122 FERC ¶ 61,175
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

LG&E Energy Marketing Inc.	Docket Nos. ER94-1188-038 ER94-1188-039 ER94-1188-040 ER94-1188-041 ER94-1188-043
Louisville Gas and Electric Company	ER98-4540-007 ER98-4540-008 ER98-4540-009 ER98-4540-010 ER98-4540-012
Kentucky Utilities Company	ER99-1623-007 ER99-1623-008 ER99-1623-009 ER99-1623-010 ER99-1623-012
Western Kentucky Energy Corporation	ER98-1279-009 ER98-1279-010 ER98-1279-011 ER98-1279-012 ER98-1279-014
LG&E Energy Marketing Inc., Louisville Gas and Electric Company, Kentucky Utilities Company, Western Kentucky Energy Corporation	EL05-99-000 EL05-99-002 EL05-99-003 EL05-99-004 ER06-1046-003

ORDER ON MARKET-BASED RATES AND TERMINATING SECTION 206 PROCEEDING

(Issued February 26, 2008)

1. This order addresses a number of filings made by the LG&E Parties[1] regarding their market-based rate authority. In particular, the Commission accepts the LG&E Parties' revised updated market power analysis for the LG&E Parties' first-tier markets studied.[2] The Commission also accepts the LG&E Parties' revised tariff language implementing its mitigation proposal for the Big Rivers balancing authority area for the period from the refund effective date in this proceeding, July 19, 2005, to the date of the LG&E Parties' withdrawal from the Midwest ISO, September 1, 2006.[3]

2. With regard to the LG&E Parties' mitigation for the LG&E/Kentucky Utilities balancing authority area and the Big Rivers balancing authority area for the period starting on the date of the LG&E Parties' withdrawal from the Midwest ISO, September 1, 2006, we accept the LG&E Parties' October 2, 2006 filing, as discussed below. We also accept the LG&E Parties' September 10, 2007 and September 24, 2007 filings revising their market-based rate tariffs to comply with the determinations made by the Commission in Order No. 697, including tariff revisions that incorporate the provision adopted in Order No. 697 concerning market-based rate sales at the metered boundary, to be effective September 18, 2007.

3. The Commission accepts the LG&E Parties' refund report for the Big Rivers balancing authority area for the period from the refund effective date in this proceeding, July 19, 2005, to the date of their withdrawal from the Midwest ISO, September 1, 2006.

4. The Commission also accepts the notice of change in status filed by the LG&E Parties.

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[1] The LG&E Parties include LG&E Energy Marketing, Inc. (LG&E Energy Marketing), Louisville Gas & Electric Company (LG&E), Kentucky Utilities Company (Kentucky Utilities), and Western Kentucky Energy Corporation (Western Kentucky Energy).

[2] These first-tier markets are Ohio Valley Electric Corporation (OVEC), Electric Energy, Inc. (EEInc), East Kentucky Power Cooperative (East Kentucky), Tennessee Valley Authority (TVA), Southern Company, and the Midwest Independent Transmission System Operator, Inc. (Midwest ISO).

[3] We note that the Commission adopted the use of "balancing authority area" instead of "control area" in *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 72 Fed. Reg. 39,904 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252 at P 250 (2007), *clarified*, 121 FERC ¶ 61,260 (2007) (Order Clarifying Final Rule).

Background

5. On December 1, 2005,[4] the Commission issued an order accepting the LG&E Parties' updated market power analysis for the Midwest ISO and Southern Company balancing authority areas. The Commission also conditionally accepted the LG&E Parties' mitigation proposal applicable to sales of electric energy at wholesale for transactions sinking in the Big Rivers balancing authority area. The purpose of this proposal was to overcome the presumption that the LG&E Parties possessed market power in the Big Rivers balancing authority area. The mitigation proposal for the Big rivers balancing authority area became effective as of the refund effective date in this proceeding, July 19, 2005, subject to the LG&E Parties: (i) making a compliance filing to revise their market-based rate tariffs so that all market-based rate energy sales by the LG&E Parties that sink in the Big Rivers balancing authority area not sold pursuant to existing agreements would be capped at the Midwest ISO's locational marginal price (LMP) at the Big Rivers interface; and (ii) making refunds and filing a refund report with the Commission. Additionally, the December 1 Order directed the LG&E Parties, to the extent that they wish to make sales of electric capacity into the Big Rivers balancing authority area, to make a filing with the Commission to that effect. The December 1 Order also accepted the LG&E Parties' revised tariff sheets incorporating the change in status reporting requirement, effective March 21, 2005.[5] Finally, Western Kentucky Energy was directed to revise its proposed tariff sheets to incorporate the market behavior rules.

