + (20)^2 = 400 + 400 + 400 + 400 + 400 = 2{,}000$." *Id.*

likewise, a low HHI can indicate a lower likelihood of coordinated interaction. *Id.* For that reason, an applicant who shows an HHI less than 2,500 in the relevant market for all season/load periods, and who also has shown it is not pivotal and does not possess more than a 20 percent market share in any of the season/load periods, satisfies the Commission that it lacks market power, absent compelling contrary evidence from other parties. *Id.*; *see also id.* at P 35 n.41 (noting U.S. Department of Justice's advocacy of same 2,500 HHI threshold), EOR 26. In addition, the Commission may consider a lower HHI (indicating an unconcentrated market[20]) to support a claim of a lack of market power even where the applicant is pivotal or does have a 20 percent or greater market share in some or all season/load periods. *Id.* at P 36, EOR 26.[21]

In sum, the Commission believes that "[t]he DPT protects customers by providing a robust analysis of the market under varying load conditions and using several different measurement criteria." Rehearing Order at P 22, EOR 5.

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[20] The Commission noted that an HHI less than 1,000 would indicate an unconcentrated market. *Id.* (citing *Screens Order* at P 111).

[21] Though a 20 percent share fails the indicative screen (*see supra* p. 10; Screen Failure Order at P 29, EOR 452), which is designed to be conservative, it is not dispositive in the second stage review of the DPT study. At that point, when the applicant files to rebut the initial presumption of market power, instead of a bright line test, the Commission considers and balances all the evidence to determine whether the applicant has market power. Rehearing Order at P 54 n.63, EOR 12.

2. PPL's Delivered Price Test Analysis Indicated That It Did Not Have Market Power

PPL's DPT analysis, submitted to rebut the initial presumption of market power, indicated that it was a non-pivotal supplier in all ten season/load conditions for both the economic capacity and available economic capacity measures. *See* PPL Rates Order at P 41, EOR 27. For the economic capacity measure, PPL's market share exceeded 20 percent in five season/load conditions, and under the available economic capacity measure, market share exceeded 20 percent during three season/load conditions. *Id.* As for market concentration, the HHI was well below the 2,500 threshold in all seasons under both measures. *Id.*

Specifically, for the economic capacity measure, PPL's market share ranged from 18 percent to 27 percent, with HHIs ranging from 1,113 to 1,304. *See* PPL Rates Order at P 39, EOR 26. The five season/load conditions in which its share exceeded 20 percent were mostly off peak. *See id.*; *see also supra* p. 27 (explaining that prices in off-peak periods may be very low, and high cost generators are not counted in market share calculations). For the available economic capacity measure, market share exceeded 20 percent during three season/load conditions (at 21, 24, and 25 percent) and ranged from 13 to 19 percent in the remaining season/load conditions, with HHIs ranging from 903 to 1,317. *See* PPL Rates Order at PP 39, 41, EOR 26, 27. PPL stated that the highest market shares occurred during off-peak load conditions, when excess supply was

greatest. *See id.* at P 40, EOR 26.[22] Again, the HHIs were consistently well below the 2,500 threshold, with a low of 903 in the winter super-peak (indicating an unconcentrated market, *see supra* note 20) and a high of 1,317 in shoulder off-peak, indicating that PPL was not a pivotal supplier in any season/load period. *Id.* Though PPL's market shares were above 20 percent in five periods using the economic capacity measure, the HHIs remained below 2,500 in all periods, meaning PPL was not a pivotal supplier under that measure. *Id.*

Accordingly, the Commission found that PPL had rebutted the presumption of market power. *Id.*; *see also* Rehearing Order at P 30, EOR 7.

