

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Badger Power Marketing Authority, Inc.
and Great Lakes Utilities

Docket No. EL06-40-000

v.

Wisconsin Public Service Corporation

Wisconsin Public Service Corporation

Docket No. ER05-164-000

ORDER DENYING COMPLAINT

(Issued February 27, 2006)

1. On December 30, 2005, Badger Power Marketing Authority, Inc. (BPMA) and Great Lakes Utilities (Great Lakes) (jointly, Badger) filed a complaint against Wisconsin Public Service Corporation (WPSC), alleging that WPSC has provided its affiliate Upper Peninsula Power Company (UPPCO) preferential rates and terms of service, while refusing to accord similar treatment to Badger. Badger requests that the Commission direct WPSC to provide a remedy to Badger for its discriminatory actions. Badger also asks that the Commission consolidate its complaint with the pending proceeding in Docket No. ER05-164-000, in which UPPCO's related power purchase agreement with WPSC is being addressed. For reasons discussed below, the Commission denies Badger's complaint.

I. Background

2. BPMA is a joint municipal action agency located in Wisconsin that purchases power on behalf of two Wisconsin municipal electric systems: Shawano Municipal Utilities and Clintonville Water & Electric Utility. BPMA presently takes full requirements power from WPSC.¹ Under its full requirements contract with WPSC,

¹ The contract between BPMA and WPSC was executed on May 1, 2003 and subsequently assigned to Great Lakes, effective February 1, 2004.

BMPA may elect to take demand nomination service and thereby convert to partial requirements upon two-years' notice. Great Lakes exercised the demand nomination option on behalf of Badger by providing the required two-years' notice on October 1, 2004. Badger is scheduled to begin taking partial requirements service under the WPSC contract as of October 1, 2006.

3. Separately, on November 1, 2002, WPSC filed a purchase power agreement (PPA) with its affiliate UPPCO to provide 65 MW of capacity and energy through December 31, 2007. The Commission accepted the PPA and established hearing procedures.² An uncontested settlement, containing a revised PPA (PPA 1), was subsequently approved by the Commission.³ On November 1, 2004, WPSC filed a new, renegotiated contract for service to UPPCO (PPA 2) to supersede PPA 1. WPSC stated that PPA 2 reflects a system sale initially for the same amount of power as PPA 1, at a market-based rate that would reduce UPPCO's charges from the PPA 1 level by approximately 10 to 15 percent; PPA 2 also provided for a term extending from January 1, 2005 through December 31, 2014. The Commission accepted and suspended PPA 2, made it effective subject to refund, and established hearing and settlement judge procedures.⁴ A partial settlement agreement to resolve all issues between WPSC and UPPCO, and also the Upper Peninsula Transmission Dependent Utilities, was approved by the Commission.⁵ Badger did not oppose the settlement agreement.⁶

II. Badger's Complaint

4. On December 30, 2005, Badger filed the instant complaint alleging that WPSC has provided its affiliate UPPCO preferential rates and terms of service, while refusing to accord the same rate decrease and the ability to revise contract terms to Badger, a similarly situated customer. Specifically, Badger argues that WPSC has: (1) permitted

² *Wisconsin Public Service Corp.*, 101 FERC ¶ 61,402 (2002).

³ *Wisconsin Public Service Corp.*, 104 FERC ¶ 61,192 (2003).

⁴ *Wisconsin Public Service Corp.*, 109 FERC ¶ 61,319 (2004) (December 21 Order).

⁵ *See Wisconsin Public Service Corp.*, 113 FERC ¶ 61,333 (2005); *Wisconsin Public Service Corp.*, 113 FERC ¶ 63,030 (2005).

⁶ Badger protested WPSC's PPA 2 filing and participated in settlement discussions, but to date has not itself settled. Badger did not submit comments opposing the settlement agreement. *See, e.g., Wisconsin Public Service*, 113 FERC ¶ 61,333 at P 2.

UPPCO to terminate its long-term power contract with WPSC prior to the end of the contract's initial term; and (2) executed a new contract that grants UPPCO a 10 to 15 percent rate reduction (with the precise level depending on certain variables).

5. Badger argues that WPSC and UPPCO have failed to show that their renegotiated contract does not involve affiliate abuse under the *Edgar* standard.⁷ Badger states that it had also asked for contract renegotiation, both with regard to converting service to WPSC's existing cost-based, partial requirements W-2A tariff and, in the alternative, a modification of its current contract terms to allow Badger to become a partial requirements customer upon providing one-years' notice instead of two-years' notice, but WPSC has refused both requests.

