

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Nora Mead Brownell, and Suedeen G. Kelly.

Oklahoma Gas and Electric Company  
OGE Energy Resources, Inc.

Docket Nos. ER97-4345-017  
ER98-511-005  
EL05-107-000

ORDER ON PROPOSED MITIGATION MEASURES AND COMPLIANCE FILINGS

(Issued March 21, 2006)

1. In this order, the Commission conditionally accepts Oklahoma Gas and Electric Company's (OG&E) and OGE Energy Resources Inc.'s (OERI) (collectively, the OGE Companies) proposal to mitigate the presumption of market power in the OG&E control area, subject to Commission acceptance of the compliance filing directed herein.
2. Also in this order, the Commission accepts: (1) the generation market power analysis for OGE Companies' directly interconnected first-tier control areas; (2) data and additional information to support the Southwest Power Pool's (SPP) simultaneous transmission import capability study; and (3) certain revisions to OGE Companies' market-based rate tariffs.

**I. Background**

3. On July 7, 2005 and August 8, 2005, OGE Companies submitted two separate compliance filings in response to the Commission's June 7, 2005 Order<sup>1</sup> on OGE Companies' updated market power analysis, which OGE Companies submitted in compliance with the Commission's order issued on May 13, 2004.<sup>2</sup>

---

<sup>1</sup> *Oklahoma Gas and Electric Co.*, 111 FERC ¶ 61,368 (June 7 Order).

<sup>2</sup> *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004) (May 13 Order). The May 13 Order addressed the procedures for implementing the generation market power analysis announced on April 14, 2004 and clarified on July 8, 2004. *AEP Power*

(continued)

4. OGE Companies' generation market power analysis indicated that, among other things, OGE Companies passed the pivotal supplier screen in all control areas considered, but failed the wholesale market share screen for each of the four seasons in OG&E's control area. As the Commission stated in the April 14 Order, where an applicant is found to have failed either generation market power screen, such failure provides the basis for instituting a proceeding pursuant to section 206 of the Federal Power Act (FPA)<sup>3</sup> and establishes a rebuttable presumption of market power in the section 206 proceeding.<sup>4</sup> Accordingly, because OGE Companies' filing indicated that it failed the wholesale market share screen, the Commission instituted a section 206 proceeding to investigate generation market power in the OG&E control area. The Commission also established a refund effective date pursuant to the provisions of section 206 of the FPA.

5. For the OG&E control area, the Commission directed OGE Companies to either: (a) file a Delivered Price Test (DPT) analysis; (b) file a mitigation proposal tailored to its particular circumstances that would eliminate the ability to exercise market power; or (c) inform the Commission that it will adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates.<sup>5</sup> In addition, the Commission stated that OGE Companies may present evidence such as historical sales data to support whether the applicant does or does not possess market power.

6. The Commission also directed OGE Companies to: (1) file data and work papers to support and make any necessary revisions to their generation market power analysis for their first-tier control areas; (2) revise the affiliate sales prohibition language in their tariffs; and (3) revise their market-based rate tariffs to incorporate the change in status reporting requirement adopted in Order No. 652.<sup>6</sup>

---

*Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

<sup>3</sup> 16 U.S.C. § 824e (2000).

<sup>4</sup> April 14 Order, 107 FERC ¶ 61,018 at P 201.

<sup>5</sup> *Id.* at P 201, 207-09.

<sup>6</sup> *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

## **II. Compliance Filings**

7. OGE Companies' July 7 compliance filing includes additional information to support the simultaneous transmission import capability study prepared by SPP for first-tier control areas and additional data and work papers to support their market power analysis for their first-tier markets. OGE Companies also provided revised tariff sheets for OG&E and OERI that incorporate the Commission's change in status reporting requirement and the Commission's requirement to include "without first receiving" language.<sup>7</sup>

8. In the August 8 compliance filing, OGE Companies propose mitigation measures that they state are designed to eliminate any potential that OGE Companies may have to exercise generation market power in the OG&E control area. Specifically, OGE Companies inform the Commission that they will adopt the Commission's default cost-based rates for sales of one week or less that they make for sales of power to loads that sink in the OG&E control area. The OGE Companies also state that they will not enter into any sales of power with durations of between one week and one year to loads that sink in the OG&E control area. They also state that any new agreements for long-term sales to loads that sink in the OG&E control area will be filed with the Commission for review under section 205 of the FPA.

