135 FERC ¶ 61,089
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Dogwood Energy, LLC

Docket Nos. ER07-312-006
ER07-312-007
EL10-74-000
EL10-74-001

ORDER ON MARKET-BASED RATES, TERMINATING SECTION 206 PROCEEDING, AND DISMISSING REQUEST FOR REHEARING AND CLARIFICATION

(Issued April 28, 2011)

1. On August 11, 2010, the Commission issued an order addressing an updated market power analysis filed by Dogwood Energy, LLC (Dogwood).[1] In that order, the Commission instituted a proceeding under section 206 of the Federal Power Act (FPA)[2] to investigate horizontal market power issues in the Kansas City Power and Light Company (KCP&L) Greater Missouri Operations Company (GMO) balancing authority area. In this order, the Commission finds that Dogwood has rebutted the presumption of market power in the GMO balancing authority area and satisfies the Commission's horizontal market power standard for the grant of market-based rate authority. Accordingly, this order terminates the section 206 proceeding instituted in Docket No. EL10-74-000. Also, the Commission dismisses as moot Dogwood's request for clarification or, in the alternative, rehearing of the August 11 Order.

I. Background

2. According to Dogwood, it is an exempt wholesale generator that leases and operates a 655 megawatt (MW) combined cycle, natural gas-fired electric generating facility in Missouri. Its facility is located within the SPP region in the GMO balancing authority area, and is interconnected with KCP&L's transmission system.

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[1] *Dogwood Energy, LLC*, 132 FERC ¶ 61,120 (2010) (August 11 Order).

[2] 16 U.S.C. § 824e (2006).

3. Dogwood states that it is not affiliated with any generation located in the GMO balancing authority area or in any first-tier markets. According to Dogwood, it is an indirect, wholly-owned subsidiary of Kelson Holdings LLC (Kelson Holdings), which indirectly owns Cottonwood Energy Company LP (Cottonwood) and Magnolia Energy L.P. (Magnolia). Dogwood states that Cottonwood owns a 1,279 MW generating facility interconnected with the transmission system of Entergy Corporation and Magnolia owns a 968 MW generating facility interconnected with the Tennessee Valley Authority's transmission system. Both Cottonwood and Magnolia have been granted market-based rate authority by the Commission.[3]

4. Dogwood states that Kelson Holdings is owned by the Harbinger Capital Partners Master Fund I, Ltd., which owns two-thirds of Kelson Holdings, and Harbinger Capital Partners Special Situations Fund, L.P., which owns one-third of Kelson Holdings (collectively known as the Harbinger Funds). According to Dogwood, the Harbinger Funds indirectly own the Island Cogeneration Plant, a 240 MW generating facility located in British Columbia, Canada and own King City L.P., which owns a 120 MW cogeneration facility that is leased to and operated by Calpine King City Cogeneration, LLC.

5. Dogwood states that the Harbinger Funds' ownership and control of public utilities or public utility holding companies is limited to their interest in Kelson Holdings. While they are authorized to own 10 percent or more of the outstanding voting securities of several public utility holding companies, Dogwood states that the Harbinger Funds do not currently own 10 percent or more of the voting securities of any company that owns or controls any generation assets in the GMO balancing authority area or any markets that are first-tier to the GMO balancing authority area.

6. On March 1, 2010, as amended on April 9, 2010, Dogwood filed an updated market power analysis for the Southwest Power Pool (SPP) region in accordance with the regional schedule adopted in Order No. 697.[4] Dogwood's market power analysis indicated that Dogwood passed the pivotal supplier indicative screen, but failed the wholesale market share indicative screen for each of the four seasons in the GMO

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[3] *Cottonwood Energy Co. LP*, Docket No. ER01-642-000 (Jan. 30, 2001) (unpublished letter order); *Magnolia Energy L.P.*, Docket No. ER01-1335-000 (Apr. 5, 2001) (unpublished letter order).

[4] *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010).

balancing authority area. Accordingly, Dogwood submitted an amendment in April 2010 containing a delivered price test (DPT) analysis and provided additional arguments concerning its ability to exercise market power in an attempt to rebut the presumption of horizontal market power arising from its failure of the wholesale market share indicative screen in the GMO balancing authority area.

