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## Missouri Public Service Commission

Respond Data RequestMissouri Public  
Service Commission

<b>Data Request No.</b>	0229
<b>Company Name</b>	Empire District Electric Company, The-Investor(Electric)
<b>Case/Tracking No.</b>	ER-2006-0315
<b>Date Requested</b>	4/25/2006
<b>Issue</b>	General Information and Miscellaneous - Other General Info & Misc.
<b>Requested From</b>	Angela M Cloven
<b>Requested By</b>	Dana Eaves
<b>Brief Description</b>	Transmission Constraints
<b>Description</b>	For the period Jan. 2005 to current, has Empire experienced any transmission constraints on its own or other systems that have impacted its ability to make: a) off-system sales to other utilities and power-serving entities that would have otherwise been made; or b) to receive purchased power from other utilities and power-serving entities that would have otherwise been received? (If "yes") Please provide the details for each such situation (location and length of the constraint, etc.), including a quantification of the financial impact of the transmission constraint upon Empire.
<b>Response</b>	Supplemental response provided by: Scott Keith – Attached is the recent August 15, 2006 FERC Order that will reduce Empire's profit on Off-System Sales since May 2005. In addition Empire has attached its motion for an extension of time to pay refunds.
<b>Objections</b>	NA

The attached information provided to **Missouri Public Service Commission** Staff in response to the above data information request is accurate and complete, and contains no material misrepresentations or omissions, based upon present facts of which the undersigned has knowledge, information or belief. The undersigned agrees to immediately inform the **Missouri Public Service Commission** if, during the pendency of Case No. **ER-2006-0315** before the Commission, any matters are discovered which would materially affect the accuracy or completeness of the attached information. If these data are voluminous, please (1) identify the relevant documents and their location (2) make arrangements with requestor to have documents available for inspection in the **Empire District Electric Company, The-Investor(Electric)** office, or other location mutually agreeable. Where identification of a document is requested, briefly describe the document (e.g. book, letter, memorandum, report) and state the following information as applicable for the particular document: name, title number, author, date of publication and publisher, addresses, date written, and the name and address of the person(s) having possession of the document. As used in this data request the term "document(s)" includes publication of any format, workpapers, letters, memoranda, notes, reports, analyses, computer analyses, test results, studies or data, recordings, transcriptions and printed, typed or written materials of every kind in your possession, custody or control or within your knowledge. The pronoun "you" or "your" refers to **Empire District Electric Company, The-Investor(Electric)** and its employees, contractors, agents or others employed by or acting in its behalf.

**Security :** Public  
**Rationale :** NA

*Empire* **Exhibit No.** 139  
**Case No(s).** ER-2006-0315  
**Date** 9-13-06 **Rptr** KE

**With Proprietary and Highly Confidential Data Requests a Protective Order must be on file.**

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

The Empire District Electric Company        )	Docket Nos.  ER99-1757-008
	ER99-1757-009
	ER99-1757-010
	EL05-67-000

**MOTION FOR EXTENSION OF TIME OF  
THE EMPIRE DISTRICT ELECTRIC COMPANY  
AND REQUEST FOR EXPEDITED TREATMENT**

Pursuant to Rule 212 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission"), 18 C.F.R. § 385.212 (2006), The Empire District Electric Company ("Empire") respectfully submits this motion for an extension of time to pay the required refunds, and submit a refund report, pursuant to the Commission's Order on Proposed Mitigation Measures and Compliance Filings, issued August 15, 2006, in this proceeding, 116 FERC ¶ 61,150 ("Order on Proposed Mitigation").