## **III. Notice of Filing and Responsive Pleadings**

9. Notice of OGE Companies' July 7 compliance filing was published in the *Federal Register*, 70 Fed. Reg. 41,698 (2005), with comments, interventions, and protests due on or before July 28, 2005. None was filed.

10. Notice of OGE Companies' August 8 compliance filing was published in the *Federal Register*, 70 Fed. Reg. 73,224 (2005), with comments, interventions, and protests due on or before December 22, 2005. None was filed.

## **IV. Discussion**

### **A. First-tier Markets and Tariff Revisions**

11. The Commission concludes that, with the July 7 compliance filing, OGE Companies satisfy the Commission's generation market power standard for market-based rate authority in the directly interconnected first-tier control areas.

---

<sup>7</sup> *Aquila Inc.*, 101 FERC ¶ 61,331 at P 12 (2002).

12. Order No. 652 requires that the change in status reporting requirement be incorporated in the market-based rate tariff of each entity authorized to make sales at market-based rates. OG&E and OERI's revised tariffs include the change in status language as required by the June 7 Order. The June 7 Order also required OG&E and OERI to revise their respective tariffs to incorporate language prohibiting the companies from making sales to affiliates without first receiving permission from the Commission in a separate filing under section 205 of the Federal Power Act. OGE Companies have complied with that requirement. The Commission accepts these revised tariff sheets as filed.

**B. OGE Companies' Mitigation Proposal**

13. As discussed below, the Commission conditionally accepts OGE Companies' mitigation proposal for filing, subject to Commission acceptance of the compliance filings directed herein.

14. In the April 14 Order, the Commission adopted default rates tailored to three distinct products. Sales of power of one week or less must be priced at the applicant's incremental cost plus a 10 percent adder. Sales of power of more than one week, but less than one year, will be priced at an embedded cost "up to" rate reflecting the costs of the unit(s) expected to provide the service. All long-term sales (one year or more) into any market where the applicant is presumed to have market power must be priced on an embedded cost of service basis, and each contract will be filed with the Commission for approval before service begins. The Commission stated that it will set the just and reasonable rate at the default rate unless it approves different cost-based rates for that applicant based on case-specific circumstances.<sup>8</sup>

15. In the June 7 Order, the Commission noted that OGE Companies failed the wholesale market share screen in their home control area (OG&E).<sup>9</sup> In the instant filing, OGE Companies submitted a mitigation proposal for the OG&E control area, proposing to adopt the Commission's default cost-based rates for mitigated sales<sup>10</sup> with a term of

---

<sup>8</sup> April 14 Order, 107 FERC ¶ 61,018 at P 148.

<sup>9</sup> June 7 Order, 111 FERC ¶ 61,018 at P 23-25.

<sup>10</sup> OGE Companies define mitigated sales as "physical sales of power and/or energy under this Tariff to loads that sink in the control area presently operated by [OG&E] Company." *See* Oklahoma Gas and Electric Company, FERC Tariff, Third Revised Volume No. 3, Original Sheet No. 10 (Appendix A); OGE Energy Resources, Inc., Fourth Revised Rate Schedule FERC No. 1, Original Sheet No. 7 (Appendix A).

one week or less. OGE Companies state that OG&E will charge a rate based on the total incremental cost to OG&E of supplying the power sold (including applicable taxes), plus a 10 percent adder. They state that OG&E shall calculate the incremental cost in a manner consistent with the mechanism for the calculation of control area system lambda contained in the FERC-issue Form 714. OGE Companies state that because OERI does not own or control any generating resources, the incremental cost component of the rate OERI will charge for mitigated sales will be based on the actual out-of-pocket costs incurred by OERI to supply the capacity and energy sold (including applicable taxes), plus a 10 percent adder.

16. OGE Companies state that they do not make sales of between one week and one year in duration. They propose revisions to the market-based rate tariffs of OG&E and OERI to state that they will not enter into transactions under the tariffs for terms of between one week and one year for loads that sink in the OG&E control area.

17. OGE Companies state that any new agreements for long-term sales to affected load will not be made under their market-based rate tariffs. Instead, the OGE Companies state that they will submit any such agreements to the Commission for review and approval prior to commencement of any such transaction. OGE Companies state that they will provide cost support at the time they make such filings with the Commission.

18. The Commission conditionally accepts OGE Companies' mitigation proposal, as modified below, subject to Commission acceptance of the compliance filings directed herein.