3. PPL's Study Appropriately Calculated Available Economic Capacity

Montana challenges PPL's calculation of available economic capacity in several respects. Br. 41-49. But here, Montana's specific criticisms of PPL's study arise from the same general challenges to the Commission's policy discussed above (*see supra* pp. 27-28, 31-33) — that is, that the market power analysis is not specially tailored to the long-term firm contracts that are Montana's specific

[22] PPL's highest share (25 percent) under this measure occurred during the winter off-peak period, when total available economic capacity to compete in the NorthWestern control area was 2,127 MW and PPL's share of that was 524 MW. *Id.* at P 41 n.46, EOR 27.

concern, and that the analysis should account for projected data, such as future contract expirations.

a. PPL's Study Properly Deducted Long-Term Contracts From Available Economic Capacity

In calculating its available economic capacity, PPL deducted 450 MW associated with its long-term firm sales contracts with NorthWestern and approximately 240 MW that was under long-term contracts with industrial customers, in accordance with the Commission's view that capacity that is committed under long-term contracts should not be included as available (uncommitted) capacity. PPL Rates Order at PP 44-45, EOR 27; Rehearing Order at P 52, EOR 11; *see also id.* at P 59 ("[F]or purposes of calculating . . . uncommitted capacity, . . . such capacity is not considered available for PPL Companies to sell elsewhere."), EOR 13. In the *Screens Order*, consistent with the "snapshot" approach of using historical data and allowing no adjustments, the Commission allowed the deduction of long-term contracts for this purpose, and rejected suggestions to treat capacity that is tied up in contracts for less than three years as uncommitted. *See id.* (citing *Screens Order* at P 95); *see also* Rehearing Order at PP 48-49 (noting that the Commission affirmed this treatment of the issue in Order No. 697 [at PP 298, 301]), EOR 11. Because the DPT considers a snapshot in time, generation that is subject to long-term commitments is not generally available to compete in wholesale markets. *Id.*

Though Montana would include capacity under certain contracts that are approaching expiration, Br. 41, "all long-term contracts expire at some point." Rehearing Order at P 50, EOR 11; *see also* Order No. 697 at PP 296, 299 (considering argument that contract expiration is known, but declining to allow DPT analysis to account for such future changes). Accordingly, the Commission viewed this argument as no different than the broader contention that it should have measured market shares using projected 2007 data. *See supra* Part III.B. "In sum, there is nothing arbitrary in our use of a consistent, unadjusted historical year [of] data for determining whether a company has market power." Rehearing Order at P 50, EOR 11. *See, e.g.*, *Ass'n of Oil Pipe Lines v. FERC*, 83 F.3d 1424, 1431 (D.C. Cir. 1996) ("agency ratemaking is far from an exact science and involves policy determinations in which the agency is acknowledged to have expertise") (internal quotation marks and citation omitted).

In any event, the Commission further found that, even if it had accepted Montana's argument and included the 450 MW in PPL's available economic capacity, "it would not have changed the result[,]" as NorthWestern's alternative DPT study showed. Rehearing Order at P 53 & n.61, EOR 11-12; *see also* PPL Rates Order at P 52 & n.65, EOR 29. *See generally infra* Part IV.A.3.c.

b. PPL's Study Appropriately Treated Non-PPL-Owned Committed Capacity

Montana disputes PPL's inclusion of other generators' capacity in its market share calculations, without having determined whether such capacity is actually available for long-term firm service. *See* Br. 44-48. Yet again, this argument stems from Montana's belief that the Commission was required specifically to evaluate available long-term, firm capacity instead of applying its longstanding policy for analyzing market power.

Nevertheless, the Commission explained which Colstrip plant capacity was included in PPL's study (only the portions that were owned by PPL or NorthWestern or were uncommitted). *See* Rehearing Order at P 46, EOR 10. The Commission also observed that PPL's treatment of the capacity was consistent with past practice in DPT studies. PPL Rates Order at P 49, EOR 28. Moreover, it made little difference in any event, because NorthWestern had indicated that even if the Commission agreed with NorthWestern (and Montana) that some of that capacity should not have been included, the impact on the DPT analysis might be a one- to two-percentage-point increase in PPL's low market share. *Id.*

c. The Commission Found That, Even With All Of NorthWestern's Changes To The Available Economic Capacity Calculations, PPL Still Would Not Be Shown To Have Market Power