6. On January 3, 2006, as amended on January 12, 2006, the LG&E Parties submitted a compliance filing in response to the Commission's December 1 Order. The LG&E Parties stated that the refund report and revised market-based rate tariff sheets implemented the mitigation measures which the Commission accepted in the December 1 Order. However, the LG&E Parties explained that they believe that mitigation of all market-based rate sales that sink in the Big Rivers balancing authority area may be overly restrictive. Thus they proposed to revise their mitigation proposal to apply the rate cap only to sales to non-affiliates of energy and capacity and associated energy with a point of source, point of delivery, and point of sink wholly within the Big Rivers balancing authority area (not a border location). With regard to capacity sales, the LG&E Parties' proposed tariff language stated that the market-based rate tariff does not apply to sales to non-affiliates of capacity (without associated energy) with a point of delivery wholly

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[4] *LG&E Energy Marketing, Inc.*, 113 FERC ¶ 61,229 (2005) (December 1 Order).

[5] *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

within the Big Rivers balancing authority area (not a border location). In addition, the LG&E Parties stated that they determined that no refunds were owed as a result of the mitigation measures.[6]

7. On February 15, 2006, the Director, Division of Tariffs and Market Development – West, acting pursuant to delegated authority, issued a delegated letter order rejecting the LG&E Parties' January 3, 2006 and January 12, 2006 filings, with the exception of the tariff revisions pertaining to the market behavior rules, as not complying with the Commission's December 1 Order. The delegated letter order directed the LG&E Parties to resubmit their filing in accordance with the December 1 Order.[7]

8. On January 30, 2006, also in response to the December 1 Order, the LG&E Parties filed an updated market power analysis to reflect the LG&E Parties' expected withdrawal from the Midwest ISO. This filing was partially superseded by the LG&E Parties' filings submitted on May 24, 2006, June 8, 2006 and June 21, 2006.[8] This updated market power analysis demonstrated that, in addition to continuing to fail the horizontal market power analysis in the Big Rivers balancing authority area, the LG&E Parties fail in the LG&E/Kentucky Utilities balancing authority area. Due to this new failure in the LG&E/Kentucky Utilities balancing authority area, the LG&E Parties proposed to expand their mitigation to apply a rate cap (the Midwest ISO's LMP at the LG&E/Kentucky Utilities interface) to sales to non-affiliates of energy and capacity and associated energy that have a point of source, point of delivery, and point of sink wholly within the LG&E/Kentucky Utilities balancing authority area (not a border location), to be effective on the date LG&E and Kentucky Utilities withdrew from the Midwest ISO. With regard to capacity sales, the LG&E Parties' proposed tariff language, to be effective on the date of withdrawal from the Midwest ISO, states that the market-based rate tariff does not apply to sales to non-affiliates of capacity (without associated energy) with a point of delivery wholly within the LG&E/Kentucky Utilities balancing authority area (not a border location), or at the border between the Big Rivers and LG&E/Kentucky

[6] The LG&E Parties further amended the market behavior rules to correct language in market behavior rule 2(b). *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003), *order on reh'g*, 107 FERC ¶ 61,175 (2004).

[7] *LG&E Energy Marketing, Inc.*, ER94-1188-037 (February 15, 2006) (unpublished letter order) (February 15 Order).

[8] As discussed below, the Commission accepted, pursuant to delegated authority, the LG&E Parties' filings submitted on May 24, 2006, June 8, 2006 and June 21, 2006. *LG&E Energy Marketing, Inc.*, ER06-1046-000 (July 6, 2006) (unpublished letter order) (July 6 Letter Order).

Utilities balancing authority areas, provided such location is not a border point to any other balancing authority area. The exemption from the rate cap of sales made pursuant to existing agreements is included in the proposed tariff.

9. Also in the January 30, 2006 filing, the LG&E Parties asserted that they pass the pivotal supplier screen and the wholesale market share screen in the OVEC, EEInc, East Kentucky, TVA, and Southern Company balancing authority areas and the Midwest ISO market.