7. In the August 11 Order, the Commission found that Dogwood had failed to rebut the presumption of market power. Accordingly, in order to institute refund protection for customers, the Commission instituted a proceeding to determine whether Dogwood's market-based rate authority for the GMO balancing authority area remains just and reasonable. In doing so, the Commission directed Dogwood, within 60 days of the issuance of the order instituting this proceeding, to show cause as to why the Commission should not revoke its authority to sell power at market-based rates in the GMO balancing authority area, file a mitigation proposal tailored to Dogwood's particular circumstances that would eliminate its ability to exercise market power, or inform the Commission that Dogwood will adopt the Commission's default cost-based rates or propose other cost-based rates.[5]

8. On September 10, 2010, Dogwood filed a timely request for rehearing and clarification of the August 11 Order. On October 12, 2010, Dogwood submitted its response to the August 11 Order. Among other things, in its response, Dogwood provides additional evidence that it contends further supports its inability to exercise market power in the GMO balancing authority area. Dogwood also proposes mitigation measures in the event that the Commission finds that Dogwood has failed to rebut the presumption of market power.

II. Notice and Responsive Pleadings

9. Notice of Dogwood's compliance filing was published in the *Federal Register*, 75 Fed. Reg. 68,341 (2010), with interventions or protests due on or before November 18, 2010. None was filed.

III. Discussion

A. Response to the August 11 Order

1. Dogwood's Response

10. Dogwood argues that the Commission should not revoke its market-based rate authority in the GMO balancing authority area because Dogwood is not a dominant supplier, and, as a result, does not have the ability to exercise market power. In support,

[5] August 11 Order, 132 FERC ¶ 61,120 at P 24.

Dogwood submits an analysis of historical sales in the GMO balancing authority area during the study period. Dogwood states that this analysis of actual sales demonstrates that Dogwood's market shares were well below 20 percent during the relevant seasons of the study period (ranging from approximately 1.9 percent to 8.5 percent) and in the relevant calendar quarters in 2007 (ranging from 3.5 percent to 8.2 percent).[6] According to Dogwood, the results of its analysis thoroughly rebut the notion that Dogwood has the ability to exercise market power in the GMO balancing authority area.[7]

11. In addition, Dogwood argues that the Commission should consider the fact that Dogwood is an independent power producer and the only merchant generator in the GMO balancing authority area.[8] Dogwood explains that it owns a single generation facility and is not affiliated with any other generation in the GMO balancing authority area, in any first-tier balancing authority area, or in any other balancing authority area within SPP. Dogwood states that KCP&L is the only other material competitor with assets in the GMO balancing authority area, and that KCP&L has captured virtually all wholesale customers in that balancing authority area under existing long-term requirements contracts. Dogwood argues that independent power producers located in areas where traditional utilities serve the majority of their customer base under long-term commitments can be expected to fail the market share analysis using the available economic capacity measure because they are new entrants attempting to compete with established traditional utilities and have been unable to secure long-term commitments.[9] Dogwood contends that failing to recognize the difference between independent power producers and traditional utilities in interpreting the results of the Commission's analyses would unnecessarily limit and penalize new entrants and could undermine competition. Thus, Dogwood maintains that the Commission should analyze the evidence presented in this proceeding in light of these market conditions.[10]

12. Dogwood contends that these market conditions in conjunction with its historical sales analysis and position in the market further support a finding that Dogwood does not have the ability to exercise market power in the GMO balancing authority area.

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[6] Dogwood calculates market shares and market concentration for the seasons and quarters of the study period, except for the period from December 2006 to February 2007 when the facility was not operational. *Id.* at 16; *also see* Affidavit of Alberto Ciganda (Ciganda Affidavit) at 11-12. Dogwood also states that HHIs were below 2,500 in every season and quarter evaluated. Ciganda Affidavit at 11-12.

[7] Show Cause Response at 16.

[8] *Id.* at 11-12.

[9] *Id.* at 14.

[10] *Id.* at 14-15.

