

123 FERC ¶ 61,123
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.

Westar Energy, Inc.
Kansas Gas and Electric Company

Docket Nos. ER03-9-006
ER03-9-007
ER03-9-009
ER06-1313-001
ER06-1313-002
ER98-2157-007
ER98-2157-008
ER98-2157-010
EL05-64-001
EL05-64-002

ORDER ON MARKET-BASED RATES, DENYING REHEARING, AND
TERMINATING SECTION 206 PROCEEDING

(Issued May 5, 2008)

1. In this order, we accept for filing Westar Energy, Inc.'s (Westar Energy) and Kansas Gas and Electric Company's (Kansas Gas and Electric) (collectively, Westar) compliance filing submitted pursuant to the Commission's order issued on September 6, 2006¹ and conditionally accept for filing tariff revisions submitted in response to Order

¹ *Westar Energy, Inc.*, 116 FERC ¶ 61,219 (2006) (September 6 Order). The September 6 Order addressed Westar's proposal to mitigate the presumption of market power for sales of electric power at wholesale for transactions in its home (Westar) balancing authority area, and two of its first-tier markets, Midwest Energy (Midwest) balancing authority area and Aquila Networks-West Plains Kansas (WPEK) balancing authority area.

No. 697.² We deny the requests for rehearing of the September 6 Order filed by Westar and Kansas Municipal Utilities (KMU).

I. Background

A. Prior Orders and Filings

2. On September 27, 2004, as amended on September 30, 2004, Westar submitted for filing an updated market power analysis pursuant to the Commission's order issued on May 13, 2004.³ The May 13 Order addressed the procedures for implementing the generation market power analysis announced on April 14, 2004, and clarified on July 8, 2004.⁴

3. On March 23, 2005, the Commission instituted a proceeding under section 206 of the Federal Power Act (FPA)⁵ regarding the justness and reasonableness of Westar's market-based rates in the balancing authority areas in which Westar failed the market share screen – the Westar, Midwest, and WPEK balancing authority areas.⁶ In that order, the Commission directed Westar to: “(1) file a Delivered Price Test analysis; (2) file a mitigation proposal tailored to its particular circumstances that would eliminate the ability to exercise market power; or (3) inform the Commission that it will adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates.”⁷ The Commission also directed Westar to revise its

² See *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 72 Fed. Reg. 39,904 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252, *clarified*, 121 FERC ¶ 61,260 (2007) (Order Clarifying Final Rule).

³ *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004) (May 13 Order).

⁴ *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

⁵ 16 U.S.C. § 824e (2000).

⁶ *Westar Energy, Inc.*, 110 FERC ¶ 61,316 (2005) (March 23 Order). We note that the Commission adopted the use of “balancing authority area” instead of “control area” in Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 250.

⁷ *Id.* at Ordering Paragraph D.

generation market power screens for its first-tier balancing authority areas (excluding Midwest and WPEK)⁸ using nameplate capacity.⁹

4. On April 22, 2005, Westar submitted a compliance filing responding to the March 23 Order. In that filing, Westar included the revised generation market power screens for Westar's first-tier balancing authority areas (excluding Midwest and WPEK). Westar stated that it continues to pass both the pivotal supplier screen and the wholesale market share screen in all locations.¹⁰ Westar asserted that its compliance filing supported the transmission import capability study for its balancing authority areas (excluding Midwest and WPEK).¹¹ Further, Westar submitted clean and redlined tariff sheets that, Westar explained, prohibit Westar Energy from making market-based power sales to any public utility affiliate "without first receiving" Commission authorization pursuant to section 205 of the FPA.¹² Finally, Westar stated that Kansas Gas and Electric does not have a separate market-based rate tariff on file with the Commission and, therefore, cannot comply with the market behavior rules adopted by the March 23 Order.

5. On May 23, 2005, Westar submitted a mitigation proposal designed to eliminate its ability to exercise market power in the Westar, Midwest, and WPEK balancing authority areas. The mitigation proposal included an amendment to section 3 of its tariff to provide that no "Mitigated Sales" shall be made under its tariff.¹³ The term "Mitigated

⁸ The other first-tier balancing authority areas include: Associated Electric Cooperative, Inc., Central and Southwest Services, Westar District Electric Company, Kansas City Power & Light Company, Missouri Public Service, Oklahoma Gas and Electric, Omaha Public Power District control areas, and Unified Government of Wyandotte County/Kansas City, Kansas, Board of Public Utilities.

⁹ March 23 Order, 110 FERC ¶ 61,316 at Ordering Paragraph E.

¹⁰ See April 22, 2005 Compliance Filing, Appendix A.

¹¹ See *id.* at Appendix C.