6. Furthermore, Badger asserts that WPSC seeks to justify its rate reduction to UPPCO by linking UPPCO's rate to the rates paid by Badger and two other wholesale customers. Badger states that, although WPSC's new rates under PPA 2 appear to be the same rates as the rates charged to WPSC's non-affiliates, in actuality UPPCO is being charged a preferential rate.

7. Badger argues that it should receive the same treatment as UPPCO since it is similarly situated to UPPCO: (1) both are WPSC wholesale customers; (2) UPPCO's rate is linked to the rate paid by Badger and several other unaffiliated wholesale customers; (3) both sought to renegotiate their contracts with WPSC; (4) both sought a rate reduction; (5) both had cost-based rates; (6) both operate in a constrained area that is not workably competitive, and (7) their contracts were executed only seven months apart.

8. Consequently, Badger asks the Commission to find that WPSC's offering of significant rate and service benefits to UPPCO, but not to Badger, results in a rate and service to Badger that is unjust, unreasonable, discriminatory, and preferential, and

⁷ *Boston Edison Co. Re: Edgar Electric Co.*, 55 FERC ¶ 61,382 (1991). In the December 21 Order, the Commission determined that the *Edgar* standard applied to PPA 2, see *Wisconsin Public Service Corp.*, 109 FERC ¶ 61,319 at P 17 (2004), and the presiding administrative law judge, in certifying the partial settlement agreement subsequently approved by the Commission, found that the *Edgar* standard had been met. See *Wisconsin Public Service Corp.*, 113 FERC ¶ 63,030 at P 8, 23.

We note that the instant filing is not the appropriate proceeding to pursue *Edgar* standard issues, which instead should have been raised, and were raised, in Docket No. ER05-164-000 when WPSC's agreement with UPPCO, PPA 2, was at issue. See *supra* notes 4-6 and accompanying text; *Wisconsin Public Service Corp.*, 113 FERC ¶ 63,030 at P 8, 23.

therefore unlawful. By its complaint, Badger requests that the Commission direct WPSC to permit Badger to take service under WPSC's W-2A tariff or a new rate schedule with rates identical to those in the W-2A tariff. Badger also claims it should receive compensation for WPSC's refusal to grant Badger the desired rate relief, including the cost of being denied an extra year of partial requirements service.

III. Notice of Filing and Responsive Pleadings

9. Notice of Badger's complaint was published in the *Federal Register*, 71 Fed. Reg. 2210 (2006), with answers to the complaint and interventions or protests due on or before January 19, 2006. WPSC submitted a timely-filed answer. A timely motion to intervene was filed by Upper Peninsula Transmission Dependent Utilities (TDUs)⁸ and Wisconsin Public Power.

10. In its answer, WPSC argues that Badger's complaint is without merit and should be dismissed without a hearing. It asserts that a hearing is not required because there are no disputed issues of material fact: (1) as the Badger complaint stipulates, Badger and UPPCO are similarly situated; (2) the PPA 2 rate charged to UPPCO is virtually the same as, and is in part derived from, the rate charged to Badger; and (3) there is no nexus between Badger's PPA 2 discrimination claim and Badger's requested W-2A tariff remedy. WPSC argues that Badger must show that the rate WPSC currently charges UPPCO is preferential as compared to the rate contemporaneously charged Badger in order to show discrimination, and that Badger hasn't.

11. WPSC also notes that Badger freely entered into its existing contract, with rates the product of negotiations between WPSC and Badger. It maintains that it informed Badger prior to the execution of the contract that new service under its cost-based W-2A tariff was unavailable,⁹ and that Badger executed the contract with knowledge that WPSC was unwilling to provide new service under the W-2A tariff. Therefore, WPSC asserts that any modification to the contract must satisfy the *Mobile-Sierra* public interest standard of review, and it states that Badger has not met that standard.

12. On February 2, 2006, Badger filed an answer. Badger argues WPSC has failed to demonstrate that there are no genuine issues of material fact and that WPSC is entitled to judgment as a matter of law. Therefore, it asserts that the Commission should reject WPSC's claim that Badger's complaint be summarily dismissed. On February 9, 2006, WPSC filed a reply to Badger's answer.

⁸ Upper Peninsula Transmission Dependent Utilities is comprised of the Village of L'Anse Electric Utility, Baraga Municipal Water & Light Plant, City of Escanaba, City of Gladstone, Negaunee Electric Department and Ontonagon County Rural electrification Association.

⁹ WPSC states that the W-2A tariff has been closed to new customers since 1999.

