

132 FERC ¶ 61,120
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
EL10-74-000

ORDER ON UPDATED MARKET POWER ANALYSIS, INSTITUTING SECTION
206 PROCEEDING AND ESTABLISHING REFUND EFFECTIVE DATE

(Issued August 11, 2010)

1. On March 1, 2010 (March 1 Filing), as amended on April 9, 2010 (April 9 Filing), Dogwood Energy LLC (Dogwood) filed an updated market power analysis for the Southwest Power Pool (SPP) region in accordance with the regional schedule adopted in Order No. 697¹ and pursuant to the Commission's order granting Dogwood authority to sell electric energy, capacity, and ancillary services at market-based rates.² As discussed below, the Commission's analysis indicates that Dogwood fails the wholesale market share screen in the KCP&L Greater Missouri Operations Company (GMO) balancing authority area.³ Such failure establishes a rebuttable presumption of horizontal market power and provides the basis for instituting a proceeding pursuant to section 206 of the Federal Power Act (FPA)⁴ to determine whether Dogwood's market-based rate authority

¹ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 882-893, *clarified*, 121 FERC ¶ 61,260, at P 9, 10, App. D-1 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055 (2008), *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).

² *Dogwood Energy, LLC*, Docket No. ER07-312-000 (Jan. 5, 2007) (unpublished letter order).

³ GMO has previously been known as Missouri Public Service, Aquila-MIPU, and Aquila Networks.

⁴ 16 U.S.C. § 824e (2006).

in the GMO balancing authority area remains just and reasonable. Although Dogwood also submitted a delivered price test (DPT) analysis, we find that it has failed to rebut the presumption of horizontal market power. Accordingly, we direct Dogwood, within 60 days of the date of issuance of this order, (1) to show cause as to why the Commission should not revoke its market-based rate authority in the GMO balancing authority area; (2) file a mitigation proposal tailored to its particular circumstances that would eliminate its ability to exercise market power; or (3) inform the Commission that it will adopt the default mitigation set forth in the Commission's regulations.⁵

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 GMO's transmission system.

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.⁶

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

⁵ 18 C.F.R. § 35.38 (2010).

⁶ *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).

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.

II. Notices and Responsive Pleadings

6. Notice of Dogwood's March 1, 2010 and April 9, 2010 filings were published in the *Federal Register* with interventions or protests due on or before April 30, 2010.⁷ None was filed.

III. Discussion

A. Market-Based Rate Authorization

7. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, horizontal and vertical market power.⁸ As discussed below, the Commission concludes that Dogwood has failed to rebut the presumption of horizontal market power that is established by its failure of the market share indicative screen and thus it may not satisfy the Commission's standards for market-based rate authority.

1. Horizontal Market Power

8. The Commission has adopted two indicative screens for assessing horizontal market power: the pivotal supplier screen and the wholesale market share screen.⁹ The Commission has stated that passage of both screens establishes a rebuttable presumption that the applicant does not possess generation market power, while failure of either screen creates a rebuttable presumption that the applicant has generation market power.¹⁰ The Commission has stated that an applicant that fails one or more of the indicative screens is provided with several procedural options, including the right to challenge the

⁷ 75 Fed. Reg. 11,155 (2010); 75 Fed. Reg. 21,289 (2010). We note that on March 11, 2010, the Commission issued an errata notice extending the comment period for the March 1 Filing to April 30, 2010.

⁸ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 62, 399, 408, 440.

⁹ *Id.* P 62.

¹⁰ *Id.* P 33, 62-63.

presumption of market power by submitting a DPT analysis, or, alternatively, sellers can accept the presumption of market power and adopt some form of cost-based mitigation.¹¹

9. Dogwood prepared the pivotal supplier and wholesale market share screens for the GMO balancing authority area, consistent with the requirements of Order No. 697.¹²

10. Dogwood passes the pivotal supplier screen but, according to its own filed study, does not pass the wholesale market share screen in the GMO balancing authority area, as its market share exceeds 20 percent in all four seasons. Accordingly, Dogwood submitted a DPT analysis for the GMO balancing authority area.

a. Delivered Price Test

11. As the Commission has previously explained, the DPT identifies potential suppliers based on market prices, input costs, and transmission availability, and calculates each supplier's economic capacity and available economic capacity¹³ for each season/load period.¹⁴ Under the DPT, applicants must also calculate market concentration using the Hirschman-Herfindahl Index (HHI).¹⁵ An HHI of less than 2,500 in the relevant market for all season/load periods, in combination with a demonstration that the applicants are not pivotal and do not possess more than a 20 percent market share in any of the season/load periods would constitute a showing of a lack of market power, absent compelling contrary evidence from intervenors. A detailed description of the mechanics of the DPT is provided in Order No. 697.¹⁶

12. As with our initial screens, applicants and intervenors may present evidence such as historical wholesale sales data, which can be used to calculate market shares and

¹¹ *Id.* P 63. The results of the DPT can be used for pivotal supplier, market share, and market concentration analyses.