Dogwood argues that the results of its pivotal supplier and market concentration analyses under the available economic capacity measure and its pivotal supplier, market share, and market concentration analyses under the economic capacity measure produced no information that would suggest that Dogwood has horizontal market power in the GMO balancing authority area and that these conclusions are corroborated by its analysis of historical sales data. Dogwood states that while its DPT indicated that the Hirschman-Herfindahl Index (HHI)[11] was above 2,500 in nine out of ten season/load periods under the economic capacity measure, KCP&L's market share accounts for between 81 percent and 99 percent of the HHIs during these seasons/load periods. Additionally, while Dogwood acknowledges that its market share is 20 percent or above in two seasons/load periods under the economic capacity measure, Dogwood states that the Commission has previously found that results such as these should not be viewed as an indication of market power and that this conclusion is further supported by the results of Dogwood's historical sales analysis.[12]

13. With respect to the results of the market share analysis under the available economic capacity measure, Dogwood asserts that there have been various changes in the market since 2007, which, if incorporated in the DPT, would reduce Dogwood's market shares further and demonstrate that Dogwood faces a market with increased competition and decreased energy usage.[13] Moreover, Dogwood argues that its analysis of historical sales data and its inability to secure long-term commitments from customers belies any notion that Dogwood is a dominant supplier in the GMO balancing authority area. Dogwood also notes that, in *Acadia Power Partners, LLC*, the Commission found that the fact that a seller's market share exceeded 20 percent in each season/load period was outweighed by the results of the seller's market concentration analysis, which indicated that HHIs ranged from 1,869 to 2,516.[14] In contrast, Dogwood states that its market shares and HHIs are similar to, but lower in many periods, than those in Acadia's DPT

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[11] The HHI is the sum of the squared market shares. For example, in a market with five equal size firms, each would have a 20 percent market share. For that market, HHI = $(20)^2 + (20)^2 + (20)^2 + (20)^2 + (20)^2 = 400 + 400 + 400 + 400 + 400 = 2{,}000$.

[12] Show Cause Response at 17-20.

[13] Specifically, Dogwood notes that: (1) KCP&L has acquired control over an additional 153 MW of generation; (2) KCP&L joined SPP, and, as a result, now has the Energy Imbalance Service (EIS) market as an option; (3) load has not dramatically changed in the GMO balancing authority area since 2007; (4) a number of additional generating plants have been added in the SPP region; and (5) KCP&L has indicated that simultaneous import limit values have increased. *Id.* at 20-21.

[14] *Id.* at 22-23 (citing *Acadia Power Partners*, LLC, 113 FERC ¶ 61,073 (2005) (*Acadia*)).

analysis. As such, Dogwood asserts that the results of the pivotal supplier and market concentration analyses, along with the results of its historical sales data, should outweigh its market shares under the available economic capacity measure. Additionally, Dogwood contends that the Commission should assign significant weight to the economic capacity measure because Dogwood has no native load commitments and is only serving wholesale load.[15]

14. Dogwood asserts that the Commission's key objective in evaluating market-based rates is to determine whether the seller has the ability to exercise market power unilaterally. Dogwood states that it passes the pivotal supplier analysis, which focuses on the ability to exercise market power unilaterally, in every season/load period under both the economic capacity measure and the available economic capacity. While Dogwood recognizes that the wholesale market share analysis evaluates the potential for a seller to exercise market power unilaterally during off-peak periods as well, Dogwood emphasizes that its market shares are below 20 percent in all off-peak periods under both the economic capacity measure and the available economic capacity measure. Dogwood also maintains that it does not have the ability to unilaterally withhold capacity from the market during peak or off-peak periods because it owns a single generator and is not affiliated with any other generation in or around the GMO balancing authority area.[16]

15. Dogwood also contends that it cannot exercise market power in coordination with other sellers. Dogwood maintains that the Commission has stated that high market shares and high HHIs may *indicate* a greater potential for sellers to exercise market power in coordination with other sellers. Dogwood states that the results of its market concentration analysis under the available economic capacity measure together with the fact that the results of the market concentration analysis under the economic capacity measure reflect KCP&L's high market shares render any concerns about Dogwood exercising market power in coordination with other sellers moot. Dogwood also asserts that any concerns about the possibility of the coordinated exercise of market power would involve Dogwood coordinating with another seller to exercise market power over KCP&L. According to Dogwood, this is not possible because KCP&L is the only other material competitor located in the GMO balancing authority area and any effort to coordinate with external sellers would be frustrated by the fact that the number of external sellers competing to use import capacity is much larger than the amount of available import capacity.[17]

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[15] *Id.* at 23-24.