¹² 16 U.S.C. § 824d (2000). Westar also included the change in status reporting requirement adopted in Order No. 652. See April 22, 2005 Compliance Filing, Appendix B, *citing Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

¹³ May 23, 2005 Compliance Filing at Attachment A (Clean and Redlined Tariff Sheets).

Sales” was defined as physical sales of power and/or energy that sink in the Westar, Midwest, or WPEK balancing authority areas. The proposed amendment to the tariff further stated that Mitigated Sales do not include sales into markets administered by the Southwest Power Pool, Inc. (SPP) and Midwest Independent Transmission System Operator, Inc. (Midwest ISO). The proposed amended tariff provided that Mitigated Sales for periods of one year or less shall be made under Schedules A or C of the Western Systems Power Pool Rate Schedule, FERC No. 6 (WSPP Agreement), as it may be amended,¹⁴ and that Mitigated Sales of greater than one year shall not be made prior to Westar first submitting a separate filing and receiving Commission authorization for the transaction under section 205 of the FPA.

B. September 6 Order

6. In the September 6 Order, the Commission conditionally accepted use of the WSPP Agreement as mitigation in the Westar, Midwest, and WPEK balancing authority areas, subject to the outcome of Order No. 697.¹⁵ However, the Commission noted that Westar's proposal to use the WSPP Agreement for sales in the Westar balancing authority area of one year or less, and Westar's commitment not to make sales there for greater than one year without Westar first obtaining Commission authorization, is inconsistent with the April 14 Order, because the Commission required long-term mitigation to apply to sales of *one year or longer*.¹⁶ Accordingly, the Commission conditioned its acceptance of Westar's use of the WSPP Agreement for mitigation purposes “on that proposal applying to sales of less than one year” and on “Westar's commitment to seek prior

¹⁴ *Western Sys. Power Pool*, 55 FERC ¶ 61,099, *order on reh'g*, 55 FERC ¶ 61,495 (1991), *aff'd in relevant part and remanded in part sub nom. Environmental Action and Consumer Federation of America v. FERC*, 996 F.2d 401 (D.C. Cir. 1993), *order on remand*, 66 FERC ¶ 61,201 (1994); *Western Sys. Power Pool*, 83 FERC ¶ 61,099; *Western Sys. Power Pool*, 85 FERC ¶ 61,363 (1998); *Western Sys. Power Pool, Inc.*, 95 FERC ¶ 61,483 (2001).

¹⁵ September 6 Order, 116 FERC ¶ 61,219 at P 33. For entities which are not members of the WSPP Agreement that request to transact with Westar in these balancing authority areas, the Commission accepted Westar's commitment to obtain Commission approval prior to consummating such a transaction. *Id.* P. 34.

¹⁶ *Id.* P 45.

authorization for long-term sales to the extent that such commitment applies to sales of one year or longer.”¹⁷

7. In addition, the Commission found that Westar “satisfies the Commission’s generation market power standard for the grant of market-based rate authority in [its first-tier balancing authority] areas (excluding Midwest and WPEK).”¹⁸ However, the Commission found that several provisions of the proposed tariff were confusing, and directed their modification, within 30 days of the date of the order.¹⁹

8. Additionally, relying on orders issued since March 17, 2006 in other proceedings and the Commission’s mitigation policy, the Commission rejected Westar’s tariff language proposing sink-based mitigation.²⁰ Instead, the Commission directed Westar revise its market-based rate tariff to prohibit *any* sales within the Westar, Midwest, and WPEK balancing authority areas.²¹

9. Finally, the Commission directed Westar to make refunds, with interest, within 30 days of the date of issuance of the order, “[t]o the extent that Westar made any sales under Westar’s market-based rate tariff in the Westar, Midwest, or WPEK balancing authority areas since the refund effective date [*i.e.*, June 7, 2005] in this proceeding at rates that were above the rates under the mitigation proposal accepted” by the Commission and file a refund report, if appropriate.²²

II. Description of Filings

10. On October 2, 2006, the Kansas Corporation Commission (Kansas Commission) filed a motion to intervene out of time. According to the Kansas Commission, it was concerned that the Commission’s rejection of Westar’s “sink test” might have negative

¹⁷ *Id.* P 45. The Commission stated that it interpreted Westar’s proposal to be that sales of one year or longer will be made on an embedded cost-of-service basis, and that acceptance is conditional that any such sales be cost-justified. *Id.*

¹⁸ *Id.* P 48.

¹⁹ *Id.* P 41-44.

²⁰ *Id.* P 38-39.

²¹ *Id.* P 40.

²² *Id.* P 47.

implications on Westar's retail ratepayers in Kansas. The Kansas Commission stated that its comments would not materially add to the Commission's decisional burden or delay or disrupt the proceeding.