19. We accept OGE Companies' proposal to adopt the default cost-based rates for sales of power of one week or less, but we note that OGE Companies filed this cost-based rate proposal as revisions to OG&E and OERI's market-based rate tariffs. However, such cost-based rates are more appropriately included in a separate tariff filing. Accordingly, we direct OGE Companies to file, within 30 days of the date of this order, the cost-based rate provisions for sales of power of one week or less as tariffs separate from their market-based rate tariffs, rather than including cost-based rates in their market-based rate tariffs. Second, we will require OGE Companies to provide, in their cost-based rate tariffs, the formulas and methodology under which they intend to calculate incremental costs for short-term sales.<sup>11</sup>

---

<sup>11</sup> We note that "incremental cost" in OG&E's tariff (Original Sheet No.10, Section 1.1) is defined as "the total cost incurred by OG&E..." We direct OG&E to address what may be an inadvertent error in the definition of incremental cost.

20. Third, while the Commission will accept OGE Companies' mitigation proposal, subject to the compliance filings directed herein, the Commission rejects OGE Companies' proposed tariff language that defines mitigated sales as sales "to loads that sink in the [OG&E] control area." The Commission has stated that its role is to assure customers that sellers who are authorized to sell at market-based rates do not have market power or have adequately mitigated it.<sup>12</sup> Further, the Commission's recent orders accepting mitigation proposals are clear that the mitigation is to apply to sales in the geographic market where an applicant is found (or presumed) to have market power.<sup>13</sup> In order to put in place adequate mitigation that eliminates the ability to exercise market power and ensure that rates are just and reasonable,<sup>14</sup> all market-based rate sales in a control area where an applicant is found or presumed to have the ability to exercise market power must be subject to mitigation approved by the Commission.

21. OGE Companies' proposed tariff language ("sink in the OG&E control area") would improperly limit mitigation to certain customers in the OG&E control area, namely, only to sales to those buyers that serve end-use customers in the OG&E control area. OGE Companies' proposal would improperly allow them to make market-based rate sales within the OG&E control area (where it has the presumption of market power). Such a limitation would not mitigate OGE Companies' ability to attempt to exercise market power over sales in the OG&E control area.

22. This proposed tariff language is also inconsistent with our direction in the April 14 Order and July 8 Order, as well as our recent precedent approving mitigation for other entities that failed the indicative screens. The Commission authorizes sales of electric energy at market-based rates only if the seller and its affiliates do not have, or have adequately mitigated, market power in the generation and transmission of such energy, and cannot erect other barriers to entry by potential competitors.<sup>15</sup> Where, as here, there is a presumption of market power within a control area, the applicant has the ability to "raise the market price above competitive levels" and charge "excessive rates" on the market-based rate sales it makes in that control area.<sup>16</sup> In previous orders, the

---

<sup>12</sup> July 8 Order, 108 FERC ¶ 61,026 at P 146.

<sup>13</sup> See *Duke Energy Trading and Marketing, L.L.C.*, 114 FERC ¶ 61,056 (2006).

<sup>14</sup> See April 14 Order, 107 FERC ¶ 61,018 at P 144 and P 147.

<sup>15</sup> See *id.* at P 144; see also, e.g., *Heartland Energy Servs., Inc.*, 68 FERC ¶ 61,223 at 62,060 (1994); *Louisville Gas & Elec. Co.*, 62 FERC ¶ 61,016 at 61,143-44 (1993).

<sup>16</sup> See April 14 Order, 107 FERC ¶ 61,018 at P 103, 152.

Commission has addressed proposals similar to what OGE Companies propose here. For example, on rehearing of the April 14 Order, it was argued that access to power sold under mitigated prices should be restricted to buyers serving end-use customers within the relevant geographic market in which the applicant has been found to have market power. In particular, arguments were made that an applicant should not be required to make sales at mitigated prices to power marketers or brokers without end-use customers in the relevant market.<sup>17</sup> In the July 8 Order, the Commission rejected the suggestion that we restrict mitigated applicants to selling power only to buyers serving end-use customers. That is precisely what OGE Companies are now proposing.

23. Accordingly, the Commission rejects this proposed tariff language, and directs OGE Companies to revise this language when it makes its compliance filing to include its cost-based rates in a separate tariff and to define mitigated sales as sales in the OG&E control area.

