

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION  
Market-Based Rates for Public Utilities Docket No. RM04-7-000**

**WRITTEN STATEMENT OF ROBERT GARVIN  
COMMISSIONER  
WISCONSIN PUBLIC SERVICE COMMISSION  
JANUARY 28, 2004 TECHNICAL CONFERENCE**

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FEDERAL ENERGY  
REGULATORY COMMISSION**

**Thank you for the opportunity to participate in today's important technical conference. My name is Bert Garvin. I am a Commissioner serving on the Public Service Commission of Wisconsin (PSCW).**

**The PSCW has consistently supported the Federal Energy Regulatory Commission's (FERC) efforts to eliminate undue discrimination in transmission service and promote more competitive wholesale electricity markets in the United States. By assigning control over its state jurisdictional transmission facilities to a FERC approved RTO as a matter of state law in 1998, Wisconsin has demonstrated its commitment to establishing the federal-state partnership needed to foster more wholesale competition, as well as a more robust transmission system that benefits Wisconsin consumers and provides greater reliability in the Upper Midwest.**

**I want to commend the FERC for initiating this dialogue as part of its ongoing public efforts to reach out to stakeholders in order to re-tool its market-based rate policy and develop necessary mitigation measures to**

**prevent the unlawful exercise of market power in the bulk power markets. Since today's proceeding focuses on just one prong of the FERC's current four-prong approach for assessing market power in electric markets relating to affiliate abuse, I think it might be helpful to make the initial observation that state regulatory commissions like the PSCW share the FERC's interest in preventing the exercise of market power, promoting market efficiency and ensuring careful regulatory oversight of affiliate transactions.**

**While NARUC has no official policy on this matter, it is fair to say that the main differences between federal and state regulators may relate to the actual mitigation measures employed to achieve our shared objective in preventing affiliate abuse. In today's volatile energy markets, there is little room for error for either federal or state regulators in carrying our statutory responsibilities to ensure just and reasonable rates for wholesale and retail customers, respectively.**

**I have experienced first hand the tremendous challenge we face in balancing our state's policy objectives of fostering greater wholesale competition while ensuring price stability for retail consumers during a time of rising fuel costs, environmental costs, as well as capital costs for needed new generation and transmission investments. For these reasons, I hope that the FERC will continue this important dialogue with my colleagues at NARUC to**

**address any perceived “gap” between federal and state regulation of affiliate transactions that respects our respective jurisdictions.**

**The FERC has correctly reminded us that the ability of a FERC regulated public utility to sell wholesale electricity at market-based rates under § 205 of the Federal Power Act is a privilege, not a right. At the same time, I agree with Chairman Wood that the revocation of market-based rate authority should be reserved for only truly odious behavior. In the context of §205 applications, the FERC has consistently stated that in cases involving sales agreements between affiliates, it is essential that transactions be above suspicion so that ratepayers are protected and market forces are not distorted. The FERC, through its application of the *Edgar* test has approved many affiliate bulk power sales resulting from competitive bidding processes after determining that the proposed sale was a result of direct head-to-head competition between affiliated and competing nonaffiliated providers.**

**There is considerable variation among the states regarding the type of regulatory oversight over affiliate transactions. The PSCW, for example, has extensive statutory authority to regulate affiliate transactions governing both the construction of new generation facilities through affiliates and sale of electricity between utility and non-utility affiliates within a holding company system. Like other state commissions, we also have broad authority to deny**

**recovery in retail rates of any imprudent costs associated with affiliate transactions.**

**While the FERC clearly has jurisdiction to implement mitigation measures it feels are necessary to mitigate market power in the area of bulk power sales between affiliates under § 205, there appears to be considerable uncertainty over what the focus of FERC's affiliate abuse policies should be as stated in the questions put to this panel, such as whether the focus should be on merely protecting competition in the wholesale market; wholesale captive customers only or wholesale and retail captive customers.**

**There also appears to be uncertainty over the ability and willingness of state PUCs to carefully review affiliates transactions or whether there are real or perceived state regulatory failures regarding affiliate transactions. I reviewed the testimony of a number of panelists at the December technical conference who suggested in their testimony that state regulators currently lack either the will or the ability to adequately address any perceived affiliate abuses. For example, one witness suggested that state commissions "lack the familiarity with competitive issues and ...mainstream thinking about competitive issues."**

**While I do not share the view that state regulators lack either the resources or the vigilance to protect retail customers from the higher costs**

**that result from affiliate abuse, those concerns, along with the questions we consider today, are illustrative of the need for greater clarity and coordination between federal and state regulators to develop enforceable protective conditions to prevent affiliate abuse. It is imperative that we work together to ensure that the competitive implications of affiliate transactions are carefully analyzed and remedies developed to ensure that neither competition nor customers are harmed.**

**In my view, the FERC's affiliate abuse policy should primarily focus on protecting captive wholesale customers and not on protecting competition in the wholesale market and certainly not protecting retail customers. While customers can seek redress from regulators for damages caused by affiliate abuse, in many ways the harm to competition or potential competition has already occurred. More importantly, simply asserting that a remedy has been crafted to "protect competition in the wholesale market" could have the adverse unintended consequence of improperly intruding upon state jurisdiction and capacity resource planning for retail service.**

**Where I see the greatest potential tension or conflict arises from the FERC's decision in the *Ameren* case last summer to apply the *Edgar* standard to affiliate acquisitions under §203 of the Federal Power Act. The extension of the *Edgar* test from market-based sale arrangements with affiliates to a public**

**utility's acquisition of state-approved affiliate generation is a significant departure from prior FERC policy and may represent a significant encroachment on the traditional role of state PUCs in generation resource procurement, planning and supply adequacy.**

**The reason this potential encroachment worries me is that it invites the FERC, using its §203 authority and the *Edgar* test, to second-guess any future state-approved generation resource procurement decision that results in the acquisition of an affiliate plant or the construction of new facilities through an affiliate that fails to follow the FERC's interpretation of the *Edgar* test. In an "all peaker" environment, adhering to the FERC's requirements will not be onerous and may be welcomed by many state PUCs.**

**Where I expect it will be difficult to adhere to the FERC's new mandate is in the cases involving future state PUC approvals of proposals by load-serving entities to acquire or to construct much-needed base load facilities. The need to replace aging base load plants in the Upper Midwest will become even more urgent over the next decade with future tougher environmental standards. A number of states like mine are currently grappling with or soon will face the difficult policy decisions that come with the replacement of its aging base load generation fleet.**

**There are multiple price and non-price factors that must be considered by load-serving entities and state regulators in considering which mix of generation resource procurement is in the public interest and will ensure reliability. In those cases, state commissions will be asked to consider a variety of different proposals ranging from wholesale merchant plants, traditional rate base facilities or affiliate arrangements in order to meet urgent base load generation needs. My concern is that the FERC's latest foray in affiliate generation acquisitions may have the unintended effect of adding regulatory uncertainty and potentially stifling future innovative approaches to constructing and financing new base load generation facilities.**

**In summary, I hope the FERC will continue this important dialogue with state regulators in order to provide some clarity in our mutual efforts to protect wholesale customers and retail customers from affiliate abuse. While this aspect of today's technical conference is focused on preventing affiliate abuse, I would also encourage the FERC to also work with states to address the more fundamental issue needed to have healthier wholesale markets—the critical need to foster greater transmission investment in our country.**

**Thank you for giving me the opportunity to testify this morning and I look forward to responding to any questions.**