10. On March 8, 2006, in response to the February 15 Order, the LG&E Parties submitted revised market-based rate tariff sheets, changing the language regarding mitigation for the Big Rivers balancing authority area, and removing the Commission's market behavior rules (March 8 Filing). The LG&E Parties' proposed tariff language applies the rate cap only to sales to non-affiliates of energy and capacity and associated energy with a point of sink wholly within the Big Rivers balancing authority area (not a border location). Additionally, the LG&E Parties filed a refund report in which certain refunds are owed to Big Rivers and Southern Indiana Gas & Electric Company (Southern Indiana) as a result of the mitigation measures set forth in the revised tariff sheets.

11. On April 13, 2006, the LG&E Parties filed a supplement to the March 8 Filing stating that, at the time of the March 8 Filing, the LG&E Parties had invoiced, but not yet received, payment for certain sales under their market-based rate tariffs during February 2006. Accordingly, the LG&E Parties stated, at the time, no refunds were due for such sales. However, since the date of that filing, the LG&E Parties have received payment for such sales and have determined that additional refunds are owed to Big Rivers and Southern Indiana Gas (should the Commission accept the tariff sheets filed by the LG&E Parties in the March 8 Filing).

12. On May 24, 2006, as supplemented on June 8, 2006 and June 21, 2006, the LG&E Parties filed revisions to their market-based rate tariffs to clarify the scope of their market-based rate authorizations post-exit from the Midwest ISO, to be effective on the date the LG&E Parties withdraw from the Midwest ISO. The LG&E Parties stated they chose to give up their market-based rate authority for sales with a point of delivery within the LG&E/Kentucky Utilities and the Big Rivers balancing authority areas. The LG&E Parties clarified that any sales made in the LG&E/Kentucky Utilities balancing authority area would be made pursuant to existing or new cost-based rate authorities, or pursuant to another mitigation mechanism filed with and approved by the Commission. The LG&E Parties stated that they intended that the filing be effective on an interim basis until they filed any changes necessary to comply with Order No. 697.[9]

[9] *See* LG&E Parties May 24, 2006 Filing.

13. The proposed tariff language in the May 24, 2006 filing allowed the LG&E Parties to make certain market-based rate sales in both their home balancing authority area and the Big Rivers balancing authority area, i.e., sales would be permitted at the balancing authority area interface border, provided that the power would not sink in a mitigated balancing authority area. The LG&E Parties stated that this is consistent with traditional patterns of sales in the market and that to not allow such sales would have a “chilling effect” on such patterns.

14. The Director, Division of Tariffs and Market Development – West issued an order on July 6, 2006 pursuant to delegated authority, accepting the LG&E Parties’ May 24, 2006 filing (and the subsequent supplements).[10] However, the approvals of the tariff language controlling sales to the interface of restricted balancing authority areas were conditioned on the LG&E Parties filing with the Commission to revise their market-based rate tariffs to comply with any future determinations the Commission were to make in the Order No. 697 proceeding.

15. On October 2, 2006, the LG&E Parties filed to inform the Commission of a change in status. Specifically, the LG&E Parties informed the Commission that, on September 1, 2006, LG&E and Kentucky Utilities withdrew from the Midwest ISO[11] and regained operational control of their respective transmission systems effective on that date. Thus, the LG&E Parties also filed to revise their market-based rate tariff sheets to reflect this effective date.

16. On September 10, 2007 and September 24, 2007, the LG&E Parties filed amendments to their respective market-based rate tariffs to comply with Order No. 697 and to incorporate additional changes to simplify their tariffs. LG&E Parties request that the Commission accept the amended tariffs to be effective September 18, 2007, the effective date of Order No. 697.

Notice of Filing and Responsive Pleadings

17. Notice of the LG&E Parties’ January 30, 2006 filing was published in the *Federal Register*, 71 Fed. Reg. 8,296 (2006), with interventions or protests due on or before February 21, 2006. Notice of the LG&E Parties’ March 8, 2006 filing was published in the *Federal Register*, 71 Fed. Reg. 14,195 (2006), with interventions or protests due on or before March 29, 2006. Notice of the LG&E Parties’ April 13, 2006 filing was published in the *Federal Register*, 71 Fed. Reg. 24,669 (2006), with interventions or protests due on or before April 21, 2006. Notice of the LG&E Parties’ October 2, 2006 filing was

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[10] July 6 Letter Order.

