

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

The Empire District Electric Company

Docket Nos. ER99-1757-002
ER99-1757-003
ER99-1757-004
ER99-1757-005
ER99-1757-006
ER99-1757-007
EL05-67-000

ORDER ON UPDATED MARKET POWER ANALYSIS, INSTITUTING SECTION
206 PROCEEDING, AND ESTABLISHING REFUND EFFECTIVE DATE

(Issued March 3, 2005)

1. On September 27, 2004, and September 28, 2004, as amended on December 15, 2004, The Empire District Electric Company (Empire District) submitted for filing updated market power analyses in compliance with the Commission's order issued on May 13, 2004.¹ The May 13 Order addressed the procedures for implementing the market power analysis announced on April 14, 2004, and clarified on July 8, 2004.²
2. The filing submitted by Empire District, as amended, indicates that it passes the pivotal supplier screen but fails the wholesale market share screen for each of the four seasons considered in Empire District's control area³ and passes both the pivotal supplier

¹ *Acadia Power Partners, LLC, et al.*, 107 FERC ¶ 61,168 (2004) (May 13 Order).

² *AEP Power Marketing, Inc., et al.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

³ Empire District's analysis shows that it has a market share as high as 84 percent in Empire District's control area.

screen and the wholesale market share screen in each directly interconnected control area. In addition, Empire District is amending its tariff to include the Commission's market behavior rules.⁴

3. 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 under section 206 of the Federal Power Act (FPA)⁵ and establishes a rebuttable presumption of market power in the section 206 proceeding. Accordingly, as discussed below, in this order the Commission institutes a proceeding pursuant to section 206 to determine whether Empire District may continue to charge market-based rates and establishes a refund effective date pursuant to the provisions of section 206. The instant section 206 proceeding, as well as any resulting mitigation or refunds, is limited to the Empire District control area market because the filing indicates that this is the geographic market for which Empire District fails the wholesale market share screen.

4. This order, including the refund effective date, will protect customers from excess rates and changes that may result from the exercise of market power.

Background

5. On February 4, 2003, in Docket No. ER99-1757-002, Empire District filed an updated market analysis and on March 25, 2003, in Docket No. ER99-1757-003, Empire District filed a supplement to that filing. In the supplement, Empire District provided a supply margin assessment and a revised tariff to clarify that Empire District cannot make sales to any affiliates under its general market-based rate authority. On May 1, 2003, in Docket No. ER99-1757-004, Empire District filed an additional supplement to its supply margin assessment.

6. In the April 14 Order, as clarified by the July 8 Order, the Commission adopted two indicative screens for assessing generation market power: a pivotal supplier screen and a wholesale market share screen. The Commission stated that passage of both screens establishes a rebuttable presumption that the applicant does not possess generation market power, while failure of either screen creates a rebuttable presumption that the applicant has generation market power. The Commission further stated that

⁴ *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).

⁵ 16 U.S.C. § 824e (2000).

applicants and intervenors may, however, rebut the presumption established by the results of the initial screens by submitting a Delivered Price Test. Alternatively, an applicant may accept the presumption of market power or forego the generation market power analysis altogether and go directly to mitigation.⁶ The May 13 Order directed Empire District to file, within 135 days of the issuance of that order, revised generation market power analyses based on these two indicative screens.⁷

7. Empire District filed an updated market power analysis on September 27, 2004, and September 28, 2004, in Docket No. ER99-1757-005, in compliance with the Commission's May 13 Order.

8. On November 24, 2004, the Director, Division of Tariffs and Market Development – South, acting pursuant to delegated authority, issued a data request seeking additional information relating to Empire District's submittals.

9. On December 15, 2004, and January 19, 2005, Empire District filed its responses to the data request.

Description of Empire District's September 2004 Compliance Filing

10. In its filing, Empire District submitted the results of the two generation market power screens. As required in the May 13 Order, Empire District also provided updated information on the other three parts of the Commission's four-part market-based rate analysis. Empire District states it lacks market power over transmission, cannot erect barriers to entry, and does not raise affiliate abuse concerns.

11. Empire District states that it passes the pivotal supplier screen in Empire District's control area and in each directly interconnected control area. Empire District further states that it passes the wholesale market share screen in each directly interconnected control area but fails the wholesale market share screen for each of the four seasons considered in the Empire District control area.

