

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Wisconsin Electric Power Company

Docket Nos. ER98-855-002
ER98-855-003
ER98-855-004
ER98-855-005
ER05-540-000
ER05-556-000

ORDER ACCEPTING UPDATED MARKET POWER ANALYSIS AND
REVISED MARKET-BASED RATE TARIFF

(Issued March 24, 2005)

1. In this order we accept an updated market power analysis and revised market-based rate tariff filed by Wisconsin Electric Power Company (Wisconsin Electric). Wisconsin Electric's revised market-based rate tariff is accepted for filing to be effective on the date on which Midwest Independent Transmission System Operator, Inc. (Midwest ISO) becomes a single market and performs functions such as central commitment and dispatch with Commission-approved market monitoring and mitigation, currently scheduled for April 1, 2005 (hereafter referred to as the Midwest ISO Energy Market).¹ As discussed below, we conclude that Wisconsin Electric satisfies the Commission's standards for market-based rate authority. This order benefits customers by reviewing the conditions under which market-based rate authority is granted, thus ensuring that the prices charged for jurisdictional sales are just and reasonable. Wisconsin Electric's next updated market power analysis is due three years from the date of this order.

¹ FERC Electric Tariff Original Volume No. 8, First Revised Sheets Nos. 2-4, Second Revised Sheet No. 5, First Revised Sheet Nos. 8-9, Second Revised Sheet No. 21 (Supersedes Original Sheets Nos. 2-4, First Revised Sheet No. 5, Original Sheet Nos. 8-9, First Revised Sheet No. 21).

Background

2. On March 30, 2001, Wisconsin Electric filed an updated market power analysis pursuant to the Commission's order granting Wisconsin Electric authority to sell electric energy and capacity at market-based rates.²

3. On January 29, 2004, Wisconsin Electric submitted an updated market power analysis using the Supply Margin Assessment. Wisconsin Electric also submitted the Commission's market behavior rules.³ In the January 29 filing, Wisconsin Electric stated that it satisfies the Commission's standards for generation market power, transmission market power, barriers to entry, and affiliate abuse or reciprocal dealing.

4. On September 27, 2004, as amended January 18, 2005, Wisconsin Electric submitted for filing a revised updated market power analysis, pursuant to the Commission's order issued on May 13, 2004 (January 2005 market power analysis).⁴ The May 13 Order addressed the procedures for implementing the generation market power analysis announced on April 14, 2004, and clarified on July 8, 2004.⁵

5. On December 17, 2004, the Director, Division of Tariffs and Market Development – South, acting pursuant to delegated authority, issued a data request seeking additional information relating to Wisconsin Electric's submittal. On January 18, 2005, Wisconsin Electric filed a response to the data request.

6. Wisconsin Electric's January 2005 market power analysis applies to the period before the Midwest ISO Energy Market is operational. Currently, Wisconsin Electric's market-based rate tariff prohibits sales within a restricted area.⁶ In its January 2005 market power analysis, Wisconsin Electric states that it does not seek to remove this restriction. For this reason, Wisconsin Electric has submitted the generation market power screens for only the first-tier markets outside of the restricted area.

² *Wisconsin Electric Power Company*, 82 FERC ¶ 61,067 (1998).

³ *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).

⁴ *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004) (May 13 Order).

⁵ *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

⁶ The restricted area is the Wisconsin Upper Michigan Systems (WUMS) region and the territory serviced by Wisconsin Electric's affiliate, Edison Sault Electric Company. The control areas in the WUMS region are Wisconsin Electric, Wisconsin Power and Light Company, Madison Gas and Electric Company, Wisconsin Public Service Corporation, and Upper Peninsula Power Company control areas.

7. On February 4, 2005, Wisconsin Electric filed a revised market-based rate tariff that removes the prohibition on sales in the restricted area as long as the sales are made through the Midwest ISO Energy Market. The proposed tariff continues to prohibit bilateral sales at market-based rates within the restricted area. In the February 4 filing, Wisconsin Electric submitted the Commission's generation market power screens using Midwest ISO as the relevant geographic market. In addition, Wisconsin Electric has revised its market-based rate tariff to reflect that it is no longer a transmission provider.

Notice and Responsive Pleadings

8. Notice of Wisconsin Electric's March 30, 2001 filing was published in the *Federal Register*, 66 Fed. Reg. 18,763 (2001), with protests and interventions due on or before April 20, 2001. None was filed.

9. Notice of Wisconsin Electric's January 29, 2004 filing was published in the *Federal Register*, 68 Fed. Reg. 6,280 (2004), with protests and interventions due on or before February 19, 2004. None was filed.

