

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. ER98-855-007  
ER05-540-001  
ER05-556-001

ORDER DENY REHEARING

(Issued June 3, 2005)

1. In this order we deny the request for rehearing filed by Madison Gas and Electric Company (MG&E) and Wisconsin Public Power Inc. (WPPI) (collectively, Wisconsin TDUs) of the Commission's March 24, 2005 order accepting an updated market power analysis and revised market-based rate tariff filed by Wisconsin Electric Power Company (Wisconsin Electric).<sup>1</sup>

**Background**

2. On September 27, 2004, as amended on 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).<sup>2</sup> 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.<sup>3</sup>

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<sup>1</sup> *Wisconsin Electric Power Company*, 110 FERC ¶ 61,340 (2005) (March 24 Order).

<sup>2</sup> *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004) (May 13 Order).

<sup>3</sup> *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

3. Wisconsin Electric's January 2005 market power analysis applied to the period before the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) Energy Market<sup>4</sup> is operational. In its January 2005 market power analysis, Wisconsin Electric stated that it did not seek to remove a restriction in its market-based rate tariff prohibiting sales within a restricted area.<sup>5</sup> For this reason, Wisconsin Electric submitted the generation market power screens for only the first-tier markets outside of the restricted area. Wisconsin Electric 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).

4. On February 4, 2005, Wisconsin Electric filed a revised market-based rate tariff that removed the prohibition on sales in the restricted area as long as the sales are made through the Midwest ISO Energy Market. The proposed tariff continued 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 the Midwest ISO as the relevant geographic market. In addition, Wisconsin Electric revised its market-based rate tariff to reflect that it is no longer a transmission provider.

5. On February 25, 2005, the Wisconsin TDUs filed a motion to intervene and conditional protest arguing 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 also argued that the WUMS load pocket could not be considered to be part of the same geographic market as the remainder of the 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 pointed to the Midwest ISO Independent Market Monitor's 2003 State of the Market Report<sup>6</sup> which concluded that

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<sup>4</sup> On April 1, 2005, the Midwest ISO became a single market and performs functions such as central commitment and dispatch with Commission-approved market monitoring and mitigation (hereafter referred to as the Midwest ISO Energy Market). *See Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,169 (2005).

<sup>5</sup> 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.

<sup>6</sup> Independent Market Monitor, Midwest ISO, Highlights of the MISO 2003 State of the Market Report, at 7.

the Hirschman-Herfindahl Index (HHI) in WUMS is a highly concentrated 2656, and WUMS and North WUMS are Narrow Constrained Areas (NCAs).<sup>7</sup> For these reasons, Wisconsin TDUs requested that Wisconsin Electric be evaluated using WUMS as the relevant geographic market.

6. In the March 24 Order, the Commission accepted Wisconsin Electric's updated market power analysis and revised market-based rate tariff<sup>8</sup> to be effective on April 1, 2005, the date on which the Midwest ISO became a single market, performing functions such as central commitment and dispatch with Commission-approved market monitoring and mitigation.<sup>9</sup> With regard to Wisconsin Electric's updated market power analysis, the Commission found that Wisconsin Electric passes the generation market power screens in NSP, MECS, and PJM.<sup>10</sup> In addition, the Commission found that Wisconsin Electric passes the generation market power screens in the Midwest ISO once the Midwest ISO Energy Market is operational. Therefore, the Commission found that Wisconsin Electric satisfies the Commission's generation market power standard for the grant of market-based rate authority for both the period before and after the Midwest ISO Energy Market became operational.<sup>11</sup>

7. In response to Wisconsin TDUs' concerns, the Commission noted that on August 6, 2004 and November 8, 2004, in *Midwest Independent Transmission System*

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<sup>7</sup> 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."

<sup>8</sup> 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).

<sup>9</sup> March 24 Order, 110 FERC ¶ 61,340 at P 18. The Commission also noted that, in the April 14 Order, the Commission held that once the Midwest ISO becomes a single market and performs such functions as central commitment and dispatch with Commission approved market monitoring and mitigation, the Midwest ISO would be considered to be a single geographic market for purposes of our generation dominance screens.

<sup>10</sup> *Id.* at P 17.

<sup>11</sup> *Id.* at P 21.