12. In an effort to rebut the presumption that it has market power as indicated by its failure of the wholesale market share screen, Empire District argues that the

⁶ In addition, as the Commission stated in the April 14 Order, the applicant or intervenors may present evidence such as historical sales data to support whether the applicant does or does not possess market power. *See* April 14 Order, 107 FERC 61,018 at P 37.

⁷ *See* May 13 Order at Ordering Paragraph (A).

Commission's market share screen ignores the amount of control area load that is seeking supplies at market-based rates, which it asserts is generally small relative to the total load within the market. Empire District asserts that there is sufficient supply of generation, not owned by Empire District, to serve uncommitted load. In support of this assertion, Empire District states that there are five wholesale customers located in the Empire District control area. All but one of them were full requirements customers of Empire District in 2003. Two of these customers are under contract until 2008 and the other two have the right to give 60-day notice and seek other supplies. The fifth customer decided to seek alternative supplies, which Empire District cites as an example of the availability of competitive alternatives. According to Empire District, the combined load of these customers in 2003 was less than 60 MW which is less than 6 percent of total load. Loads that are not under contract to Empire District are less than 10 MW, or about one percent of the total load. Empire District argues that, even without generation controlled by Empire District, supply from imports ranging from 171 to 1,338 MW depending on the season is in excess of the 10 to 60 MW of contestable load.

13. In response to the Commission's data request, Empire District provided revised pivotal supplier and wholesale market share screens, and additional information regarding long-term firm requirement sales, Empire District's justification of its reliance on seasonal capacity ratings, some underlying data and work papers in electronic format supporting its first-tier import study and the historical sales data and relevant information filed by Empire District.

14. Empire District's import study submittal does not include the transfer limits in effect for the applicable historical seasons and as applied to Open Access same-time system (OASIS)-posted transfer capabilities; the voltage transfer limits in effect for the applicable historical seasons and as applied to OASIS-posted transfer capabilities; the historical short term network and firm reservations controlled by applicant and its affiliates utilized in the power flow cases submitted for each of the four seasonal peaks; and the work papers and other documentation for historical short-term network and firm reservations controlled by applicant and its affiliates utilized in the power flow cases submitted for each of the four seasonal peaks.

Notice of Filing and Responsive Pleadings

15. Notice of the February 4, 2003 filing was published in the *Federal Register*, 68 Fed. Reg. 7,415 (2003), with interventions or protests due on or before February 25, 2003. None were filed. Notice of the May 1, 2003 filing was published in the *Federal Register*, 68 Fed. Reg. 25,868 (2003), with interventions or protests due on or before May 22, 2003. None were filed. Notice of Empire District's September 27 and September 28, 2004 compliance filings was published in the *Federal Register*, 69 Fed. Reg. 60,386 (2004), with interventions or protests due on or before October 18, 2004.

None were filed. Notice of the responses by the Empire District to the Commission's data request was published in the *Federal Register*, 69 Fed. Reg. 78,012 (2004) and 70 Fed. Reg. 4,116 (2005) with interventions or protests due on or before January 5, 2005 and February 2, 2005. None were filed.

Discussion

Market-Based Rate Authorization

16. 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.⁸

Generation Market Power

17. Empire District states in its compliance filing, as amended, that Empire District's share of uncommitted capacity in Empire District's control area exceeds 20 percent in each of the four seasons during the time period considered. Consequently, Empire District fails the market share screen in Empire District's control area market.

18. In its submission, Empire District presents alternative evidence including historical sales data and other data that it believes to be relevant to rebut the presumption of market power. According to Empire District, it does not have market power because an analysis of historical wholesale sales data shows that there should be sufficient access to suppliers to serve the contestable load (load that can "shop" in the wholesale market) in Empire District's home control area. Empire District states that the contestable load in Empire District's home control area is 10 MW, while the simultaneous import capability is 171 MW at summer peak and more in other seasons. Thus, Empire District argues that ample generation may be imported to serve contestable load. As a result, Empire District asserts that it is not in a position to exercise generation market power.

19. The Commission stated in the April 14 and July 8 Orders that applicants may present historical evidence to show that the applicant satisfies the generation market power concerns. The evidence that will be considered is historical sales and/or access to

⁸ 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).

transmission to move supplies within, out of, and into a control area.⁹ The Commission will further examine the information Empire District submitted in conjunction with other evidence submitted in the section 206 proceeding we institute herein.