¹² *Id.* P 231-232.

¹³ "Economic capacity" is the total generation capacity of a potential supplier that can compete in the destination market, given its costs and transmission availability. "Available economic capacity" is derived by subtracting each potential supplier's native load obligation from its total capacity and adjusting transmission availability accordingly. *See Id.* P 96 n.78.

¹⁴ Super-peak, peak, and off-peak, for winter, shoulder, and summer periods and an additional highest super-peak for the summer.

¹⁵ 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, $HHI = (20)^2 + (20)^2 + (20)^2 + (20)^2 + (20)^2 = 400 + 400 + 400 + 400 + 400 = 2,000$.

¹⁶ FERC Stats. & Regs. ¶ 31,252 at P 104-117.

market concentration and to refute or support the results of the DPT. In Order No. 697, the Commission encouraged applicants to present the most complete analysis of competitive conditions in the market as the data allows.¹⁷

13. Dogwood's DPT analysis for the GMO balancing authority area indicates that it is not pivotal in any season/load period using either the economic capacity measure or the available economic capacity measure. It passes the market share screen in all season/load periods except the winter peak (21.5 percent) and shoulder-peak (20.0 percent) periods, and fails the HHI screen in all season/load periods except the shoulder peak period when the economic capacity measure is used.¹⁸ When the available economic capacity measure is used, however, Dogwood fails the market share screen in seven season/load periods with market shares ranging from 32.7 percent to 39.6 percent but passes the HHI test in all season/load periods with HHIs ranging from 763 to 2,268.

14. Dogwood argues that the available economic capacity measure provides a more accurate measure of Dogwood's ability to exercise market power in the GMO balancing authority area than the economic capacity measure because traditional suppliers maintain their load serving responsibilities in the GMO balancing authority area.¹⁹ And while Dogwood acknowledges that the results of its DPT are mixed, it argues that it lacks horizontal market power in the GMO balancing authority area for the following reasons.

15. First, Dogwood argues that it cannot exercise market power unilaterally during either peak or off-peak season/load periods. It states that the results of the DPT demonstrate that it is not a pivotal supplier and that all demand can be met by other suppliers in the market during all season/load conditions. Dogwood further states that it does not have an incentive to withhold capacity from the market during peak or off-peak season/load periods because it only owns a single generating facility and is not affiliated with any generators in the GMO balancing authority area or any proximate markets. Additionally, Dogwood maintains that because its market share falls to zero during off-peak times due to lower market prices, any concerns that the Commission may have about the risk of Dogwood exercising market power during such periods should be allayed. It also maintains that any suggestion that it has market power is refuted by the fact that GMO, who is the only other material competitor with assets in the GMO

¹⁷ *Id.* P 111.

¹⁸ The HHI values for the failures range from 2,535 to 4,118.

¹⁹ March 1 Filing, Transmittal Letter at 9 (citing *Kansas City Power & Light Co.*, 113 FERC ¶ 61,074, at P 31, 35 (2005); *Nevada Power Co.*, 113 FERC ¶ 61,265, at P 15 (2005)).

balancing authority area, is effectively the only potential wholesale customer in the market.²⁰

16. Second, it argues that any concerns about the fact that Dogwood's market shares exceed 20 percent using the available economic capacity measure are rendered moot by the fact that its HHI is below 2,500 in all season/load conditions because the Commission has found that "a low HHI . . . could be used to support a claim of a lack of market power by a seller that is pivotal or has a 20 percent or greater market share in some or all season/load conditions."²¹

17. Third, it argues that adjusting the results of the DPT to reflect Dogwood's actual output during the study period demonstrates that Dogwood does not have market power. Dogwood cautions that the DPT may be misleading because it uses a generic capacity factor while Dogwood's facility operated at an average capacity factor of only 16.2 percent during the study period. Accordingly, Dogwood provides an adjusted DPT that reflects Dogwood's actual output during the study period, which indicates that Dogwood is not a pivotal supplier in any season using the economic capacity measure or the available economic capacity measure, it passes the market share analysis in all periods using the economic capacity measure and six periods using the available economic capacity measure, and it has HHIs below 2,500 using the available economic capacity measure and above 2,500 using the economic capacity measure in each period. Dogwood argues that Commission precedent supports finding that the results of the adjusted DPT using the available economic capacity measure demonstrate that it does not have market power, despite the fact that it fails the market share screen in three periods.²²

b. Commission Determination

18. After weighing all of the relevant evidence, the Commission finds that, based on Dogwood's DPT analysis in the GMO balancing authority area, Dogwood has failed to rebut the presumption of horizontal market power and thus does not satisfy the Commission's horizontal market power standard for market-based rate authority.