*Operator, Inc.*,<sup>12</sup> the Commission accepted the Midwest ISO's Open Access Transmission and Energy Markets Tariff (TEMT). The Commission stated that the TEMT, which establishes threshold levels for offers, with mitigation of bids that exceed such thresholds, contains provisions that address the Wisconsin TDUs' concerns regarding the Midwest ISO's mitigation of transmission constraints and load pockets in WUMS.<sup>13</sup>

### **Request for Rehearing**

8. In their request for rehearing of the March 24 Order, Wisconsin TDUs raise many of the same concerns that they raised in their protest. Specifically, Wisconsin TDUs argue that the Commission erred by unconditionally approving Wisconsin Electric's market-based rate authority in WUMS. They assert that the Commission failed to engage in reasoned decision-making, violated its statutory obligations and acted contrary to its own policies when it approved, without setting for investigation, Wisconsin Electric's market-based rates for WUMS after the start of the Midwest ISO's Energy Market. They also argue that the Commission erred by assuming that the Midwest ISO footprint is the relevant geographic market, despite contrary evidence that rebutted that assumption. Wisconsin TDUs argue that the Commission failed to take meaningful account of evidence in their protest that transmission constraints separate WUMS from the remainder of the Midwest ISO.

9. Wisconsin TDUs reassert that, in the July 8 Order, the Commission expressly recognized that even in a regional transmission organization (RTO) with Commission-approved market monitoring, an RTO-wide geographic market is rebuttable on a case-specific basis, especially in the case of load pockets.<sup>14</sup> They state that ignoring the effect of these constraints on price separation is inconsistent with the locational pricing that is Commission policy in RTO markets. Wisconsin TDUs explain that pricing becomes locational because generation from outside an area cannot compete with generation within an area due to transmission constraints and that prices separate between the areas. Thus, Wisconsin TDUs state that buyers within the constrained area cannot turn to

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<sup>12</sup> *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,163 (2004) (TEMT I), *order on reh'g*, 109 FERC ¶ 61,157 (2004) (TEMT II).

<sup>13</sup> March 24 Order, 110 FERC ¶ 61,340 at P 20.

<sup>14</sup> July 8 Order, 108 FERC ¶ 61,026 at P 177. Wisconsin TDUs also cite to *Wisvest-Connecticut, LLC*, 96 FERC ¶ 61,101 at 61,401 (2001), where, they state, the Commission rejected arguments that the entire ISO-New England footprint should serve as the relevant geographic market, citing the role of transmission constraints in creating smaller geographic markets. Wisconsin TDUs' rehearing request at 5.

suppliers outside the area in response to a price increase caused by sellers within the area, thus making the area a separate geographic market.<sup>15</sup> Therefore, Wisconsin TDUs assert that the highly-constrained WUMS load pocket cannot be fairly considered to be part of the same geographic market as the remainder of the Midwest ISO.

10. Further, Wisconsin TDUs again argue that the Commission should have required, or at least investigated the need for, conditioning Wisconsin Electric's market-based rate authority for sales into WUMS with a 110 percent of unit-specific marginal cost bid cap. Wisconsin TDUs state that Wisconsin Electric did not submit a WUMS-focused assessment of its market power and that if it had done such an analysis, it would have failed the Commission's market share screen and possibly failed the pivotal supplier screen.<sup>16</sup> Specifically, Wisconsin TDUs note that the three largest utilities control approximately 90 percent of the generation available within WUMS, with Wisconsin Electric owning or controlling approximately 50 percent, which they state is enough to fail the market share screen. In addition, Wisconsin TDUs assert that one of the premises of WUMS being designated an NCA under the TEMT is that Wisconsin Electric generation is pivotal, indicating that it might fail the pivotal supplier screen in WUMS.<sup>17</sup> Further, they state that the Public Service Commission of Wisconsin (Wisconsin Commission) has described WUMS as "an electric 'island system,' a limited market in which a large electric generating firm can obtain leverage over the prices paid for electricity."<sup>18</sup> Wisconsin TDUs also cite several studies, including one commissioned by the Wisconsin state legislature, confirming Wisconsin Electric's market power within WUMS.<sup>19</sup>

11. Wisconsin TDUs also argue that the Commission erred by concluding that the Midwest ISO's market mitigation measures address Wisconsin Electric's market power. They state that this conclusion lacks empirical proof and contradicts the Commission's previously stated policy that it "must independently verify the effectiveness of any

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<sup>15</sup> *Id.*

<sup>16</sup> Wisconsin TDUs' rehearing request at 9.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 6 (*citing* Approval of Affiliated Interest Transactions Between W.E. Power, LLC, Wisconsin Electric Power Co., and Wisconsin Energy Company, Wisconsin Commission Docket No. 05-AE-109, Final Decision, December 20, 2002 at 23-24).