[16] *Id.* at 25-28 (citing Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 35, 36, 69, 77).

[17] *Id.* at 28-31.

16. To the extent that the Commission finds that Dogwood has horizontal market power in the GMO balancing authority area, Dogwood proposes to cap the price of bilateral transactions in the GMO balancing authority based on the seller-specific cap on offers into SPP's EIS market, which is developed by the market monitor and posted daily for each supplier.[18] In addition, Dogwood seeks waiver of the Commission's accounting and reporting requirements contained in Parts 41, 101, and 141 of the Commission's regulations because the proposed mitigation is not cost-based. Dogwood states that it should also be permitted to retain blanket authorization under section 204 of the FPA and Part 34 of the Commission's regulations for the future issuance of securities and assumptions of liabilities. Further, Dogwood asks that it be allowed to retain these waivers if the Commission rejects Dogwood's proposed mitigation and requires cost-based mitigation.[19]

2. Commission Determination

17. After weighing all of the relevant factors, the Commission finds that, on balance, based on the record evidence, Dogwood has rebutted the presumption of horizontal market power and satisfies the Commission's horizontal market power standard for the grant of market-based rate authority. First, we note that Dogwood's DPT analysis for the GMO balancing authority area indicates that Dogwood is not pivotal in any season/load period using either the economic capacity measure or the available economic capacity measure. Dogwood's market shares under the economic capacity measure are below 20 percent in all season/load periods except for the winter peak and shoulder super-peak periods. Moreover, although Dogwood's market share exceeds 20 percent in seven out of ten season/load periods under the available economic capacity measure, HHIs are below 2,500 in every season/load period. Thus, we find that Dogwood passes two out of the three screens (pivotal supplier and HHI) in every season/load condition under the available economic capacity measure.

18. Second, in Order No. 697, the Commission stated that sellers and intervenors may present evidence, such as historical sales and transmission data, to refute or support the results of the DPT. The Commission encouraged sellers to provide the most complete analysis of competitive conditions in the market that the data allows.[20]

19. In this case, Dogwood has supplemented the results of its DPT by providing additional evidence detailing the competitive conditions in the GMO balancing authority area, including information concerning sales in the market and Dogwood's position in the

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[18] *Id.* at 31-40.

[19] *Id.* at 41-44.

[20] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 111.

market. Certain of this evidence shows that Dogwood is not a dominant seller in the GMO balancing authority area. Specifically, Dogwood has historically had a limited presence in the GMO balancing authority area when actual sales are taken into account (under nine percent over the past two years). Thus, based on the DPT results and the supplemental actual historical sales data,[21] we find that Dogwood does not have horizontal market power in the GMO balancing authority area.

B. Request for Clarification and Rehearing

1. Dogwood's Request for Clarification and Rehearing

20. Dogwood filed a request for clarification or, in the alternative, rehearing of the August 11 Order. Dogwood requests that the Commission clarify that Dogwood is not prohibited from responding to and presenting additional evidence relative to the Commission's conclusions in the August 11 Order. Dogwood states that its request for clarification is moot to the extent that the Commission takes action on Dogwood's response to the August 11 Order and does not dismiss any of Dogwood's arguments on the ground that they are collateral attacks on the August 11 Order.[22] Dogwood states that if the Commission declines to clarify the August 11 Order as requested, the Commission should grant rehearing of the August 11 Order on the basis that the Commission misinterpreted the results of the DPT and failed to take into account the additional evidence provided by Dogwood.[23]

2. Commission Determination

21. We find that the request for clarification is moot in light of our decision here to act on Dogwood's response to the August 11 Order without dismissing any of Dogwood's arguments as collateral attacks on the August 11 Order.