[11] *Louisville Gas & Electric Co.*, 114 FERC ¶ 61,282 (2006) (March 17 Order).

published in the *Federal Register*, 71 Fed. Reg. 60,503 (2006), with interventions or protests due on or before October 23, 2006. Notice of the LG&E Parties' September 10, 2007 filing was published in the *Federal Register*, 72 Fed. Reg. 54,254 (2007), with interventions or protests due on or before October 1, 2007. Notice of the LG&E Parties' September 24, 2007 filing was published in the *Federal Register*, 72 Fed. Reg. 57,548 (2007), with interventions or protests due on or before October 15, 2007. None was filed.

Discussion

Market-Based Rate Authorization

18. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. The Commission also considers whether there is evidence of affiliate abuse or reciprocal dealing.[12]

Horizontal Market Power

19. In the January 30, 2006 filing, pursuant to the December 1 Order, the LG&E Parties updated their horizontal market power analysis for the LG&E/Kentucky Utilities balancing authority area and first-tier markets to reflect the LG&E Parties' circumstances upon withdrawal from the Midwest ISO. In order to assess horizontal market power, the LG&E Parties prepared both the pivotal supplier and the wholesale market share screen analyses for their balancing authority area and first-tier markets.

20. The Commission has reviewed the LG&E Parties' pivotal supplier and the wholesale market share screens for the OVEC, EEInc, East Kentucky, TVA, and Southern Company balancing authority areas and Midwest ISO, and has determined that the LG&E Parties pass the screens for those markets. Accordingly, the Commission finds that the LG&E Parties satisfy the Commission's horizontal market power standard for the grant of market-based rate authority in those markets.

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[12] We note that the Commission has recently revised and codified in the Commission's regulations the standards pertaining to market-based rates. *See* Order No. 697, FERC Stats. & Regs. ¶ 31,252. Given the LG&E Parties filed its updated market power analysis prior to the effective date of Order No. 697, the Commission will examine the filing based on the market-based rate analysis in effect at that time. However, Applicant is reminded that it became subject to the requirements of Order No. 697 on September 18, 2007, the effective date of Order No. 697. *See, e.g., Progress Power Marketing, Inc.*, 76 FERC ¶ 61,155 at 61,919 (1996); *Northwest Power Marketing Co., L.L.C.*, 75 FERC ¶ 61,281 at 61,899 (1996); *accord Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223 at 62,062-63 (1994).

21. In their January 30, 2006 filing, the LG&E Parties also stated that their share of capacity in the Big Rivers balancing authority area and LG&E's balancing authority area exceeds 20 percent for each of the four seasons during the relevant time period. Consequently, the LG&E Parties fail the wholesale market share screen in those balancing authority areas upon their withdrawal from the Midwest ISO. The LG&E Parties' January 30, 2006 filing was partially superseded by their filings submitted on May 24, 2006, June 8, 2006 and June 21, 2006. The July 6 Letter Order accepted, subject to the outcome of Order No. 697, the LG&E Parties' mitigation for the period after they withdraw from the Midwest ISO. We address this below.

Vertical Market Power

22. In the January 30, 2006 filing, the LG&E Parties state that only LG&E and Kentucky Utilities own or control any transmission facilities, with the exception of certain limited interconnection facilities, which cannot be used by another party to effectuate a wholesale sale of electric energy. The LG&E Parties state that LG&E and Kentucky Utilities lack transmission market power and will continue to lack transmission market power following their exit from the Midwest ISO.[13] Further, we note that no intervenor has raised transmission market power concerns.

23. In the January 30, 2006 filing, the LG&E Parties state that they own and operate certain natural gas distribution facilities that are used almost exclusively to provide retail natural gas service to customers in central Kentucky. The LG&E Parties state further that the Commission's decision granting LG&E's request to charge market-based rates for storage service[14] demonstrates that the Commission is convinced that LG&E's ownership of natural gas facilities does not provide it with the ability to erect barriers to entry. The LG&E Parties further assert they are aware that, should LG&E or any other affiliates deny, delay, or require unreasonable terms, conditions, or rates for natural gas service to potential electric competitors of the LG&E Parties in bulk power markets, the Commission could suspend the LG&E Parties' authority (and that of other affiliates) to sell power at market-based rates.[15]

24. In addition, the LG&E Parties state that they are unable to erect other potential barriers to entry identified by the Commission in other proceedings. The LG&E Parties

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[13] Since the January 30, 2006 filing, the LG&E Parties' revised OATT was accepted. *See, E.ON U.S., LLC*, Docket No. ER06-20-006 (November 8, 2006) (unpublished letter order).

