

111 FERC ¶61,373
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Tampa Electric Company	Docket No. ER99-2342-006
Panda Gila River, L.P.	Docket No. ER01-931-010
Union Power Partners, L.P.	Docket No. ER01-930-010
Commonwealth Chesapeake Company, L.L.C.	Docket No. ER99-415-009
TECO EnergySource, Inc.	Docket No. ER96-1563-023
TPS Dell, LLC	Docket No. ER02-510-006
TPS McAdams, LLC	Docket No. ER02-507-006
TECO-PANDA Generating Company, L.P.	Docket No. ER02-1000-007
Tampa Electric Company, Panda Gila River, L.P., Union Power Partners, L.P., Commonwealth Chesapeake Company, L.L.C., TECO EnergySource, Inc., TPS Dell, LLC, TPS McAdams, LLC, TECO-PANDA Generating Company, L.P.	Docket No. EL05-68-001

ORDER DENYING REHEARING

(Issued June 8, 2005)

1. In this order we deny the request for rehearing filed by Tampa Electric Company (Tampa) and its affiliates, Panda Gila River, L.P. (Panda Gila), Union Power Partners, L.P. (Union), TECO EnergySource, Inc. (EnergySource), Commonwealth Chesapeake Company, L.L.C. (Commonwealth), TPS Dell, LLC

(Dell), TPS McAdams, LLC (McAdams), and TECO-PANDA Generating Company, L.P. (TECO-PANDA), (collectively, TECO) of the Commission's March 3, 2005 order in this proceeding.¹

Background

2. On November 9, 2004, TECO submitted for filing an updated market power analysis in compliance with the Commission's order issued on May 13, 2004.² In its November 9 Filing, TECO submitted the results of the two generation market power screens. As required in the May 13 Order, TECO also provided updated information on the other three parts of the Commission's four-part analysis. TECO stated that it continued to be unable to exercise transmission market power, erect barriers to entry, or engage in affiliate abuse or reciprocal dealing.

3. For the generation market power screens, TECO stated that it passed the pivotal supplier screen in Tampa's control area and in each directly interconnected control area. TECO stated further that it passed the wholesale market share screen in each directly interconnected control area but failed the wholesale market share screen in both the Tampa and Reedy Creek control areas. TECO noted that the generating facilities located outside of Florida, owned by Panda Gila, Union, Commonwealth, Dell and McAdams were all constructed after July 9, 1996, and thus a generation market power analysis was not needed for those facilities pursuant to section 35.27(a) of the Commission's regulations.³

4. TECO argued that, despite the screen failures, TECO does not have market power in the Tampa or Reedy Creek control areas. TECO stated that there were no wholesale loads that are physically connected to the Tampa transmission system. TECO noted that, while it did provide service to two wholesale customers (with total load of approximately 25 MW), these customers are physically located in the Progress Energy Florida system and are electronically included in Tampa's control area via

¹ 110 FERC ¶ 61,206 (2005) (March 3 Order).

² *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004) (May 13 Order). 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. *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

³ 18 C.F.R. § 35.27(a) (2004).

dynamic scheduling.⁴ TECO noted further that one of these customers announced that it would use a new supplier, the Florida Municipal Power Agency, at the expiration of its current contract with Tampa. TECO concluded, therefore, that it had no market power with respect to wholesale loads within the Tampa control area.

5. TECO also attempted to rebut the screen failure in Reedy Creek noting that the only reason for the screen failure in the winter season was the increased import capability and stating that this resulted in a greater allocation of transfer capability to TECO, thereby increasing its uncommitted capacity in the Reedy Creek control area. TECO asserted that this was of no concern because it also increased the remote generation choices available to serve the small potential load in the Reedy Creek control area.⁵

6. The March 3 Order concluded that TECO's failure of the wholesale market share screen warranted instituting the instant section 206 proceeding, limited to the Tampa and Reedy Creek control areas. The March 3 Order also established a refund effective date in order to put in place the necessary procedural framework to promptly impose an effective remedy.

TECO's Request for Rehearing

7. In its request for rehearing of the March 3 Order, TECO argues that the Commission erred by failing to consider its rebuttal evidence showing that TECO does not have market power in the Tampa and Reedy Creek control areas in which the screen failures occurred. TECO reiterates that it does not have market power in the control areas in which the screen failures occurred because there are no wholesale customers in the Tampa control area, and there is a small amount of wholesale load in the Reedy Creek control area during the season that TECO fails, compared to the overall level of supply that can reach the control area. TECO argues that, for both the Tampa and Reedy Creek control areas, there is import capability that would provide competitive alternatives for any potential wholesale load supply options. TECO notes that, in its November 9 Filing, it provided examples of how the potential wholesale

⁴ TECO's November 9 Filing was unclear as to whether it treated these customers as part of its control area for purposes of the generation market power analysis. The Commission stated in Order No. 888 that dynamic scheduling electronically moves load out of the control area in which it is physically located and into another control area. Order No. 888 at 31,709-10.