10. Notice of Wisconsin Electric's September 27, 2004 filing was published in the *Federal Register*, 69 Fed. Reg. 61,246 (2004), with protests and interventions due on or before October 18, 2004. None was filed.

11. Notice of Wisconsin Electric's January 18, 2005 filing was published in the *Federal Register*, 70 Fed. Reg. 5,177 (2005), with protests and interventions due on or before February 8, 2005. None was filed.

12. Notice of Wisconsin Electric's February 4, 2005 filing in Docket No. ER05-556-000 was published in the *Federal Register*, 70 Fed. Reg. 7,930 (2005), with protests and interventions due on or before February 25, 2005. None was filed.

13. Notice of Wisconsin Electric's February 4, 2005 filing in Docket No. ER05-540-000 was published in the *Federal Register*, 70 Fed. Reg. 7,929 (2005), with protests and interventions due on or before February 25, 2005. Madison Gas and Electric Company and Wisconsin Public Power Inc. (collectively, Wisconsin TDUs) jointly filed a timely motion to intervene and protest.

Procedural Matters

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

Discussion

Market-Based Rate Authorization

15. 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.⁷

16. As discussed below, the Commission concludes that Wisconsin Electric satisfies the Commission's standards for market-based rate authority.

Generation Market Power

17. In the April 14 Order, the Commission adopted two indicative screens for assessing generation market power, the pivotal supplier screen and the wholesale market share screen. In its January 2005 market power analysis, which applies to the period before the Midwest ISO Energy Market is operational, Wisconsin Electric has prepared both indicative screens for each of its interconnected first-tier markets outside of the restricted area. Wisconsin Electric has prepared screens for the Northern States Power Co. (NSP) control area, the Michigan Electric Coordinated System (MECS) market, and the market operated by PJM Interconnection, LLC (PJM). The Commission has reviewed Wisconsin Electric's generation market power screens, and has determined that Wisconsin Electric passes the screens in NSP, MECS, and PJM.

18. In Wisconsin Electric's filing revising its market-based rate tariff to allow it to make sales into the Midwest ISO Energy Market, Wisconsin Electric has submitted the indicative screens for the Midwest ISO market. As the Commission noted in the April 14 Order, once Midwest ISO becomes a single market and performs such functions as central commitment and dispatch with Commission approved market monitoring and mitigation (which is currently scheduled for April 1, 2005), Midwest ISO would be considered to be a single geographic market for purposes of our generation dominance screens. Based on the analysis provided by Wisconsin Electric, Wisconsin Electric passes both the pivotal supplier screen and the wholesale market share screen for the Midwest ISO market.⁸

⁷ 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).

⁸ We note that Wisconsin Electric's market share is no higher than 6.6 percent.

19. In its protest, Wisconsin TDUs argue that Wisconsin Electric should not be permitted to bid in excess of 110 percent unit-specific marginal costs since Wisconsin Electric owns approximately 50 percent of the generation in the highly constrained WUMS region. Wisconsin TDUs argue that the highly-constrained WUMS load pocket cannot be considered to be part of the same geographic market as the remainder of Midwest ISO because there is no uncommitted long-term firm transfer capability into eastern Wisconsin from any direction and, within WUMS, there is no uncommitted long-term transfer capability between any of its five control areas. Wisconsin TDUs point to the Midwest ISO Independent Market Monitor's 2003 State of the Market Report⁹ which concludes that the Hirschman-Herfindahl Index (HHI) in WUMS is a highly concentrated 2656, and WUMS and North WUMS are Narrow Constrained Areas (NCAs).¹⁰ For these reasons, Wisconsin TDUs request that Wisconsin Electric be evaluated using WUMS as the relevant geographic market.

20. The Commission has recognized that transmission may be constrained in the WUMS region during certain hours. In our August 6, 2004 and November 8, 2004 Orders in *Midwest Independent System Operator, Inc.*,¹¹ the Commission accepted for filing Midwest ISO's Open Access Transmission and Energy Markets Tariff (TEMT), which contains provisions that address the Wisconsin TDUs' concerns regarding Midwest ISO's mitigation of transmission constraints and load pockets in WUMS. The TEMT establishes threshold levels for offers, with mitigation of bids that exceed such thresholds. In highly constrained areas such as the WUMS and North WUMS NCAs, the conduct and impact thresholds are set more tightly than in less constrained areas, providing for more frequent mitigation because market power is more likely to be exercised on a recurring basis in these areas.¹² In this regard, we find that Wisconsin TDUs' concerns should be adequately addressed by the monitoring and mitigation in Midwest ISO's Energy Market and that there is no need for additional restrictions on Wisconsin Electric's bidding behavior. We note that, as discussed above, the proposed tariff continues to prohibit bilateral sales at market-based rates within the restricted area.

