

144 FERC ¶ 61,098
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Westar Energy, Inc.

Docket No. ER12-2124-000

ORDER ACCEPTING UPDATED MARKET POWER ANALYSIS

(Issued August 2, 2013)

1. On June 28, 2012, as amended on January 25, 2013, Westar Energy, Inc. (Westar) filed an updated market power analysis for the Southwest Power Pool, Inc. (SPP) region in compliance with the regional reporting schedule adopted in Order No. 697.¹ As part of the filing, Westar proposed revisions to the limitations and exemptions section of its market-based rate tariff.

2. In this order, the Commission accepts Westar's updated market power analysis, as amended, and concludes that Westar continues to satisfy the Commission's standards for market-based rate authority in the SPP region, except for the Westar and Kansas City Board of Public Utilities (KACY) balancing authority areas. The Commission also accepts Westar's proposal to exclude from its market-based rate authority the Westar and KACY balancing authority areas. In addition, the Commission concludes that Westar now satisfies the Commission's standards for market-based rate authority in the Midwest Energy balancing authority area, where it is currently mitigated. For these reasons, the

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 PP 848-850, *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), *aff'd sub nom. Montana Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied sub nom. Pub. Citizen, Inc. v. FERC*, 133 S. Ct. 26 (2012). Westar must file an updated market power analysis for all regions in which they are designated as Category 2 sellers in compliance with the regional reporting schedule adopted in Order No. 697. Order No. 697, FERC Stats. & Regs. ¶ 31,252.

Commission accepts Westar's proposed revisions to the limitations and exemptions section of its market-based rate tariff, effective as of the date of this order.

I. Background

3. Westar explains that it is a Kansas corporation with its principal office located in Topeka, Kansas. Westar states that it is a public utility primarily engaged in the generation, transmission, distribution, and sale of electricity. According to Westar, it has approximately 6,500 megawatts (MW) of electric generation capacity, operates and coordinates approximately 33,000 miles of electric distribution and transmission lines, and provides retail and wholesale electric service to approximately 679,000 customers. Westar further states that its transmission system is located in eastern and central Kansas and is under the functional control of SPP.

II. Notice of Filings

4. Notice of Westar's June 28, 2012 filing was published in the *Federal Register*, 77 Fed. Reg. 40,351 (2012), with interventions or protests due on or before August 27, 2012. None was filed.

5. Notice of Westar's January 25, 2013 filing² was published in the *Federal Register*, 78 Fed. Reg. 8504 (2013), with interventions or protests due on or before February 15, 2013. None was filed.

III. Discussion

A. Market-Based Rate Authorization

6. 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.³ As discussed below, we find that Westar satisfies the Commission's standards for market-based rate authority in the SPP region for all study areas except the Westar and KACY balancing authority areas.

² Westar's January 25, 2013 filing is a supplement to its June 28, 2012 updated market power analysis.

³ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at PP 62, 399, 408, 440.

1. Horizontal Market Power

7. The Commission has adopted two indicative screens for assessing horizontal market power: the pivotal supplier screen and the wholesale market share screen.⁴ The Commission has stated that passage of both screens establishes a rebuttable presumption that the applicant does not possess horizontal market power, while failure of either screen creates a rebuttable presumption that the applicant has horizontal market power.⁵

8. Westar prepared the pivotal supplier and wholesale market share screens for the Associated Electric Cooperative, Inc. (AECI), American Electric Power – West (AEPW), Empire District Electric Company (EDE), KACY, Kansas City Power & Light (KACP), KCP&L Greater Missouri Operations (MIPU), Mid-Kansas Electric Company (MKEC), Midwest Energy, Nebraska Public Power District (NPPD), Oklahoma Gas & Electric Company (OKGE), Omaha Public Power District (OPPD), Sunflower, and Westar balancing authority areas, consistent with the requirements of Order No. 697.

9. We have reviewed Westar's pivotal supplier screens and wholesale market share screens and determined that Westar passes both screens in the AECI, AEPW, EDE, KACP, MIPU, MKEC, Midwest Energy, NPPD, OKGE, OPPD, and Sunflower balancing authority areas when the Commission-accepted simultaneous import limit values (SIL) values for these areas are applied.⁶ Accordingly, we find that Westar satisfies the Commission's requirements for market-based rates regarding horizontal market power in the AECI, AEPW, EDE, KACP, MIPU, MKEC, Midwest Energy, NPPD, OKGE, OPPD, and Sunflower balancing authority areas.

