

128 FERC ¶ 61,048
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

MidAmerican Energy Company	Docket Nos. ER96-719-025
PacifiCorp	ER97-2801-026
Cordova Energy Company LLC	ER99-2156-018

ORDER ACCEPTING TARIFF AMENDMENTS AND UPDATED MARKET POWER
ANALYSIS

(Issued July 16, 2009)

1. In this order, the Commission accepts MidAmerican Energy Company (MidAmerican), Cordova Energy Company LLC (Cordova Energy), and PacifiCorp's (collectively, the MidAmerican Companies) proposed revisions to their market-based rate tariffs, effective September 1, 2009. As discussed below, the Commission concludes that the currently-effective restrictions on the MidAmerican Companies' market-based rate authority may be removed upon MidAmerican's integration with the Midwest ISO.
2. Additionally, the Commission finds that the MidAmerican Companies meet the criteria for Category 2 sellers and they are so designated. The MidAmerican Companies' next updated market power analysis must be filed according to the regional schedule adopted in Order Nos. 697 and 697-A.¹

I. Background

3. The MidAmerican Companies are wholly-owned, indirect subsidiaries of MidAmerican Energy Holdings Company (MidAmerican Holdings), a subsidiary of Berkshire Hathaway Inc. MidAmerican, an Iowa corporation, is a combination gas and

¹ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055 (2008), *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009).

electric company and a public utility under the Federal Power Act. MidAmerican provides retail electric service to customers in Iowa, Illinois, and South Dakota, retail natural gas service to customers in Iowa, Illinois, Nebraska, and South Dakota, wholesale requirements service to municipal electric utilities, and transmission service pursuant to an open access transmission tariff (OATT) on file with the Commission. Cordova Energy, an exempt wholesale generator, operates a gas-fired generating facility located in Illinois that is interconnected with the MidAmerican and Commonwealth Edison Company transmission systems. PacifiCorp, which was acquired by MidAmerican Holdings in 2006, provides retail electric service to customers in Utah, Oregon, Wyoming, Washington, Idaho, and California, and transmission service pursuant to an OATT on file with the Commission. PacifiCorp owns both transmission and generation assets outside the Midwest ISO.

4. In April 2009, the Midwest ISO and MidAmerican announced MidAmerican's intention to fully integrate with the Midwest ISO as a transmission-owning member.

5. On May 15, 2009, the MidAmerican Companies filed, pursuant to section 205 of the Federal Power Act,² revisions to their market-based rate tariffs to remove certain restrictions on their market-based rate sales authority.³ The MidAmerican Companies filed the tariff amendments in connection with MidAmerican's anticipated integration with the Midwest ISO, which is expected to occur on September 1, 2009.

6. According to MidAmerican, its currently-effective tariff provides that it may not make market-based rate sales under the tariff within the MidAmerican balancing authority area. Similarly, the existing tariffs of Cordova Energy and PacifiCorp also provide that they may not make sales within the MidAmerican balancing authority area. The filing would remove these restrictions from the MidAmerican Companies' existing tariffs upon integration of MidAmerican with the Midwest ISO – the revised tariffs of the MidAmerican Companies would permit MidAmerican, Cordova Energy, and PacifiCorp to make market-based sales of capacity, energy, and ancillary services throughout the Midwest ISO market. The MidAmerican Companies state that MidAmerican's integration with the Midwest ISO will address concerns which caused the Commission to impose the limitations on the MidAmerican Companies' market-based rate sales authority.

7. In support of this statement, the MidAmerican Companies include in the filing indicative screens for assessing horizontal market power for the Midwest ISO market. The MidAmerican Companies explain that, under Commission precedent, upon MidAmerican's integration with the Midwest ISO, the Midwest ISO will be the relevant

² 16 U.S.C. § 824d (2006).

³ The restrictions on the MidAmerican Companies' market-based rate authority were established in *MidAmerican Energy Co.*, 114 FERC ¶ 61,280 (2006).

geographic market in the Central Region for market power analysis purposes.⁴ Accordingly, in the filing, the MidAmerican Companies evaluate their ability to exercise horizontal and vertical market power in the Midwest ISO and they conclude that they pass all of the Commission's market power screens.

II. Notices and Responsive Pleadings

8. Notice of the Filing was published in the *Federal Register*, 74 Fed. Reg. 25,527 (2009), with interventions or protests due on or before June 5, 2009. The Resale Power Group of Iowa filed a motion to intervene. Midwest Municipal Transmission Group, Northern Iowa Municipal Electric Cooperative Association, and Municipal Energy Agency of Nebraska (collectively, the Midwest Municipals), jointly filed a motion to intervene and protest on June 5, 2009.⁵ The MidAmerican Companies filed an answer to the Midwest Municipals' protest on June 22, 2009.