11. On October 6, 2006, Westar filed a request for rehearing of the September 6 Order. In general, it requests that the Commission grant rehearing and accept Westar's mitigation plan, which applies only to wholesale power sales when the power is ultimately consumed in balancing authority areas in which the Commission found that Westar has market power. It asserts that the plan is tailored to the particular facts contained in the record and is consistent with prior Commission orders. Alternatively, it requests that, if the Commission finds that mitigation should apply to all wholesale power sales made by Westar in the mitigated balancing authority area, the Commission should exercise discretion to waive any refund obligation.

12. Also on October 6, 2006, KMU filed a request for rehearing. Generally KMU requests that the Commission modify the order to ensure that Westar's mitigation plan reflects cost-based rates based on Westar's average system costs, requires Westar to sell to customers in the mitigated territories at such cost-based rates at least until true transmission access is available, and otherwise prevent Westar from engaging in physical or economic withholding. Alternatively, KMU renews its request that the Commission establish hearing procedures to ensure that a full record is developed prior to acting on or adopting a mitigation plan.

13. Additionally, on October 6, 2006, Westar made the compliance filing required by the September 6 Order.²³

14. On September 17, 2007, Westar filed revisions to its market-based rate tariff in order to comply with the requirements of Order No. 697.²⁴

²³ On November 30, 2006, Westar amended its market-based rate tariff to reflect the purchase of WPEK by Mid-Kansas Electric Company, LLC (MKEC). On January 8, 2007, the Director, Division of Tariffs and Market Development – West, acting pursuant to delegated authority, accepted the notice of change in status. Because of this change, we will refer to the WPEK balancing authority area as MKEC.

²⁴ Order No. 697, FERC Stats. & Regs. ¶ 31,252.

III. Notice of Filing and Responsive Pleadings

15. Notice of Westar's October 6, 2006 compliance filing was published in the *Federal Register*, 71 Fed. Reg. 63,301 (2007), with interventions and protests due on or before October 27, 2007. None was filed. Notice of Westar's September 17, 2007 compliance filing was published in the *Federal Register*, 72 Fed. Reg. 62,225 (2007), with interventions and protests due on or before October 9, 2007. None was filed.

IV. Discussion

A. Procedural Matter

16. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2007), we will grant the Kansas Commission's late motion to intervene in this proceeding for good cause shown and the lack of prejudice or delay.

B. Substantive Matters

Westar's Request for Rehearing

17. Westar challenges the September 6 Order, alleging that the buyers in the markets in which Westar demonstrated that it lacks market power have sufficient alternatives to eliminate Westar's ability to impose price increases that are above the otherwise prevailing market price. Westar argues that the Commission's traditional market power analysis is concerned only with the incentive and ability to exercise market power, not with attempts to exercise market power; the Commission wrongly applied a new and much lower standard (*i.e.*, the mere "ability to attempt to exercise market power") to reject Westar's mitigation proposal and require refunds. Additionally, Westar maintains that the Commission's apparent conclusion that Westar has market power over off-system purchasers who voluntarily transact in its balancing authority area runs contrary to court precedent. Westar points out that the courts have questioned "the Commission's past attempts to protect buyers who voluntarily subject themselves to a seller's market power."²⁵

18. Westar argues that the arbitrary nature of the Commission's decision is evidenced by the fact that it could have engaged in an economically identical transaction without running contrary to the Commission's new mitigation policy by simply making the sale at

²⁵ Westar Rehearing Request at 12, citing *Potomac Electric Power Co. v. FERC*, 210 F.3d 403, 411 (D.C. Cir. 2000) (*Potomac Electric Power*), citing *Northeast Utilities Serv. Co. v. FERC*, 993 F.2d 937, 961 (1st Cir. 1993) (*Northeast Utilities*).

a different location. Westar asserts that the real question is whether the buyer has the ability to choose its supplier from a competitive market – thus, there is no difference between a sale at its generation buses to buyers located outside that will export the power to areas in which Westar does not have market power and selling at a point outside the balancing authority area.

19. Westar states that it modeled its mitigation proposal after that of AEP Power Marketing, Inc., which was accepted in January 2006.²⁶ According to Westar, the Commission has no consistent policy to mitigate “all sales” in a balancing authority area where the seller is presumed to have market power regardless of the buyer and where the energy is ultimately delivered.

20. Westar argues that the September 6 Order departs from the Commission’s series of orders accepting the “sink” mitigation, without adequate explanation. Westar further argues that the Commission seems to erroneously believe that Westar can charge, and did charge, the off-system buyers unjust and unreasonable rates. Westar maintains that the orders shifting the mitigation policy were issued after Westar submitted its filings that were based on prior “sink” orders. Westar states that it made non-emergency and emergency sales in its home balancing authority area to off-system purchasers based on the existing Commission precedent that these sales would not be subject to mitigation. Therefore, Westar argues that it would be inequitable to require Westar to pay refunds, which would simply be a totally unexpected windfall to these buyers in competitive markets.

