

136 FERC ¶ 61,001
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.

Duke Energy Indiana, Inc. Docket Nos. ER11-2902-000
ER11-2902-001

Duke Energy Kentucky, Inc. ER11-2901-000
ER11-2901-001

ORDER ACCEPTING MARKET-BASED RATE TARIFF REVISIONS

(Issued July 1, 2011)

1. In this order, we accept Duke Energy Indiana, Inc. (Duke Indiana) and Duke Energy Kentucky, Inc.'s (Duke Kentucky) (collectively, Applicants) proposed amendments to their respective market-based rate tariffs, effective April 18, 2011, as requested.

I. Background

2. On February 17, 2011, as amended May 4, 2011, Applicants submitted applications pursuant to section 205 of the Federal Power Act (FPA),¹ proposing to revise their respective market-based rate tariffs with respect to sales in the Midwest Independent Transmission System Operator, Inc. (MISO) and PJM Interconnection, L.L.C. (PJM) markets to market-regulated power sales affiliates. Applicants also propose to revise their tariffs to indicate that they are Category 2 sellers in the Central region and Category 1 sellers in all other regions.²

¹ 16 U.S.C. § 824d (2006).

² *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 848-850, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *order on reh'g*, 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

(continued...)

3. Applicants explain that their current market-based rate tariffs provide for the companies to make sales in MISO to a market-regulated power sales affiliate pursuant to the terms of their respective market-based rate tariffs as long as such sales are not made at a rate that is lower than, on an after-the fact comparison basis, the locational marginal price applicable at the time of sale reported at the Cinergy Hub.³ Applicants state that the proposed revisions are intended to enable Applicants to make energy and capacity sales to affiliates within PJM under similar limitations given the pending move of Duke Kentucky and its market-regulated power sales affiliate Duke Energy Ohio, Inc. (Duke Ohio) from MISO to PJM effective January 1, 2012.⁴

4. For sales to market-regulated power sales affiliates in MISO, Applicants propose to amend their tariffs to add a reference to the “Indiana Hub.” Specifically, Applicants’ proposed tariff revisions state that Applicants may make sales in MISO to a market-regulated power sales affiliate provided that “in no case may such sale be made at a rate that is lower than, on an after-the-fact comparison basis, the locational marginal price applicable at the time of sale, reported at the [MISO] Cinergy Hub or the Indiana Hub, if and when [MISO] replaces the Cinergy Hub with the Indiana Hub.” Applicants explain that MISO has agreed to create the Indiana Hub as the successor to the Cinergy Hub once Duke Kentucky and Duke Ohio move to PJM because a large number of the pricing nodes that currently comprise the Cinergy Hub will be leaving MISO. Applicants state that the Indiana Hub will represent the Duke Indiana pricing nodes that currently are part of the Cinergy Hub.

5. For sales to market-regulated power sales affiliates in PJM, Applicants propose to revise their tariffs to provide that they may make sales in PJM of capacity and energy to market-regulated power sales affiliates provided that no sale of capacity be made at a rate that is lower than the PJM Final Duke Zonal Capacity Price, explained further below, and no sale of energy be made at a rate that is lower than, on an after-the fact comparison basis, the locational marginal price applicable at the time of sale, reported in the PJM Duke Energy Load Zone, explained further below.

Stats. & Regs. ¶ 31,291 (2009), *order on reh’g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010).

³ Applicants state that the Commission approved this arrangement in *Cincinnati Gas & Electric Co.*, 113 FERC ¶ 61,197 (2005) (*Cincinnati Gas*); *Cinergy Corp.*, 128 FERC ¶ 61,102 (2009).

⁴ *Duke Energy Ohio, Inc.*, 133 FERC ¶ 61,058 (2010), *order denying reh’g*, 134 FERC ¶ 61,235 (2011).

6. Additionally, Applicants propose to amend their respective tariffs to reflect that they are a Category 2 seller in the Central region, and a Category 1 seller in all other regions. They state that if any of the facts change, they will revise the category designations in their respective market-based rate tariffs.

II. Notice of Filings

7. Notice of Duke Indiana's February 17, 2011 filing in Docket No. ER11-2902-000 was published in the *Federal Register*, 76 Fed. Reg. 10,579 (2011), with interventions and comments due on or before March 10, 2011. None was filed.

8. Notice of Duke Kentucky's February 17, 2011 filing in Docket No. ER11-2901-000 was published in the *Federal Register*, 76 Fed. Reg. 10,579 (2011), with interventions and comments due on or before March 10, 2011. None was filed.

