

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

Badger Power Marketing Authority, Inc.  
and Great Lakes Utilities

Docket No. EL06-40-001

v.

Wisconsin Public Service Corporation

ORDER DENYING REHEARING

(Issued August 31, 2006)

1. On March 29, 2006, Badger Power Marketing Authority, Inc. (BPMA) and Great Lakes Utilities (GLU) (jointly, Badger) filed a request for rehearing of the Commission's February 27, 2006 Order in this proceeding.<sup>1</sup> In that order, the Commission denied the complaint filed by Badger against Wisconsin Public Service Corporation (WPSC), finding that WPSC did not unduly discriminate against Badger. As discussed below, we determine that the Commission did not erroneously dismiss the complaint and, accordingly, deny the rehearing.

**I. Background**

2. On November 1, 2002, WPSC filed a purchase power agreement (PPA) with its affiliate Upper Peninsula Power Company (UPPCO) to provide 65 MW of capacity and energy through December 31, 2007. The Commission accepted the PPA, suspended it for a nominal period, to be effective January 1, 2003, subject to refund and established

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<sup>1</sup> *Badger Power Marketing Authority, Inc. and Great Lakes Utilities v. Wisconsin Public Service Corp.*, 114 FERC ¶ 61,208 (2006) (February 27 Order).

hearing procedures.<sup>2</sup> An uncontested settlement, containing a revised PPA (PPA 1), was subsequently approved by the Commission.<sup>3</sup> On November 1, 2004, WPSC filed a new, renegotiated contract for service to UPPCO (PPA 2) to supersede PPA 1. 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.<sup>4</sup> 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.<sup>5</sup>

3. Badger's service from WPSC began on May 1, 2003 with the execution of a Master Agreement under a full requirements contract, which allows Badger to convert to partial requirements service upon two years' notice (Badger contract). The contract was assigned to GLU effective February 1, 2004. Badger states that during 2004, GLU negotiated with WPSC to modify the terms of the Badger contract to receive service under WPSC's W-2A tariff for cost-based rates,<sup>6</sup> or as an alternative to shorten the two-year notice requirement to one year for converting from full requirements to partial requirements service, but nothing materialized. Subsequently, GLU exercised the option on behalf of Badger by providing the required two-years' notice on October 1, 2004.

4. On December 30, 2005, Badger filed a complaint against WPSC, alleging that WPSC provided its affiliate UPPCO preferential rates and terms of service while refusing to accord similar treatment to Badger. Specifically, Badger argued that WPSC: (1) permitted 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

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

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

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

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

<sup>6</sup> WPSC's cost-based wholesale sales are made under its all requirements W-1A tariff and partial requirements W-2A tariff.

15 percent rate reduction.<sup>7</sup> Badger requested that the Commission find that WPSC's offering of 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 therefore unlawful. Accordingly, Badger asked the Commission to direct WPSC to provide a remedy to Badger for its discriminatory actions.<sup>8</sup>

5. In the February 27 Order, the Commission denied Badger's complaint, finding that Badger and UPPCO are similarly situated, that UPPCO's rate is substantially the same as Badger's rate, and is not unduly discriminatory vis-à-vis Badger's rate.<sup>9</sup> The Commission also concluded that there was no nexus between Badger's alleged harm and the proposed remedy since Badger argued that it suffered harm because WPSC accorded preferential treatment to UPPCO by allowing it to convert from PPA 1 to PPA 2, but Badger did not seek to align its rates with the rates under the PPA 2; rather it wanted a cost-based rate under the W-2A tariff.<sup>10</sup>

## **II. Request for Rehearing**

6. In its request for rehearing, Badger argues that the Commission erred in the February 27 Order by finding that WPSC did not unduly discriminate against Badger by denying Badger's request for renegotiation of the terms of the Badger contract. Badger contends that the Commission erred in ruling that there can be no undue discrimination as long as WPSC charges Badger and UPPCO essentially the same rate, and that renegotiation of contract terms is "irrelevant" to the discrimination analysis.