Commission Determination

21. In the September 6 Order, the Commission rejected Westar’s proposed sink language because it determined that such tariff language would not properly mitigate Westar’s potential to exercise market power in the Westar, Midwest, and MKEC balancing authority areas. The Commission found that the proposed tariff language would improperly allow Westar to make market-based rate sales within its balancing authority area to any entities that do not serve end-use customers in the Westar, Midwest, and MKEC balancing authority areas. Accordingly, the Commission directed Westar to revise its market-based rate tariff to reflect its commitment to “provide that service under the tariff applies only to sales outside the Westar, Midwest, and [MKEC] balancing

²⁶ *AEP Power Marketing, Inc.*, 114 FERC ¶ 61,025 (2006).

authority areas.”²⁷ We will affirm that finding here and, therefore, will deny Westar’s request for rehearing.

22. Westar’s argument that the Commission’s traditional market power analysis is concerned with the ability and incentive to exercise market power and that the Commission wrongly applied a lower standard in the September 6 Order when it stated that Westar’s mitigation proposal would not mitigate its “ability to attempt to exercise market power over sales in the mitigated control area” is inaccurate. None of the cases Westar cites in support of its claim that the Commission also is concerned with the seller’s incentive to exercise market power are market-based rate cases. Rather, with regard to whether the Commission grants a seller’s request to obtain or retain market-based rate authority, the Commission’s market power analysis considers historical data to determine whether the seller has the ability to exercise market power.²⁸

23. Westar’s reliance on *Potomac Electric Power* and *Northeast Utilities* is also misplaced. In those cases, the courts were discussing the Commission’s obligations to protect customers in the face of contracts that limited the Commission to review under the public interest standard of review, rather than the just and reasonable standard of review.²⁹ That is not the situation here.

24. In regard to Westar’s argument about inconsistent treatment, we recognize that, in some prior orders, the Commission accepted certain mitigation proposals that included the sink language we rejected in this proceeding. However, as we explained in *South Carolina Electric and Gas Company*, after further review (subsequent to those other orders), the Commission concluded that the sink language was insufficient mitigation of

²⁷ September 6 Order, 116 FERC ¶ 61,219 at P 40.

²⁸ *See, e.g.*, Order No. 697, FERC Stats & Regs. ¶ 31,252 at P 36, 70 (explaining that the horizontal market power screens examine the seller’s ability to exercise market power).

²⁹ *See United Gas Pipe Line Co. v. Mobile Gas Serv.*, 350 U.S. 332 (1956); *Federal Power Comm’n v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

the seller's potential to exercise market power.³⁰ The Commission also realized that prohibiting only market-based rate sales that sink in the balancing authority area was inconsistent with the Commission's determinations in the April 14 and July 8 Orders. Therefore, the Commission directed market-based rate sellers who have been found or presumed to have market power to remove the sink language and instead, adopt tariff language that reflects their commitment to not make any sales at market-based rates within the balancing authority area.³¹

25. Moreover, the Commission noted that Westar's proposed tariff language was contrary to the Commission's direction in the April 14 and July 8 Orders, as well as recent precedent approving mitigation for other entities that failed the indicative screens.³² As the Commission explained in the September 6 Order, the Commission authorizes sales of electric energy at market-based rates only if the seller and its affiliates do not have, or have *adequately* mitigated, market power in the generation and transmission of such energy, and cannot erect other barriers to entry by potential competitors. When there is a presumption of market power within a balancing authority area (as there is in this case), the seller has the ability to raise the market price above competitive levels and charge excessive rates on the market-based rate sales it makes in that balancing authority area.³³ In that respect, the Commission explained that it had previously addressed and rejected proposals similar to what Westar proposed here.

26. Additionally, since the issuance of the September 6 Order, the Commission has further addressed mitigation issues in Order No. 697, and considered and rejected arguments similar to those raised by Westar, such as that the Commission erroneously focused on the physical location of the transaction's point of sale. In Order No. 697, the Commission concluded that adequately protecting customers from the potential exercise

³⁰ The Commission stated that all sellers are subject to the requirements of Order No. 697 and thus may not limit mitigation to sales that "sink" in the balancing authority area where the mitigated seller has been found, or presumed, to have market power. Rather, such sellers are required to comply with the mitigation policy as stated in Order No. 697. *See*, Order Clarifying Final Rule, 121 FERC ¶ 61,260 at P 7; *South Carolina Electric & Gas Co.*, 121 FERC ¶ 61,263, at P 12 (2007); *LG&E Energy Marketing, Inc.*, 122 FERC ¶ 61,175, at P 32 (2008).