C. Tariff

22. We note that Dogwood's currently effective tariff does not reflect that Dogwood was granted waiver of 18 C.F.R. Part 141, with the exception of sections 141.14 and

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[21] We emphasize that the decision of whether a seller has market power necessarily requires a case-by-case determination. With respect to Dogwood's arguments concerning recent changes in the GMO balancing authority area, we note that such arguments are of limited value because we do not have sufficient information to determine whether there are countervailing factors that may affect Dogwood's market power analysis. *See* Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 130.

[22] Dogwood Request for Clarification at 7-8 & n.11.

[23] *Id.* at 9-32.

141.15.[24] Therefore, we direct Dogwood to include a revised tariff to reflect these exceptions in the limitations and exemptions section the next time that it makes a market-based rate filing with the Commission.

D. Reporting Requirements

23. Consistent with the procedures the Commission adopted in Order No. 2001, an entity with market-based rates must file electronically with the Commission an Electric Quarterly Report (EQR) containing: (1) a summary of the contractual terms and conditions in every effective service agreement for market-based power sales; and (2) transaction information for effective short-term (less than one year) and long-term (one year or longer) market-based power sales during the most recent calendar quarter.[25] Public utilities must file EQRs no later than 30 days after the end of the reporting quarter.[26]

24. Dogwood must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting

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[24] *Dogwood Energy, LLC*, Docket No. ER07-312-000 (Jan. 5, 2007) (unpublished letter order).

[25] *Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127, *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reh'g denied*, Order No. 2001-B, 100 FERC ¶ 61,342, *order directing filing*, Order No. 2001-C, 101 FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001-D, 102 FERC ¶ 61,334, *order refining filing requirements*, Order No. 2001-E, 105 FERC ¶ 61,352 (2003), *order on clarification*, Order No. 2001-F, 106 FERC ¶ 61,060 (2004), *order revising filing requirements*, Order No. 2001-G, 120 FERC ¶ 61,270, *order on reh'g and clarification*, Order No. 2001-H, 121 FERC ¶ 61,289 (2007), *order revising filing requirements*, Order No. 2001-I, 125 FERC ¶ 61,103 (2008). Attachments B and C of Order No. 2001 describe the required data sets for contractual and transaction information. Public utilities must submit EQRs to the Commission using the EQR Submission System Software, which may be downloaded from the Commission's website at http://www.ferc.gov/docs-filing/eqr.asp.

[26] The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2010). Failure to file an EQR (without an appropriate request for extension), or failure to report an agreement in an EQR, may result in forfeiture of market-based rate authority, requiring filing of a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

market-based rate authority.[27] This includes the timely submission of land acquisition reports.[28]

25. Additionally, Dogwood must file an updated market power analysis in the SPP region, in compliance with the regional reporting schedule adopted in Order No. 697.[29] The Commission also reserves the right to require such an analysis at any intervening time.

E. Docket No. EL10-74-000

26. The Commission terminates Docket No. EL10-74-000. That proceeding was established to investigate horizontal market power issues in the GMO balancing authority area. Based on the above findings, the Commission finds that there is no further need for the proceeding in this docket.

The Commission orders:

(A) Dogwood's updated market power analysis is hereby accepted for filing, as discussed in the body of this order.

(B) Dogwood is hereby directed to submit revisions to the limitations and exemptions section of its tariff the next time it makes a market-based rate filing with the Commission, as discussed in the body of this order.

(C) Dogwood is hereby directed to file an updated market power analysis according to the regional reporting schedule adopted in Order No. 697, as discussed in the body of this order.

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[27] *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005); 18 C.F.R. § 35.42 (2010).

[28] *See* Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 at P 18 (requiring market-based rate sellers to report the acquisition of control of sites for new generation capacity development on a quarterly basis instead of within 30 days of the acquisition); Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 at P 21-24; 18 C.F.R. § 35.42(d) (2010); *Notice of New Docket Prefix "LA" for Land Acquisition Reports and Guidelines for Filing Under Order No. 697-C*, Docket No. RM04-7-006, 75 Fed. Reg. 22,125 (2010).

[29] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 882.

(D) The section 206 proceeding in Docket No. EL10-74-000 is hereby terminated, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.