9. According to the Midwest Municipals, they are concerned that if MidAmerican's integration with the Midwest ISO is not handled appropriately, they will be injured and competition will be impaired. While the Midwest Municipals explain that MidAmerican and the Midwest ISO have committed to work with the Midwest Municipals concerning MidAmerican's integration, the Midwest Municipals filed the protest as a "cautionary measure"⁶ since the parties are currently working through the MidAmerican integration and the outcome of their discussions is uncertain.

10. In their protest, the Midwest Municipals explain that some of them own certain transmission assets and interests in generation assets, and that some are entitled to transmission rights under MidAmerican's existing tariffs and contracts. The Midwest Municipals assert that if these contracts and arrangements are not honored or continuously enforced, then competition will be adversely affected. For example, the Midwest Municipals cite to a 2005 agreement and memorandum of understanding which resolved market power concerns that they raised during a previous proceeding on MidAmerican's market-based rate authority, and which includes protections against congestion costs and excessive redispatch costs (2005 Agreement). The Midwest Municipals claim that if the arrangements contemplated in the existing agreements, including the 2005 Agreement, are no longer enforced, the Midwest Municipals would likely see increased costs due to MidAmerican's integration with the Midwest ISO. The Midwest Municipals also are concerned about potential seams and rate pancaking issues.

⁴ The MidAmerican Companies cite Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 235.

⁵ The Midwest Municipals filed an errata to their Protest on June 9, 2009.

⁶ Midwest Municipals Protest at 2.

11. The Midwest Municipals reason that if the negative impacts of MidAmerican joining the Midwest ISO are not resolved, then implementation of the tariff revisions would be inappropriate. The Midwest Municipals explain that even if the MidAmerican Companies pass the indicative screens for assessing horizontal market power in the Midwest ISO, the Commission should be cognizant of the fact that MidAmerican previously failed the indicative screens within the MidAmerican balancing authority area. While the Midwest Municipals do not show that MidAmerican has market power in the MidAmerican balancing authority area, or that there is a transmission constraint into or out of the MidAmerican balancing authority area, they attest that transmission constraints do exist and reserve the right to supplement the protest with additional evidence regarding the MidAmerican balancing authority area in the event the Midwest Municipals' contracts and rights cannot be protected through negotiations with MidAmerican and the Midwest ISO.

12. In their answer, the MidAmerican Companies argue that the two primary issues raised by the Midwest Municipals have no bearing on whether the MidAmerican Companies should be authorized to make market-based rate sales in the Midwest ISO. The MidAmerican Companies also believe that the Midwest Municipals' concerns are premature at this stage in the process, and are not pertinent to this particular filing.

13. The MidAmerican Companies also claim that the protest fails to satisfy the requirements of Order No. 697 which, according to the MidAmerican Companies, require parties challenging market power analyses to present evidence to rebut the presumption that market power does not exist (if such a presumption has been established). The MidAmerican Companies contend that the Midwest Municipals have not met this burden. Rather, the MidAmerican Companies assert that the Midwest Municipals merely reference flawed information and suggest that if they become dissatisfied with the results of the negotiations, they should be allowed to supplement their protest.

14. Finally, the MidAmerican Companies respond to the Midwest Municipals' claims that the 2005 Agreement may be threatened by MidAmerican's integration with the Midwest ISO. According to the MidAmerican Companies, MidAmerican has made clear to the Midwest Municipals that it will honor existing commitments under the 2005 Agreement and that it will work with the Midwest ISO to provide a mechanism through which transmission revenue credits may continue on and after September 1, 2009. However, the MidAmerican Companies explain that the 2005 Agreement applies to MidAmerican's role *as a transmission provider* under the MidAmerican OATT; upon integration with the Midwest ISO, the Midwest ISO will become the transmission provider. Thus, issues such as recovery of transmission investment, transmission planning processes and procedures, and other transmission related issues must and will be resolved pursuant to the Midwest ISO's OATT.

III. Discussion

A. Procedural Matters

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

16. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the MidAmerican Companies' answer because it has provided information that assisted us in our decision-making process.

B. Market-Based Rate Authorization

17. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, horizontal and vertical market power.⁷ As discussed below, the Commission concludes that the MidAmerican Companies satisfy the Commission's standards for market-based rate authority.

1. Horizontal Market Power

18. The Commission has adopted two indicative screens for assessing horizontal market power, the pivotal supplier screen and the wholesale market share screen.⁸ The MidAmerican Companies have prepared the pivotal supplier and wholesale market share screens for the Midwest ISO market, consistent with the requirements of Order No. 697.⁹

19. The MidAmerican Companies' indicative screens rely on the Revised Midwest ISO simultaneous transmission import limit (Revised Midwest ISO SIL) Study. Although the Commission approved the Revised Midwest ISO SIL Study in *ALLETE, Inc.*,¹⁰ such study is inappropriate here because it does not include MidAmerican as a transmission-owning member in the Midwest ISO market.

⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 62, 399, 408, and 440.

⁸ *Id.* P 62.

⁹ *Id.* P 231-232, and P 235. Prior to joining the Midwest ISO, the relevant geographic area for a market power study for the MidAmerican Companies was the MidAmerican balancing authority area and any first-tier markets to that balancing authority area. After joining the Midwest ISO, the default relevant geographic area for a market power study is the Midwest ISO market.

¹⁰ 127 FERC ¶ 61,143 (2009).

20. The MidAmerican Companies also submit that even if they did not rely on the Revised Midwest ISO SIL Study and did not attribute any import capability to its competitors, they would still pass the pivotal supplier and wholesale market share screen in the Midwest ISO market with market shares ranging from 6.7 percent to 9.6 percent. The Commission has reviewed the MidAmerican Companies' pivotal supplier screen and wholesale market share screen for the Midwest ISO market and has determined that they pass the pivotal supplier screen and the wholesale market share screen in the Midwest ISO market. Using the conservative assumption of no imports, the MidAmerican Companies still pass the Commission's indicative screens in the Midwest ISO market.¹¹

21. Accordingly, we find that the MidAmerican Companies satisfy the Commission's requirements for market-based rate authority regarding horizontal market power in the Midwest ISO market.

2. Vertical Market Power

22. The Commission requires, in cases where a public utility, or any of its affiliates, owns, operates, or controls transmission facilities, that there be a Commission-approved OATT on file before granting a seller market-based rate authorization.¹²

23. The MidAmerican Companies state that, upon MidAmerican's integration with the Midwest ISO, service over the MidAmerican transmission system will be offered under the Midwest ISO OATT.¹³ In addition, they reiterate that PacifiCorp offers transmission service under a Commission approved OATT¹⁴ and that Cordova Energy does not own or operate transmission facilities.

24. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.¹⁵ The Commission requires a seller to provide a description of its ownership or control of, or affiliation with an entity that owns or controls, intrastate natural gas transportation, storage, or distribution facilities; sites for generation capacity development; and physical coal supply sources and ownership of or control over who may access transportation of coal supplies (collectively, inputs to

¹¹ See Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 379; *see also*, *Carthage Energy, LLC*, 123 FERC ¶ 61,186, at P 19 (2008).

¹² Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 408.

¹³ *Midwest Independent Transmission System Operator, Inc.*, 84 FERC ¶ 61,231 (1998).

¹⁴ *Pacific Gas & Electric Co.*, 77 FERC ¶ 61,025 (1996).

¹⁵ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 440.

electric power production).¹⁶ In Order No. 697, the Commission adopted a rebuttable presumption that the ownership or control of, or affiliation with any entity that owns or controls, inputs to electric power production does not allow a seller to raise entry barriers but will allow intervenors to demonstrate otherwise.¹⁷

25. The MidAmerican Companies state that they do not own or control, and are not affiliated with any entity that owns or controls, any intrastate natural gas transportation or intrastate natural gas storage facilities. The MidAmerican Companies state that, although MidAmerican does operate natural gas local distribution and appurtenant storage facilities in the Central Region, these facilities are regulated by the Iowa Utilities Board, the Illinois Commerce Commission, the South Dakota Public Utilities Commission, and various Nebraska municipalities. The MidAmerican Companies state that MidAmerican owns some easements on sites for wind power generation capacity development and a site that could potentially be used for natural gas-fired generation in Iowa. The MidAmerican Companies state that MidAmerican does not own any coal reserves and that it acquires all the coal it needs for electric generation from unaffiliated suppliers. However, they explain that MidAmerican owns or controls through lease agreements a fleet of coal rail cars for private use in connection with its coal-fired generation. The MidAmerican Companies state that PacifiCorp does not own or control intrastate natural gas transportation, storage or distribution facilities; sites for generation capacity development; or infrastructure for the transportation of coal supplies such as barges and rail cars. They explain that, although PacifiCorp controls some coal mining operations in Colorado, Utah, and Wyoming through ownership and lease, they represent a small fraction of the total coal operations in the western United States.

26. Lastly, the Commission requires sellers to make an affirmative statement that they have not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.¹⁸

27. The MidAmerican Companies affirmatively state that they have not erected barriers to entry and will not erect barriers to entry into the relevant markets.

28. Based on the MidAmerican Companies' representations, we find the MidAmerican Companies' submittal satisfies the Commission's requirements for market-based authority regarding vertical market power.

¹⁶ *Id.* P 447. Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 176.

¹⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 446.

¹⁸ *Id.* P 447.

C. Tariff Revisions

29. The MidAmerican Companies have demonstrated that, upon MidAmerican's integration with the Midwest ISO, they pass the Commission's indicative market power screens. As such, the Commission will permit removal of the restrictions on the MidAmerican Companies' market-based rate authority so that they may make market-based rate sales of energy, capacity, and ancillary services throughout the Midwest ISO market.