<sup>19</sup> Wisconsin TDUs' rehearing request at 10, n.17 (regarding Exhibit E of Wisconsin TDUs' rehearing request), and n.18 (regarding Exhibit F Wisconsin TDUs' rehearing request).

alternative mitigation measures, including the ISO/RTO mitigation, which would serve to replace the default mitigation adopted in the April 14 Order.”<sup>20</sup> Wisconsin TDUs explain that the Commission could not have known whether the Midwest ISO NCA thresholds mitigate Wisconsin Electric’s market power because Wisconsin Electric’s reference levels were not known at the time of the March 24 Order. They state that the NCA threshold for the Midwest ISO was posted on the Midwest ISO website on March 30, 2005. Thus, Wisconsin TDUs assert that, in the absence of specific facts, the Commission’s conclusion that the TEMT mitigation measures address Wisconsin Electric’s generation market power was not supported by substantial evidence and was not reasoned decision-making.<sup>21</sup>

12. Regardless, Wisconsin TDUs assert that even now that the NCA threshold for WUMS is known; the TEMT mitigation measures do not address Wisconsin Electric’s generation market power. They argue that the Commission approved the Midwest ISO mitigation measures, despite knowing that the Midwest ISO will not mitigate bids that exceed NCA thresholds in the day-ahead market until the day after market power has been exercised, allowing Wisconsin Electric to reap the benefits of its market power on the day of its exercise.<sup>22</sup> Further, they state that the Midwest ISO has not justified bidding and price increase thresholds in NCAs on grounds of higher costs, but on grounds of revenues needed to attract investment in load pockets where generation is short. However, Wisconsin TDUs state that their argument is not a collateral attack on the TEMT mitigation measures themselves and that regardless of the sufficiency of those provisions as part of the TEMT, there is no factual record here (or in the proceedings on the TEMT) to conclude that the mitigation measures address Wisconsin Electric’s market power in WUMS.<sup>23</sup>

### **Discussion**

13. The Commission will deny Wisconsin TDUs’ request for rehearing. First, the Commission did not ignore the evidence presented by Wisconsin TDUs in their protest

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<sup>20</sup> *Id.* at 11 (*citing* July 8 Order, 108 FERC ¶ 61,026 at P 174).

<sup>21</sup> Wisconsin TDUs explain that the actual reference levels and thresholds matter because they affect the locational marginal price (LMP), the amount of LMP increase that can occur if Wisconsin Electric exercises its market power, and the extent of mitigation of that market power. Thus, they state that the thresholds determine how much competitive harm consumers will suffer and the Commission will tolerate.

<sup>22</sup> Wisconsin TDUs’ rehearing request at 14.

<sup>23</sup> *Id.* at 16.

regarding the transmission constraints in the WUMS region. As Wisconsin TDUs state in their request for rehearing, the Commission has acknowledged on several occasions that transmission constraints are a problem in the WUMS region.<sup>24</sup> Furthermore, in relying on the Midwest ISO TEMT provisions, the Commission noted that the tariff “contains provisions that address the Wisconsin TDUs’ concerns regarding Midwest ISO’s *mitigation of transmission constraints and load pockets in WUMS.*”<sup>25</sup> The Commission further noted that the tariff includes tighter thresholds of mitigation and bids in “highly constrained areas such as the WUMS and North WUMS NCAs...providing for more frequent mitigation because market power is more likely to be exercised on a recurring basis in these areas.”<sup>26</sup> Thus, the Commission found that there is no need for additional restrictions on Wisconsin Electric’s bidding behavior. In short, the Commission took account of the evidence provided by Wisconsin TDUs that transmission constraints exist in WUMS that could affect Wisconsin Electric’s ability to exercise market power, and found that the Midwest ISO TEMT provisions will address such concerns. Having proceeded on the basis that transmission constraints do exist that could have an impact on Wisconsin Electric’s market power and reaching a conclusion from that basis, there was no need to set the matter for investigation.<sup>27</sup>

14. Wisconsin TDUs’ assertion that the Commission’s decision in the March 24 Order is contrary to Commission policy and renders the RTO-wide geographic market presumption irrebutable is similarly unpersuasive. In the July 8 Order, the Commission stated that “the ISO/RTO footprint or control area will not always be the appropriate geographic area to consider, and [we] have afforded the opportunity for the default relevant geographic market to be rebutted on a case-specific basis.”<sup>28</sup> The Commission

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<sup>24</sup> See, e.g., *Wisconsin Public Service Corp.*, 109 FERC ¶ 61,319, n. 3 (2004) and citations therein.

