

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

MidAmerican Energy Company

Docket Nos. ER96-719-002
ER96-719-003
ER96-719-004
EL04-106-000
EL04-106-001
EL05-59-000

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

(Issued June 1, 2005)

1. On October 29, 2004, as amended on November 23, 2004, MidAmerican Energy Company (MidAmerican), submitted for filing revised generation market power screens in compliance with the Commission's orders issued on April 14, 2004 and July 8, 2004,¹ as well as an "Order on Market-Based Rate Authority" issued on July 12, 2004.² The filing, as amended, indicates that MidAmerican passes the pivotal supplier screen but fails the wholesale market share screen for each of the four seasons considered in the MidAmerican control area.³ The filing, as amended, further indicates that MidAmerican passes the pivotal supplier screen and the wholesale market share screen in each of the directly interconnected first-tier control areas examined in each of the four seasons considered. In addition, intervenors have filed protests alleging that MidAmerican has market power and requesting customer protection.

¹ *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (*April 14 Order*), order on reh'g, *AEP Power Marketing, Inc.*, 108 FERC ¶ 61,026 (2004) (*July 8 Order*).

² *MidAmerican Energy Co.*, 108 FERC ¶ 61,043 (2004) (*July 12 Order*).

³ MidAmerican's filing, as amended, shows that it has a market share as high as 55 percent in the MidAmerican control area.

2. 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 of the Federal Power Act (FPA)⁴ and establishes a rebuttable presumption of market power in the section 206 proceeding.⁵ Accordingly, as discussed below, in this order, the Commission institutes a proceeding pursuant to section 206 of the FPA to determine whether MidAmerican may continue to charge market-based rates. The instant section 206 proceeding, as well as any resulting mitigation or refunds, is limited to the MidAmerican control area because the compliance filing indicates that this is the geographic market for which MidAmerican fails the wholesale market share screen. Additionally, as explained in more detail below, the Commission will also examine transmission market power in the section 206 proceeding established by this order.

3. This order, including the refund effective date, will protect customers from excessive rates and charges that may result from the exercise of market power.

Background

4. 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 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

5. Because MidAmerican had not filed an updated market power analysis, and the order granting MidAmerican market-based rate authorization did not include a requirement to file an updated market power analysis, the Commission instituted a

⁴ 16 U.S.C. § 824e (2000).

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

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. April 14 Order, 107 FERC ¶ 61,018 at P 37.

section 206 proceeding in Docket No. EL04-106-000 and required MidAmerican to submit an explanation, within 15 days of the issuance of that order, why its market-based rate authority should not be modified to include the requirement to submit a market-based rate review every three years.⁷ Additionally, the *July 12 Order* directed MidAmerican to file, within 60 days of the issuance of that order, an updated market-based rate review.⁸

6. On July 23, 2004, MidAmerican submitted a letter informing the Commission that it does not contest the modification of its market-based rate authority to include a requirement that it submit a market-based rate review every three years. MidAmerican stated that it would submit such a review in the following several weeks, and would submit subsequent market power analysis updates as may be required under the Commission's rules. Subsequently, on October 29, 2004, as amended on November 23, 2004, MidAmerican submitted an updated market power analysis.

7. Also on July 23, 2004, MidAmerican submitted in Docket Nos. ER96-719-002 and EL04-106-001 a request for rehearing of the July 12 Order, arguing that there is no longer any need to keep open the investigation initiated in Docket No. EL04-106-000 since it agreed that it should submit an updated market power analysis.

Description of MidAmerican's Filing

8. In its filing, MidAmerican states that it passes the pivotal supplier screen in the MidAmerican control area and in each directly interconnected control area. MidAmerican further states that it passes the wholesale market share screen in each directly interconnected control area, but that it fails the wholesale market share screen in the MidAmerican control area, its home control area, for each of the four seasons considered. In response to this failure, MidAmerican argues that the Commission's market share screen produces false positives that, absent further analysis, result in a finding of market power that is not supported by the evidence. MidAmerican states that because of its native load obligations, the type of generation that it owns and operates to meet those obligations, and the typical level of import capability and third-party generation located in a control area where the host utility must serve retail obligations, one would not expect it to pass the market share screens within its own control area.