Contrary to Montana's conjecture that the Commission "treat[ed] each proposed change separately" (Br. 66), the Commission explicitly found that: "[e]ven if we were to accept *all* of NorthWestern's corrections to PPL Companies' 2004 analysis, the DPT results . . . do not, on balance, support NorthWestern's contention that PPL Companies have the ability to exercise market power." PPL Rates Order at P 55 (emphasis added), EOR 29-30. The Commission explained that NorthWestern's alternative study included the adjustments that both NorthWestern and Montana advocated: "NorthWestern's DPT results include adjustments to the available economic capacity measure to account for 450 MW from expiring contracts, removal of PPL Companies' native load reduction . . . , and exclusion of wholesale sales to investor-owned utilities, exclusion of PacifiCorp's and Puget's capacity." *Id.* at P 52 n.65, EOR 29; *accord*, Rehearing Order at P 53 n.61, EOR 12; *see also id.* at P 37, EOR 8.[23] And even in NorthWestern's analysis, "the market concentrations for all periods would still be

[23] As explained in Part IV.A, *infra*, the Commission relied on the alternative DPT study prepared by NorthWestern, which raised the same objections to PPL's capacity deductions as Montana, because Montana's study was skewed by uncorrected assumptions about import limitations. *See* PPL Rates Order at P 15 & n.26, EOR 22; Rehearing Order at PP 2, 35 & n.41, EOR 2, 8.

below the 2,500 HHI threshold, with the maximum HHI being 1,812 and market shares ranging from 25 percent to 33 percent." PPL Rates Order at P 55, EOR 30; *see also* Rehearing Order at PP 53-54, EOR 11-12. The Commission did not need to "show its math" (Br. 66), as NorthWestern had already done so.

4. PPL Used Appropriate Simultaneous Import Limits In Its Study

In connection with the market power study, the Commission requires a simultaneous transmission import limits study to be used as a basis for analyzing the amount of supply that can reach the relevant market. *Screens Order* at P 84. This calculation represents an estimate of the total import capability available to remote generation resources. *Id.* The Commission defined this study methodology in Appendix E to the *Screens Order*, and clarified in its subsequent rulemaking that the Appendix E methodology is the only study that meets the Commission's requirements. Order No. 697 at P 19.

The Commission's primary objective for performing a simultaneous transmission import limit study is to determine transmission accessibility in the applicant's control area to first-tier suppliers that want to serve the demand/load in that control area. Rehearing Order at P 69, EOR 14. The Commission uses such studies to determine the amount of competing supplies that can reach the area given physical constraints, because it has concluded that "simultaneous transmission import capability provides a more realistic evaluation of transmission

limitations in competitive markets than total transfer capability . . . ." *Id.* (citing *Screens Order* at PP 77-84; Order No. 697 at P 384), EOR 14-15. *See generally Papago Tribal Util. Auth. v. FERC*, 776 F.2d 828, 830 (9th Cir. 1985) ("Restricted judicial review is particularly appropriate where, as here, the FERC order addresses complex and technical problems of utility regulation that fall within the special expertise of the Commission.").

With that in mind, the Commission found that PPL had properly used simultaneous transmission import limits that take account of constraints calculated by the Western Electricity Coordinating Council ("WECC"), which the Commission had accepted for this purpose in previous cases. Rehearing Order at PP 70-71 & n.72 (citing other FERC Orders), EOR 15; PPL Rates Order at P 56, EOR 30. In addition, the Commission noted that PPL had used the limits that NorthWestern — the transmission owner — had reported in *its own* market-based rate triennial review filing in December 2005,[24] and adjusted the figures *downward*, "represent[ing] a conservative assumption that reduces the amount of competing supplies considered and increases PPL Montana's market share accordingly." Rehearing Order at P 75, EOR 15-16.

[24] Montana incorrectly implies, at Br. 50-51, that the Commission rejected NorthWestern's transmission import limits study in favor of one prepared by PPL (which the Commission reasonably could have chosen to do, in any event).

Montana, however, contends that the Commission failed to account for the impact of operational limits, and that transfer capability into the NorthWestern control area varies significantly depending on transmission demand and system conditions. Br. 49-55. For that reason, Montana believes that PPL's study overstated the alternative power supplies available in the NorthWestern market.