As discussed in more detail below, Empire requests an extension of 15 days after the Commission issues its order on requests for rehearing filed in this proceeding for Empire to make refunds that may result in this proceeding. Empire respectfully requests expedited consideration of this motion, in light of the September 14, 2006 deadline for submitting refunds pursuant to the Order on Proposed Mitigation. In further support, Empire shows as follows:

## **I. COMMUNICATION**

The names, titles and mailing addresses of the persons who should be served with communications concerning this filing are:

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## **II. DESCRIPTION**

Based in Joplin, Missouri, Empire is a small investor-owned utility operating within the Southwest Power Pool, Inc. ("SPP") regional transmission organization ("RTO") market area. Empire has approximately 1,100 MW of generation and provides electric service to approximately 162,000 retail customers in southwest Missouri, southeast Kansas, northeast Oklahoma, and northwest Arkansas, as well as four wholesale requirements customers in its service area. Empire's load reached an all-time peak of 1,159 MW on July 19, 2006. Empire is a public utility company regulated by the Missouri Public Service Commission, the Kansas Corporation Commission, the Oklahoma Corporation Commission, the Arkansas Public Service Commission, and the Federal Energy Regulatory Commission.

Empire is a transmission owning member of the SPP, and currently receives regional reliability coordination, open access transmission administration, and transmission services for Empire's retail and wholesale electric customers from the SPP.

### III. BACKGROUND

On September 27, 2004, and September 28, 2004, as amended on December 15, 2004 in response to a staff deficiency letter, Empire submitted for filing updated market power analyses in compliance with the Commission's April 14 Order and July 8 Order.<sup>1</sup> No comments, interventions, or protests were filed.

On March 3, 2005, the Commission issued an order finding that Empire satisfies the Commission's generation market power standard for market-based rate authority in Empire's first-tier control areas, but did not satisfy the generation market power standard for market-based rate authority in Empire's home control area in the SPP. *The Empire District Electric Company*, 110 FERC ¶ 61,214, at P 20 (2005) ("Market Power Order"). Accordingly, the Commission instituted a section 206 proceeding and directed Empire, within 60 days of the issuance of the Market Power Order, to: "(1) file a Delivered Price Test analysis; (2) file a mitigation proposal tailored to its particular circumstances that would eliminate the ability to exercise market power; or (3) inform the Commission that it will adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates." *Id.* at P 22.

On May 2, 2005, as amended on January 9, 2006 in response to a staff deficiency letter, Empire filed a mitigation proposal tailored to Empire's particular circumstances that will eliminate Empire's ability to exercise market power within Empire's control area in the SPP. Among other things, Empire amended its tariff to prohibit wholesale

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<sup>1</sup> *AEP Power Marketing, Inc., et al.*, 107 FERC ¶ 61,108 ("April 14 Order"), *order on reh'g*, 108 FERC ¶ 61,026 (2004) ("July 8 Order").

sales at market-based rates for transactions that sink in its control area, where the Commission found a presumption of market power. The proposed tariff permitted Empire to make sales at market-based rates that sink in control areas outside of Empire's.

Empire believed that the "sink test" fully mitigated any market power concerns. Empire does not make any short term wholesale sales that ultimately sink in its control area, nor does Empire have any opportunity to make such wholesale sales. There are only five wholesale customers in the Empire control area. Four of these customers take Commission-approved full requirements service at cost-based rates from Empire. Empire understands that the remaining customer, KEPCO, obtains its full requirements (approximately 5 MW) from Westar Energy, Inc.

Empire generally is a net buyer of short term wholesale power. To the extent Empire sells short term wholesale power, it normally does so pursuant to its market-based rate tariff at its generation buses (point of sale) to buyers who export the power outside of Empire's control area, where the power ultimately sinks in control areas in which the Commission has found Empire does not have market power.

Like Empire, numerous other market-based sellers proposed the "sink test." Initially, the Commission accepted those proposals. *See, e.g., Duke Power*, 113 FERC ¶ 61,192 (2005); *AEP Power Marketing, Inc.*, 112 FERC ¶ 61,320 (2005); *LG&E Energy Marketing Inc.*, 113 FERC ¶ 61,229 (2005); *South Carolina Electric and Gas Co.*, 114 FERC ¶ 61,143 (2006); *Florida Power Corp.*, 113 FERC ¶ 61,131 (2005); *Carolina Power & Light Co.*, 113 FERC ¶ 61,130 (2005).