9. In an effort to rebut the presumption of market power as indicated by the failure of the market share screen, MidAmerican developed an alternative market share analysis by using truncated supply data. MidAmerican also presents a snapshot of short-term power

⁷ July 12 Order, 108 FERC ¶ 61,043 (2004) at Ordering Paragraph (A).

⁸ *Id.* at Ordering Paragraph (B).

sales data within the MidAmerican control area during 2003. Based upon the application of the alternative market share analysis and historical wholesale sales data, MidAmerican concludes that it does not possess market power within the MidAmerican control area.

10. In its October 29 filing, MidAmerican also noted certain changes in status since it filed its application for market-based rate authority in 1996, including a merger between its parent company and an independent power producer, and the acquisition by its parent of certain natural gas pipeline facilities.

Notice of Filings and Responsive Pleadings

11. Notice of MidAmerican's October 29 and November 23 filings were published in the *Federal Register*,⁹ with interventions or protests due on or before November 19, 2004, and December 14, 2004, respectively. On December 14, 2004, the Resale Power Group of Iowa (RPGI) filed a motion to intervene and comments, and Midwest Municipal Transmission Group (MMTG) filed a motion to intervene and protest.

12. On December 28, 2004, January 31, 2005, February 25, 2005, and March 31, 2005, MidAmerican filed four separate motions seeking an extension of time to file a reply to the pleadings filed by RPGI and MMTG. On December 28, the Commission granted MidAmerican an extension of time to January 31, 2005.

Summary of Pleadings

13. RPGI states that MidAmerican once provided wholesale requirements services to all of its members. In 2003, however, RPGI conducted a request for proposals (RFP), which Ameren Energy Marketing (Ameren) won. However, RPGI reports that Ameren and RPGI could not secure transmission reservations from MidAmerican for two of its members due to insufficient capacity. RPGI states that MidAmerican later informed RPGI that it had sufficient capacity to serve the two customers, but only if MidAmerican were the supplier instead of Ameren. RPGI states that because its service contract with MidAmerican was about to expire, it was forced to sign new contracts to purchase power from MidAmerican instead of from Ameren in order to continue serving its retail customers. RPGI explains that it, along with Ameren, contacted the Commission, arguing that the denial of service constituted a violation of MidAmerican's Open Access Transmission Tariff (OATT).

14. RPGI states that these recent efforts illustrate that MidAmerican is often the only supply option, that it has generation market power in its control area, and that adoption of

⁹ 69 Fed. Reg. 67,566 (2004); 69 Fed. Reg. 71,026 (2004).

an OATT is not sufficient to establish a lack of transmission market power. RPGI asks that the Commission fully investigate its claims, which it states may reveal the extent to which MidAmerican exercises market power, and will assist in determining the appropriate mitigation.

15. In its protest, MMTG includes affidavits which it states show that MidAmerican has market power and that wholesale customers often have no choice in suppliers. MMTG references the scenario above regarding RGPI, and a similar instance in which Buffalo, Iowa found an alternative supplier but could not get transmission service. Similarly, MMTG asserts that entities trying to sell into the MidAmerican area on either a short-term or long-term basis cannot find a transmission path, even for very small transactions. MMTG argues that MidAmerican should not be allowed to charge market-based rates in its control area, and suggests mitigation for MidAmerican's transmission market power.

16. MMTG also states that MidAmerican's historical sales and other data fail to rebut the presumption of market power, and that it should file a Delivered Price Test. MMTG notes what it argues are several faults in MidAmerican's analysis, and as a result rejects MidAmerican's "truncated market share analysis" and historical sales data. MMTG includes an analysis that it claims shows that MidAmerican's generation portfolio gives it the ability and incentive to withhold supply in order to raise prices. In addition, MMTG takes issue with the inputs MidAmerican provides for the screens, arguing that the simultaneous import capability study is unrealistic, and including examples using runs from the Mid-Continent Area Power Pool (MAPP) Scenario Analyzer as evidence.¹⁰ MMTG also states that MidAmerican did not properly account for long-term firm requirements sales when analyzing unaffiliated supply, nor did it identify those competing suppliers.