19. As an initial matter, we find that Dogwood's reliance on the adjusted DPT is misplaced. The Commission has not permitted the use of individual capacity factors

²⁰ March 1 Filing, Transmittal Letter at 9-11.

²¹ *Id.* at 11-12 (citing Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 111). Dogwood argues that the market concentration measure using the economic capacity measure reflects the high market share of GMO. March 1 Filing, Transmittal Letter at 12 n.29.

²² March 1 Filing, Transmittal Letter at 14-15 (citing *PacifiCorp*, 115 FERC ¶ 61,349, at P 34 (2006); *PPL Montana, LLC*, 115 FERC ¶ 61,204, at P 41 (2006)).

except in the case of energy-limited resources, such as hydro.²³ Here, Dogwood is a combined cycle, natural gas-fired electric generating facility and there is no indication that its facility is an energy-limited resource. Thus, we find Dogwood's reliance on the adjusted DPT is inappropriate. It is worth noting, however, that even Dogwood's adjusted DPT indicates that Dogwood exceeds the thresholds established by the Commission in various periods. Even in the adjusted DPT, Dogwood fails the market share analysis in four season/load periods using the available economic capacity (with market shares ranging from 26.9 percent to 38.5 percent). It also fails the market concentration analysis in every season/load period using the economic capacity measure with HHIs ranging from 2,568 to 5,035. Thus, even if we did choose to rely on it, this study shows that Dogwood has an identified market power problem.

20. The Commission has noted that the DPT does not function like the initial screens – i.e., failure of either the economic capacity or available economic capacity analyses does not result in an automatic failure of the test as a whole. Neither measure is definitive; the Commission weighs the results of both the economic capacity and the available economic capacity analyses and considers the arguments of the parties.²⁴

21. The Commission has recognized that not all generation capacity is available all of the time to compete in wholesale markets and that some accounting for native load requirements is warranted.²⁵ In the DPT analysis, available economic capacity accounts for native load requirements. As noted above, using the available economic capacity measure, Dogwood's market share exceeds 20 percent in seven out of ten season/load periods. During five of these season/load periods, its market shares range from 35.1 percent to a high of 39.6 percent. Dogwood passes the pivotal supplier and market concentration analysis in all season/load periods using the available economic capacity measure.

22. While available economic capacity reflects native load obligations when assessing the potential for horizontal market power, a clear distinction between generation serving native load and generation competing for wholesale load is not easily made. The Commission therefore also considers economic capacity in assessing horizontal market power.²⁶ Using the economic capacity measure, Dogwood's market concentration analysis indicates that its HHIs exceed 2,500 in nine out of ten periods (ranging from 2,535 to 4,118). Further, Dogwood fails the market share analysis during two

²³ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 344.

²⁴ *Id.* P 13, 112 (stating that the Commission will weigh both available economic capacity and economic capacity).

²⁵ *See, e.g., Sierra Pac. Power Co.*, 126 FERC ¶ 61,283, at P 21 (2009).

²⁶ *Id.* P 22.

season/load periods using the economic capacity measure but passes the pivotal supplier analysis in all season/load periods.

23. In addition, we find that the other arguments provided by Dogwood regarding horizontal market power are unpersuasive. While Dogwood argues that it does not have the incentive to exercise market power, the Commission has previously stated that its analysis in the market-based rate context focuses on the ability to exercise market power, not the incentive to do so.²⁷ With respect to its argument that it does not have the ability to exercise market power because GMO is effectively its only wholesale customer in the market, the mere fact that its primary customer is also its primary competitor does not necessarily mean that it does not have the ability to exercise market power, especially in light of the results of its DPT.²⁸ Further, while Dogwood points to the fact that its HHIs are consistently below 2,500 using the available economic capacity measure and that its market share falls to zero during off-peak periods, this does not change the fact that it fails the market share analysis using both the available economic capacity and economic capacity measures in multiple periods under each approach.