However, on March 17, 2006, the Commission changed course. *See MidAmerican Energy Company*, 114 FERC ¶ 61,280 (2006) ("*MidAmerican*"). In a series of

orders, the Commission stopped approving tariff language using the “sink test,” requiring instead a point of sale test -- *i.e.*, no sales can be made at market-based rates in a mitigated control area, including those that sink outside the mitigated control area in control areas where the Commission has found the seller has no market power. *See MidAmerican; Oklahoma Gas and Electric Co.*, 114 FERC ¶ 61,297 (2006) (“*OGE*”); and *Carolina Power and Light Co.*, 114 FERC ¶ 61,294 (2006) (“*CP&L I*”).<sup>2</sup> The *OG&E* and *MidAmerican* orders are pending rehearing.

On May 19, 2006, in Docket RM04-7, the Commission issued a notice of proposed rulemaking to examine its policies regarding market-based rates. *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, 115 FERC ¶ 61,210 (2006) (“*MBR NOPR*”). The Commission included in the *MBR NOPR* the issue of whether it should apply a sink or point of sale test for mitigating market-based rate sales. *Id.* at PP 147-149.

On August 15, 2006, approximately 15 months from when Empire made its mitigation compliance filing, the Commission issued its Order on Proposed Mitigation, accepting Empire’s proposed mitigation to become effective May 16, 2005, subject to compliance filings directed in the Order. The Commission, relying on orders issued since March 17, 2006 in other proceedings, rejected Empire’s tariff language proposing the ultimate “sink test.” Order on Proposed Mitigation at PP 15-18. The Commission directed Empire to file revisions to its market-based tariff to “provide that service under the tariff applies only to sales outside the Empire control area.” *Id.* at P 18. The Order on Proposed

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<sup>2</sup> The Commission took the unusual step of “clarifying” this in a compliance filing where no party had raised the issue. *CP&L II* at P 9. Notably, refunds in the *CP&L* docket totaled only \$5,035.02.

Mitigation also directed Empire to make refunds, with interest, within 30 days of the date of issuance of the order, "to the extent that Empire made any sales under Empire's market-based rate tariff in the Empire control area since the refund effective date [*i.e.*, May 16, 2005] in this proceeding at rates that were above the rates under the mitigation proposal accepted...." *Id.* at P 23.

Empire intends to file a timely request for rehearing of the Order on Proposed Mitigation.

#### **IV. REQUEST FOR EXTENSION OF TIME**

Empire respectfully requests an extension until 15 days after the Commission rules on its request for rehearing in this proceeding for Empire to make refunds.

The Commission has granted extensions of time to make refunds pending rehearing when Commission action on the issues raised on rehearing may affect refunds, making refunds would be burdensome, or there is assurance that funds are available for refunds. *See, e.g., Cranberry Pipeline Corp.*, Notice of Extension of Time, Docket No. PR04-6-001, issued Oct. 6, 2005 (granting request for extension of time to make refunds pending resolution of issues raised on rehearing); *Panhandle Eastern Pipe Line Co.*, 107 FERC ¶ 61,319 (2004) (granting extension of time to make refunds when refunds due were in an escrow account); *ISO New England, Inc.*, 94 FERC ¶ 61,015 (2001) (granting stay of order regarding billing until the Commission acts on pending requests on rehearing, which, if successful, would require extensive refunds and surcharges). Each of these factors is present here.