17. In its motions for extension of time, MidAmerican states that it is in discussions with both RPGI and MMTG to resolve issues in their pleadings filed in response to MidAmerican's filing. In its March 31, 2005 motion, MidAmerican states that it and

¹⁰ The Scenario Analyzer is a program used by MAPP and Midwest Independent Transmission System Operator in approving or denying transmission transactions. The Scenario Analyzer will determine whether there is sufficient available transmission capacity on constrained interfaces for a transmission request. The estimates provided are based on the latest available transmission capacity data, outage and existing known approved transmission requests.

MMTG have agreed to take certain actions that would resolve the transmission-related issues raised by MMTG in its protest. MidAmerican states further that MMTG has agreed to withdraw its protest, subject to the completion of a memorandum of understanding setting forth their agreement and the resolution of a supply issue between MidAmerican and one of MMTG's members. MidAmerican states that it is currently in discussion with that MMTG member on the supply issue. In addition, MidAmerican states that it and RPGI have agreed that the only outstanding issue raised by RPGI's comments is a supply issue with a specific RPGI member. According to MidAmerican, that RPGI member has accepted a MidAmerican proposal to resolve the issue, and is awaiting separate actions by Midwest Independent Transmission System Operator, Inc. (Midwest ISO) and MidAmerican's transmission group on transmission service requests made on behalf of the member. According to MidAmerican, RPGI advises that once the requested transmission service is available, it will no longer have any concerns with MidAmerican's market power filing in this docket. MidAmerican asks the Commission in its motion to extend indefinitely the time for it to file a response to MMTG and RPGI in this proceeding, to accommodate the unknown timing of a response to Midwest ISO to the transmission service request.

Discussion

Procedural Matters

18. 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. Additionally, the Commission will terminate the section 206 proceeding initiated in Docket No. EL04-106-000, since MidAmerican has complied with the requirements of the *July 12 Order*, which initiated that docket. Given MidAmerican's compliance, the Commission will also dismiss as moot the rehearing request filed in Docket Nos. ER96-719-002 and EL04-106-001.

Market-Based Rate Authorization

19. 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.¹¹

¹¹ 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).

Generation Market Power

20. In the *April 14 Order*, the Commission adopted two indicative screens for assessing generation market power. MidAmerican performed the generation market power screens for the MidAmerican control area (its home control area) and thirteen first-tier control areas. The Commission has reviewed MidAmerican's generation market screens for its first-tier control areas, which indicate that MidAmerican passes both the pivotal supplier and wholesale market share screens in these geographic markets. Accordingly, the Commission finds that MidAmerican satisfies the Commission's generation market power standard for the grant of market-based rate authority in the first-tier control areas.

21. MidAmerican states in its filing, as amended, that MidAmerican's share of uncommitted capacity in the MidAmerican control area exceeds 20 percent for each of the four seasons during the time period considered. Consequently, MidAmerican's compliance filing indicates that it fails the wholesale market share screen in the MidAmerican control area.

22. In its submission, MidAmerican presents an alternative market share analysis by using truncated supply data¹² to rebut the presumption of market power established by its failure of the wholesale market share screen. MidAmerican states that this analysis truncates the supply of any single supplier to the amount of wholesale market demand. MidAmerican states that under this calculation, its market shares range from 10 percent to 14 percent. MidAmerican also presents a snapshot of short-term power sales data within the MidAmerican control area to identify any instances or patterns indicative of the exercise of market power during 2003. MidAmerican concludes that the level of MidAmerican's sales was relatively small, and its share of the overall sales within the MidAmerican control area accounted for no more than about three percent of on-peak or of peak short-term transactions.

23. The Commission stated in the *April 14 Order* and *July 8 Order* that applicants may present historical evidence to show that the applicant satisfies the generation market power concerns, however, the evidence that will be considered is historical sales and/or access to transmission to move supplies within, out of, and into a control area.¹³

¹² MidAmerican states that in a scenario where there are multiple suppliers and sufficient capacity to meet the contestable wholesale load (the demand in excess of the wholesale customers' generation ownership entitlements and/or rights under long-term firm purchases), the alternative analysis disregards a supplier's capacity in excess of that load level.