24. In summary, after weighing all of the relevant evidence, the Commission concludes that, based on Dogwood's DPT analysis, Dogwood has horizontal market power in the GMO balancing authority area. Therefore, we will institute a proceeding in Docket No. EL10-74-000, pursuant to section 206 of the FPA, to determine whether Dogwood's market-based rate authority for the GMO balancing authority area remains just and reasonable. Under the section 206 proceeding established herein, Dogwood must show cause, within 60 days of the date of issuance of this order, as to why the Commission should not revoke its authority to sell power at market-based rates in the GMO balancing authority area. In this regard, Dogwood may present alternative evidence such as historical sales and transmission data to rebut the Commission's finding that it has market power in the GMO balancing authority.²⁹ In the alternative, Dogwood may (1) file a mitigation proposal tailored to its particular circumstances that would eliminate the ability to exercise market power; or (2) inform the Commission that it will adopt the Commission's default cost-based rates or propose other cost-based rates and submit cost support for such rates.³⁰

²⁷ See *Westar Energy, Inc.*, 123 FERC ¶ 61,123, at P 22 (2008) (rejecting the argument that the Commission's market power analysis for market-based rate authority is concerned with the ability *and* incentive to exercise market power); *Empire District Electric Co.*, 123 FERC ¶ 61,084, at P 17 (2008).

²⁸ When determining whether a seller has market power under our market-based rate policy, the Commission does not consider the identity of its customers.

²⁹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 117.

³⁰ *Id.* P 604, 620, 648, 659; 18 C.F.R. § 35.38.

25. In cases where, as here, the Commission institutes a section 206 investigation on its own motion, the Commission is required to establish a refund effective date that is no earlier than publication of notice of the Commission's initiation of its investigation in the *Federal Register*, and no later than five months subsequent to that date. In order to give maximum protection to customers, and consistent with our precedent,³¹ we will establish a refund effective date at the earliest date allowed. This date will be the date on which notice of our investigation in this proceeding is published in the *Federal Register*.

26. In addition, section 206 requires that, if no final decision has been rendered by the earlier of the refund effective date or the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it failed to do so and shall state its best estimate as to when it reasonably expects to make such a decision. We expect that we should be able to render a decision within five months of the date that Dogwood submits the filing ordered below, or March 31, 2011.

2. Vertical Market Power

27. In cases where a public utility, or any of its affiliates, owns, operates, or controls transmission facilities, the Commission requires that there be a Commission-approved open access transmission tariff on file before granting that utility or affiliate market-based rate authorization.³²

28. Dogwood states that it and its affiliates do not own, control, or operate any transmission facilities in the GMO balancing authority area and therefore do not have transmission market power.

29. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.³³ The Commission requires a seller to provide a description of its ownership or control of, or affiliation with an entity that owns or controls, intrastate natural gas transportation, storage, or distribution facilities; sites for generation capacity development; and physical coal supply sources and ownership of or control over who may access transportation of coal supplies (collectively, inputs to electric power production).³⁴ The Commission adopted a rebuttable presumption that the ownership or control of, or affiliation with any entity that owns or controls, inputs to

³¹ See, e.g., *Canal Electric Co.*, 46 FERC ¶ 61,153, *order on reh'g*, 47 FERC ¶ 61,275 (1989).

³² Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 408.

³³ *Id.* P 440.

³⁴ *Id.* P 448; Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 176; Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 at P 38.

electric power production does not allow a seller to raise entry barriers but will allow intervenors to demonstrate otherwise.³⁵

30. Dogwood states that it and its affiliates do not own or control (i) intrastate natural gas transportation, storage, or distribution facilities; or (ii) physical coal supply sources and ownership of or control over who may access the transportation of coal supplies, such as barges and rail cars. Dogwood also states that it does not own or control generation sites in the GMO balancing authority area other than the site of its existing facility.³⁶

31. The Commission also requires sellers to make an affirmative statement that they have not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.³⁷ Dogwood affirmatively states that it has not and will not erect barriers to entry in the GMO balancing authority area.³⁸

32. Dogwood included an asset appendix as required by Order No. 697.³⁹

33. Based on Dogwood's representations, we find that it satisfies the Commission's requirements for market-based rate authority regarding vertical market power.

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and by the FPA, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R., Chapter I), the Commission hereby institutes a proceeding in Docket No. EL10-74-000 concerning the justness and reasonableness of Dogwood's market-based rates, as discussed in the body of this order.

(B) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of the proceeding under section 206 of the FPA in Docket No. EL10-74-000.

³⁵ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 446.

³⁶ March 1 Filing, Transmittal Letter at 16-17.

³⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 448.

³⁸ March 1 Filing, Transmittal Letter at 17.

³⁹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 894-895.

(C) The refund effective date in Docket No. EL10-74-000, established pursuant to section 206(b) of the FPA, shall be the date of publication in the *Federal Register* of the notice discussed in Ordering Paragraph (B) above.

(D) For the GMO balancing authority area, Dogwood is directed, within 60 days from the date of issuance of this order, to (1) 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; (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 Commission's default cost-based rates or propose other cost-based rates and submit cost support for such rates.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.