<sup>25</sup> March 24 Order, 110 FERC ¶ 61,340 at P 20 (emphasis added).

<sup>26</sup> *Id.*

<sup>27</sup> On rehearing Wisconsin TDUs also argue that Wisconsin Electric’s market power in WUMS is evidenced by an October 2000 report, “Estimating the Opportunities for Market Power in a Deregulated Wisconsin Electric Market,” and a November 2000 report, forwarded to the Wisconsin state legislature on “Horizontal Market Power in Wisconsin Electricity Markets: A Report to the Public Service Commission of Wisconsin.” However, we note that these studies were performed in 2000, five years before the Midwest ISO’s markets became operational with Commission-approved market monitoring and mitigation in place.

<sup>28</sup> July 8 Order, 108 FERC ¶ 61,026 at P 177.

further stated, however, that “all ISOs and RTOs have forms of local market power mitigation in place, and this mitigation can be taken into account in the analysis.”<sup>29</sup> The tighter thresholds in NCAs such as WUMS in the Midwest ISO, and the resulting tighter mitigation of bids, are local market power mitigation measures. As noted above, the Commission took these forms of local market power mitigation, and their application to the WUMS area that Wisconsin TDUs are concerned is subject to the exercise of market power by Wisconsin Electric, into account in its analysis, as the July 8 Order permits.

15. Wisconsin TDUs’ assertions that the mitigation provisions in the Midwest ISO TEMT are insufficient to specifically address Wisconsin Electric’s ability to exercise market power in WUMS are without merit. The TEMT, by setting individual thresholds for Wisconsin Electric, and specifically tightening such thresholds and mitigating bids in the WUMS NCA, specifically addresses the possibility that Wisconsin Electric could exercise market power in WUMS. Furthermore, as the Commission noted in the April 14 Order, markets with Commission-approved market monitoring and mitigation “undertake daily and hourly oversight of seller’s pricing behavior to ensure, consistent with clearly established Commission approved rules, that prices do not exceed competitive levels.”<sup>30</sup> Moreover, “[a]ll seller’s interactions with the market are required to comply with pre-determined bidding restrictions and Commission-approved rules and mitigation protocols,” and “[h]igh locational prices or binding transmission constraints can trigger the market monitor into further examining the market outcome.”<sup>31</sup> The market monitoring and mitigation, now implemented in the Midwest ISO, should adequately address specific concerns regarding the possibility that Wisconsin Electric can exercise market power in the WUMS region.

16. Contrary to Wisconsin TDUs’ assertion, many of the arguments in their request for rehearing represent a collateral attack on the TEMT provisions that were considered and accepted by the Commission in another proceeding, and as a result we reject them.<sup>32</sup> Wisconsin TDUs’ assertion that the “the Commission approved the [Midwest ISO] mitigation measures, despite knowing that [the Midwest ISO] will not mitigate bids that exceed NCA thresholds in the day-ahead market until the day after market power has

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<sup>29</sup> *Id.*

<sup>30</sup> April 14 Order, 107 FERC ¶ 61,018 at P 190.

<sup>31</sup> *Id.*

<sup>32</sup> See, e.g., *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange*, 110 FERC ¶ 61,293 at P 25-26 (2005).

been exercised,” is not only a collateral attack on the outcome of the TEMT proceeding, but also misconstrues the Commission’s action in the TEMT proceeding. There, the Commission sought to set thresholds that would not result in over-mitigation of market participants where “higher offers reflect higher costs, not manipulation.”<sup>33</sup> Further, as noted above, the Commission has independently determined that the TEMT mitigation measures will address the potential for Wisconsin Electric to exercise market power in WUMS, and therefore, their request for rehearing on this issue is denied.<sup>34</sup>

The Commission orders:

Wisconsin TDUs’ request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Linda Mitry,  
Deputy Secretary.

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<sup>33</sup> TEMT I, 108 FERC ¶ 61,163 at P 316.

<sup>34</sup> *See* TEMT II, 109 FERC ¶ 61,157 at P 242 (noting the differences between the analysis of market power mitigation in the Midwest ISO and the market-based rates assessment, and stating that “pieces of one should not automatically be used as precedent for the other.”).