³¹ *See, e.g., MidAmerican Energy Co.*, 114 FERC ¶ 61,280, at P 33 (2006).

³² *Id.* P 39.

³³ *Id.* P 37 (emphasis added).

of market power required that it continue to apply mitigation to *all* sales in the balancing authority area in which a seller is found, or presumed, to have market power.³⁴ In this regard, the Commission rejected proposals that it limit mitigation to sales that “sink” in the balancing authority area in which the seller is mitigated.³⁵ The Commission noted that allowing a seller that has been found to have market power, or has so conceded, to make market-based rate sales in the very market in which market power is a concern is inconsistent with the Commission’s responsibility under the FPA to ensure that rates are just and reasonable and not unduly discriminatory or preferential.³⁶ The Commission further stated that, while it generally agrees that it is desirable to allow market-based rate sales into markets where the seller has not been found to have market power, it does not agree that it is reasonable to allow a mitigated seller to make market-based rate sales *anywhere* within a balancing authority area in which the seller has been found to have market power, or has so conceded, as it is unrealistic to believe that such sales could be effectively monitored to ensure against improper sales.³⁷ However, the Commission stated that it would allow mitigated sellers to make market-based rate sales within a

³⁴ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 817. Although the Commission used the term “mitigated market” in Order No. 697, we believe that “balancing authority area in which a seller is found, or presumed, to have market power” is a more accurate way to describe the area in which a seller is mitigated. Accordingly, we use that phrase herein.

³⁵ *Id.* P 818.

³⁶ *Id.* P 819.

³⁷ *Id.* P 818-19.

mitigated balancing authority area at the metered boundary with a balancing authority area in which the seller has market-based rate authority under certain circumstances.³⁸

27. We also deny Westar's request that we waive refunds. We disagree that refunds would be an undeserved windfall for off-system customers. Ordering refunds in this instance is consistent with Commission policy that "[a]pplicants that have a presumption of market power . . . will have their rates prospectively made subject to refund."³⁹

KMU's Rehearing Request

28. On rehearing, KMU asserts that the Commission has not met its duty to protect wholesale customers from Westar exercising its market power within its balancing authority area. KMU argues that this protection can be achieved if the Commission modifies the September 6 Order to adopt true protective measures.⁴⁰ KMU maintains that the Commission failed to address its arguments that show that the proposed mitigation

³⁸ Such sales will be allowed provided: (i) legal title of the power sold transfers at the metered boundary of the balancing authority area where the seller has market-based rate authority; (ii) any power sold is not intended to serve load in the seller's mitigated market; and (iii) no affiliate of the mitigated seller will sell the same power back into the mitigated seller's mitigated market. The seller must retain, for a period of five years from the date of the sale, all data and information related to the sale that demonstrates compliance with items (i), (ii), and (iii) above. Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 830. The required tariff provision need not also be effective September 18, 2007, and may be effective as of the date that the market-based rate seller commences making market-based rate sales at the metered boundary. As discussed below, Westar made such a filing on September 17, 2007.

³⁹ April 14 Order at P 149; *see also*, July 8 Order at P 131.

⁴⁰ KMU states that these measures include: (1) ensuring that Westar's mitigation plan reflects cost-based rates that are based on Westar's system costs; and (2) requiring Westar to sell to all customers in the mitigated territories at those cost-based rates until transmission access is available at a level that would prevent Westar from engaging in physical or economic withholding. KMU Rehearing Request at 2.

plan fails to achieve true mitigation or protection.⁴¹ According to KMU, this lack of protection for Westar's wholesale customers in its balancing authority area is further exacerbated by widespread transmission constraints that impede the ability of those customers to buy from third parties.

29. More specifically, KMU argues that deferring concerns about the use of the WSPP Agreement to Order No. 697 is not appropriate, as a rulemaking proceeding of general applicability is not the proper forum to consider company-specific mitigation measures for that company's self-admitted market power. KMU asserts that, although it raised material issues that called into question the justness and reasonableness of Westar's incremental costs and related matters, the Commission failed to address these substantive issues, but merely reminded customers of their rights to initiate complaint proceedings. According to KMU, this impermissibly shifts the burden of disproving the efficacy of the mitigation measures away from the Commission (and ultimately Westar) and on to the customers (such as KMU).⁴²

30. KMU argues that the Commission is obligated to determine whether the cost-based rate caps under the WSPP Agreement are just and reasonable as a mitigation measure that sufficiently protects customers in the three balancing authority areas requiring mitigation in this case. KMU points out that no pricing mechanism or price cap can provide effective mitigation when the company with market power is not obligated to engage in sales to affected customers at any price. Furthermore, KMU states that price does not come into play if there are no sales and transmission constraints that inhibit or preclude the customers' ability to access other suppliers. KMU also challenges the use of the WSPP Agreement as an appropriate mitigation measure for application in Kansas because the WSPP rate caps are "based on a conglomerate of 18 utilities in the west and

⁴¹ KMU reiterates its argument that the Commission's decision to: (1) permit Westar to sell at market-based rates outside of its control area; (2) reject a "must sell" obligation applicable to wholesale customers within the Westar control area; and (3) accept the WSPP Agreement as a proxy for true cost-based rates permits and encourages Westar not to sell power to wholesale customers in its control area and instead to sell power at higher market rates elsewhere. *Id.* at 3.