¹³ April 14 Order, 107 FERC ¶ 61,018 at P 102.

MidAmerican's alternative market share screen method, its justification, and its historical sales data are under review. We will further examine this information in conjunction with other evidence submitted in the section 206 proceeding we institute herein.

24. As outlined in the *April 14 Order*, MidAmerican'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 MidAmerican's home control area, to determine whether MidAmerican may continue to charge market-based rates in that market, and establishes a rebuttable presumption of market power. 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.

25. Our decision to institute the instant section 206 proceeding does not constitute a definitive finding by the Commission that MidAmerican has market power in the MidAmerican control area. As discussed in the *April 14 Order* and *July 8 Order*, the screens are conservatively designed to identify the subset of applicants who require closer scrutiny. Accordingly, for the MidAmerican control area, MidAmerican 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.¹⁴ In addition, as the Commission stated in the *April 14 Order*,¹⁵ the applicant or intervenors may present evidence such as historical sales data to support whether the applicant does or does not possess market power.

26. 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,¹⁶ we will establish a refund effective

¹⁴ *Id.* at P 201, 207-209.

¹⁵ *Id.* at P 37 n.11.

¹⁶ *See, e.g., Canal Electric Company*, 46 FERC ¶ 61,153 (1989), *reh'g denied*, 47 FERC ¶ 61,275 (1989).

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. EL05-59-000 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 October 31, 2005.

27. Additionally, MidAmerican states in its filing that it is an affiliate of various non-regulated, direct and indirect wholly and partially owned subsidiaries of MidAmerican Energy Holdings Company in the United States and abroad which manage and own interests in over 5,000 MW of power generation facilities and conduct business in the United States and the Philippines. Some of these generation facilities are located in California, New York, Arizona and Texas. MidAmerican has not, however, provided generation market power screens for these facilities. MidAmerican states that such energy projects in the United States consist entirely of ownership interests in various qualifying facilities (QFs) under PURPA located in California, New York and Arizona; and an EWC in Texas. MidAmerican states that none of these QF or exempt wholesale generator (EWG) projects are located in the same markets in which MidAmerican operates. It further states that all capacity (other than 59 MW of geothermal capacity in California) from each of the QF projects is committed under long-term contracts. Because MidAmerican has failed to provide sufficient information regarding these affiliated generators, we will direct MidAmerican to file, within 30 days from the date of this order, additional information in this regard. In particular, MidAmerican should identify each company to which it refers, whether the generator is a QF or EWG facility, the location of the facility, and the nameplate capacity and uncommitted capacity for each generator. In addition, MidAmerican should also provide any applicable indicative screen analysis pursuant to our *April 14 Order* and *July 8 Order*. In this regard, MidAmerican may use simplifying assumptions.

Transmission Market Power

28. When a transmission-owning public utility seeks market-based rate authority, the Commission has required the public utility to have an OATT on file before granting such authorization. MidAmerican states in its filing that it has an OATT on file with the Commission. We note that MidAmerican's OATT was accepted by Commission order.¹⁷

¹⁷ *MidAmerican Energy Company*, 73 FERC ¶ 61,027 (1995).

29. Intervenors have raised concerns regarding the issue of transmission market power sufficient to warrant further examination, as part of the section 206 proceeding that we initiate herein in Docket No. EL05-59-000, of MidAmerican's potential to exercise transmission market power. In particular, as noted in the "Summary of Pleadings" above, RPGI asserts that MidAmerican has violated the terms of its OATT by denying transmission service that would permit RPGI to enter into a contract with a different wholesale power supplier. MidAmerican will have the opportunity to file, within 60 days of the date of issuance of this order, any additional information that it believes the Commission should take into consideration in determining whether MidAmerican satisfies the Commission's transmission market power standard for the grant of market-based rate authority. MidAmerican's filing will be noticed in the *Federal Register* and an opportunity will be provided for interested parties to file comments. MidAmerican's response, and any comments thereto, will supplement the record and enable the Commission to better examine whether MidAmerican satisfies the Commission's transmission market power standard for the grant of market-based rate authority. Further, as described above, MMTG cites at least one instance where an alternative supplier could not get transmission service, and argues that entities trying to sell into the MidAmerican control area often cannot find a transmission path, even for small transactions. This is the type of evidence that the April 14 and July 8 Orders anticipated could be considered as part of the Commission's examination of generation market power.¹⁸ Therefore, the Commission may consider these issues in the context of the generation market power section 206 investigation instituted herein.