The Commission addressed Montana's arguments at length in both orders. First, the Commission noted that, contrary to Montana's claim, the WECC ratings do take account of contingencies and constraints. Rehearing Order at P 71, EOR 15; PPL Rates Order at P 56, EOR 30. In addition, the Commission rejected Montana's and NorthWestern's reliance on actual transmission capacity postings on NorthWestern's Open Access Same-Time Information System ("OASIS").[25] The Commission concluded that, aside from the protestors' improper reliance on projected 2006 data for the 2004 DPT study, use of actual OASIS postings "as an alternative transmission import capability value in this case significantly understates import capability[]" because it does not take into account existing transmission reservations. PPL Rates Order at P 63, EOR 31; Rehearing Order at P 72, EOR 15. Deducting transmission reservations from import limits removes

[25] OASIS is an accessible electronic, real-time system that a transmission provider uses to post information about transmission service and other communications with customers. *See generally* 18 C.F.R. § 37.6 (2006).

existing competitive supply and thus distorts the market study. *Id.*; *see also id.* at P 73 (citing Order No. 697 at P 369), EOR 15; *id.* at P 76, EOR 16.

The Commission stated it would be willing to consider actual data in place of a study, but the data must reflect full transmission capability, divided into four components: (1) available transmission capacity, (2) the applicant's transmission reservations, (3) competitors' reservations, and (4) transmission that is set aside for reliability. Rehearing Order at P 72, EOR 15. The Commission considers all four "to obtain an accurate understanding of the actual, physical transmission capability" in the control area, then reduces the import limits by the second and fourth components before allocating transmission capacity to the competing supply for purposes of the market share screens and the DPT. *Id.* OASIS postings, which Montana insists are the only appropriate data (Br. 49-54), measure only the first of the four components, and thus fail to provide a complete picture. Because the purpose of the import limits study is to determine how much generation can be imported from first-tier markets, and because competitive supply in first-tier markets must purchase reserved transmission capacity to compete in the control area, both existing (competitors') reservations *and* available (OASIS) capacity must be considered. Rehearing Order at PP 77-78, EOR 16.

Montana also objects that the Commission did not try to match the available transmission capacity to the available competing supplies, to determine whether

those supplies can actually serve NorthWestern's load on a long-term, firm basis. Br. 52. But this, again, goes back to Montana's fundamental disagreement with the Commission's policy. *See* Rehearing Order at P 81 (Commission "disagreed . . . that the point at issue is the availability of future long-term firm capacity"; rather, the question here was whether PPL had rebutted the presumption of market power and satisfied the Commission's generation market power standard), EOR 17.[26]

Finally, the Commission did not, as Montana contends, depart from its earlier analysis in the Screen Failure Order. Br. 56. Montana misreads that order. There, the issue was PPL's argument that the Northwest Power Pool should be the relevant geographic market, rather than the smaller, default control area (NorthWestern). *See* Screen Failure Order at PP 36-41, EOR 453-54; *supra* pp. 10-11. The Commission concluded that PPL had failed to justify the alternative geographic market; the required "accounting" of transmission constraints was necessary only for that specific purpose: "When considering

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[26] Montana Counsel raised the same argument in the rulemaking. *See* Order No. 697 at P 348. Nevertheless, the Commission determined that it:

> will continue to require sellers to submit the Appendix E analysis . . . to calculate aggregated simultaneous transfer capability into the balancing authority area being studied. The Commission reaffirms that the [simultaneous import limits] study is "intended to provide a reasonable simulation of historical conditions" and is not "a theoretical maximum import capability or best import case scenario."

Id. at P 354 (citation omitted).

geographic markets *other than the default* geographic market, ..." Screen Failure Order at P 40, EOR 454. The Commission having rejected PPL's argument and ordered it to use the default market for its DPT study, PPL complied and filed a DPT analysis based on the NorthWestern control area. *See* Rehearing Order at PP 67, 74, EOR 14, 15. Accordingly, in the instant orders, the Commission had no cause to revisit the case for using an alternative geographic market. *See id.* Montana is mistaken — there was no "turn-about."