[14] *Louisville Gas & Electric Co.*, 99 FERC ¶ 62,040 (2002).

[15] *See, e.g., Louisville Gas & Elec. Co.*, 62 FERC ¶ 61,016 (1993).

state, in particular, that none of the LG&E Parties or any of their affiliates engage in the manufacture of electric equipment, or own or control resources that could impede potential competitors from gaining access to alternative generation suppliers. No intervenor has raised concerns regarding barriers to entry.

25. Based on the LG&E Parties' representation, the Commission finds that the LG&E Parties satisfy the Commission's vertical market power standard for the grant of market-based rate authority.

Affiliate Abuse

26. In the January 30, 2006 filing, the LG&E Parties state that they all have codes of conduct currently on file with the Commission as part of their market-based rate tariffs.[16] The LG&E Parties state that the market-based rate tariffs of LG&E Energy Marketing and Western Kentucky Energy prohibit sales under those tariffs to LG&E and Kentucky Utilities, the only affiliates of the LG&E Parties with captive electric customers. The LG&E Parties state further that the joint market-based rate tariff of LG&E and Kentucky Utilities prohibits sales under that tariff to any affiliates except LG&E Energy Marketing and Western Kentucky Energy.[17] No intervenor has raised concerns regarding affiliate abuse.

27. Based on the LG&E Parties' representation, the Commission finds that the LG&E Parties satisfy the Commission's concerns with regard to affiliate abuse.

Mitigation

Pre-Withdrawal from the Midwest ISO

28. In the December 1 Order, the Commission accepted the LG&E Parties' mitigation proposal and directed them to file revised market-based rate tariffs reflecting this

[16] We note that in Order No. 697 the Commission codified as part of the affiliate restrictions the requirements that previously have been known as the market-based rate "code of conduct" (governing the separation of functions, the sharing of market information, sales of non-power goods or services, and power brokering), as clarified and modified.

[17] This exception to the Commission's general prohibition on affiliate sales at market-based rates was accepted by the Commission in *LG&E Operating Cos.*, Docket No. ER99-1623-000 (June 4, 1999) (unpublished letter order). *See also Detroit Edison Co.*, 80 FERC ¶ 61,348 (1997); *Tucson Electric Power Co.*, 82 FERC ¶ 61,141 at 61,525 (1998).

proposal. (As described above, the LG&E Parties had proposed that all market-based rate energy sales by the LG&E Parties with a point of sink in the Big Rivers balancing authority area not made pursuant to existing agreements will be capped at the Midwest ISO's LMP at the Big Rivers interface.) The Commission further directed the LG&E Parties, to the extent that the LG&E Parties wish to make sales of capacity into the Big Rivers balancing authority area, to make a filing with the Commission to that effect.

29. In their March 8 Filing submitted in compliance with the December 1 Order and the February 15 Order, the LG&E Parties proposed tariff language that applies the rate cap only to sales to non-affiliates of energy and capacity and associated energy, with a point of sink wholly within the Big Rivers balancing authority area (not a border location). The LG&E Parties state that such mitigation will apply only to sales by the LG&E Parties to a buyer who is located in, and is expected to use the energy within, the Big Rivers balancing authority area, or where the LG&E Parties otherwise know that the energy sinks in the Big Rivers balancing authority area. Furthermore, the LG&E Parties state that this tariff does not apply to sales to non-affiliates of capacity (without associated energy) with a point of delivery wholly within the Big Rivers balancing authority area (not a border location). This mitigation would be effective as of the refund effective date in this proceeding, July 19, 2005.

30. With regard to the proposed tariff language regarding sales that "sink" within the Big Rivers balancing authority area, we note that in the Notice of Proposed Rulemaking (NOPR) 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.[18] However, the Commission also noted that 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.[19] The Commission stated that such a limitation would not mitigate the seller's ability to attempt to exercise market power over sales in the mitigated market and was inconsistent with the Commission's direction in the April 14 and July 8 Orders.[20] The Commission explained that, in the

[18] *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).