Other Barriers to Entry

30. MidAmerican states that it has an affiliated pipeline, Northern Natural, that supplies natural gas to upper Midwest markets in Iowa, Wisconsin, Minnesota and a small portion of Illinois. MidAmerican states that there are four interstate pipelines serving the Iowa market. MidAmerican further states that Northern Natural supplies little of the gas-fired generation serving the relevant electric market, and that the existing gas-fired generation in the market has other alternatives to obtain transportation service. MidAmerican states further that Northern Natural is a certified, open-access pipeline and both it and MidAmerican operate entirely separately pursuant to the Commission's

¹⁸ April 14 Order, 107 FERC ¶ 61,108 at P 102, 119 and July 8 Order, 108 FERC ¶ 61,026 at n.84 (explaining that the type of evidence to be considered is historical sales and/or access to transmission to move supplies within, out of, and into a control area).

standards of conduct requirements in Order No. 2004.¹⁹ MidAmerican states that neither it nor its affiliates exercise control over sites for generating plants that could restrict entry by other suppliers. MidAmerican also states that it and its affiliates cannot erect barriers to entry that would prevent competitors from participating in the relevant markets. Based on MidAmerican's representations, the Commission is satisfied that MidAmerican cannot erect barriers to entry.²⁰

Affiliate Abuse/Reciprocal Dealing

31. The Commission is also concerned with the potential for affiliate abuse. MidAmerican states that it has filed with the Commission and operates under an approved code of conduct that is consistent with the Commission's requirements. However, based on the Commission's review of MidAmerican's market-based rate tariffs, we note that the tariffs do not prohibit sales to MidAmerican's affiliates "without first receiving" Commission authorization of the transaction under section 205 of the Federal Power Act (FPA). Consistent with Commission precedent,²¹ MidAmerican is directed to make a compliance filing within 30 days of the date of issuance of this order to revise their market-based rate tariffs to include such language. With this revision, and based on MidAmerican's representations, we find that MidAmerican satisfies the Commission's concerns with regard to affiliate abuse.

Market Behavior Rules

32. In the Market Behavior Rules Order, the Commission directed market-based rate sellers to include as an amendment to their market-based rate tariff the market behavior rules at such time as they seek continued authorization to sell at market-based rates.²² In

¹⁹ *Standards of Conduct for Transmission Providers*, Order No. 2004, FERC Stats. & Regs., Regulations Preambles ¶ 31,155 (2003), *order on reh'g*, Order No. 2004-A, 107 FERC ¶ 61,032 (2004), *order on reh'g*, 108 FERC ¶ 61,118 (2004).

²⁰ In *Enron Power Marketing, Inc.*, 65 FERC ¶ 61,305 (1993), the Commission determined that a power marketer may be affiliated with an interstate natural gas pipeline because, under the Commission's requirements, such pipelines must offer open-access services on a non-discriminatory basis.

²¹ *Aquila, Inc.*, 101 FERC ¶ 61,331 at P 12 (2002).

²² *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003) at Ordering Paragraph (A), *order on reh'g*, 107 FERC ¶ 61,175 (2004) (Market Behavior Rules Order).

its October 29 filing, MidAmerican submitted revised tariff sheets to amend its tariff to include the market behavior rules set forth in Appendix A to the Market Behavior Rules Order. The Commission accepts the revised tariff sheets for filing.

