

131 FERC ¶ 61,004
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

MidAmerican Energy Holdings Company
Scottish Power plc
PacifiCorp Holdings, Inc.
PacifiCorp

Docket No. EC05-110-002

ORDER APPROVING REQUEST TO REMOVE INDEPENDENT
MARKET MONITOR

(Issued April 1, 2010)

1. On December 28, 2009, PacifiCorp submitted a request under section 203(b) of the Federal Power Act (FPA)¹ for Commission approval to remove the independent market monitor that PacifiCorp instated upon MidAmerican Energy Holdings Company's (MidAmerican Holdings) acquisition of PacifiCorp in 2005.² As discussed below, we grant PacifiCorp's request.

I. Background

A. 2005 Authorization Order

2. In the 2005 Authorization Order, the Commission granted a joint application filed by MidAmerican Holdings, Scottish Power plc, PacifiCorp Holdings, Inc. (PacifiCorp Holdings), and PacifiCorp (collectively, Applicants) pursuant to section 203 of the FPA,³ which requested Commission authorization for a disposition of jurisdictional facilities associated with the sale of PacifiCorp by PacifiCorp Holdings to MidAmerican Holdings.

¹ 16 U.S.C. § 824b (2006).

² *MidAmerican Energy Holdings Co.*, 113 FERC ¶ 61,298 (2005) (2005 Authorization Order), *reh'g denied*, 118 FERC ¶ 61,003 (2007).

³ 16 U.S.C. § 824b (2006).

The Commission found that the proposed transaction is consistent with the public interest. Specifically, the Commission stated that the combination of generation and transmission assets would not adversely affect competition in any relevant market and that the proposed transaction would not adversely affect wholesale power rates or transmission rates. The Commission also found that the proposed transaction would not adversely affect regulation because Applicants had committed that, for wholesale ratemaking, they will follow the Commission's policy regarding the pricing of affiliate transactions for non-power goods and services. Furthermore, the Commission concluded that the proposed transaction will not impair the ability of any state commission to regulate any of the Applicants.

3. With regard to vertical market concerns, the Commission determined that the proposed transaction would not increase Applicants' ability or incentive to use control over their transmission facilities to gain a competitive advantage in wholesale electricity markets. The Commission noted that Applicants do not compete in the downstream markets that could be affected by their upstream transmission assets because the merging companies are in different interconnections.⁴ Also, the 2005 Authorization Order noted that Applicants were able to show that the combination of their natural gas and generation assets would not harm competition. Thus, the Commission concluded that the proposed transaction did not raise any vertical market concerns.

B. PacifiCorp

4. As a result of the 2005 transaction, PacifiCorp is an indirect, wholly-owned subsidiary of MidAmerican Holdings. PacifiCorp is a vertically-integrated public utility primarily engaged in the business of providing retail electric service to approximately 1.7 million residential, commercial, industrial and other customers in portions of Utah, Oregon, Wyoming, Washington, Idaho and California. PacifiCorp provides electric transmission service pursuant to a Commission-approved open access transmission tariff (OATT) and operates an integrated system spanning two control areas, PacifiCorp East and PacifiCorp West.

II. Request to Remove Independent Market Monitor

5. According to PacifiCorp, in authorizing the disposition of facilities, the Commission did not condition its authorization of the 2005 transaction on the existence of an independent market monitor. Thus, according to PacifiCorp, it is unclear whether it is required to seek Commission approval to remove the independent market monitor, but PacifiCorp notes that it is submitting this instant request under section 203(b) out of an abundance of caution. PacifiCorp asserts that the Applicants voluntarily included in their

⁴ 2005 Authorization Order, 113 FERC ¶ 61,298 at P 38.