[19] Order No. 697 NOPR, FERC Stats. & Regs. ¶ 32,602 at P 148.

[20] *AEP Power Marketing*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

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 has since rejected tariff language that proposes to do so (albeit, not in this case). 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.[21]

31. 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.[22] 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.[23] 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.[24] 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.[25] However, the Commission stated that it would allow mitigated sellers to make market-based rate sales within a mitigated balancing authority area at the metered boundary with a balancing authority area in which the seller has market-based rate authority under certain circumstances.

32. Thus, our acceptance in the December 1 Order of the LG&E Parties' mitigation proposal concerning sales that sink in the Big Rivers balancing authority area was

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[21] *See id*. P 149.

[22] 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.

[23] *Id*. P 818.

[24] *Id*. P 819.

[25] *Id*. P 818-19.

inconsistent with the April 14 and July 8 Orders and, therefore, in error. Nonetheless, because LG&E Parties' proposed tariff language in the March 8 Filing is consistent with the directives of the December 1 Order, we will accept it as being in compliance with the December 1 Order.[26] Additionally, as we discuss below, we note that the LG&E Parties' September 10, 2007 compliance filing incorporates the tariff provision adopted in Order No. 697 concerning market-based rate sales at the metered boundary.[27]

Post-Withdrawal from the Midwest ISO

33. On October 2, 2006, the LG&E Parties filed to inform the Commission of a change in status. Specifically, the LG&E Parties informed the Commission that, on September 1, 2006, LG&E and Kentucky Utilities withdrew from the Midwest ISO[28] and regained operational control of their respective transmission systems effective on that date. Thus, the LG&E Parties also filed to revise their market-based rate tariff sheets to reflect this effective date. Because the LG&E Parties' October 2, 2006 filing complies with the Commission's directive in the July 6 Letter Order that the LG&E Parties file tariff sheets reflecting the actual date of withdrawal,[29] we will accept the LG&E Parties'

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[26] LG&E Energy Marketing, Rate Schedule FERC No. 1, Replacement Substitute Second Revised Sheet No. 1 (superseding Substitute Second Revised Sheet No. 1), Second Revised Sheet No. 2 (superseding First Revised Sheet No. 2), First Revised Sheet No. 3 (superseding Original Sheet No. 3); LG&E/Kentucky Utilities, First Revised Volume No. 3, First Revised Sheet No. 3 (superseding Original Sheet No. 3), First Revised Sheet Nos. 9-10 (superseding Original Sheet Nos. 9-10); LG&E/Kentucky Utilities, FERC Electric Tariff, First Revised Volume No. 2, First Revised Sheet No. 2 (superseding Original Sheet No. 2), First Revised Sheet Nos. 17-18 (superseding Original Sheet Nos. 17-18); Western Kentucky Energy, Rate Schedule FERC No. 1, Substitute Second Revised Sheet No. 1 (superseding Second Revised Sheet No. 1), Second Revised Sheet No. 3 (superseding First Revised Sheet No. 3), First Revised Sheet No. 4 (superseding Original Sheet No. 4).

[27] In its Order Clarifying Final Rule, 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 at P 8.

[28] *See* March 17 Order.

[29] July 6 Letter Order at 3.

tariff language for the period beginning on the date of the LG&E Parties' withdrawal from the Midwest ISO, September 1, 2006, for sales in the LG&E/Kentucky Utilities and the Big Rivers balancing authority areas.[30]

34. In their January 30, 2006 updated market power analysis reflecting the LG&E Parties' expected withdrawal from the Midwest ISO, the LG&E Parties stated that their share of capacity in the Big Rivers balancing authority area and their home balancing authority area exceeds 20 percent for each of the four seasons during the relevant time period. Consequently, the LG&E Parties fail the wholesale market share screen in those balancing authority areas upon their withdrawal from the Midwest ISO. The LG&E Parties included a mitigation proposal and tariff revisions that reflect their proposed mitigation for the period after their withdrawal from the Midwest ISO.

