

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Upper Peninsula Power Company

Docket No. ER05-89-004

ORDER ON COMPLIANCE FILING

(Issued October 19, 2006)

1. In an order issued on March 25, 2005,<sup>1</sup> the Commission accepted Upper Peninsula Power Company's (UPPCO) request for authorization to sell power at market-based rates and directed UPPCO to make refunds with interest because it had sold power at wholesale without prior Commission authorization. In this order, we clarify that our March 25, 2005 Order directed UPPCO to make the necessary refunds, with interest, which refunds include both the revenues collected resulting from the difference, if any, between the market-based rate and a cost-justified rate, and the time value of those revenues. As discussed below, UPPCO made refunds as directed in the March 25, 2005 Order.

**I. Background**

2. In the March 25, 2005 Order, the Commission accepted for filing UPPCO's proposed market-based rate tariff, effective on the date the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) became a single market and performed functions such as single central commitment and dispatch with Commission approved market-monitoring and mitigation. Since UPPCO had been making sales without a rate on file, the Commission ordered UPPCO to make refunds to its customers, including the time value of the revenues collected, for sales made between May 14, 2004, and July 23, 2004.

3. On June 1, 2005, UPPCO filed a refund report in compliance with the Commission's March 25, 2005 Order. In that report, UPPCO states that it made refunds to the PJM Interconnection L.L.C. (PJM) on April 25, 2005. UPPCO also states,

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<sup>1</sup> *Wisconsin Pub. Serv. Corp.*, 110 FERC ¶ 61,353 (2005) (March 25, 2005 Order).

however, that it made excess refunds due to a calculation error and that it has requested PJM to return the excess amount.<sup>2</sup> UPPCO's refund report, which indicates refunds totaling \$2,381.08, appears to reflect that the proposed refunds are limited to the time value of revenues UPPCO collected without prior Commission authorization.

## **II. Notice of Filing and Responsive Pleadings**

4. Notice of UPPCO's refund compliance report was published in the *Federal Register*, 70 Fed. Reg. 41,213 (2005), with protests and interventions due on or before July 22, 2005. On July 22, 2005, PJM filed a timely motion to intervene and protest. On August 8, 2005, UPPCO filed an answer to PJM's protest.

5. PJM argues that UPPCO was directed to make refunds with interest according to the March 25, 2005 Order, which refunds include the unauthorized revenues represented by the difference between the locational marginal price (LMP) market prices and the cost of service for each sale, as well as the time value of money on the total LMP price for each sale.<sup>3</sup> According to PJM, after paying this amount, UPPCO contacted PJM stating that it had incorrectly calculated the refunds and claiming that it only owed the time value of money on the LMP revenues it received.

6. PJM disagrees with UPPCO's claim that UPPCO was only directed to refund the interest on unauthorized revenues it collected. PJM states that the March 25, 2005 Order directed UPPCO to refund both the unauthorized revenues for the sales to the PJM spot market and the time value of money of the total revenues for such sales. In support, PJM cites the March 25, 2005 Order, which reads, "UPPCO is hereby ordered to make refunds regarding sales made pursuant to Rate Schedule No. 53, with interest..."<sup>4</sup>

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<sup>2</sup> The amount of excess refunds given to PJM is not provided in UPPCO's refund report. However, UPPCO states, in response to PJM's protest, that the excess amount is \$39,791.98.

<sup>3</sup> PJM states that the original amount UPPCO refunded was \$42,173.06. This included \$39,791.98 of unauthorized revenues and \$2,381.08 of interest, calculated pursuant to the time value remedy.

<sup>4</sup> March 25, 2005 Order, 110 FERC ¶ 61,353 at ordering para. (I). Rate Schedule No. 53 refers to Original Rate Schedule FERC No. 53 between UPPCO and PJM. Rate Schedule No. 53 sets forth the dates, quantity, and rates at which UPPCO sold energy to PJM on fourteen occasions for the period beginning May 14, 2004, and ending July 23, 2004.