First, Commission action on rehearing may affect the need to pay refunds in the first place. Whether Empire must pay refunds depends on whether the sink or point of



sale test applies. The outcome of this issue is not certain. Initially, the Commission approved numerous tariff provisions proposed by market-based rate sellers providing for the sink test. This included AEP's mitigation proposal and settlement in the very docket in which the Commission announced its new interim market power screens. *See AEP*, 112 FERC ¶ 61,320 (2005) (dismissing rehearing requests as moot because of the utility's commitment to mitigate sales "that sink within AEP-SPP and setting cost-based rate issues for hearing), and 114 FERC ¶ 61,025 (2006) (letter order accepting settlement regarding cost-based rate issues). Empire followed the example of AEP and others in proposing its tariff language. Empire is aware of at least six orders, *see supra* p. 4, in which FERC has approved the sink test.

However, on March 17, 2006, the Commission began to apply a point of sale test. *See MidAmerican, OGE, and CP&L II*. The *OG&E* and *MidAmerican* orders are pending rehearing on the point of sale test. The Commission also applied this test in its order on Empire's filing, and Empire intends to request rehearing as well. In addition, the Commission has initiated an industry-wide rulemaking that requests comment on whether the point of sale test is appropriate. Under these circumstances, Empire may not have a refund obligation if the Commission grants rehearing or changes its policy in the rulemaking proceeding.

Second, making refunds now, before rehearing, will be burdensome. The anticipated refund liability is substantial -- approximately \$600,000.00 -- for a small company like Empire.<sup>3</sup> The refunds would apply to thousands of short-term market-based rate sales by Empire at its generation buses to numerous buyers who exported the power

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<sup>3</sup> Empire is still in the process of determining the exact amount of refunds.

outside of Empire's control area to control areas in which the power ultimately sunk and in which the Commission has found Empire does not have market power. It will be expensive and administratively difficult for Empire to provide refunds for these transactions now, and then have to go through the additional difficulty and expense of notifying and surcharging customers if the Commission grants rehearing.

Finally, Empire is taking steps to ensure that any refund amount ultimately due will be available for payment to all affected customers. Consistent with *Panhandle*, Empire could place the refund amount for sales during the refund period in an interest bearing escrow account, if so required by the Commission, thereby assuring payment of refunds, to the extent they are necessary. *Panhandle*, 107 FERC at P 9.

Accordingly, for the foregoing reasons, Empire respectfully request an extension of time to make refunds, as necessary, until 15 days after the Commission's order on Empire's request for rehearing.

#### **V. REQUEST FOR EXPEDITED TREATMENT**

The Order on Proposed Mitigation directed Empire to make refunds within thirty (30) days after the issuance of the Order, *i.e.*, September 14, 2006. Empire respectfully requests expedited Commission action on this Motion for Extension of Time in order for Empire to have certainty with respect to Empire's obligations under the Order.

**VI. CONCLUSION**

**WHEREFORE**, for the foregoing reasons, Empire respectfully requests that the Commission expeditiously grant this request for an extension of time to pay refunds until 15 days after the Commission issues its order on rehearing in this proceeding.

Respectfully submitted,

*/s/ Margaret H. Claybour*

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ATTORNEYS FOR  
THE EMPIRE DISTRICT ELECTRIC COMPANY

Dated: August 25, 2006

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding, in accordance with Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2005).

Dated at Washington, D.C., this 25<sup>th</sup> day of August, 2006.

*/s/ Margaret H. Claybour*

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Margaret H. Claybour

116 FERC ¶61,150  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

The Empire District Electric Company

Docket Nos. ER99-1757-008  
ER99-1757-009  
ER99-1757-010  
EL05-67-000

ORDER ON PROPOSED MITIGATION MEASURES AND COMPLIANCE FILINGS

(Issued August 15, 2006)

1. In this order, the Commission conditionally accepts for filing The Empire District Electric Company's (Empire) mitigation proposal applicable to sales of electric power at wholesale for transactions in its home control area (Empire control area) to become effective May 16, 2005, the refund effective date in this proceeding, subject to Commission acceptance of the compliance filings directed herein.
2. Also in this order, the Commission accepts Empire's revised market-based rate tariff sheets which incorporate the Commission's change in status reporting requirement<sup>1</sup> and a revised tariff sheet prohibiting Empire from making market-based rate power sales to any public utility affiliate without first receiving Commission authorization pursuant to section 205 of the Federal Power Act (FPA).<sup>2</sup>

**Background**

3. On May 13, 2004,<sup>3</sup> the Commission addressed the procedures for implementing the generation market power screens announced on April 14, 2004 and clarified on July 8, 2004.<sup>4</sup> On September 27, 2004, and September 28, 2004, as amended on December

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<sup>1</sup> *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175 (2005) (Order No. 652).

