122 FERC ¶ 61,023
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Wisconsin Electric Power Company Docket No. EL08-10-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued January 17, 2008)

1. On November 13, 2007, Wisconsin Electric Power Company (Wisconsin Electric) filed a petition for a declaratory order (Petition) requesting that the Commission determine, for sales that were completed by the end of August 2007, that sales under its market-based rate tariff (MBR Tariff) with a sink[1] outside of the Wisconsin-Upper Michigan Systems region (WUMS)[2] complied with the provision in its MBR Tariff limiting sales to those with "delivery points" outside of WUMS. In this order, we grant the Petition.

I. Petition

2. Wisconsin Electric is a wholly-owned public utility operating company subsidiary of Wisconsin Electric Company, a public utility holding company. It owns electric generation and distribution facilities and natural gas distribution facilities located in the states of Wisconsin and Michigan. Wisconsin Electric has divested its transmission system and no longer provides Commission-jurisdictional transmission service.

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[1] For purposes of this order, the term "sink" refers to the location where power reaches buyers that serve end-use customers.

[2] The restriction also includes the Eastern region of the Upper Peninsula of Michigan that was formerly in the East Central Area Reliability Coordinating Agreement (ECAR), however, we refer to the restricted area as WUMS herein.

Wisconsin Electric owns or controls approximately 7,300 megawatts (MW) of generation in WUMS, and has approximately 6,400 MW of retail and wholesale load in WUMS.[3] Wisconsin Electric's MBR Tariff was approved in 1998[4] and amended in 2005.[5]

3. On October 26, 2007, in Docket No. ER98-855-009, Wisconsin Electric submitted a notice of change in status filing that, among other things, proposes to amend its MBR Tariff to comply with the requirements of Order No. 697. That filing is currently pending.

A. "Delivery Point" Limitation

4. Wisconsin Electric requests that the Commission determine, for sales that were completed by the end of August 2007, that sales under its MBR Tariff with a sink outside of WUMS complied with the provision in its MBR Tariff limiting sales to those with "delivery points" outside of WUMS. The relevant MBR Tariff provision was accepted by the Commission in 1998,[6] and specifically prohibits sales under Wisconsin Electric's MBR tariff "to any delivery point located in" WUMS. The term "delivery point" is not defined in Wisconsin Electric's MBR Tariff. Wisconsin Electric states that the intent of the restriction was to prohibit sales to loads in WUMS, but to permit sales that sink outside of WUMS. According to Wisconsin Electric, the delivery point geographic restriction was included in its MBR Tariff because Wisconsin Electric knew that loads inside WUMS had the potential for Wisconsin Electric to exercise market power.[7] Therefore, in order to avoid a contested Commission proceeding on its MBR Tariff application, Wisconsin Electric states that it "wanted those loads to understand that the MBR Tariff would not be used for sales to them."[8] Wisconsin Electric also states that its MBR Tariff application explained that the delivery point restriction was offered in recognition of transmission constraints that affected imports in to WUMS across the interface with MAPP, which were discussed in the Commission's 1997 Order on

[3] Petition at 8.

[4] *Wisconsin Electric Power Co.*, 82 FERC ¶ 61,067 (1998) (1998 Order).

[5] *Wisconsin Electric Power Co.*, 110 FERC ¶ 61,340, *reh'g denied*, 111 FERC ¶ 61,361 (2005).

[6] 1998 Order.

[7] *Wisconsin Electric Power Co.*, 79 FERC ¶ 61,158, at 61,700 (1997).

[8] Petition at 2-3.

Wisconsin Electric's then-proposed merger with Northern States Power Company (NSP).[9]

5. Wisconsin Electric requests that the Commission determine that the term "delivery point" in its MBR Tariff means "the location of the sink of the transaction," (i.e., the sink of the purchaser), not the place where title and risk change hands, for all sales under its MBR Tariff that were completed before it identified this issue in late August 2007. It raises this issue because it recognizes that "the Commission's recent policy has been to prohibit market-based rate sales in mitigated control areas regardless of whether the transactional sink is outside the mitigated control area."[10]

6. In support of its request, Wisconsin Electric states that its MBR Tariff restriction is best interpreted in the context in which it was proposed and approved. Specifically, Wisconsin Electric explains that, consistent with the intent that the delivery point geographic restriction was to prevent sales to loads within the restricted region, Wisconsin Electric's MBR Tariff application stated that "[t]he tariff restricts sales of capacity and/or energy under the tariff for delivery to loads within the Company's retail electric service territory…."[11] Wisconsin Electric also argues that the fact that its MBR Tariff creates a restriction on sales "to" a delivery point, rather than "at" a delivery point, further reinforces that Wisconsin Electric's intent was to prohibit sales "to" loads within WUMS, and that "the 'delivery point' restriction is intended to allow sales under the MBR Tariff that sink outside the restricted region."