9. On April 4, 2011, staff, acting under delegated authority, issued a data request directing Applicants to submit additional information concerning how the Indiana Hub, the PJM Final Duke Zonal Capacity Price, and the locational marginal price in the PJM Duke Energy Load Zone will each serve as an index that satisfies the *Edgar*⁵ standard of review. Staff additionally requested information regarding Applicants' seller category designations, and Duke Kentucky and Duke Ohio's proposed move from MISO to PJM.

10. On May 4, 2011, Applicants amended their filings in response to staff's April 4, 2011 data request.

11. Notice of Duke Indiana's May 4, 2011 filing in Docket No. ER11-2902-001 was published in the *Federal Register*, 76 Fed. Reg. 27,039 (2011), with interventions and comments due on or before May 25, 2011. None was filed.

12. Notice of Duke Kentucky's May 4, 2011 filing in Docket No. ER11-2901-001 was published in the *Federal Register*, 76 Fed. Reg. 27,039 (2011), with interventions and comments due on or before May 25, 2011. None was filed.

III. Discussion

13. Under the Commission's regulations, no wholesale sale of electric energy or capacity may be made between a franchised public utility with captive customers and a market-regulated power sales affiliate without first receiving Commission authorization

⁵ *Boston Edison Co. Re: Edgar Electric Energy Co.*, 55 FERC ¶ 61,382 (1991) (*Edgar*).

for the transaction under section 205 of the FPA.⁶ The Commission previously explained that it is concerned that there exists the potential for a franchised public utility with captive customers to interact with market-regulated power sales affiliates in ways that transfer benefits to the affiliates and their stockholders to the detriment of captive customers.⁷ In cases where affiliates are entering into sales agreements, it is essential that ratepayers be protected and that transactions be above suspicion in order to ensure that the market is not distorted.⁸ In Order No. 697, the Commission adopted in its regulations affiliate restrictions intended to guard against behavior that could harm captive customers.

14. In *Edgar*, the Commission explained that there are three approaches to demonstrate that a buyer has chosen the lowest cost supplier and thus that it has not unduly preferred an affiliate.⁹ First, the utility may submit evidence of direct head-to-head competition between affiliated and non-affiliated suppliers either in a formal solicitation or in an informal negotiation process.¹⁰ Second, the utility may present evidence of the prices that non-affiliated buyers were willing to pay for similar services from that project. This second type of evidence is credible only to the extent that the non-affiliated buyers are in the relevant market as the purchaser and are not subject to market power by the seller or its affiliates.¹¹ Finally, the utility may provide “benchmark” evidence of the prices, terms and conditions of sales by non-affiliated sellers. This can include purchases made by the utility itself or by other buyers in the relevant market. Two major considerations with respect to the credibility of benchmark

⁶ 18 C.F.R. § 35.39(b) (2011). *See* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 467.

⁷ *See* Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 188.

⁸ *Edgar*, 55 FERC at 62,167.

⁹ In Order No. 697, the Commission stated that it will continue its approach for determining the types of affiliate transactions that are permissible and the criteria that should be used to make those decisions, including evaluation of the *Edgar* criteria. Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 540.

¹⁰ *Edgar*, 55 FERC at 62,168.

¹¹ *Id.* at 62,168-69.

evidence are whether the benchmark sales are contemporaneous and whether they are for similar services when compared to the original transaction.¹²

15. Applicants contend that their proposal satisfies the *Edgar* criteria. Applicants maintain that use of the Indiana Hub price indices will satisfy *Edgar*, both because the Indiana Hub provides evidence of prices paid by non-affiliates for similar services and provides benchmark evidence that shows the prices for energy sales made by non-affiliated sellers. We agree and find that that for purposes of applying *Edgar*, reference to the Indiana Hub price, similar to the reference to the Cinergy Hub price approved in *Cincinnati Gas*, satisfies our concerns with respect to sales to market-regulated power sales affiliates in MISO. Thus, should Duke Kentucky and Duke Indiana make a sale in MISO to a market-regulated power sales affiliate, Duke Kentucky and Duke Indiana will make the sale at a price no lower than the locational marginal price reported at the Indiana Hub (once MISO establishes the Indiana Hub), just as they previously would have used the Cinergy Hub as the pricing floor for such a sale.¹³

16. With respect to sales to market-regulated power sales affiliates in PJM, Applicants contend that their proposed limitations provide the same protections against potential affiliate abuse as the limitation pertaining to affiliate sales approved by the Commission with respect to the Cinergy Hub, but in a manner that references the appropriate PJM pricing points. For energy sales, Applicants represent that PJM has designated the PJM Duke Energy Load Zone hub to reflect pricing nodes for Duke Ohio and Duke Kentucky. With regard to capacity sales, they state that one significant difference between PJM and MISO is that PJM has implemented an organized “Day 2” capacity market; i.e., the Reliability Pricing Model. Applicants explain that the Reliability Pricing Model implements an auction mechanism that establishes forward capacity prices and that PJM has established the PJM Final Duke Zonal Capacity Price as the basis for establishing the forward capacity prices in the Duke Kentucky and Duke Ohio zones within PJM. Applicants state that the Commission did not address indices for capacity prices in *Cincinnati Gas*. However, Applicants state that consistent with *Cincinnati Gas*, the capacity price for the Applicants will be determined in accordance with a transparent Commission-approved Day-2 mechanism.