10. Westar notes that it fails the indicative screens in both the Westar and KACY balancing authority areas, and thus it does not seek market-based rate authority in those balancing authority areas. Instead, Westar requests that the Commission permit Westar to make market-based rate wholesale power sales under its market-based rate tariff in all areas except in the Westar and KACY balancing authority areas. Westar submits a revised market-based rate tariff, which specifies that Westar does not have market-based rate authority in the Westar or KACY balancing authority areas. Westar also proposes to remove from its tariff the mitigation language for the Midwest Energy balancing authority area because it now passes both indicative screens in that balancing authority area. We accept the proposed mitigation and related revised market-based rate tariff and

⁴ *Id.* P 62.

⁵ *Id.* PP 33, 62-63.

⁶ *See AEP Energy Partners, Inc.*, 143 FERC ¶ 61,077 (2013) (SIL Study Order). In the SIL Study Order, the Commission indicated that it will consider these SIL values when examining updated market power analyses for the SPP region.

direct Westar to submit a compliance filing containing revisions to the limitations and exemptions section of its market-based rate tariff to include a citation to this order.⁷

2. Vertical Market Power

11. 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 (OATT) on file or that the seller has received waiver of the OATT requirement before granting a seller market-based rate authorization.⁸ Westar states that its transmission in the SPP region is under the functional control of SPP, and subject to the SPP OATT.⁹

12. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.¹⁰ 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).¹¹ 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.¹² The Commission adopted a rebuttable presumption that the ownership or control of, or affiliation with any entity that

⁷ See Order No. 697, FERC Stats. & Regs. ¶ 31,252 at App. C, *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 384. See also *Niagara Mohawk Power Corp.*, 121 FERC ¶ 61,275, at P 8 (2007). These tariff revisions may be filed no later than the next time Westar makes a market-based rate filing with the Commission.

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

⁹ *Southwest Power Pool, Inc.*, 82 FERC ¶ 61,267, *modified*, 82 FERC ¶ 61,285, *order on reh'g*, 85 FERC ¶ 61,031 (1998); see also *Southwest Power Pool, Inc.*, 86 FERC ¶ 61,090 (1999); see also *Southwest Power Pool, Inc.*, 89 FERC ¶ 61,284 (1999), *order on reh'g*, 98 FERC ¶ 61,038 (2002).

¹⁰ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 440.

¹¹ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 176.

¹² Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447.

owns or controls, inputs to electric power production does not allow a seller to raise entry barriers but will allow intervenors to demonstrate otherwise.¹³

13. Regarding other barriers to entry, Westar represents that it owns approximately 273 rail cars and leases approximately 1,811 rail cars that it uses for coal transportation.

14. Finally, consistent with Order No. 697, Westar affirmatively states that it has not erected barriers to entry into the SPP region, nor will it erect barriers into the SPP region.¹⁴

15. Based on Westar's representations, we find that Westar's submittals satisfy the Commission's requirements for market-based rates regarding vertical market power in the SPP region.

B. Reporting Requirements

16. Consistent with the procedures the Commission adopted in Order No. 2001, an entity with market-based rate authorization must electronically file an Electric Quarterly Report (EQR) with the Commission 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.¹⁵

¹³ *Id.* P 446.

¹⁴ We interpret this statement to apply to Westar and its affiliates. *See* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447.

¹⁵ *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, FERC Stats. & Regs. ¶ 31,282 (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>.

Public utilities must file EQRs no later than 30 days after the end of the reporting quarter.¹⁶

17. Westar must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.¹⁷

18. Additionally, Westar must file updated market power analyses in compliance with the regional reporting schedule adopted in Order No. 697. The Commission also reserves the right to require an analysis at any intervening time.

The Commission orders:

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

(B) Westar's proposed revisions to the limitations and exemptions section of its market-based rate tariff is hereby accepted, effective as of the date of this order.

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

(D) Westar is hereby directed to revise the limitations and exemptions section of its market-based rate tariff to include a citation to this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁶ The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2012). Failure to file an Electric Quarterly Report (without an appropriate request for extension), or failure to report an agreement in an Electric Quarterly Report, 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.

¹⁷ *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 (2012).