35. On May 24, 2006, as supplemented on June 8, 2006 and June 21, 2006, the LG&E Parties filed revisions to their market-based rate tariffs that "replace[d] those tariff sheets submitted January 30, 2006."[31] The revised tariff sheets clarify the scope of their market-based rate authorizations post-exit from the Midwest ISO, to be effective on the date the LG&E Parties withdrew from the Midwest ISO. The LG&E Parties also stated that they

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[30] LG&E Energy Marketing, Rate Schedule FERC No. 1, Substitute Third Revised Sheet No. 1 (superseding Third Revised Sheet No. 1), Substitute First Revised Sheet No. 1A (superseding First Revised Sheet No. 1A), Second Revised Sheet No. 2 (superseding First Revised Sheet No. 2), First Revised Sheet No. 3 (superseding Original Sheet No. 3); LG&E/Kentucky Utilities, First Revised Volume No. 3, Original Sheet No. 1, Substitute First Revised Sheet No. 2 (superseding First Revised Sheet No. 2), Substitute Original Sheet No. 2A (superseding Original Sheet No. 2A), Substitute First Revised Sheet No. 3 (superseding First Revised Sheet No. 3), Original Sheet No. 4, Substitute Original Sheet No. 4A (superseding Original Sheet No. 4A), Original Sheet Nos. 5-8, First Revised Sheet Nos. 9-10 (superseding Original Sheet Nos. 9-10); LG&E/Kentucky Utilities, FERC Electric Tariff, First Revised Volume No. 2, Substitute First Revised Sheet No. 1 (superseding First Revised Sheet No. 1), Substitute Original Sheet No. 1A (superseding Original Sheet No. 1A), First Revised Sheet No. 2 (superseding Original Sheet No. 2), Original Sheet Nos. 3-8, Substitute Original Sheet No. 8A (superseding Original Sheet No. 8A), Original Sheet Nos. 9-16, First Revised Sheet Nos. 17-18 (superseding Original Sheet Nos. 17-18); Western Kentucky Energy, Rate Schedule FERC No. 1, Substitute Third Revised Sheet No. 1 (superseding Third Revised Sheet No. 1), Substitute First Revised Sheet No. 1A (superseding First Revised Sheet No. 1A), Original Sheet No. 2, Second Revised Sheet No. 3 (superseding First Revised Sheet No. 3), First Revised Sheet No. 4 (superseding Original Sheet No. 4).

[31] LG&E Parties, May 24, 2006 Filing at 6.

chose to relinquish their market-based rate authority for sales with a point of delivery within the LG&E/Kentucky Utilities and the Big Rivers balancing authority areas. The LG&E Parties clarified that any sales made in these balancing authority areas would be made pursuant to existing or new cost-based rate authorities, or pursuant to another mitigation mechanism filed with and approved by the Commission. Additionally, the LG&E Parties stated that they intended that the filing be effective on an interim basis until they file any changes necessary to comply with Order No. 697.[32] The July 6 Letter Order accepted these revisions subject to the outcome of Order No. 697 and conditioned its approval of the tariff language controlling sales to the interface of restricted balancing authority areas on "the LG&E Parties filing with the Commission to revise their market-based rate tariffs to comply with any determinations the Commission makes on this issue in a Final Rule in the pending Docket No. RM04-7-000 proceeding where this issue is being considered generically."[33]

36. In Order No. 697, the Commission determined that it would allow mitigated sellers to make market-based rate sales within a mitigated balancing authority area at the metered boundary with a balancing authority area in which the seller has market-based rate authority subject to the conditions set forth in Order No. 697 and the adoption of the required tariff provision.[34] The LG&E Parties' September 10, 2007 filing incorporates changes to their respective market-based rate tariffs to comply with Order No. 697, including tariff revisions that incorporate the tariff provision adopted in Order No. 697 concerning market-based rate sales at the metered boundary. We will accept the LG&E Parties' revisions to their market-based rate tariffs in their September 10, 2007 filing as in compliance with Order No. 697, to be effective September 18, 2007.[35]

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[32] *See id*.

[33] July 6 Letter Order at P 2.

[34] 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 date of the sale, all data and information related to the sale that demonstrates compliance with items (i), (ii) and (iii) above. Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 830. The required tariff provision need not also be effective September 18, 2007, and may be effective as of the date that the market-based rate seller commences making market-based rate sales at the metered boundary.

[35] LG&E Energy Marketing, First Revised Rate Schedule FERC No. 1, Original Sheet Nos. 1-2; LG&E/Kentucky Utilities, FERC Electric Tariff, Second Revised

(continued...)