21. The Commission finds that Wisconsin Electric satisfies the Commission's generation market power standard for the grant of market-based rate authority in the

⁹ Independent Market Monitor, Midwest ISO, Highlights of the MISO 2003 State of the Market Report, at 7.

¹⁰ Article 63.4.1(b) of Midwest ISO's Open Access Transmission and Energy Markets Tariff defines NCA as constrained areas "within which one (1) or more suppliers are pivotal."

¹¹ *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,163 (2004), *order on reh'g*, 109 FERC ¶ 61,157 (2004).

¹² *Id.*

period before the Midwest ISO Energy Market is operational. Further, the Commission has determined that Wisconsin Electric passes both screens in the Midwest ISO market once the Midwest ISO Energy Market is operational. Accordingly, the Commission will accept Wisconsin Electric's revised market-based rate tariff for filing to be effective upon the date on which the Midwest ISO begins operation of its Energy Market.

Transmission Market Power

22. 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. Wisconsin Electric states that on January 1, 2001 it transferred its transmission assets to the American Transmission Company, LLC (ATCo). ATCo is a for profit transmission company that owns transmission facilities in Wisconsin, Illinois, and Michigan. ATCo has transferred control of all of its transmission assets to Midwest ISO. Wisconsin Electric states that these transmission assets are operated under the Midwest ISO OATT.¹³ Further, no intervenors have raised transmission market power concerns. Based on Wisconsin Electric's representation, the Commission finds that Wisconsin Electric satisfies the Commission's transmission market power standard for the grant of market-based rate authority.

Other Barriers to Entry

23. Wisconsin Electric states that neither it nor its affiliates exercise control over sites for generating plants that could restrict entry by other suppliers or other barriers to entry in Midwest ISO. Wisconsin Electric states that it is affiliated with a local distribution company delivering natural gas in Wisconsin, but that this local distribution company only delivers natural gas to one competing gas generator. In addition, no intervenors have raised barrier to entry concerns. Based on Wisconsin Electric's representations, the Commission is satisfied that Wisconsin Electric cannot erect barriers to entry. However, should Wisconsin Electric or its affiliates deny, delay, or require unreasonable rates, terms, or conditions for natural gas service to a potential electric competitor, then the Commission may suspend Wisconsin Electric's authority to sell electricity at market-based rates.¹⁴

¹³ *Id.*

¹⁴ *Louisville Gas & Electric Company*, 62 FERC ¶ 61,016 (1993).

Affiliate Abuse

24. Wisconsin Electric states that its relationship to its affiliates continues to be governed by the code of conduct incorporated in its market-based rate tariff. Further, Wisconsin Electric states that its affiliates have their own codes of conduct on file with the Commission. In addition, no intervenors have raised affiliate abuse concerns. Based on Wisconsin Electric's representations, the Commission finds that Wisconsin Electric satisfies the Commission's concerns with regard to affiliate abuse.

Reporting Requirements

25. 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.¹⁵ Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.¹⁶

26. Wisconsin Electric 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.¹⁷ 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, Wisconsin Electric is directed, within

¹⁵ *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/docs-filing/eqr.asp>.

¹⁶ 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.

¹⁷ *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).

30 days of the date of issuance of this order, to revise its market-based rate tariff to incorporate the following provision:

Wisconsin Electric 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. 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.

27. Wisconsin Electric is directed to file an updated market power analysis within three years of the date of this order, and every three years thereafter. The Commission also reserves the right to require such an analysis at any intervening time.

The Commission orders:

(A) Wisconsin Electric's updated market power analysis is hereby accepted for filing, as discussed in the body of this order.

(B) Wisconsin Electric's revised market-based rate tariff is accepted for filing, effective on the date Midwest ISO begins operation of its Energy Market, as discussed in the body of this order.

(C) Wisconsin Electric's next updated market power analysis is due within three years of the date of this order.

(D) Wisconsin Electric is directed, within 30 days of the date of issuance of this order, to revise its market-based rate tariffs to include the change in status reporting requirement adopted in Order No. 652.

(E) Wisconsin Electric's revised tariff sheets incorporating the market behavior rules are accepted for filing effective December 17, 2003.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.