20. Regarding import capability, as noted above, Empire District's simultaneous import capability study is incomplete. Thus, the Commission cannot validate whether Empire District passes the pivotal supplier screen in the directly interconnected control areas when imports are considered.¹⁰ However, Empire District passes both the pivotal supplier screen and the wholesale market share screen in each directly interconnected control area without considering imports of competing supplies. Therefore, Empire District passes the indicative screens in the directly interconnected control areas using this simplifying assumption. Accordingly, the Commission finds here that Empire District satisfies the Commission's generation market power standard for market-based rate authority in the first-tier control areas.

21. As outlined in the April 14 Order, Empire District's failure of the wholesale market share screen provides the basis for the Commission to institute the instant section 206 proceeding, which is limited to the Empire District control area, to examine whether Empire District may continue to charge market-based rates and establishes a rebuttable presumption of market power in this control area. This order establishes a refund effective date in order to put in place the necessary procedural framework to promptly impose an effective remedy, in case the Commission determines that such a remedy is required. Our decision to establish a refund effective date does not constitute a determination that refunds will be ordered.

22. The Commission's decision to institute the instant section 206 proceeding does not constitute a definitive finding by the Commission that Empire District has market power in the Empire District control area. As discussed in the April 14 and July 8 Orders, the indicative screens are conservatively designed to identify the subset of applicants who

⁹ April 14 Order, 107 FERC ¶ 61,018 at P 102; July 8 Order, 108 FERC ¶ 61,026 at P 181.

¹⁰ Similarly, the incomplete import capability study prevents validation that Empire District passes the pivotal supplier screen in the Empire District control area. The Commission's review indicates that Empire District would fail the pivotal supplier screen in the Empire District control area if imports of competing supplies were not considered. However, failure of either indicative screen creates a rebuttable presumption of market power. April 14 Order, 102 FERC ¶ 61,018 at P 99 and 102.

require closer scrutiny. Accordingly, for the Empire District control area, Empire District will have 60 days from the date of issuance of this order finding a screen failure 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.¹¹

23. In cases where, as here, the Commission institutes a section 206 proceeding on its own motion, section 206(b) requires that the Commission establish a refund effective date that is no earlier than 60 days after publication of notice of the initiation of the Commission's proceeding in the Federal Register, and no later than five months subsequent to the expiration of the 60-day period. In order to give maximum protection to customers, and consistent with our precedent,¹² we will establish a refund effective date at the earliest date allowed. This date will be 60 days from the date on which notice of the initiation of the proceeding in Docket No. EL05-67-000 is published in the Federal Register. In addition, section 206 requires that, if no final decision has been rendered by that date, the Commission must provide its estimate as to when it reasonably expects to make such a decision. Given the times for filing identified in this order, and the nature and complexity of the matters to be resolved, the Commission estimates that it will be able to reach a final decision by June 30, 2005.

Transmission Market Power

24. When a transmission-owning public utility seeks market-based rate authority, the Commission has required the public utility to have an Open Access Transmission Tariff (OATT) on file before granting such authorization. Empire District states that it has an OATT on file with the Commission.¹³ It further states that new customers can obtain transmission service over Empire District's facilities under the Southwest Power Pool's (SPP) OATT.¹⁴ Further, no intervenor has raised transmission market power concerns.

¹¹ April 14 Order, 107 FERC ¶ 61,018 at P 201, 207-209.

¹² See, e.g., *Canal Electric Company*, 46 FERC ¶ 61,153, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

¹³ Empire District's OATT was accepted by the Commission in *Empire District Electric Company*, 80 FERC ¶ 61,169 (1997).

¹⁴ The Commission has granted the SPP conditional regional transmission operator status. See *Southwest Power Pool Inc.*, 106 FERC ¶ 61,110 (2004).

Based on Empire District's representation, we find that Empire District satisfies the Commission's transmission market power standard for the grant of market-based rate authority.

Other Barriers to Entry

25. Empire District states that neither it nor its affiliates owns fuel supplies or delivery services to electric generation facilities, exercises control over sites for generating plants that could restrict the entry of suppliers into competitive electric markets, nor owns or controls engineering or construction firms participating in the energy industry and do not otherwise possess the ability to raise other barriers to entry.