37. On September 24, 2007, the LG&E Parties filed revised market-based rate tariff sheets for LG&E and Kentucky Utilities, correcting the inadvertent failure in the September 10, 2007 filing to list in its revised tariff specific affiliate sales authority already approved by the Commission.[36] We will accept these revised tariff sheets, to be effective September 18, 2007.[37]

Refund Report

38. On March 8, 2006, as supplemented on April 13, 2006, the LG&E Parties filed a refund report in which they state that they "have determined that certain refunds are owed to [Big Rivers] and Southern Indiana Gas & Electric Company … as a result of the mitigation measures set forth in the Revised Tariff Sheets" for the period from the refund effective date in this proceeding to the date of their withdrawal from the Midwest ISO.[38] We will accept the LG&E Parties' refund report.

Market Behavior Rules

39. As stated above, in the March 8, 2006 filing (and subsequently included in the October 2, 2006 filing) the LG&E Parties filed revised market-based rate tariff sheets, pursuant to Order No. 674,[39] removing the market behavior rules from the LG&E Parties' market-based rate tariffs. The Commission will accept these revised tariff sheets effective February 27, 2006, as requested.

Volume No. 3, Original Sheet Nos. 1-2; LG&E/Kentucky Utilities Company, FERC Electric Tariff, Second Revised Volume No. 2, Original Sheet Nos.1-13; Western Kentucky Energy, First Revised Rate Schedule FERC No. 1, Original Sheet Nos. 1-2.

[36] In particular, LG&E Parties revised the market-based rate tariff of LG&E and Kentucky Utilities to identify the order granting LG&E and Kentucky Utilities authority to make market-based rate sales to their affiliates LG&E Energy Marketing and Western Kentucky Energy Corporation and the conditions of that authorization.

[37] LG&E/Kentucky Utilities, Second Revised Volume No. 3, Substitute Original Sheet No. 2 (superseding Original Sheet No. 2); LG&E/Kentucky Utilities, FERC Electric Tariff, Second Revised Volume No. 2, Substitute Original Sheet No. 7 (superseding Original Sheet No. 7).

[38] *See* the LG&E Parties March 8, 2006 Filing at 3.

[39] *Conditions for Public Utility Market-Based Rate Authorization Holders*, Order No. 674, FERC Stats. & Regs. ¶ 31,208, 114 FERC ¶ 61,163 (2006).

Docket No. EL05-99-000

40. The Commission terminates Docket No. EL05-99-000. That proceeding was established to investigate horizontal market power issues in the Big Rivers balancing authority area. Based on the above findings, the Commission finds that there is no need for further investigation in this docket.

The Commission orders:

(A) The LG&E Parties' March 8 Filing revising tariff language regarding mitigation for the Big Rivers balancing authority area for the period from the refund effective date in this proceeding, July 19, 2005, to the date of withdrawal from the Midwest ISO, September 1, 2006, is hereby accepted, as discussed in the body of this order.

(B) The LG&E Parties' notice of change in status is hereby accepted for filing.

(C) The LG&E Parties' October 2, 2006 filing revising their market-based rate tariffs to reflect the date on which the LG&E Parties withdrew from the Midwest ISO is hereby accepted for filing, effective September 1, 2006.

(D) The LG&E Parties' September 10, 2007 and September 24, 2007 filings revising their market-based rate tariffs to comply with the determinations made by the Commission in Order No. 697, including tariff revisions that incorporate the provision adopted in Order No. 697 concerning market-based rate sales at the metered boundary, are hereby accepted, effective September 18, 2007, as discussed in the body of this order.

(E) The LG&E Parties' refund report for the period from the refund effective date in this proceeding, July 19, 2005, to the date of withdrawal from the Midwest ISO, September 1, 2006, is hereby accepted for filing, as discussed in the body of this order.

(F) The LG&E Parties' updated market power analyses, submitted on January 30, 2006, for the OVEC, EEInc, East Kentucky, TVA, Southern Company and Midwest ISO balancing authority areas and markets are hereby accepted for filing, as discussed in the body of this order.

(G) The LG&E Parties' revised tariff sheets removing the market behavior rules are hereby accepted, effective February 27, 2006.

(H) The section 206 proceeding in Docket No. EL05-99-000 is hereby terminated.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.