30. We find the Midwest Municipals' concerns misplaced. The proposed tariff revisions have a narrow focus: to eliminate the restrictions on the MidAmerican Companies' transacting at market-based rates in the MidAmerican balancing authority area. The updated market power analysis shows that integration of MidAmerican with the Midwest ISO eliminates the market power concerns that these restrictions addressed. The Commission had required mitigation of sales by the MidAmerican Companies in the MidAmerican balancing authority area because MidAmerican had failed the market power screens. However, upon MidAmerican's integration with the Midwest ISO, the relevant geographic market for market power analysis is the Midwest ISO market.¹⁹ MidAmerican's ability to exert market power, if any, will be reduced by virtue of MidAmerican being in a larger geographic market. In addition, MidAmerican will be subject to the Midwest ISO's Commission-approved market power mitigation and market monitoring once it joins the Midwest ISO.

31. The Midwest Municipals have failed to present any evidence that would undermine the updated market power analysis provided by the MidAmerican Companies, or the showing that integration of MidAmerican with the Midwest ISO eliminates the market power concerns addressed by the restrictions in the MidAmerican Companies' market-based rate tariffs. In fact, the Midwest Municipals' concerns do not appear to be related to this issue. Nevertheless, the Commission acknowledges the Midwest Municipals' concerns and notes that MidAmerican has stated that it will honor existing commitments under the 2005 Agreement and that it will work with the Midwest ISO to provide a mechanism so that transmission revenue credits can continue on and after September 1, 2009. We address many concerns raised by the Midwest Municipals in more detail in the orders relating to MidAmerican's integration with the Midwest ISO issued concurrently with this order.²⁰ Should the Midwest Municipals find themselves specifically aggrieved by MidAmerican's integration with the Midwest ISO, they are free

¹⁹ *Id.* P 235.

²⁰ *See* orders issued concurrently in Docket Nos. ER09-1246-000, ER09-1248-000, ER09-1253-000, ER09-1252-000, and ER09-1260-000.

to file a complaint or protest in response to a future filing predicated on those specific harms. At this time, however, the Midwest Municipals' protest is unsupported and not directly related to the current filing.

D. Reporting Requirements

32. 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 longer) market-based power sales during the most recent calendar quarter.²¹ Public utilities must file Electric Quarterly Reports no later than 30 days after the end of the reporting quarter.²²

33. The MidAmerican Companies 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.²³

34. Additionally, in Order No. 697, the Commission created two categories of sellers.²⁴ Category 1 sellers are not required to file regularly scheduled updated market

²¹ *Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127, *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reh'g denied*, Order No. 2001-B, 100 FERC ¶ 61,342, *order directing filing*, Order No. 2001-C, 101 FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001-D, 102 FERC ¶ 61,334 (2003). Attachments B and C of Order No. 2001 describe the required data sets for contractual and transaction information. Public utilities must submit Electric Quarterly Reports 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>.

²² The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2008). 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.

²³ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005); 18 C.F.R. § 35.42 (2008).

²⁴ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 848.

power analyses. Category 1 sellers are wholesale power marketers and wholesale power producers that own or control 500 MW or less of generation in aggregate per region; that do not own, operate, or control transmission facilities other than limited equipment necessary to connect individual generation facilities to the transmission grid (or have been granted waiver of the requirements of Order No. 888²⁵); that are not affiliated with anyone that owns, operates or controls transmission facilities in the same region as the seller's generation assets; that are not affiliated with a franchised public utility in the same region as the seller's generation assets; and that do not raise other vertical market power issues.²⁶ Sellers that do not fall into Category 1 are designated as Category 2 and are required to file regularly scheduled updated market power analyses.²⁷

35. Based on the MidAmerican Companies' representations, we find that they meet the criteria for a Category 2 seller in the Central Region and are so designated based on their ownership of generation assets totaling greater than 500 MW of capacity and ownership of transmission in the Central Region. Thus, the MidAmerican Companies must file an updated market power analysis for the Central region in compliance with the regional reporting schedule adopted in Order No. 697.²⁸ The Commission also reserves the right to require such an analysis at any intervening time.

The Commission orders:

(A) The MidAmerican Companies' updated market power analysis is hereby accepted for filing, as discussed in the body of this order.

(B) The MidAmerican Companies' tariff revisions are accepted for filing effective September 1, 2009.

²⁵ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 FR 21,540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036, *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

²⁶ 18 C.F.R. § 35.36(a)(2) (2008).

²⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 850.

²⁸ *Id.* P 882.

(C) The MidAmerican Companies are hereby directed to file an updated market power analysis according the regional reporting schedule adopted in Order No. 697.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.