<sup>2</sup> 16 U.S.C. § 824d (2000).

<sup>3</sup> *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004) (May 13 Order).

<sup>4</sup> *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 at P 151-55 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

15, 2005, Empire submitted its updated market power analysis in compliance with the May 13 Order. In its order issued March 3, 2005,<sup>5</sup> the Commission found that Empire failed the wholesale market share screen for each of the four seasons considered in Empire's control area. As we 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 under section 206 and establishes a rebuttable presumption of market power in the resulting section 206 proceeding.<sup>6</sup>

4. In the March 3, 2005 Order, the Commission instituted a proceeding under section 206 of the FPA<sup>7</sup> to investigate generation market power in the Empire control area, and to determine whether Empire may continue to charge market-based rates within the Empire control area. The Commission also established a refund effective date pursuant to the provisions of section 206.

5. In the March 3, 2005 Order, the Commission directed Empire to either: (1) file a Delivered Price Test analysis; (2) file a mitigation proposal tailored to its particular circumstances that would eliminate the ability to exercise market power; or (3) inform the Commission that it will adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates. The Commission also directed Empire to revise section 5 of its market-based rate tariff to include a statement that Empire will not make any sales to affiliates without first receiving Commission authorization of the transaction under section 205 of the FPA and to incorporate the change in status reporting requirement adopted in Order No. 652.

6. On March 31, 2005, Empire filed revised tariff sheets to reflect: (1) a revision to include language regarding first receiving authority from the Commission pursuant to section 205 of FPA before Empire engages in any affiliate transactions under its tariff, and (2) inclusion of the change in status reporting requirement adopted in Order No. 652.

7. On May 2, 2005, Empire submitted a mitigation proposal that Empire states will eliminate its ability to exercise market power within its control area. Empire proposes to amend its market-based rate tariff to prohibit sales that sink in Empire's control area. Specifically, Empire proposes to amend section 3 of its market-based rate tariff to provide that no Mitigated Sales shall be made under this tariff. The term "Mitigated Sales" is defined in the tariff as "physical sales of power and/or energy that sink in the control area presently operated by Empire within Southwest Power Pool, Inc. (SPP)."<sup>8</sup>

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<sup>5</sup> *The Empire District Electric Company*, 110 FERC ¶ 61,214 (2005) (March 3, 2005 Order).

<sup>6</sup> April 14 Order, 107 FERC ¶ 61,018 at P 201.

<sup>7</sup> 16 U.S.C. § 824e (2000).

<sup>8</sup> Empire May 2, 2005 Compliance Filing at 2.

Empire states that Mitigated Sales do not include sales into markets administered by the SPP. Empire states that Mitigated Sales for periods of one year or less will be made under Schedules A or C, as applicable, of Western Systems Power Pool (WSPP) Rate Schedule FERC No. 6, as it may be amended from time to time (WSPP Agreement). Empire also states that Mitigated Sales of greater than one year will not be made prior to Empire first submitting a separate filing and receiving Commission authorization of the transaction under section 205 of the FPA. Empire adds that the foregoing provisions governing Mitigated Sales shall end upon such date as the Commission allows these provisions to terminate or to be superseded by other measures. Empire requests that the revised tariff be made effective on May 16, 2005, the refund effective date established in Docket No. EL05-67-000.

8. On December 8, 2005, the Director, Division of Tariffs and Market Development – South, acting pursuant to delegated authority, issued a data request directing Empire to answer various questions pertaining to the WSPP Agreement and its applicability in this proceeding.