B. The Commission Also Properly Considered Other Evidence

While the DPT analysis — PPL's study, and the protestors' criticisms and alternative studies — was appropriately at the center of the Commission's assessment of PPL's ability to exercise market power, the Commission also found other evidence relevant to determining to the extent to which alternative supplies were available in the NorthWestern control area.

1. Evidence Regarding NorthWestern's Request For Proposals Supported The Commission's Finding

The Commission concluded that the results of NorthWestern's RFP provided further evidence that alternative supplies were available in the NorthWestern control area.

Specifically, PPL submitted evidence showing that, during a summer 2004 RFP seeking bids to supply NorthWestern's load requirements, NorthWestern was able to select from a varied portfolio of suppliers (including wind, dispatchable,

base-load and non-unit contingent offers) and to short-list eight entities, at least two of which were non-PPL suppliers, offering base-load resources. PPL Rates Order at P 59, EOR 30. In all, 44 proposals were submitted; nine for intermediate-term capacity and 35 for long-term. *Id.* Ten of those 35 long-term bids were eliminated, while at least eight were short-listed by NorthWestern's independent consultant. *Id.* At least four bids were from suppliers with projects that were proposed to be built in time to commence operations in 2007. Rehearing Order at P 29, EOR 6. Two of the short-listed bids were from proposed new wind and coal projects (the latter due to commence commercial operation in 2008), and the wind project was one of the winning bidders, resulting in a 20-year contract for 135 to 150 MW of power. *Id.*[27]

The RFP bid prices generally ranged from $40 to $70 per megawatt hour (MWh). PPL Rates Order at P 59, EOR 30. PPL's bids were well within the range of the other RFP bids, at $40 to $50/MWh, including 20 years at $39 to $44/MWh and 12.5 years at about $39.05/MWh. *Id.* The 20-year wind power contract was priced at approximately $32/MWh (plus $7 to $14 for firming supply). *Id.*

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[27] Montana downplays the significance of the wind power contract, arguing that a small amount of wind power does not demonstrate absence of entry barriers or existence of a competitive base-load power sales market. Br. 38. Of course, the Commission did not suggest that the fact of a single contract was decisive; but the responses to and results of the RFP were probative as additional evidence.

NorthWestern also announced that it would buy a 50 MW unit contingent resource from its 222 MW share of the Colstrip facility for 11.5 years at $35.80/MWh. *Id.* These details refute Montana's contention (Br. 59) that the Commission saw only evidence of the quantity of bids, not the "quality."[28]

Though NorthWestern disputed the variety and desirability of the bids, the Commission found that NorthWestern had not provided any additional substantial evidence to support its claims. PPL Rates Order at P 60, EOR 30. Indeed, NorthWestern itself had stated that 83 percent of the portfolios "beat" PPL's full-requirements bid. *Id.* & n.78 (citing Answer and Comments of NorthWestern, EOR 472). Thus, the available information suggested that NorthWestern had alternatives to renewing expiring contracts, and the Commission found no indication in the RFP results that PPL had market power. *Id.* at P 60.

The Commission closely considered all of the RFP evidence and determined that it both corroborated the results of the DPT, because a wide range of suppliers

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[28] Much of Montana's argument with regard to the RFP centers on the existence of unknown additional details about the RFP, without which Montana believes the Commission could not take *any* of the evidence regarding the RFP into account. *See* Br. 59, 61-62. The Commission, however, properly found that Montana failed to introduce whatever evidence it considered necessary to the Commission's consideration. *See infra* Part IV.C. Notably, the evidence that PPL filed was drawn from NorthWestern's own public filings before Petitioner Montana Commission. *See, e.g.*, Rehearing Order at P 29 nn.32-33 (citing exhibits), EOR 6.

submitted conforming bids, and confirmed the absence of barriers to entry. Rehearing Order at PP 27, 29, 42, EOR 6, 9.