IV. Discussion

A. Procedural Matters

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), the timely, unopposed motions to intervene of TDUs and Wisconsin Public Power serve to make them parties to the proceeding.¹⁰ Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2005), prohibits answers to answers unless otherwise ordered by the decisional authority. We will accept Badger's and WPSC's answers since they have provided information that assisted us in our decision-making process.

B. Analysis

14. The issue raised by Badger's complaint is whether WPSC discriminated against Badger by denying Badger's request for modification of its current contract with WPSC when it offered a renegotiation of a contract to another, affiliated customer, which is similarly situated to Badger. For reasons discussed below, the Commission denies Badger's complaint.

15. Section 206(a) of the FPA¹¹ prohibits WPSC from charging rates that are, as relevant here, unduly discriminatory or preferential to its similarly situated customers. Here, both WPSC and Badger agree that UPPCO and Badger are similarly situated customers. Therefore, having concluded that UPPCO and Badger are similarly situated, the issue becomes whether UPPCO received unduly discriminatory or preferential treatment.

16. WPSC states that the existing Badger rate is virtually the same as the rate WPSC currently charges to UPPCO. It states that UPPCO thus did not receive a better deal than Badger, as Badger claims; indeed, the PPA 2 rate is derived from the rates that WPSC is charging to its other customers, including Badger. Therefore, WPSC argues that adjusting the PPA 1 rate to the PPA 2 rate level, which is materially the same as the Badger rate level, is not unduly discriminatory.

¹⁰ 18 C.F.R. § 385.214 (2005).

¹¹ 16 U.S.C. § 824e(a) (2000).

17. Badger, on the other hand, argues that it did not receive the “same deal” that WPSC provided to UPPCO.¹² While it concedes that Badger and UPPCO may share similar rates, Badger argues that it was never accorded the same opportunity as UPPCO to renegotiate its contract and receive a 10 to 15 percent rate reduction.

18. Under section 206 of the FPA,¹³ Badger must show that the rate WPSC currently charges Badger is unduly discriminatory as compared to the rate contemporaneously charged UPPCO, or, phrased differently, that the rate WPSC currently charges UPPCO is unduly preferential as compared to the rate contemporaneously charged Badger, in order to show discrimination. Badger has not done so, and, indeed, concedes that these two similarly situated customers are essentially charged the same rate.¹⁴

19. The Commission finds that UPPCO’s rate is substantially the same as Badger’s rate, and is not unduly discriminatory vis-a-vis Badger’s rate. The fact that PPA 2 results in 10 to 15 percent reduction over UPPCO’s previous rate is irrelevant to this complaint so long as the charged rate is similar to Badger’s rate.

20. Moreover, the Commission finds that there is no nexus between Badger’s alleged harm and the proposed remedy that it seeks in this proceeding.¹⁵ Badger argues that it suffered harm because WPSC accorded preferential treatment to UPPCO by converting PPA 1 to PPA 2, yet Badger does not seek to align its current charges to the rates under PPA 2 (in fact, it has that already). Rather, it seeks a cost-based rate under W-2A tariff. There is no nexus between the remedy and the alleged harm.

¹² Badger cites to *Alabama Electric Coop., Inc. v. FERC*, 684 F.2d 20, 21 (D.C. Cir. 1982), in asserting that the same rate to similarly situated customers can nevertheless amount to unlawful undue discrimination. In that case, however, the court came to that conclusion because the uniform rate created an undue disparity between the rates of return to the utility on its sales to two groups of wholesale customers, where one was being required to pay approximately \$173,000 more than what it was paying before and the other customer was required to pay \$171,000 less. Thus, the nominally same rate to similarly situated customers resulted in disparity of rates of return. Badger has not demonstrated that that is the case here, *i.e.*, the different costs of serving the two mean that the nominally same rate results in very different rates of return.

¹³ 16 U.S.C. § 824e (2000)

¹⁴ Badger’s Answer at 7.

¹⁵ *FirstEnergy Operating Companies*, 95 FERC ¶ 61,237 at 61,812 (2001).

21. For reasons discussed above, the Commission finds that WPSC did not unduly discriminate. Therefore, the Commission denies Badger's complaint. As the Commission denies Badger's complaint and does not institute a trial-type evidentiary hearing, Badger's request for consolidation with Docket No. ER05-164-000 is dismissed.

The Commission orders:

(A) Badger's complaint is hereby denied, as discussed in the body of this order.

(B) Badger's request for consolidation with Docket No. ER05-164-000 is hereby dismissed, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.