7. More specifically, Badger asserts that the Commission's ruling that charging the same rates cannot be discriminatory: (1) imposes a new, inappropriate standard for determining whether discrimination exists; (2) contravenes prior precedent which holds that charging two customers the same rate can nevertheless be discriminatory; and (3) ignores Badger's arguments that charging two customers the same rate can nevertheless be discriminatory.

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<sup>7</sup> February 27 Order, 114 FERC ¶ 61,208 at P 4.

<sup>8</sup> *Id.* P 8.

<sup>9</sup> *Id.* P 15-19.

<sup>10</sup> *Id.* P 20.

8. Badger also argues that the Commission inappropriately focused on rates, while ignoring contract renegotiation rights. Badger claims that it is not just rates that are subject to Commission investigation for undue preference and discrimination, but also practices affecting the rates. Badger contends that WPSC's practice of providing contract renegotiation rights only to its affiliate UPPCO, is an unduly preferential (to UPPCO) and discriminatory (to Badger) practice. Furthermore, this practice affects rates.

9. In addition, Badger argues that the Commission unlawfully ruled that there is a lack of nexus between the harm and the remedy sought by Badger. Badger contends that, in making its ruling, the Commission ignored the harm of not permitting Badger the right to renegotiate its contract, and focused only on rates rather than contract renegotiation rights. Badger believes the proposed remedy, contract renegotiation, is properly aligned with the alleged wrong – the failure to negotiate.

### **III. Discussion**

10. Badger's request for rehearing will be denied. The issue raised on rehearing is whether WPSC unduly discriminated against Badger by denying renegotiation of the Badger contract. As discussed below, we find no undue discrimination in WPSC's charging UPPCO rates that are essentially the same as what WPSC charges Badger, when UPPCO and Badger in this instance are similarly-situated customers with similar contracts. Badger's claim, at bottom, is that Badger is entitled to a better rate, an unduly preferential rate, compared to UPPCO's rate. We disagree; Badger is not now entitled to renegotiation and thus to an even lower rate mainly because Badger is charged a rate that is essentially the same as UPPCO's rate. Accordingly, we will deny rehearing.

#### **A. Renegotiation of Contract**

11. Badger contends that it did not receive equal treatment as the similarly situated affiliate, UPPCO, i.e. contract-negotiation, because it was not offered the "same deal." Badger claims that equal treatment does not solely rest on similar rates, but *practices* that affect rates. Therefore, it contends that the Commission should include in its discrimination analysis Badger's request for renegotiation of its contract.

12. In the February 27 Order, the Commission found that both Badger and UPPCO are similarly-situated customers with similar contracts for market-based rates. Therefore, the Commission stated that under section 206 of the FPA, Badger must show that the rate WPSC currently charges Badger is unduly discriminatory as compared to the rate contemporaneously charged UPPCO to show discrimination. Badger failed to do so, and

indeed conceded that the two now share similar rates.<sup>11</sup> While it is true that Badger was not given an opportunity to renegotiate, WPSC was not required to do so given that Badger's rate is now, as Badger concedes, similar to UPPCO's rate.<sup>12</sup> The fact that PPA 2 results in a rate reduction for UPPCO does not automatically entitle Badger to negotiate a further rate reduction to a rate lower than UPPCO's and WPSC's decision not to negotiate a further rate reduction is not an evidence of undue discrimination. The results of PPA 2 brought the UPPCO rates and service in line with Badger's rates and services.<sup>13</sup> Thus, the end result is that UPPCO is no longer discriminated against (and Badger is no longer unduly preferred) by rates and services for UPPCO that are higher than the rates and services for Badger.

13. In addition, Badger argues that it is entitled to renegotiation of the terms in the Badger contract,<sup>14</sup> because renegotiation of a contract qualifies as "practice" under section 206.<sup>15</sup> However, section 206 "speaks . . . to the [Commission's] power to conduct an investigation into any practice *affecting any rate or charge which is unjust or*

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<sup>11</sup> Badger Answer at 7.