2. Other Suppliers' Public Filings With The Commission Also Supported The Commission's Finding

The Commission also found that EQR data filed by all FERC-jurisdictional sellers[29] indicated that PPL "is one of many suppliers into the NorthWestern control area." Rehearing Order at P 33, EOR 7. Specifically, EQR data indicated that in 2004 through 2005 more than 18 entities besides PPL sold power in that market, and that five of those entities made long-term sales. *See id.* The Commission pointed to this as further support for the Commission's finding that PPL does not have market power in generation. *Id.*

Montana challenges the Commission's reliance on "non-record" data. Br. 63. EQR data is required to be filed publicly, however, and is readily available

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[29] Under the Commission's reporting requirements, entities making power sales must submit reports containing: a summary of the contractual terms and conditions in every effective service agreement for all jurisdictional services, including market-based and cost-based power sales and transmission services, and transaction information for effective short-term (less than one year) and long-term (one year or greater) power sales during the most recent calendar quarter. *See* Order No. 697 at P 717 (citing *Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127 (2002)); 18 C.F.R. § 35.10b.

The Commission, and this Court, consider EQR data integral to the Commission's ongoing oversight of power sellers who have been granted market-based rate authority. *Lockyer*, 383 F.3d at 1014-17; *see also* Order No. 697 at PP 5, 117.

to the public on the Commission's website. *See Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127 at P 16; http://www.ferc.gov/docs-filing/eqr.asp.[30] The Commission named the suppliers whose EQR data it considered. Rehearing Order at P 33 n.38, EOR 7.

C. The Commission Properly Placed The Burden Of Proof On PPL

Montana claims the Commission shifted the burden to Montana to prove that PPL has market power. Br. 61. Montana misunderstands the Commission's ruling.

When the Commission, in the Screen Failure Order, instituted a proceeding under FPA § 206, 16 U.S.C. § 824e, it placed the burden on PPL to rebut the presumption of market power by filing a DPT analysis. Screen Failure Order at PP 42-43, EOR 454. (Though Montana correctly notes that PPL failed the preliminary market share screen, Br. 29 n.9, the Commission's decision did "not constitute a definitive finding by the Commission that Applicants have market power in the NorthWestern control area," because the indicative screen that PPL failed is a tool "conservatively designed to identify the subset of applicants who

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[30] *Cf. Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1025-26 n.2 (9th Cir. 2006) (taking judicial notice of documents available to public on government website); 18 C.F.R. § 385.508(c), (d) (FERC procedural rules governing references to public documents and official notice of matters that may be judicially noticed by federal courts, "or any matter about which the Commission, by reason of its function, is an expert.").

require closer scrutiny." Screen Failure Order at P 43, EOR 454.)

Accordingly, in the § 206 proceeding, the Commission started from that premise. PPL Rates Order PP 3-4, EOR 20. Based on all evidence and arguments in the record, the Commission concluded that PPL had successfully rebutted the presumption of market power. *Id.* at PP 1, 30, 41, 65, EOR 20, 25, 27, 31. *See also id.* at PP 7-8, 38-56 (detailing PPL's showing), EOR 21, 26-30. On rehearing, the Commission further explained that PPL had filed the required studies and supporting evidence and "satisfied . . . its burden of proof by showing that, under the DPT analysis, it did not have market power." Rehearing Order at P 42, EOR 9; *accord*, *id.* at PP 62-63, EOR 13-14. In addition to the DPT, the Commission considered all of the record evidence regarding the RFP — which NorthWestern, not PPL, first raised[31] — "and found it corroborated, rather than undermined, [PPL's] DPT results." *Id.* at P 42.

Where PPL had made its affirmative showing to the Commission's satisfaction, supported by substantial and detailed evidence, intervenors seeking to undermine that showing had to provide an evidentiary basis for the Commission to

[31] *See id.* at P 41 ("After intervenors initially alleged that the Northwestern RFP supported their claims that the PPL Companies had market power, the PPL Companies submitted detailed information and workpapers concerning this RFP to rebut claims that the RFP evidenced a lack of supply alternatives to PPL Companies."), EOR 9; PPL Rates Order at P 25, EOR 24.

find otherwise. *Id.* at P 42 ("If Montana believed that other evidence undercut that conclusion, the burden was on them, not PPL Montana, to supply that evidence."), EOR 9; *accord*, *id.* ("If [Montana] believed that other RFP evidence should have been considered, they should have submitted that evidence into the record.").