⁴² *Id.*, at 3-4, 13. KMU goes on to argue that, given the circumstances, this case is especially troubling because in the instant proceeding Westar has the burden of proving that its mitigation plan is appropriate but the Commission has not developed a record (including evidence that KMU would proffer). In any event, KMU points out Westar would be free to continue to exercise market power in the period before a section 206 complaint is filed. *Id.* at 14.

bear no direct relationship to Westar's costs or to the costs of other entities in the state of Kansas."⁴³ Moreover, it alleges, the use of the WSPP Agreement accepted for filing in *Portland General Electric Co. and Enron Power Marketing, Inc.*,⁴⁴ resulted from protracted negotiations addressing alleged tariff violations stemming from the California market crisis, whereas in the instant case there has been no settlement agreement, no negotiations, no other concessions or settlement payment, no 12-month limitation. KMU argues that the "up to adders" would create "cost-based rates" that are actually higher than the market price that the Commission has determined must be mitigated. Without a requirement that Westar offer capacity at cost-based rates in the three affected balancing authority areas, KMU insists that the Commission is permitting Westar to engage in physical withholding. KMU argues that a "must-offer" requirement, not included among the Commission's "default" mitigation measures, is a practical and necessary defense against Westar's ability to threaten captive customers with no alternative sources of power. KMU argues that the Commission ignored the reality that Westar will play both sides of the fence to its advantage, and to the disadvantage of those who require protection.

31. Additionally, KMU highlights the adverse effects of the Commission's decision not to impose the mitigation measures it supports by pointing out that several of its members have full or partial requirements contracts with Westar that will soon terminate (some as early as April 2007). According to KMU, these members met with Westar to discuss future power supply arrangements and, without divulging specific details of the discussions due to their confidential nature, proffer a scenario to describe how the mitigation measures adopted in the September 6 Order fail to protect customers. KMU asserts that Westar has the ability to offer services subject to certain conditions of Westar's choosing. For example, KMU theorizes that Westar could: (1) refuse to sell to a municipal power pool; (2) refuse to allow the pooling of Westar-supplied power under agreements among various KMU members; (3) refuse to offer capacity to wholesale customers in Westar's control area unless those customers agree to sign long-term full requirements contracts, because Westar can otherwise sell power outside of its territory at higher market-based rates and has no obligation to sell within its territory; (4) condition its offer on being the exclusive or near-exclusive supplier to each of its control area wholesale customers; and (5) refuse to sell unless the wholesale customers give up their

⁴³ KMU Rehearing Request at 16.

⁴⁴ On December 31, 2003, the Director, Division of Tariffs and Market Development – South, acting pursuant to delegated authority, accepted for filing a revised market tariff that was the result of an uncontested partial settlement. 105 FERC ¶ 61,302 (2003).

ability to use their own behind-the-meter generation and instead sell their generation capacity to Westar at the price set by Westar.⁴⁵ According to KMU, if Westar were to impose these types of conditions captive customers would have no protection under the proposed mitigation. KMU asserts that, if the customers had adequate access to transmission service, they could secure power from other suppliers, and would not need to rely on Westar capacity to fill the void left by their expiring requirements contracts. KMU states that some members issued Requests for Proposals to obtain alternate power supplies, but transmission constraints make those options unavailable, at least until SPP causes the necessary upgrades to be put into service, which is why more meaningful mitigation measures are needed.

Commission Determination

32. We will deny KMU's request for rehearing regarding the rate cap in the WSPP Agreement. When we instituted the instant section 206 proceeding, we did not initiate an investigation into the WSPP Agreement; rather, we investigated the justness and reasonableness of Westar's market-based rates in the Westar, Midwest, and WPEK balancing authority areas. At the time we acted on Westar's mitigation proposal, the WSPP Agreement demand charge rate was a cost-based rate on file with the Commission, and was presumed to be just and reasonable for any seller that is a member of WSPP. Thus, Westar's proposal to use the WSPP Agreement rate cap in the mitigated balancing authority areas was appropriate, and any challenges to that rate would need to be made in a separate section 206 proceeding.