7. Wisconsin Electric argues that this interpretation is supported by the Commission orders relied on in its MBR Tariff application to support the delivery point restriction. It states that, in each of those orders, the sales limitation was based upon the location of the customer, not the point where title changed hands.[12] Wisconsin Electric also states that it did not intend to adopt a mitigation measure that was more restrictive than provided for in these orders. Wisconsin Electric explains that, in 1998, when the Commission approved its MBR Tariff, there were very few cases involving market power mitigation

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[9] Petition, Keller Affidavit at ¶ 5-6 (citing *Wisconsin Electric Power Co.*, 79 FERC at 61,700).

[10] Petition at 4.

[11] *Id*. at 10 (citing Wisconsin Electric Power Co., December 1, 1997 MBR Tariff Application, Docket No. ER98-855-000, at 1).

[12] *Id*. at 11-12 (citing *Florida Power & Light Co.*, 81 FERC ¶ 61,107, at 61,394 (1997); *Delmarva Power & Light Co.*, 76 FERC ¶ 61,331, at 62,582 (1996); *CSW Power Marketing, Inc.*, 79 FERC ¶ 61,308, at 62,374 (1997)).

in relation to market-based rate sales.[13] Additionally, Wisconsin Electric references several recent orders where the Commission considered whether to allow sales at market-based rates in which the title changed hands in the mitigated geographic market, but the sink was outside that mitigated geographic market.[14]

8. Wisconsin Electric also explains that, prior to 2002, interpretation of the term "delivery point" was not an issue because, from 1998 until February 2002, transmission rates in the Midwest were single-system "pancaked" rates. Thus, when Wisconsin Electric made a sale under its MBR Tariff during that pre-Midwest Independent Transmission System Operator, Inc. (Midwest ISO) period, it used point-to-point transmission service under its transmission tariff to the border of its transmission system, which in all cases under the MBR Tariff was also the border of WUMS. Consequently, the purchaser would take delivery at or beyond that point.

9. However, since the Midwest ISO's single tariff replaced the pancaked transmission rates in February 2002, Wisconsin Electric entered into transactions with points that sink outside of WUMS, *but with title to the power changing hands at Wisconsin Electric's generators within WUMS*. Wisconsin Electric explains that, under the Midwest ISO's single tariff, sales of capacity and energy for delivery to points that sink anywhere outside of WUMS could be accomplished most economically by having the purchaser take title to power at the generator source, and delivering it across Midwest ISO using network transmission service. Thus, it was no longer necessary for Wisconsin Electric to take point-to-point service to the WUMS border, for pickup at that point, by the customer under network service.[15] Wisconsin Electric states that "[t]here was no accompanying change to the MBR Tariff and thus no obvious prompt to revisit whether sales of the same products to the same counterparties with the same sinks outside of WUMS had suddenly become problematic due to elimination of the rate pancake."[16]

10. Wisconsin Electric acknowledges that, since February 2002, sales of capacity and short-term energy under Wisconsin Electric's MBR Tariff to purchasers with sinks

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[13] *Id*. at 12.

[14] *Id*. at 14-16 (citing *LG&E Energy Marketing, Inc.*, 113 FERC ¶ 61,229 (2005); *South Carolina Electric & Gas Co*., 114 FERC ¶ 61,143, at P 15-16 (2006); *MidAmerican Energy Co.*, 114 FERC ¶ 61,280 (2006); *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 72 Fed. Reg. 39,904 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252, *clarified*, 121 FERC ¶ 61,260 (2007) (*Order Clarifying Final Rule*).

[15] *Id*. at 13.

[16] *Id*. at 5.

outside of WUMS have occurred, with title changing hands at the generator network resource inside WUMS. Wisconsin Electric "believes that all such sales were at rates at or below the rates in [Wisconsin Electric's] up-to cost-based tariff, and were openly and fully reported in [Wisconsin Electric's] electric quarterly reports (EQRs)."[17] Wisconsin Electric states that it confirmed that, with the exception of a single, one-hour sale of 50 MW in 2002, all transactions that may be affected by interpretation of the term "delivery point," had a sink outside of WUMS. Wisconsin Electric also states that the total revenue from such sales, since the switch to the Midwest ISO single tariff in February 2002, has been less than $1.4 million.[18] The majority of these revenues are from capacity sales to Wisconsin Electric's neighbor, Northern States Power Company (NSP), and an express requirement of these sales has been deliverability of capacity to NSP.[19]

11. Specifically, Wisconsin Electric explains that, during the period from the inception of the Midwest ISO single transmission tariff until Wisconsin Electric identified the delivery point interpretative issue in late August 2007, Wisconsin Electric completed six capacity sales. Wisconsin Electric explains that all of these sales had sinks outside of WUMS and that, of these, the largest sale, accounting for 84 percent of the revenues from all such capacity sales, was a sale of 150 MW of capacity to NSP that took place in July and August 2007. The revenue from that sale was $900,000, or $3,000/MW-month. Wisconsin Electric states that the comparable capacity rate in the Wisconsin Electric cost-based tariff is "[u]p to $1,697/MW-week for periods of one through twelve weeks,[20] and that, therefore, the rate for this sale was well below the comparable rate under the cost-based tariff.[21] Further, Wisconsin Electric states that each of its completed capacity

[17] *Id*. at 5-6.