⁵ According to TECO, Reedy Creek's peak load in winter is 152 MW and total import capability is 235 MW for all seasons. TECO's pro-rata share of that import capability is highest in winter (54 MW versus 18 MW in summer).

loads in the Reedy Creek control area are utilizing competitive supply options. TECO argues on rehearing that the Commission failed to address whether this rebuttal evidence was sufficient to rebut the presumption of market power caused by the screen failures.

8. TECO also argues that it suffers financial harm because of the institution of the section 206 proceeding and the refund obligation. TECO contends that it submitted allegedly substantial and credible rebuttal evidence in its filing to rebut the presumption of market power, and accordingly there should be no bar to continued market-based rate authority in the markets where the screen failures occurred. According to TECO, the section 206 proceeding creates the perception that TECO has been found to exercise market power, regardless of how limited the intended scope of the proceeding. TECO argues further that the section 206 proceeding harms its relationships with trading partners who may be uncertain about what sort of wholesale power transactions can be made with TECO in the short- or near-term pending resolution of the section 206 proceeding. TECO also notes that it will incur allegedly unnecessary costs due to the proceeding because it must prepare alternative rate models for the control areas in which the screen failures occurred.

9. Finally, TECO argues that Commission consideration of its rebuttal evidence prior to the March 3 Order would have obviated the need for the section 206 proceeding and would have alleviated the harm to TECO. TECO notes that, while there may be situations in which companies fail the wholesale market share screen and a section 206 proceeding therefore is required, TECO's allegedly straightforward and fully documented rebuttal evidence and the fact that no party disputed the evidence make a section 206 proceeding unnecessary in this case. TECO, therefore, requests the Commission to grant rehearing, find that no mitigation is necessary because TECO cannot exercise market power based on the originally filed rebuttal evidence, terminate the section 206 proceeding and refund obligation, and find that TECO continues to satisfy the Commission's requirements for market-based rates.

Discussion

10. We will deny TECO's request for rehearing. In the March 3 Order, the Commission explained the basis for its decision to institute a section 206 proceeding. Consistent with the April 14 Order, where an applicant is found to have failed either generation market power screen, such failure creates a rebuttable presumption that the applicant has generation market power and provides the basis for instituting a section 206 proceeding. Thus, as the Commission stated in the March 3 Order, TECO's failure of the wholesale market share screen in the Tampa and Reedy Creek control areas provides the basis for the Commission to institute the instant section 206 proceeding. The Commission noted in the March 3 Order that TECO had presented evidence it believes to be relevant to rebut the presumption of market power

established by its failure of the wholesale market share screen. The Commission explained that it would further examine the information TECO submitted in conjunction with other evidence submitted in the section 206 proceeding. TECO has failed to demonstrate on rehearing that the Commission's conclusion in this regard was in error. To the contrary, the decision to establish a section 206 proceeding based on TECO's failure of the wholesale market share screen and to further examine the information submitted by TECO as part of the section 206 proceeding is fully consistent with the procedures and policy established in the April 14 Order and July 8 Order.

11. Further, with respect to TECO's statement that there should be no bar to continued market-based rate authority in the markets where the screen failures occurred, in the April 14 Order the Commission stated: "Market-based rates will not be revoked and cost-based rates will not be imposed until there has been a Commission order making a definitive finding that the applicant has market power (*i.e.*, after the Commission has ruled on a Delivered Price Test analysis) or, where the applicant accepts a presumption of market power, an order is issued addressing whether default cost-based rates or case-specific cost-based rates are to be applied."⁶

12. Further, in response to TECO's argument that it is harmed by the institution of the section 206 proceeding and the refund obligation, as the Commission stated in the March 3 Order, the decision to institute a section 206 proceeding in this case does not constitute a definitive finding by the Commission that TECO has market power in the Tampa and Reedy Creek control areas, nor does the Commission's decision to establish a refund effective date constitute a determination that refunds will be ordered.⁷ The Commission noted that, as discussed in the April 14 and July 8 Orders, the screens are conservatively designed to identify the subset of applicants who require closer scrutiny. In this case, TECO's November 9 Filing indicates that TECO requires closer scrutiny.

13. As the Commission noted in the March 3 Order, TECO's rebuttal evidence will be addressed in the context of the section 206 proceeding, and TECO will have an opportunity to submit additional evidence to support its position that it cannot exercise market power in the Tampa and Reedy Creek control areas. On its own, the evidence submitted by TECO was not sufficient to rebut the presumption of market power. The Commission found in the March 3 Order and affirms here that TECO requires further investigation due to its failure of the generation market power screens in the Tampa and Reedy Creek control areas.

⁶ 107 FERC ¶ 61,018 at P 149.

⁷ 110 FERC ¶ 61,206 at P 26, 27.

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14. On this basis, the Commission, therefore, denies TECO's request for rehearing.

The Commission orders:

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

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.