<sup>12</sup> In its rehearing request, Badger never contests the Commission's finding in the February 27 Order that UPPCO and Badger are charged similar rates. *See* Rehearing Request at 8-9; *accord id.* at 14-18.

<sup>13</sup> February 27 Order, 114 FERC ¶ 61,028 at P 18.

<sup>14</sup> While Badger makes much of the notion of "practice" versus "rates," and argues that it is concerned with the former and not the latter, this distinction in this instance is more imaginary than real. What Badger ultimately wants is a lower rate, and thus wants to renegotiate in order to get that lower rate. In short, Badger asks the Commission essentially to look to form and ignore substance. This we are not willing to do.

<sup>15</sup> Badger cites to *Town of Norwood v. FERC*, 587 F.2d 1306, 1314 (D.C. Cir. 1978) (*Norwood*), in asserting that section 205(b) discrimination violations can involve a utility's failure to offer similar contract terms, not just rates. *Norwood*, however, ultimately alleged *rate* discrimination; the court examined whether the utility discriminated against its customer, Norwood, by offering a higher rate than the rate offered in another contract. Moreover, here the discrimination was against UPPCO, which had the higher rates, not Badger, which had the lower rates. So if anyone had a basis to rely on *Norwood*, it was UPPCO, which had the higher rates, and it thus was UPPCO and not Badger that was akin to Norwood.

unduly discriminatory.”<sup>16</sup> In that respect, Badger has not shown that WPSC’s “practice” of denying renegotiation of the Badger contract has resulted in or “affected” rates that are “unjust, unreasonable, and unduly discriminatory or preferential.”<sup>17</sup> Again, UPPCO and Badger are similarly-situated customers with similar rates.<sup>18</sup>

## **B. Nexus Between Harm and Remedy**

14. Badger argues that there is, in fact, a nexus between the alleged harm and the remedy it is seeking. It asserts that the Commission failed to consider the harm of denying Badger’s right to renegotiate the Badger contract and the remedy of permitting Badger instead to take service under W-2A cost-based rates, or alternatively, a one-year notice provision for changing from full to partial requirements service.

15. As stated above, renegotiation of WPSC’s contract with UPPCO from PPA 1 to PPA 2 in and of itself does not amount to undue discrimination vis-à-vis Badger. Therefore, there is no nexus between the alleged discrimination, WPSC’s refusal to renegotiate the Badger contract and the remedy that Badger seeks, *i.e.*, to convert its current services to W-2A tariff service or at least to change the two-year notice to a one-year notice provision. A nexus would exist if the renegotiation from PPA 1 to PPA 2 resulted in rates that are unduly discriminatory against Badger and Badger were seeking a remedy to align its rates to other long-term customers with market-based rates. There is no such request. In fact, Badger seeks the opposite; it wishes to replace its existing rate, which is virtually the same as UPPCO’s current rate, with a different and lower rate. Similarly, there is no justification to change the notice requirement from two years to one year to allow Badger to shift from full requirements to partial requirements.

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<sup>16</sup> See also *Niagara Mohawk Power Corp. v. FPC*, 538 F.2d 966, 971 (2d Cir. 1976) (emphasis added).

<sup>17</sup> See 16 U.S.C. § 824e (2000).

<sup>18</sup> Badger’s hindsight that it should have negotiated different rates from those it had originally agreed to is insufficient to grant Badger a right to renegotiation of the Badger contract. Courts have required parties “to live by their bargains as time passes and various projections about the future are proved correct or incorrect.” *Potomac Electric Power Co. v. FERC*, 210 F.3d 403, 409 (D.C. Cir. 1984) (quoting *Norwood*, 587 F.2d 1306 at 1312-13).

The Commission orders:

Badger's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.