9. On January 9, 2006, Empire submitted a response to the December 8, 2005, data request. Empire asserted that the WSPP Agreement is a Commission-approved cost-based rate schedule. Empire stated that the Commission has approved the use of the WSPP Agreement for purposes of mitigating market power in other cases.<sup>9</sup> Empire stated that the WSPP Agreement's cost-based rate ceilings are based on the "calculation of average costs for [18 public utilities] within the WSPP which are subject to the Commission's jurisdiction, using data from the 1989 FERC Form No. 1 filings."<sup>10</sup> Empire stated that the WSPP Agreement's demand charge is consistent with Empire's costs for the units expected to provide the service, is consistent with long-standing Commission precedent concerning the pricing of cost-based power sales, and is, therefore, tailored to Empire's particular circumstances. Empire stated that if a non-WSPP member requests to transact with Empire for a sale that would sink in the Empire control area, Empire will file an appropriate rate schedule with the Commission prior to consummating the transaction.

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<sup>9</sup> Citing *Western Resources, Inc.*, 94 FERC ¶ 61,050 (2001) (accepting WSPP Agreement to mitigate potential affiliate preference concerns between prospective merger partners); *Portland General Elec. Co.*, Docket No. ER04-199-000 (December 31, 2003) (unpublished letter order) (accepting revised market-based rate settlement that used cost-based rate caps under the WSPP Agreement to address code of conduct issues); *El Paso Elec. Co.*, 105 FERC ¶ 61,107 (2003) (accepting sales under the cost-based rate caps of the WSPP Agreement during two-year suspension of the utility's market-based rate tariff).

<sup>10</sup> Jan. 9, 2006 Compliance Filing at 2 (quoting *Western Sys. Power Pool*, 55 FERC ¶ 61,495 at 62,712 (1991)).

**Notice of Filings and Responsive Pleadings**

10. Notice of Empire's March 31, 2005, May 2, 2005, and June 23, 2005, filings was published in the *Federal Register*, 70 Fed. Reg. 19,748 (2005), 70 Fed. Reg. 25,564 (2005) and 70 Fed. Reg. 38,907 (2005), respectively with interventions and protests due on or before April 21, 2005, May 13, 2005 and July 6, 2005. None was filed.

11. Notice of Empire's January 9, 2006 filing was published in the *Federal Register*, 71 Fed. Reg. 3,285 (2006), with comments, interventions, and protests due on or before January 30, 2006. None was filed.

**Discussion****Mitigation Proposal**

12. The Commission will accept Empire's proposed use of the WSPP Agreement as mitigation for sales made in the Empire control area. The Commission has previously accepted the WSPP Agreement and found it to be a just and reasonable cost-based rate. Furthermore, we note that Empire has the option of transacting under the WSPP Agreement and thus can make sales under the WSPP Agreement without any further authorization from the Commission. Our action in this regard is subject to the outcome of the Market-based Rate Rulemaking in RM04-7-000 and any determinations that the Commission makes regarding mitigation in that proceeding.<sup>11</sup>

13. We will also accept Empire's proposed revisions to its market-based rate tariff subject to the modifications directed below. We accept Empire's proposal to revise its tariff to eliminate Empire's ability to exercise market power within Empire's control area. However, we reject the specific tariff language that Empire proposes to use to implement the sales prohibition in Empire's control area.

14. A component of Empire's proposal to mitigate its ability to exercise generation market power in the Empire control area is a revision of its market-based rate tariff to provide that no Mitigated Sales shall be made under its tariff. The term "Mitigated Sales" is defined in the tariff as "physical sales of power and/or energy that sink in the control area presently operated by Empire within SPP."<sup>12</sup> The tariff further states that Mitigated Sales do not include sales into markets administered by SPP. The tariff provides that Mitigated Sales for periods of one year or less shall be made under

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<sup>11</sup> 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 (2006).