33. Since then, however, the Commission initiated an investigation under section 206 into the WSPP Agreement demand charge rate as it pertains to mitigated sellers. On February 21, 2008, in *Western Systems Power Pool*,⁴⁶ the Commission determined that a public utility that lacks market-based rate authority may no longer rely on the system-wide ceiling rate demand charge in the WSPP Agreement, but rather must justify that rate based on its actual costs. The Commission directed such sellers to make a compliance filing within 60 days of the date of the WSPP Order providing cost justification for that ceiling rate or cost support for an alternative rate. However, in the WSPP Order, the Commission exercised its discretion and did not direct the payment of refunds which might have accrued prior to the date of the compliance filing. In this regard, Westar filed its compliance filing on March 18, 2008 in Docket No. EL07-69-000. This filing will be

⁴⁵ See KMU Rehearing Request at 20.

⁴⁶ 122 FERC ¶ 61,139 (2008) (WSPP Order).

addressed in a separate proceeding. Any remaining concerns that KMU has with Westar's rate may be raised in that docket.

34. We will also deny KMU's request that we impose a "must offer" requirement. In Order No. 697, the Commission discussed at length the proposal of a generic "must-offer" requirement and declined to impose an across-the-board "must offer" requirement for mitigated sellers.⁴⁷ In Order No. 697, the Commission found that, despite theoretical concerns that wholesale customers will be unable to access power absent a "must offer" requirement, no one provided any concrete examples of harm nor explained how the potential harm justifies a generic remedy. In addition, the Commission was concerned that adoption of a "must offer" requirement would present a number of difficult implementation and logistical problems. However, the Commission stated that it did not rule out the possibility that it might find the imposition of a "must offer" requirement, or some other condition on the seller's market-based rate authority, to be an appropriate remedy in a particular case, depending on the facts and circumstances (as it has done in the past). If an intervenor believes a "must-offer" requirement is the only way to mitigate market power, it may present evidence to that effect in a particular proceeding.

35. We do not find that such evidence exists in this case. While KMU states that adverse effects of this mitigation are already being felt by KMU's members, KMU does not present specific evidence to support such an allegation. The example that KMU provides appears more as a hypothetical scenario. Without specific, credible evidence to support this allegation, the Commission cannot make a determination that Westar needs a must-offer requirement in the mitigated balancing authority areas. Moreover, we note that Order No. 697 discussed potential remedies available on a case-by-case basis to a wholesale customer alleging undue discrimination or other unlawful behavior on the part of a mitigated seller.⁴⁸

36. In addition, with regard to KMU's comments regarding transmission constraints, the Commission has already found in this proceeding that Westar satisfies our concerns regarding vertical market power by virtue of its Open Access Transmission Tariff (OATT) on file with, and accepted by, the Commission.⁴⁹ Furthermore, KMU has raised no specific, credible evidence to indicate that Westar has acted in violation of its OATT.

⁴⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 759-775.

⁴⁸ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 763.

⁴⁹ March 23 Order, 110 FERC ¶ 61,316 at P 22.

Westar's October 6, 2006 Compliance Filing

37. The compliance filing removed language from section 3 of Westar's tariff the Commission deemed "confusing."⁵⁰ According to Westar, proposed Fourth Revised Sheet No. 1 now provides that service under Westar's market-based rate tariff applies only to sales outside the mitigated balancing authority areas. However, Westar explains, to be consistent with how such sales would be recorded in Westar's electric quarterly reports (EQR), the specific tariff language provides that the tariff is applicable to "all sales where title transfers at a point outside of the Westar Energy, Midwest Energy, Inc. or Aquila Networks-West Plains Kansas balancing authority areas." Additionally, Westar has removed from its market-based rate tariff all references to its cost-based, WSPP Agreement mitigation proposal. According to Westar, since the WSPP Agreement is already on file with the Commission, no further filing is required by Westar regarding its cost-based sales. Further, the compliance filing makes the Commission's modifications to Westar's mitigation proposal concerning sales of one year or longer as outlined in paragraph 45 of the September 6 Order. Finally, Westar revised its market-based rate tariff to incorporate the provision outlined in paragraph 49 of the September 6 Order, without variation, consistent with Order No. 652.⁵¹

Commission Determination

38. As stated above, the Commission directed Westar to file revisions to its market-based tariff to provide that service under the tariff applies only to sales outside the Westar, Midwest, and MKEC balancing authority areas. We find this filing adequate to address the mitigation needed in the Westar, Midwest, and MKEC balancing authority areas. Accordingly, the Commission will accept Westar's compliance filing in this regard, effective June 7, 2005.⁵²

39. With regard to the revisions to Westar's market-based rate tariff incorporating the change in status reporting requirement adopted in Order No. 652, the Commission will

⁵⁰ September 6 Order, 116 FERC ¶ 61,219 at P 41.