application market monitoring plans to remove any potential for vertical market power.⁵ Under their market monitoring plan, PacifiCorp and MidAmerican Holdings proposed to install an independent market monitor for each company, which would review and analyze each company's activities on a quarterly basis, and provide quarterly reports to the Commission. If the independent market monitor identified any potential anti-competitive behavior, it would report such behavior to the Commission within 48 hours of discovery. To date, according to PacifiCorp, the independent market monitor (Potomac Economics) has submitted twelve Quarterly Market Monitoring Reports and each report demonstrates that there is no evidence of anti-competitive conduct.⁶

6. PacifiCorp states that several circumstances have changed since the 2005 transaction that demonstrate that the independent market monitor is no longer necessary. As a result, it asserts that any potential for vertical market power issues can be adequately addressed through other means. Specifically, it states that MidAmerican Energy Company (MidAmerican Energy), another MidAmerican Holdings subsidiary with transmission facilities in the Eastern Interconnection, is now a member of the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) and is subject to the Midwest ISO market monitoring plan.⁷ PacifiCorp notes that MidAmerican Energy has integrated its generation and transmission operations with the Midwest ISO and that MidAmerican Energy is subject to Module D of the Midwest ISO Open Access Transmission, Energy, and Operating Reserve Markets Tariff (Midwest ISO Tariff).⁸ Given that MidAmerican's transmission assets are physically remote from PacifiCorp (located in a separate interconnection) and that MidAmerican Energy's transmission assets are now under Midwest ISO's operational control, PacifiCorp asserts that there should be no concern that MidAmerican Energy could operate its transmission system to benefit PacifiCorp.⁹

⁵ Transmittal Letter at 6.

⁶ *Id.* at 9.

⁷ MidAmerican Energy joined Midwest ISO on September 1, 2009. *Midwest Indep. Transmission Sys. Operator, Inc.*, 128 FERC ¶ 61,046 (2009).

⁸ Module D of the Midwest ISO addresses market monitoring and mitigation measures. Transmittal Letter at 7.

⁹ *Id.*

7. PacifiCorp, which has transmission facilities in the Western Interconnection, asserts that its Order No. 890¹⁰-compliant OATT has mitigated, and will continue to mitigate, any vertical market power.¹¹ PacifiCorp states that the Commission has held that a compliant OATT mitigates transmission market power.¹² Moreover, PacifiCorp states that joint planning initiatives, significant planned transmission expansion, and tariff revisions under Order No. 890 provide additional safeguards to ensure pro-competitive, transparent and not unduly discriminatory operation of PacifiCorp's transmission system. In particular, PacifiCorp notes that various posting on the Open Access Same-Time Information System required under Order No. 890 have further enhanced transparency of PacifiCorp's transmission operations.¹³

8. PacifiCorp adds that the Commission may review PacifiCorp's vertical and horizontal market impacts through the company's triennial market power filings, change-in-status filings, in response to a complaint, or on the Commission's own motion.¹⁴ Thus, according to PacifiCorp, even without an independent market monitor, there are other avenues to review the company's operations and to ensure that it does not engage in anti-competitive behavior. Removing the independent market monitor, PacifiCorp asserts, will not harm any of its competitors and will save its ratepayers at least \$168,000 per year.¹⁵

III. Notice of Filing and Responsive Pleadings

9. Notice of PacifiCorp's filing was published in the *Federal Register*, 75 Fed. Reg. 2531 (2010), with interventions and protests due on or before January 19, 2010. The Electric Power Supply Association (EPSA) filed a motion to intervene and comments. On January 29, 2010, Potomac Economics, LTD (Potomac Economics) filed a motion to intervene out of time and comments. PacifiCorp filed an answer to Potomac Economics' comments.

¹⁰ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008) *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009).

¹¹ *PacifiCorp*, 121 FERC ¶ 61,223 (2007).

¹² Transmittal Letter at 7-8 & n.31.

¹³ *Id.* at 9.

¹⁴ *Id.* at 8.

¹⁵ *Id.* at 5.