<sup>12</sup> Empire May 2, 2005 Compliance Filing at 2.



Schedules A or C of the WSPP Agreement, as may be amended,<sup>13</sup> and that Mitigated Sales of greater than one year shall not be made prior to Empire first submitting a separate filing and receiving Commission authorization of the transaction under section 205 of the FPA.

15. First, the Commission has stated that its role is to assure customers that sellers who are authorized to sell at market-based rates do not have market power or have adequately mitigated it.<sup>14</sup> Further, the Commission's recent orders accepting mitigation proposals are clear that the mitigation is to apply to sales in the geographic market where a seller is found (or presumed) to have market power, not only to sales to end users in the control area.<sup>15</sup> In order to put in place adequate mitigation that eliminates the ability to exercise market power and ensure that rates are just and reasonable,<sup>16</sup> all market-based rate sales in a control area where an applicant is found or presumed to have the ability to exercise market power must be subject to mitigation approved by the Commission.

16. Empire's proposed tariff language (which defines Mitigated Sales as physical sales of power and/or energy that sink in the Empire control area) would improperly limit mitigation to certain customers in the Empire control area, namely, only to sales to those buyers that serve end-use customers in the Empire control area. Empire's proposal would improperly allow it to make market-based rate sales within its control area (where it has the presumption of market power) to any entities that do not serve end-use customers in the Empire control area. Such a limitation would not mitigate Empire's ability to attempt to exercise market power over sales in the mitigated control area.

17. This proposed tariff language is inconsistent with our direction in the April 14 Order and July 8 Order, as well as our recent precedent approving mitigation for other entities that failed the indicative screens.<sup>17</sup> For example, on rehearing of the April 14

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<sup>13</sup> *Western Sys. Power Pool*, 55 FERC ¶ 61,099, *order on reh'g*, 55 FERC ¶ 61,495 (1991), *aff'd in relevant part and remanded in part sub nom. Environmental Action and Consumer Federation of America v. FERC*, 996 F.2d 401 (D.C. Cir. 1992), *order on remand*, 66 FERC ¶ 61,201 (1994); *Western Sys. Power Pool*, 83 FERC ¶ 61,099 (1998); *Western Sys. Power Pool*, 85 FERC ¶ 61,363 (1998); *Western Sys. Power Pool, Inc.*, 95 FERC ¶ 61,483 (2001).

<sup>14</sup> July 8 Order at P 146.

<sup>15</sup> See *Oklahoma Gas and Electric Company*, 114 FERC ¶ 61,297 (2006), *reh'g pending*; *Carolina Power and Light Company*, 114 FERC ¶ 61,294 (2006) (CP&L); *Duke Energy Trading and Marketing, L.L.C.*, 114 FERC ¶ 61,056 (2006); and *MidAmerican Energy Company*, 114 FERC ¶ 61,280 (2006).

<sup>16</sup> See April 14 Order at P 144.

<sup>17</sup> See, e.g., *MidAmerican Energy Company*, 114 FERC ¶ 61,280 (2006).

Order, it was argued that access to power sold under mitigated prices should be restricted to buyers serving end-use customers within the relevant geographic market in which the applicant has been found to have market power. In particular, arguments were made that an applicant should not be required to make sales at mitigated prices to power marketers or brokers without end-use customers in the relevant market.<sup>18</sup> In the July 8 Order, the Commission rejected the suggestion that we restrict mitigated applicants to selling power only to buyers serving end-use customers, and has rejected tariff language that proposes to do so.<sup>19</sup> That is precisely what Empire is now proposing.

18. Accordingly, the Commission rejects this proposed tariff language, and directs Empire to file, within 30 days of the date of issuance of this order, revisions to its market-based tariff to provide that service under the tariff applies only to sales outside the Empire control area, effective as of the refund effective date in this proceeding, May 16, 2005.

