

balancing authority area. As the Commission stated in the April 14 Order, where an applicant is found to have failed either generation market power screen, such failure provides the basis for instituting a proceeding pursuant to section 206 of the Federal Power Act (FPA)⁴ and establishes a rebuttable presumption of market power in the section 206 proceeding.⁵ Accordingly, because SCE&G's filing indicated that it failed the wholesale market share screen, on June 16, 2005, the Commission instituted a section 206 proceeding (in Docket No. EL05-122-000) to investigate generation market power in the SCE&G balancing authority area.⁶ The Commission also established a refund effective date pursuant to the provisions of section 206.

3. In the June 16 Order, the Commission directed SCE&G, for the SCE&G balancing authority area, to: (1) file a Delivered Price Test analysis; (2) file a mitigation proposal tailored to its particular circumstances that would eliminate its ability to exercise market power; or (3) inform the Commission that it would adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates.⁷

4. On August 15, 2005, SCE&G submitted a compliance filing in response to the June 16 Order. In its compliance filing, SCE&G proposed a voluntary prohibition on wholesales sales by SCE&G within its balancing authority area, absent Commission approval for such sales. SCE&G stated that it currently makes (and historically has made) no balancing authority area sales with a duration of one week or less, or more than one week but less than one year. Thus, SCE&G stated that it did not anticipate making future filings seeking authorization for such sales. With regard to long-term sales, SCE&G stated that its mitigation proposal would require, for future sales contracts, that SCE&G and each balancing authority area wholesale customer (whether a current customer under an expiring contract seeking a new contract, or a new customer) work together in good faith to ensure that the parties agree in timely fashion on an appropriate contract to be filed with the Commission for review. SCE&G noted that it recognized that Commission acceptance of such a contract would be granted only where SCE&G has demonstrated that a proposed transaction would be in compliance with Commission pricing policies.

⁴ 16 U.S.C. § 824e (2000).

⁵ April 14 Order, 107 FERC ¶ 61,018 at P 201.

⁶ *South Carolina Electric and Gas Co.*, 111 FERC ¶ 61,410 (2005) (June 16 Order).

⁷ April 14 Order, 107 FERC ¶ 61,018 at P 201, 207-09.

5. SCE&G explained that, despite its expectation that the only balancing authority area sales it will make in the foreseeable future will be those under long-term contracts, its mitigation proposal covers SCE&G's balancing authority area sales of any duration. SCE&G stated that the only sales that would remain permissible under its market-based rate tariff would be those sales of capacity and/or energy that do not sink within the SCE&G balancing authority area. SCE&G stated that, if the Commission accepts its mitigation proposal, SCE&G would file revised tariff sheets.

6. On February 16, 2006, the Commission stated that it conditionally accepted "SCE&G's proposal to revise its tariff to prohibit wholesale sales by SCE&G within its control area, absent Commission approval for such sales," subject to SCE&G filing revised tariff sheets that reflect its mitigation proposal. The Commission found that SCE&G's proposal not to make sales within its balancing authority area under its market-based rate tariff adequately addressed SCE&G's failure of the market share screen in its balancing authority area.⁸ The Commission added that, as SCE&G stated, to the extent SCE&G seeks in the future to make sales in its balancing authority area, it will be required to demonstrate that a proposed transaction would comply with Commission pricing policy and give the Commission the opportunity at that time to review any such proposal to ensure that it is just and reasonable.

7. On April 12, 2006, pursuant to the Commission's February 16 Order, SCE&G submitted a revised version of its market-based rate tariff which includes a provision stating: "SCE&G shall have no authorization under this Tariff to make wholesale sales of capacity and/or energy to serve loads that sink within the balancing authority area operated by SCE&G, except to the extent that such sales are approved by the Federal Energy Regulatory Commission." SCE&G also revised its tariff to remove the Market Behavior Rules, in accordance with *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*.⁹

II. Notice of Filing

8. Notice of SCE&G's April 12, 2006 filing was published in the *Federal Register*, 71 Fed. Reg. 24,848, with comments, interventions, and protests due on or before May 3, 2006. None was filed.

⁸ *South Carolina Electric and Gas Co.*, 114 FERC ¶ 61,143 (2006) (February 16 Order).

⁹ 114 FERC ¶ 61,165 (2006).

III. Discussion

9. SCE&G's proposed tariff language states that SCE&G will not be authorized to make wholesale sales to serve loads that "sink" within the balancing authority area operated by SCE&G, except to the extent such sales are approved by the Commission. Because SCE&G's proposed tariff complies with the February 16 Order conditionally accepting SCE&G's proposal to revise its tariff, as discussed below, we will accept the tariff revisions with respect to the "sink" language, effective September 15, 2005, as requested, and terminate the section 206 proceeding instituted in Docket No. EL05-122-000. However, as we discuss below, and as discussed in our Order Clarifying Final Rule, which was issued on December 14, 2007,¹⁰ any tariff provisions which do not comport with those directed in Order No. 697 ceased to be effective on September 18, 2007, as provided by those orders.