10. In its comments, EPSA notes that the Commission is currently working with RTOs and ISOs and stakeholders to develop a set of metrics to be applied across organized markets to analyze the benefits and performance of such organizations. EPSA states that parallel mechanisms applicable to entities operating outside of RTOs and ISOs that require a comparable independent assessment of performance and operations would provide an important safeguard for other market participants and consumers. Thus, if the Commission were to grant PacifiCorp's request to remove the independent market monitor, EPSA states that the Commission should require or at least not preclude other mechanisms to hold those operating outside of organized markets to the same standards as those within them.¹⁶

11. Potomac Economics states that it has provided value-added services to PacifiCorp in its role as PacifiCorp's independent market monitor since 2006. Potomac Economics also alleges that PacifiCorp instituted several market reforms and upgrades to its system as a result of issues and solutions that were identified in the market monitoring reports. Therefore, Potomac Economics argues that continuing with the independent market monitoring would provide value to PacifiCorp that the Commission may find relevant in making a determination on PacifiCorp's section 203(b) request. In response, PacifiCorp contends that virtually all of the issues identified in the independent market monitoring reports were the result of either human or system errors that were in large part corrected immediately. PacifiCorp also states that Potomac Economics overstates the influence of its independent market monitoring on upgrades to PacifiCorp's technology and procedures. According to PacifiCorp, many of the upgrades were already in place prior to the commencement of the independent market monitoring and the upgrades were also largely influenced by the Commission's mandatory reliability standards and Order No. 890 requirements.

IV. Discussion

A. Procedural Matters

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), EPSA's timely, unopposed motion to intervene serves to make it a party to this proceeding.

13. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2009), the Commission will grant Potomac Economics' late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

¹⁶ EPSA at 3.

14. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept PacifiCorp's answer because it has provided information that assisted us in our decision-making process.

B. Commission Determination

15. We will grant PacifiCorp's request to remove the independent market monitor. We find that allowing PacifiCorp to retire the independent market monitor will not harm competition in the region.¹⁷

16. Contrary to Potomac Economics' comment that we should consider its value-added services in our analysis of PacifiCorp's filing, we note that the pertinent issue under section 203(b) of the FPA is not whether the independent market monitor will provide value to PacifiCorp. Rather, the question is whether the Commission can continue to find that MidAmerican Holdings' acquisition of PacifiCorp is consistent with the public interest if the independent market monitor is terminated. In the 2005 Authorization Order, the Commission found that the combination of generation and transmission assets resulting from the proposed transaction would not adversely affect competition in any relevant market and that the proposed transaction would not adversely affect wholesale power rates or transmission rates. Furthermore, the Commission determined that the proposed transaction would not increase Applicants' ability or incentive to use control over their transmission facilities to gain a competitive advantage in wholesale electricity markets.

17. We note that structural mechanisms are in place to address any potential for vertical market power within the footprint of PacifiCorp and MidAmerican Energy. On September 1, 2009, MidAmerican Energy integrated its generation and transmission operations with the Midwest ISO. Thus, MidAmerican Energy is now subject to market monitoring and mitigation measures pursuant to the Midwest ISO Tariff. Moreover, PacifiCorp's transmission assets are physically remote from MidAmerican Energy – they are located in a separate interconnection.

18. With respect to EPSA's comment about the Commission's on-going efforts with RTOs and ISOs to develop metrics to analyze benefits and performance of such

¹⁷ Notwithstanding this decision, PacifiCorp remains subject to the representations, conditions and requirements upon which the 2005 Authorization was granted as well as the Commission's ongoing regulatory oversight.

organizations, those comments do not address PacifiCorp's filing and are therefore outside the scope of this proceeding.¹⁸

The Commission order:

We hereby grant PacifiCorp's request to remove the independent market monitor, as discussed in this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁸ The Commission recently issued a notice requesting comments on RTO and ISO performance metrics. *RTO/ISO Performance Metrics*, AD10-5-000 (Feb. 3, 2010).