Montana, however, contends that the Commission should have either disregarded the evidence that PPL submitted regarding the RFP, or "order[ed] that the RFP responses be provided with or without protection [for confidential information] . . . ." Br. 61. (Any such order would, of course, have been directed to the protestors themselves — either to NorthWestern, which conducted the RFP and thus had all of the information about the bids, or to the Montana Commission, to whom NorthWestern had submitted much of that information.) But the Commission fully addressed Montana's arguments and the evidence that Montana (as well as NorthWestern) did put into the record, and reasonably concluded that PPL's showing was more persuasive. Moreover, the Commission's handling of confidential materials in this case[32] demonstrates that the Commission could have

[32] The Commission directed PPL to give NorthWestern and Montana access to its workpapers and modeling software, pursuant to a protective order. *See* PPL Rates Order at P 11, EOR 21. It also accommodated Montana's requests to extend the comment period, and allowed numerous supplemental filings. *Id.*; *id.* at P 15 n.26, EOR 22. Many documents in the record were filed in both public and non-public form, in accordance with established FERC procedures for protecting non-public information.

devised a process for Montana to obtain, and submit as evidence, sensitive confidential information — had Montana only asked.

In sum, the Commission never shifted the substantive burden of proof to Montana. Rather, the Commission reasonably ruled that, once PPL had already met its affirmative substantive burden, protestors seeking to undermine that showing must do so with evidence in the record — and if the existing record is insufficient to support their arguments, those protestors must submit appropriate additional evidence.

V. THE COMMISSION FULLY ADDRESSED AND REASONABLY REJECTED MONTANA'S REMAINING ARGUMENTS

A. The Commission Adequately Considered Montana Counsel's "Attachment A Analysis"

Montana contends that the Commission failed to respond to Montana Counsel's Attachment A Analysis (EOR 182), which questioned whether PPL's analysis presented an accurate view of the market. Br. 45-46. On rehearing, however, the Commission clarified that it had considered all of the arguments and supporting documents submitted by the protestors, but had found Montana Counsel's analysis to be significantly flawed because it improperly calculated simultaneous transmission import limits, ignoring existing transmission

reservations. *See supra* Part IV.A.4. Rehearing Order at P 35 & n.41, EOR 8.[33] In addition, the Commission found key tables in the Attachment A Analysis unreliable due to the use of projected data for the year 2007, in contravention of Commission policy and precedent. *Id.*; *see supra* Part III.B.

In any event, though the Commission had not directly referenced the Attachment A Analysis in the PPL Rates Order, the Commission had in fact considered it in addressing NorthWestern's similar arguments about the availability of imported power. Rehearing Order at P 37, EOR 8 (citing PPL Rates Order at PP 53-54, EOR 29). The Commission concluded that, even if it were to accept all of NorthWestern's corrections to PPL Companies' analysis, the DPT results would not, on balance, support a finding that PPL has the ability to exercise market power. *Id.*; *see supra* Part IV.A.3.c. Those corrections included what both NorthWestern and Montana (in its Attachment A Analysis) alleged to be incorrect assumptions in calculating the available economic capacity that could be imported. Rehearing Order at P 37, EOR 8.

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[33] Montana never corrected this serious defect. Montana initially filed its DPT results in December 9, 2005; even after the Commission gave Montana additional time and access to PPL's modeling software, Montana never supplemented its results to correct the deficiencies. PPL Rates Order at P 15 n. 26, EOR 22. In its Brief (at 66), Montana misses the Commission's point; the Commission recognized that Montana submitted additional filings after being given access to PPL's workpapers and software — but it still failed to correct its flawed study.

B. The Commission Appropriately Addressed Antitrust Concerns

Finally, Montana contends that the Commission failed to "take antitrust policy into account . . . ." Br. 67. Montana does not explain *how* it believes the Commission failed in this regard, except by deciding to grant PPL market-based rate authority over Montana's objections. *Id.* ("As a predicate for denying relief [sought by Montana], FERC's statement is contrary to judicial and Commission precedent.").