[18] *Id*. at 6. Wisconsin Electric also states that, during the five year period since the elimination of rate pancakes in the Midwest ISO, when it began making sales where title changed hands at a Wisconsin Electric generator resource rather than at or beyond the border of WUMS, to the time when the interpretative issue was identified in August 2007, the total revenue from such sales was $1,388,667. The average revenues per year over the five-plus years since the institution of the Midwest ISO single transmission tariff were less than $300,000 per year. *Id*. at 17.

[19] In this regard, Wisconsin Electric states that NSP is located outside of WUMS, and so the parties understood and agreed that the purpose of the transaction was to designate the capacity for use outside of WUMS. Therefore, according to Wisconsin Electric, the intended result of this transaction was consistent with the intent of the delivery point restriction. *Id*. at 19-20.

[20] *Id*. at 18 (citing Wisconsin Electric FERC Electric Tariff, Second Revised Volume No. 2, Original Sheet No. 20).

[21] *Id*. at 18.

sales transactions involved requirements for deliverability under Midwest ISO Module E for use by a purchaser located outside of WUMS. Additionally, Wisconsin Electric confirmed that each capacity sale was at a rate lower than the rate for capacity sales of a comparable duration in Wisconsin Electric's cost-based tariff.[22]

12. For energy sales that could be affected by interpretation of the term "delivery point," Wisconsin Electric states that data shows that all such sales, with a single exception, had sinks outside of WUMS and were short-term sales of 16 hours or less. Wisconsin Electric explains that, while it appears there were 171 such sales, total revenue from these sales was only $315,576, or less than $2,000 per sale.[23] Almost all of these sales occurred in the time period from the inception of the single Midwest ISO tariff in February 2002 to the beginning of the Midwest ISO energy market in April 2005. Wisconsin Electric determined the cost-based rate, based on out-of-pocket costs, for 31 of the market-based rate energy sales in question with the highest rates, and states that it has "confirmed that all prices were at or below the rate in the cost-based tariff."[24]

13. Wisconsin Electric has not entered into any bilateral sales under its MBR Tariff since the interpretative issue concerning the meaning of the term "delivery point" was identified in late August 2007.[25] Wisconsin Electric states that it will continue this "voluntary moratorium" on bilateral sales under the MBR Tariff until it has completed a section 205 proceeding to update its MBR Tariff.[26] Further, Wisconsin Electric explains that "[n]otwithstanding [its] good faith belief that it has acted appropriately, [Wisconsin Electric] recognizes as well that the historic interpretation of 'delivery point' expressed here is not the same interpretation that would likely pertain were a similar tariff mitigation provision adopted today [and that it] does not want the interpretation affecting its past actions to be colored by going-forward policy considerations."[27]

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[22] *Id*. at 20.

[23] *Id*.

[24] *Id*. at 21 (internal citation omitted). Wisconsin Electric states that it believes that the other market-based rate sales would not exceed the cost-based rate. *Id*. at 22.

[25] *Id*. at 22. Wisconsin Electric states that it has made sales into the Midwest ISO market at locational marginal prices, which is permitted by the MBR Tariff. *Id*. at n.46.

[26] As noted above, Wisconsin Electric has submitted a notice of change in status filing in Docket No. ER98-855-009 that, among other things, proposes to amend its MBR Tariff to comply with the requirements of Order No. 697. That filing is currently pending.

[27] Petition at 22.

B. Sale to TransAlta

14. Wisconsin Electric's Petition identifies a single sale in 2002 that had a sink within WUMS, and that was therefore in violation of Wisconsin Electric's MBR Tariff. Wisconsin Electric states that this was "a single one hour sale to TransAlta Energy Marketing US [TransAlta] of 50 MW at $30.00/MWh in 2002, for a total sale price of $1,500 [which] is well below the allowable cost-based rate in that hour of $39.95/MWh."[28] Wisconsin Electric explains that this sale "most likely was intended to be a cost-based sale, and the trader simply chose the wrong tariff on the computer's drop-down menu when recording the sale."[29] According to Wisconsin Electric, this explanation is reasonable, given that each of the other 170 energy sales in question, including nine other sales to TransAlta, did have sinks outside of WUMS.