10. In the Notice of Proposed Rulemaking resulting in Order No. 697, the Commission noted that some companies had proposed limiting mitigation to sales that "sink" in the mitigated market, so that mitigation would only apply to end users in the mitigated market.¹¹ However, the Commission also noted that, in *MidAmerican Energy Company*,¹² the Commission had stated that limiting mitigation to sales that "sink" in the mitigated market would improperly limit mitigation to certain sales, namely, only to sales to buyers that serve end-use customers in the mitigated market, while improperly allowing market-based rate sales within the mitigated market to entities that do not serve end-use customers in the mitigated market.¹³ The Commission stated that such a limitation would not sufficiently mitigate the seller's ability to attempt to exercise market power over sales in the mitigated market, and moreover was inconsistent with the Commission's direction in the April 14 and July 8 Orders. The Commission explained that, in the July 8 Order, the Commission had rejected the suggestion that mitigated sellers be restricted to selling power only to buyers serving end-use customers, and had since rejected tariff language that proposed to do so (albeit, not in this case).

¹⁰ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, 121 FERC ¶ 61,260 (2007) (Order Clarifying Final Rule).

¹¹ *See Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Notice of Proposed Rulemaking*, 71 Fed. Reg. 33,102 (June 7, 2006), FERC Stats. & Regs. ¶ 32,602 at P 148 (2006) (Order No. 697 NOPR).

¹² 114 FERC ¶ 61,280 at P 29-33 (2006).

¹³ *Id.* P 31.

Nevertheless, the Commission sought comment on whether it should modify its current policy that mitigation should not be limited to sales that “sink” in the mitigated market.¹⁴

11. In Order No. 697, the Commission concluded that adequately protecting customers from the potential exercise of market power required that it continue to apply mitigation to *all* sales in the balancing authority area in which a seller is found, or presumed, to have market power.¹⁵ In this regard, the Commission rejected proposals that it limit mitigation to sales that “sink” in the balancing authority area in which the seller is mitigated.¹⁶ The Commission noted that allowing a seller that has been found to have market power, or has so conceded, to make market-based rate sales in the very market in which market power is a concern is inconsistent with the Commission’s responsibility under the FPA to ensure that rates are just and reasonable and not unduly discriminatory or preferential.¹⁷ The Commission further stated that, while it generally agrees that it is desirable to allow market-based rate sales into markets where the seller has not been found to have market power, it does not agree that it is reasonable to allow a mitigated seller to make market-based rate sales *anywhere* within a balancing authority area in which the seller has been found to have market power, or has so conceded, as it is unrealistic to believe that such sales could be effectively monitored to ensure against improper sales.¹⁸ However, the Commission stated that it would allow mitigated sellers to make market-based rate sales at the metered boundary with a balancing authority area in which the seller has market-based rate authority under certain circumstances.¹⁹

¹⁴ See Order No. 697 NOPR, FERC Stats. & Regs. ¶ 32,602 at P 149.

¹⁵ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 817. Although the Commission used the term “mitigated market” in Order No. 697, we believe that “balancing authority area in which a seller is found, or presumed, to have market power” is a more accurate way to describe the area in which a seller is mitigated. Accordingly, we use that phrase herein.

¹⁶ *Id.* P 818.

¹⁷ *Id.* P 819.

¹⁸ *Id.* P 818-19.

¹⁹ Such sales will be allowed provided: (i) legal title of the power sold transfers at the metered boundary of the balancing authority area where the seller has market-based rate authority; (ii) any power sold is not intended to serve load in the seller’s mitigated market; and (iii) no affiliate of the mitigated seller will sell the same power back into the mitigated seller’s mitigated market. Seller must retain, for a period of five years from the

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12. Thus, our acceptance in the February 16 Order of SCE&G's mitigation proposal which focused on sales that do not "sink" within the balancing authority area was inconsistent with the April 14 and July 8 Orders and, therefore, in error. Nonetheless, because the proposed tariff language is consistent with the Commission's directive in the February 16 Order, we will accept it as being in compliance with the February 16 Order, and we will terminate the section 206 proceeding instituted in Docket No. EL05-122-000. However, because SCE&G's tariff language is not consistent with the Commission's current policy as set forth in Order No. 697,²⁰ as of the effective date of Order No. 697 (September 18, 2007), SCE&G is subject to the requirements of that Final Rule and thus may not limit its mitigation to sales that "sink" in the SCE&G balancing authority area.²¹ Accordingly, SCE&G is directed, within 30 days from the date of this order, to revise its market-based rate tariff in compliance with Order No. 697.²²

13. In addition, we will accept SCE&G's revised tariff sheets which remove the Commission's market behavior rules, effective February 27, 2006, in accordance with *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 114 FERC ¶ 61,165 (2006).

The Commission orders:

SCE&G's revised tariff sheets are hereby accepted, the section 206 proceeding instituted in Docket No. EL05-122-000 is hereby terminated, and SCE&G is directed,

date of the sale, all data and information related to the sale that demonstrates compliance with items (i), (ii) and (iii) above. *See id.* P 830.

²⁰ In its Order Clarifying Final Rule, which was issued on December 14, 2007, the Commission clarified that sellers are required to comply with all of the requirements of Order No. 697 as of the effective date of the Final Rule. Thus, any sales made after September 18, 2007 are expected to be in compliance with the requirements of Order No. 697. Order Clarifying Final Rule, 121 FERC ¶ 61,260.

²¹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 818-819. Based on SCE&G's statement that it currently makes (and historically has made) no sales with a duration of one week or less, or more than one week but less than one year in the SCE&G balancing authority area, our understanding is that SCE&G has not made any sales that would be subject to the mitigation provision.

²² *Id.* P 923-924.

within 30 days from the date of this order, to revise its market-based rate tariff, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.