26. Empire District further, states that neither it nor any of its affiliates control or own natural gas pipeline facilities that would allow them to deny service to potential electric competitors. It further asserts that if a party believes that Empire District is unfairly denying it access to natural gas supplies, then the party may file a complaint with the Commission that could result in the suspension of Empire District's ability to sell power at market-based rates. Based on Empire District's representations, the Commission finds that Empire District cannot erect barriers to entry. However, should Empire District or any of its affiliates deny, delay or require unreasonable terms, conditions or rates for natural gas service to a potential electric competitor in bulk power markets, that electric competitor may file a complaint with the Commission that could result in the suspension of Empire District's authority to sell power at market-based rates.¹⁵

Affiliate Abuse

27. Empire District states that it does not have an affiliated wholesale power marketer. Empire District states that its market-based power sales tariff and code of conduct contain the Commission's standard restrictions on transactions with marketing affiliates. However, Empire District's tariff does not state that Empire District will not make any sales to affiliates "without first receiving" Commission authorization of the transaction under section 205 of the FPA.¹⁶ Therefore, consistent with Commission precedent, Empire District is directed to make a compliance filing within 30 days of the date of this order, to revise its market-based rate tariff to include such language.¹⁷ With this tariff

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

¹⁶ Instead, the tariff states that "Empire shall submit a separate rate filing with the Commission for any sales to affiliates."

¹⁷ See *Aquila, Inc.*, 101 FERC ¶ 61,331, at P 7-9, 12 (2002).

revision, the Commission finds that Empire District satisfies the Commission's concerns with regard to affiliate abuse.

Reporting Requirements

28. Consistent with the procedures the Commission adopted in Order No. 2001, an entity with market-based rates must file electronically with the Commission an Electric Quarterly Report containing: (1) a summary of the contractual terms and conditions in every effective service agreement for market-based power sales; and (2) transaction information for effective short-term (less than one year) and long-term (one year or greater) market-based power sales during the most recent calendar quarter.¹⁸ Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.¹⁹

29. Empire District must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.²⁰ A change in status includes, but is not limited to, each of the following: (i) ownership or control of generation or transmission facilities or inputs to electric power production other than fuel supplies; or (ii) affiliation with any entity not disclosed in the application for market-based rate authority that owns or controls generation or transmission facilities or inputs to electric power production, or affiliation with any entity that has a franchised service area. Any change in status must be filed no later than 30 days after the change in status occurs.

¹⁸ *Revised Public Utility Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31,043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002). Required data sets for contractual and transaction information are described in Attachments B and C of Order No. 2001. The Electric Quarterly Report must be submitted to the Commission using the EQR Submission System Software, which may be downloaded from the Commission's website at <http://www.ferc.gov/doc-filing/eqr.asp>.

¹⁹ The exact dates for these reports are prescribed in 18 C.F.R. § 35.10b (2004). Failure to file an Electric Quarterly Report (without an appropriate request for extension), or failure to report an agreement in an Electric Quarterly Report, may result in forfeiture of market-based rate authority, requiring filing of a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

²⁰ *Reporting Requirement for Changes in Status for Public Utilities With Market-Based Rate Authority*, Order No. 652, 110 FERC ¶ 61,097 (2005) (Order No. 652).

30. Order No. 652 requires that the change in status reporting requirement be incorporated in the market-based rate tariff of each entity authorized to make sales at market-based rates. Accordingly, Empire District is directed, within 30 days of the date of issuance of this order, to revise its market-based rate tariff to incorporate the change in status reporting requirement adopted in Order No. 652.

The Commission orders:

(A) Empire District is directed, within 30 days of the date of issuance of this order, to revise section 5 of its market-based rate tariff as discussed in the body of this order, and to revise its market-based rate tariff to incorporate the change in status reporting requirement adopted in Order No. 652.

(B) Empire District's updated market power analysis for all relevant markets not subject to the section 206 proceeding instituted herein is hereby accepted for filing, as discussed in the body of this order.

(C) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), the Commission hereby institutes a proceeding in Docket No. EL05-67-000 concerning the justness and reasonableness of the terms and conditions of Empire District's market-based rate authorization, as discussed in the body of this order.

(D) The Secretary shall promptly publish in the Federal Register a notice of the Commission's initiation of the proceeding under section 206 of the FPA in Docket No. EL05-67-000.

(E) The refund effective date established pursuant to section 206(b) of the FPA will be 60 days following publication in the Federal Register of the notice discussed in Ordering Paragraph (D) above.

(F) For the Empire District control area market, Empire District is directed, within 60 days from the date of issuance of this 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.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.