⁵¹ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

⁵² FERC Electric Tariff, Third Revised Volume No. 6, Fourth Revised Sheet No. 1 (superseding Third Revised Sheet No. 1).

accept this tariff revision, effective March 21, 2005.⁵³ However, as noted above, in the WSPP Order, the Commission directed Westar to provide cost justification for the demand charge in the WSPP Agreement or propose an alternative, cost-justified rate, and Westar made a compliance filing on March 18, 2008.

Westar's September 17, 2007 Compliance Filing

40. Westar filed tariff revisions to comply with Order No. 697, as stated above. Westar states that it incorporated the applicable provision regarding mitigated sales adopted by the Commission in Order No. 697 to permit Westar to make sales of energy and capacity in non-mitigated balancing authority areas, as well as to make sales of energy and capacity under its market-based rate tariff at the metered boundary between the mitigated balancing authority areas and a balancing authority area where Westar has been granted market-based rate authority. Additionally, Westar states that it is amending its market-based rate tariff to incorporate the standard required provisions adopted in Order No. 697, to use the term "balancing authority area" in place of the term "control area," and to reflect the purchase of WPEK by MKEC.⁵⁴

Commission Determination

41. We find that Westar generally complied with the directives of Order No. 697. However, Westar's proposed tariff revisions neglected to remove the now-codified affiliate sales restriction (section 4(a) of Westar's market-based rate tariff) as well as the now-codified change in status reporting requirement (section 9). In addition, section 5 of Westar's market-based rate tariff is applicable to transmission services, which is no longer permitted in market-based rate tariffs. Accordingly, the Commission will conditionally accept Westar's revised market-based rate tariff, subject to Westar filing, within 30 days of the date of this order, a revised market-based rate tariff that is in full compliance with the requirements of Order No. 697.⁵⁵

⁵³ FERC Electric Tariff, Third Revised Volume No. 6, First Revised Sheet No. 1A (superseding Substitute Original Sheet No. 1A).

⁵⁴ See *Aquila, Inc. and Mid-Kansas Electric Company, LLC*, 117 FERC ¶ 61, 276 (2006).

⁵⁵ In its Order Clarifying the Final Rule, the Commission clarified that sellers must comply with all of the requirements of Order No. 697 as of the effective date of the rule. See Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 924.

Refund Report

42. In the September 6 Order, we directed that Westar pay refunds, to the extent Westar made any sales under its market-based rate tariff since the refund effective date in this proceeding⁵⁶ in the Westar, Midwest, and MKEC balancing authority areas that were above the WSPP Agreement rate in effect at the time of the refund effective date within 30 days of the date of issuance of that order. However, on September 14, 2006, Westar filed a request for extension of time to file its refund report until 15 days after the Commission issues an order on its request for rehearing. The Commission granted this request on September 15, 2006. Accordingly, within 15 days of the issuance of this order, Westar must make such refunds, with interest. In addition, we will direct Westar to file a refund report within 15 days after making refunds. If no refunds are due, Westar is expected to file with the Commission within 30 days of the date of issuance of this order so stating.

Docket No. EL05-64-000

43. The Commission will terminate Docket No. EL05-64-000. That proceeding was established to investigate horizontal market power issues in the Westar, Midwest, and WPEK balancing authority areas. Based on the above findings, the Commission finds that there is no need for further investigation in this docket.

The Commission orders:

- (A) KCC's late motion to intervene is hereby granted.
- (B) The requests for rehearing are hereby denied, as discussed in the body of this order.
- (C) Westar's October 6, 2006 compliance filing is hereby accepted effective June 7, 2005, as discussed in the body of this order.
- (D) Westar's revised tariff sheet incorporating the change in status reporting requirement adopted in Order No. 652 is hereby accepted for filing, effective March 21, 2005.
- (E) Westar is hereby directed, within 30 days of the date of issuance of this order, to revise its market-based rate tariff consistent with Order No. 697, as discussed in the body of this order.

⁵⁶ The refund effective date is June 7, 2005.

(F) Westar's September 17, 2007 compliance filing, as modified in accordance with Ordering Paragraph (E) above, is hereby accepted for filing, as discussed in the body of this order.

(G) Westar is hereby ordered to make refunds, within 30 days of the date of issuance of this order, with interest, calculated pursuant to 18 C.F.R. § 35.19a(a) (2007), and to file a refund report with the Commission within 15 days of the date refunds are made, as discussed in the body of this order. If no refunds are due, Westar is expected to file with the Commission within 30 days of the date of issuance of this order so stating.

(H) The section 206 proceeding in Docket No. EL05-64-000 is hereby terminated.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.