17. Thus, Applicants state that reference to the PJM Final Duke Zonal Capacity Price for capacity sales and to the PJM Duke Energy Load Zone for energy sales satisfies

¹² *Id.* at 62,169.

¹³ *See* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 533, 542 (allowing an established, relevant market price or index such as in a regional transmission organization to be used as a benchmark for the reasonableness of the price of an affiliate transaction).

Edgar, providing evidence of the prices that non-affiliated buyers are willing to pay for similar services from the affiliate, and benchmark evidence that shows the prices, terms, and conditions of sales made by non-affiliated sellers. We agree and find that Applicants' proposal satisfies our concerns with respect to their sales of energy or capacity to market-regulated power sales affiliates in PJM. Thus, should Duke Kentucky or Duke Indiana make a capacity sale in PJM to a market-regulated power sales affiliate, Duke Kentucky or Duke Indiana will make the sale at a price that is no lower than PJM Final Duke Zonal Capacity Price. Also, should Duke Kentucky or Duke Indiana make an energy sale in PJM to a market-regulated power sales affiliate, Duke Kentucky or Duke Indiana will make the sale at a price that is no lower than the locational marginal price reported at the PJM Duke Energy Load Zone.

18. This order satisfies the requirement that Applicants first receive Commission authorization, pursuant to section 205 of the FPA, before engaging in power sales at market-based rates with a market-regulated power sales affiliate for sales in MISO and PJM as described by Applicants in their February 17, 2011 and May 4, 2011 filings.

19. Next, we will accept Applicants' proposed tariff revisions concerning their Category 1 and Category 2 seller designations. In Order No. 697, the Commission created two categories of sellers.¹⁴ Category 1 sellers are not required to file regularly scheduled updated market power analyses. Category 1 sellers are wholesale power marketers and wholesale power producers that own or control 500 MW or less of generation in aggregate per region; that do not own, operate, or control transmission facilities other than limited equipment necessary to connect individual generation facilities to the transmission grid (or have been granted waiver of the requirements of Order No. 888¹⁵); that are not affiliated with anyone that owns, operates or controls transmission facilities in the same region as the seller's generation assets; that are not affiliated with a franchised public utility in the same region as the seller's generation assets; and that do not raise other vertical market power issues.¹⁶ Sellers that do not fall

¹⁴ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 848.

¹⁵ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

¹⁶ 18 C.F.R. § 35.36(a)(2) (2011).

into Category 1 are designated as Category 2 and are required to file regularly scheduled updated market power analyses.¹⁷

20. Based on Applicants' representations, we will accept each Applicant's proposed tariff revision indicating that it is a Category 2 seller in the Central region and a Category 1 seller in all other regions. Applicants represent that Duke Indiana and Duke Kentucky, both franchised public utilities, currently own and operate in excess of 500 MW in the Central region, and they each own and operate transmission facilities in that region as well. Each Applicant represents that it does not own or control generation or transmission facilities in any other region. They represent that certain affiliates own and operate in excess of 500 MW of generation and transmission facilities in other regions, and those entities are classified as Category 2 sellers in those other regions. Applicants state that once they implement their move to PJM, which is located in the Northeast region, they will be Category 2 sellers in the Northeast region and will revise their market-based rate tariffs to indicate that they will be Category 1 Sellers in regions other than the Northeast region. However, we note that it appears that only one Applicant, Duke Energy Kentucky, will be moving to PJM. Therefore, only Duke Energy Kentucky would need to revise its category status in its tariff (from Category 2 in the Central region to Category 2 in the Northeast region) after its move from MISO to PJM. Additionally, when the move to PJM is implemented, Duke Energy Kentucky must submit updated asset appendices.

21. We will direct Applicants to each submit a compliance filing, within 30 days of the date of this order, revising the limitations and exemptions section of their market-based rate tariffs to list the authorization to make affiliate sales granted herein and include a citation to this order.¹⁸

The Commission orders:

(A) Applicants' proposed tariff revisions are hereby accepted, effective April 18, 2011, as requested, as discussed in the body of this order.

¹⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 850.

¹⁸ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 384; Order No. 697, FERC Stats. & Regs. ¶ 31,252 at Appendix C.

(B) Applicants are hereby directed to each submit a compliance filing, within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.