19. Second, as stated above, Empire's proposed tariff language provides that Mitigated Sales do not include sales into markets administered by SPP. Empire provides no explanation of the basis for this exclusion. Furthermore, the Commission is accepting mitigation as it applies to the Empire control area. Thus, Empire is directed to file, within 30 days of the date of issuance of this order, revised tariff sheets removing this provision from the proposed tariff.

20. Third, Empire's proposed revisions to its market-based rate tariff include a reference to its proposal to use the WSPP agreement as the basis for mitigation. The Commission notes that Empire's cost-based mitigation proposal should not be referenced in the market-based rate tariff. Accordingly, we direct Empire to file, within 30 days of the date of issuance of this order, revised tariff sheets removing such references from the proposed revised market-based rate tariff.

21. Finally, we note that Empire states that it will transact under the WSPP Agreement for sales in the Empire control area of one year or less and commits that sales in the Empire control area greater than one year shall not be made prior to Empire first submitting a separate filing and receiving Commission authorization of the transaction under section 205 of the FPA. This commitment, however, is inconsistent with the April 14 Order, that the Commission required long-term mitigation to apply to sales of one year or longer.<sup>20</sup> Accordingly, our acceptance of Empire's use of the WSPP Agreement for mitigation purposes is conditioned on that proposal applying to sales of less than one year. Similarly, we accept Empire's commitment to seek prior authorization for long-

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<sup>18</sup> July 8 Order at P 134.

<sup>19</sup> See, e.g., *MidAmerican Energy Company*, 114 FERC ¶ 61,280 (2006).

<sup>20</sup> April 14, Order at P155.

term sales to the extent that such commitment applies to sales of one year or longer. Further, we interpret Empire's proposal to be that sales of one year or longer will be made at cost-based rates and we will accept Empire's proposal on the condition that any such sales be cost-justified.

22. Empire is directed, within 30 days of the date of issuance of this order, to state whether it accepts these modifications to its mitigation proposal.

23. To the extent that Empire made any sales under Empire's market-based rate tariff in the Empire control area since the refund effective date<sup>21</sup> in this proceeding at rates that were above the rates under the mitigation proposal accepted herein, Empire is directed, within 30 days of the date of issuance of this order, to make refunds, with interest. In addition, we direct Empire to file a refund report within 15 days after making refunds. If no refunds were due, Empire is expected to file with the Commission within 30 days of the date of issuance of this order so stating.

#### **Other Tariff Revisions**

24. We accept as in compliance with the March 3, 2005 Order Empire's revisions to its market-based rate tariff incorporating the change in status reporting requirement and affiliate sales prohibition language.<sup>22</sup>

#### **The Commission orders:**

(A) Empire's proposal is conditionally accepted, to be effective on May 16, 2005, as requested, subject to Commission acceptance of the compliance filings directed herein.

(B) Empire is directed to file, within 30 days of the date of issuance of this order, revisions to its market-based tariff and to file a statement that it accepts the modifications to Empire's mitigation proposal as discussed in the body of this order.

(C) Empire is hereby ordered to make refunds within 30 days of the date of issuance of this order, with interest, calculated pursuant to 18 C.F.R. § 35.19(2) (2006), and to file a refund report with the Commission within 15 days of the date refunds are made, as discussed in the body of the order. If no refunds are due, Empire is directed to file with the Commission within 30 days of the date of issuance of this order a report so stating.

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<sup>21</sup> The refund effective date in this proceeding is May 16, 2005.

<sup>22</sup> FERC Electric Tariff, First Revised Volume No.3, First Revised Sheet No. 1 and Original Sheet No. 1A (Supersedes Original Sheet No. 1).

(D) Empire's revised tariff sheets incorporating the change in status reporting requirement is hereby accepted for filing, effective March 21, 2005, as requested.

(E) The tariff revision prohibiting Empire from making market-based power sales to any affiliate "without first receiving" Commission authorization pursuant to section 205 of the Federal Power Act is hereby accepted for filing, effective as of the date of this order.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.