In the PPL Rates Order, the Commission declined to address Montana's allegations that PPL was violating the antitrust laws by refusing to sell power to Northwestern at cost-based rates. PPL Rates Order at P 64, EOR 31.[34] The Commission ruled that such concerns were "beyond the scope" of the FPA § 206 proceeding directed to the question whether to grant PPL's request to continue its market-based rate authority. *Id.*

On rehearing, Montana contended that the Commission was "obligated to consider antitrust policy in all of its functions[]" and, in particular, to consider the anticompetitive effects of regulated operations. Montana Rehearing Request at 34-

[34] *See also* Montana Consumer Counsel's Reply to Answer of the PPL Montana Parties to Supplemental Protest of the Montana Consumer Counsel at 7-15, 17 (filed Mar. 27, 2006) (urging Commission not only to deny PPL market-based rate authority but also, as a "corollary," to require PPL to sell power to NorthWestern (at cost-based rates)), EOR 140-48, 150.

36, EOR 115-17. But the Commission made clear that its market power analysis *does* incorporate antitrust principles. The Commission explained that it had thoroughly evaluated whether PPL had the ability to engage in anticompetitive behavior. More to the point, it had evaluated PPL's market power under standards that take into account the DPT analysis, the relevant HHI number, and other factors that indicate whether an applicant possesses market power. Rehearing Order at P 86, EOR 17. Those standards are firmly grounded in antitrust policy: "Analysis of market shares and market concentration have long been staples of market power analysis among the antitrust agencies, and indeed, the market concentration thresholds used in the Commission's HHI analysis were modeled after the Department of Justice/Federal Trade Commission Guidelines." *Id.*[35] Montana has not, either before the Commission or now on appeal, offered any argument to the contrary.

VI. INTERVENOR REC SILICON'S ADDITIONAL ARGUMENTS ARE JURISDICTIONALLY BARRED

By its own admission (REC Br. 8), REC Silicon elected not to participate at any stage in the FERC proceedings. Having failed to present any of its arguments

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[35] *See also* PPL Rates Order at P 35 & n.41 (noting comments filed by U.S. Department of Justice, with regard to market-based pricing for oil pipelines, observing that concentration measures, using HHI, can aid in assessing market power); *supra* p. 42.

to the Commission in a rehearing request, REC Silicon is precluded from introducing any issue on appeal that was not specifically raised on rehearing by the Petitioners. *See* FPA § 313(b), 16 U.S.C. § 825*l*(b). In fact, REC Silicon cannot raise any issue that Montana raised on rehearing but has not pursued on appeal. *Cf. ASARCO, Inc. v. FERC*, 777 F.2d 764, 773 (D.C. Cir. 1985) (holding, under identical provision of Natural Gas Act, that petitioner could not raise argument on appeal that it had not raised on rehearing itself, even though another party had raised it and Commission had addressed it). Accordingly, REC Silicon's arguments must be strictly limited to those that Montana (1) properly preserved on rehearing *and* (2) actually raises on appeal. *See Ala. Mun. Distribs. Group v. FERC*, 300 F.3d 877, 879-80 (D.C. Cir. 2002); *Process Gas Consumers Group v. FERC*, 912 F.2d 511, 512-16 (D.C. Cir. 1990).

For that reason, the Commission does not attempt to respond in the first instance to REC Silicon's new arguments. (Notably, REC Silicon's brief is rife with assertions lacking any apparent basis in the administrative record, often more testimonial in nature than analytical. *See, e.g.*, REC Br. 7-9, 28-29.) Indeed, any response the Commission could offer to new arguments would necessarily constitute Commission counsel's *post hoc* rationalization, given the Commission's lack of opportunity to address those arguments below.

CONCLUSION

For the reasons stated, the petitions should be denied, and the challenged FERC Orders should be affirmed in all respects.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Respondent is not aware of any related case pending in this Court.

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i) and 9th Cir. R. 32-1, I certify that the Brief of Respondent Federal Energy Regulatory Commission is proportionally spaced, has a typeface of 14 points, and contains 15,079 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum.

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