II. Notice of Filing and Responsive Pleadings

15. Notice of Wisconsin Electric's Petition was published in the *Federal Register*, 72 Fed. Reg. 67,292 (2007), with interventions and protests due on or before December 13, 2007. The Intergrys Energy Group (Intergrys) filed a timely motion to intervene.

III. Discussion

A. Procedural Matters

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), the timely, unopposed motion to intervene serves to make Intergrys party to this proceeding.

B. "Delivery Point" Limitation

17. Notwithstanding that Wisconsin Electric's interpretation of the delivery point limitation contained in its tariff is inconsistent with the Commission's current policy, we will grant Wisconsin Electric's request that, for sales that were completed by the end of August 2007, the term "delivery point" is "the location of the sink of the transaction," (i.e., the sink of the purchaser), not the place where title changes hands. Wisconsin Electric's interpretation was reasonable under the circumstances at that time; however, as discussed in our *Order Clarifying Final Rule*, any tariff provisions which do not comport with those directed in Order No. 697 ceased to be effective on September 18, 2007, and

[28] *Id*. at 21 (*quoting* Keller Aff. ¶ 14).

[29] *Id*. at 21 (citing Keller Aff. ¶ 14).

the provisions of Order No. 697 control.[30] As such, as of the effective date of Order No. 697 (September 18, 2007), Wisconsin Electric is subject to the requirements of that Final Rule and thus may not limit its mitigation to sales that sink in WUMS.[31]

18. Based on the facts and circumstances of this case, we agree with Wisconsin Electric's assertion that, "the intent of the 'delivery point' geographic restriction in the MBR Tariff was to prevent sales to loads within the restricted region."[32] We find that, for sales under Wisconsin Electric's MBR Tariff that were completed by the end of August 2007, Wisconsin Electric's interpretation of the term "delivery point" to mean the location of the sink of the transaction (i.e., the sink of the purchaser) was reasonable, given that the Commission did not address the specific intent of the delivery point limitation in the 1998 Order and that the term "delivery point" is not defined in Wisconsin Electric's MBR Tariff.[33] Although Order No. 697 clarified the Commission's current policy concerning sales that sink in a balancing authority area where the seller has been found, or presumed, to have market power,[34] when Wisconsin Electric's MBR Tariff provisions were adopted in 1998, there were few cases involving mitigated sales authority.

19. Further, we note that all sales of capacity and energy under Wisconsin Electric's MBR Tariff from the inception of the Midwest ISO in February 2002 through the end of August 2007 were at rates at or below the rates for the same products in Wisconsin Electric's cost-based tariff.[35] Thus, sales of energy and capacity under Wisconsin Electric's MBR Tariff during this time period did not increase customer rates.[36] In addition, Wisconsin Electric has not entered into any bilateral sales under the MBR Tariff since the interpretative issue with respect to the meaning of the term "delivery point" was

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[30] Wisconsin Electric filed, as part of a change in status filing pending in Docket No. ER98-855-009, a revised MBR Tariff to comply with the requirements of Order No. 697.

[31] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 818-819.

[32] Petition at 2 (citing Keller Aff. ¶ 7).

[33] In fact, the 1998 Order recognizes the use of the term "delivery point" without comment. 1998 Order at 61,233.

[34] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 817.

[35] Petition at 13, 18, 20-22.

[36] Also, these sales were openly and fully reported in Wisconsin Electric's EQRs.

identified in late August 2007. Wisconsin Electric therefore stopped making sales at market-based rates that were inconsistent with the Commission's current policy before the effective date of Order No. 697, September 18, 2007.

C. Sale to TransAlta

20. With regard to Wisconsin Electric's single sale to TransAlta, in 2002, that had a sink in WUMS, we find that, although this sale violated the delivery point limitation in Wisconsin Electric's MBR Tariff, given the facts and circumstances, there is no need for the Commission to take action with regard to this sale. We make this finding based on the following facts. First, the sale to TransAlta was a single, one hour 50 MW sale at a rate of $30.00/MWh, which was well below the allowable cost-based rate in that hour of $39.95/MWh.[37] Thus, no customers paid higher rates as a result of this sale. Second, this 50 MW sale to TransAlta was the only sale out of 170 other energy sales, including nine other sales to TransAlta, that did not have a sink outside of WUMS. In this regard, we find Wisconsin Electric's explanation that "this sale most likely was intended to be a cost-based sale, and the trader simply chose the wrong tariff on the computer's drop-down menu when recording the sale"[38] to be reasonable. We therefore will not take action with regard to the single 50 MW sale to TransAlta.

The Commission orders:

Wisconsin Electric's petition for declaratory order is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[37] Petition at 21 (citing Keller Aff. ¶ 14).

[38] *Id*. at 21.