7. PJM provides examples where the Commission has ordered a party to refund both the revenues and the time value of such revenues.<sup>5</sup> PJM concludes that, consistent with its precedent, the Commission's explicit direction in the March 25, 2005 Order directing UPPCO to make refunds with interest means that "[UPPCO] is required to refund both the unauthorized revenues *and* the time value of those revenues." PJM discusses a Commission order issued shortly before UPPCO's filing, where, under virtually identical facts, the Commission directed the company to make refunds with interest (*i.e.*, refunds of the revenues collected plus time value on those revenues).<sup>6</sup>

8. PJM, therefore, asks the Commission to reject UPPCO's refund report and direct UPPCO to file a refund report that includes the time value of money, as well as the difference between the LMP prices UPPCO received and a cost-justified rate for each sale.

9. In its response to PJM's protest, UPPCO contends that it was only required to refund the time value of the Rate Schedule No. 53 revenues. UPPCO maintains that the March 25, 2005 Order "clearly and specifically provides that UPPCO is to refund only the time value of money for the revenues received."<sup>7</sup> UPPCO further argues that PJM's reliance on Ordering Paragraph (I) of the March 25, 2005 Order, which directs refunds "with interest," is frivolous. A time value refund subsumes interest, according to UPPCO. UPPCO asserts that the attempt to characterize Rate Schedule No. 53 as a market-based rate is equally frivolous. UPPCO remarks that PJM's pleading is not a protest but rather an untimely request for rehearing or motion for reconsideration of the March 25, 2005 Order. Finally, UPPCO claims that PJM's protest is an improper collateral attack on the March 25, 2005 Order's adoption of time value refunds as the appropriate remedy. UPPCO asks the Commission to direct PJM to return the excess refunds to UPPCO, namely, \$39,791.98, with interest.

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<sup>5</sup> *E.g.*, *Pittsfield Generating Co.*, 111 FERC ¶ 61,033, at P 21 (2005); *Vermont Elec. Coop., Inc.*, 110 FERC ¶ 61,232, at P 3 (2005); *Vermont Elec. Coop., Inc.*, 108 FERC ¶ 61,223, at P 24 & ordering para. (B) (2004); *Southern California Water Co.*, 106 FERC ¶ 61,305, at ordering para. (A) (2004).

<sup>6</sup> PJM Protest at 9-11 (discussing *Vermont Elec. Coop., Inc.*, 108 FERC ¶ 61,223 (2004)).

<sup>7</sup> UPPCO Answer at 4.

### III. Discussion

#### A. Procedural Matters

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the timely, unopposed motion to intervene serves to make PJM a party to this proceeding.

11. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept UPPCO's answer because it has provided information that assisted us in our decision-making process.

#### B. Substantive Matters

12. The Commission's intent in the March 25, 2005 Order was to direct UPPCO to refund the time value of the revenues collected as well as to refund all revenues resulting from the difference, if any, between the market-based rate charged and a cost-justified rate, consistent with Commission precedent governing the refund of revenues collected pursuant to market-based rates charged without prior Commission authorization.<sup>8</sup> We agree with UPPCO, however, that the language in paragraphs 40 through 42 of the March 25, 2005 Order may have been unclear.<sup>9</sup> Accordingly, we clarify that UPPCO was directed to make the necessary refunds, with interest, which refunds include the revenues collected resulting from the difference, if any, between the market-based rate and a cost-justified rate, as well as the time value of those revenues.

13. PJM's protest does not challenge the amount of dollars actually refunded by UPPCO but rather argues that the refund report submitted in this proceeding is incomplete because it only reflects the time value of the unauthorized revenues collected by UPPCO. We agree with PJM that UPPCO's refund report is incomplete. However, because PJM does not challenge the amount of dollars refunded (*i.e.*, UPPCO has made

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<sup>8</sup> *Prior Notice*, 64 FERC at 61,980; *see also* cases cited *supra* note 4.

<sup>9</sup> March 25, 2005 Order, 110 FERC ¶ 61,353 at P 38-42, ordering para. (I).

refunds to PJM consisting of the unauthorized revenues collected as well as the time value of those revenues, consistent with the March 25, 2005 Order), ordering a new refund report would serve no purpose, and we consider this matter resolved.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.