Reporting Requirements

33. 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.²³ Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.²⁴

34. MidAmerican 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.²⁵ 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, MidAmerican is directed, within 30 days of the date of issuance of this order, to revise its market-based rate tariffs to incorporate the following provision:

²³ *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/Electric/eqr/eqr.htm>.

²⁴ 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.

²⁵ *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).

[insert market-based rate seller name] 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.

The Commission orders:

(A) 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. EL05-59-000 concerning the justness and reasonableness of MidAmerican's market-based rates, as discussed in the body of this order.

(B) 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. EL05-59-000.

(C) 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 (C) above.

(D) For the MidAmerican control area, MidAmerican 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.

(E) MidAmerican is directed, within 30 days from the date of this order, to make a compliance filing providing additional information in regard to certain affiliated QF and EWG generators, as discussed in the body of this order.

(F) MidAmerican is directed, within 60 days of the date of this order, to file a written response to the issues raised by intervenors concerning transmission market power, as discussed in the body of this order.

(G) MidAmerican is directed, within 30 days from the date of this order, to make a compliance filing to revise the affiliate sales prohibition language in its market-based rate tariffs, as discussed in the body of this order.

(H) The revised tariff sheets submitted by MidAmerican to include in its tariff the Market Behavior Rules are hereby accepted for filing, as discussed in the body of this order.

(I) Docket No. EL04-106-000 is hereby terminated, as discussed in the body of this order.

(J) The rehearing request filed in Docket Nos. ER96-719-002 and EL04-106-001 is hereby dismissed as moot, as discussed in the body of this order.

By the Commission. Commissioner Kelliher dissenting in part with a separate statement attached.

(S E A L)

Linda Mitry,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

MidAmerican Energy Company

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(Issued June 1, 2005)

Joseph T. KELLIHER, Commissioner *dissenting in part*:

This order finds that a section 206 proceeding is necessary to determine whether MidAmerican may continue to charge market-based rates. As stated in the order, the institution of this section 206 proceeding stems from MidAmerican's failure of one of the Commission's generation market power screens and "concerns regarding the issue of [whether MidAmerican exerts] transmission market power. . . ."¹ I support the institution of a section 206 proceeding to examine whether MidAmerican has generation market power because the Commission's precedent is clear that failure of either generation market power screen provides the basis for instituting a section 206 proceeding. However, at this time, I do not believe that the evidence submitted in this proceeding supports a section 206 proceeding that includes an examination of whether MidAmerican exercises transmission market power. For this reason, I dissent on this part of the order.

To date, the transmission market power prong of the Commission's market power test has largely involved whether or not a public utility seeking market-based rate authorization that owns transmission has an OATT on file.² Generally, the inquiry ends

¹ See *supra* P 29.

² *Consumers Energy Co. v. FERC*, 367 F.3d 915, 917 (D.C. Cir. 2004) citing *Progress Power Marketing, Inc.*, 76 FERC ¶ 61,155 at 61,919 (1996); and December Order at P 39.

there. However, the Commission has investigated transmission market power issues when there is a *prima facie* showing that a public utility with an OATT on file has violated its OATT.³

One of the intervenors in this proceeding, RPGI, alleges that MidAmerican violated its OATT, but requests that the Commission “wait until the conclusion of its investigation in Docket No. PA04-18 before it acts”⁴ in the instant docket, so that the Commission may “reveal the extent to which MidAmerican is able to exercise generation or transmission market power.”⁵ Since RPGI has not submitted evidence to support its allegation that MidAmerican exercised transmission market power in violation of its OATT and requests that the Commission further investigate RPGI’s allegations concerning transmission market power before proceeding with the section 206 proceeding, I believe that, at this time, the decision to include transmission market power issues in the section 206 proceeding is unwarranted. Given the lack of evidence at this time, I would wait until the conclusion of the Commission’s pending investigation in Docket No. PA04-18 before deciding whether to include in a section 206 proceeding an examination of whether MidAmerican exercises transmission market power.

Joseph T. Kelliher

³ *WPS Resources Corp.*, 83 FERC ¶ 61,196 at 61,837-38 (1998).

⁴ RPGI Comments at 6-7.

⁵ *Id.* at 7.