24. With regard to sales for periods of one week to one year, as noted above, the OGE Companies commit not to enter into any sales with a duration of between one week and one year to loads that sink in the OG&E control area,<sup>18</sup> but their tariff language does not accurately reflect that intention. The proposed tariff language states that OG&E and OERI “will not make sales under this Tariff with a duration in excess of one week to loads that sink in the OG&E control area.”<sup>19</sup> Based on the OGE Companies’ transmittal letter, we interpret their proposal to be that they will not make sales of power of more than one week but less than one year under their market-based rate tariffs.<sup>20</sup> Further, as noted above, the proposed tariff language (“to loads that sink in the OG&E control area”) would improperly limit mitigation to certain customers in the OG&E control area, namely, only to sales to those buyers that serve end-use customers in the OG&E control area. The Commission’s acceptance of OGE Companies’ mitigation proposal not to make sales under their market-based rate tariffs for sales of between one week and one year in duration is conditioned on that proposal applying to sales of power of more than one week but less than one year and to such proposal applying to any such sales in the

---

<sup>17</sup> July 8 Order, 108 FERC ¶ 61,026 at P 134.

<sup>18</sup> OGE Companies’ August 8, 2005 filing at 3-4.

<sup>19</sup> See Oklahoma Gas and Electric Company, FERC Tariff, Third Revised Volume No. 3, Original Sheet No. 1; OGE Energy Resources, Inc., Fourth Revised Rate Schedule FERC No. 1, Original Sheet No. 1.

<sup>20</sup> OGE Companies’ August 8, 2005 filing, at 3-4.

OG&E control area, not just to sales to loads that sink in the OG&E control area. Accordingly, we direct OGE Companies to submit a compliance filing within 30 days of the date of this order to revise their tariff language to specify that they will not enter into sales of more than one week but less than one year in the OG&E control area. Further, while we accept OGE Companies' commitment not to make any sales of more than one week and less than one year in the OG&E control area, should they decide in the future to make such sales, the Commission expects that such sales will be made under a separate cost-based rate schedule that OG&E will submit for filing with the Commission prior to the commencement of service.

25. With regard to long-term sales, we interpret OGE Companies' commitment to seek Commission authorization prior to the commencement of any contracts for long-term sales to "affected load" to apply to any long-term sales in the OG&E control area. Further, we note that OGE Companies' definition of long-term sales as sales for more than one year is inconsistent with the April 14 Order, in which the Commission required long-term mitigation to apply to sales of one year or longer.<sup>21</sup> Accordingly, we accept OGE Companies' commitment with regard to long-term sales to the extent that such commitment applies to sales of one year or longer. We also accept OGE Companies' commitment to provide cost support at the time it makes such filings with the Commission.

26. Conditioned on compliance with the requirements discussed above, the Commission finds that OGE Companies' proposed mitigation measures adequately address the concerns raised by OGE Companies' failure of the wholesale market share screen.<sup>22</sup>

### **C. Waivers and Reporting Requirements**

27. In Order No. 664, the Commission stated that it no longer intends to grant waivers of the full requirements of Part 45 in its orders granting market-based rate authority. Rather, persons seeking to hold interlocking positions will be required henceforth to comply with the full requirements of Part 45.<sup>23</sup> With respect to an individual who

---

<sup>21</sup> April 14 Order, 107 FERC ¶ 61,018 at P 40.

<sup>22</sup> The Commission will terminate the instant 206 proceeding in Docket No. EL05-107-000 upon finding that OGE Companies have met the conditions set forth in this order.

<sup>23</sup> *Commission Authorization to Hold Interlocking Positions*, Order No. 664, 112 FERC ¶ 61,298 at P 34 (2005).

currently is authorized to hold interlocking positions, that individual will not need to refile under the full requirements of Part 45 to continue to hold such interlocking positions (unless and until that individual assumes different or additional interlocking positions).<sup>24</sup> Thus, consistent with Order No. 664, OERI will be required to comply with the full requirements of Part 45.<sup>25</sup>

The Commission orders:

(A) OGE Companies' mitigation proposal is conditionally accepted, subject to Commission acceptance of the compliance filings directed herein, as discussed in the body of this order.

(B) OGE Companies' July 7 compliance filing providing data and work papers submitted to support their simultaneous transmission import capability study and their market power analysis for first-tier markets are accepted for filing.

(C) OGE Companies are directed, within 30 days of the date of this order, to file cost-based rate tariffs, including the formulas and methodology according to which they intend to calculate incremental costs, as discussed in the body of this order.

(D) OGE Companies are directed, within 30 days of the date of this order, to file revised market-based rate tariffs, as discussed in the body of this order.

(E) The revised tariff sheets incorporating the change in status reporting requirement adopted in Order No. 652 and the affiliate sales language are hereby accepted for filing.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.

---

<sup>24</sup> *Id.* at P 36.

<sup>25</sup> OERI was granted waiver of the full requirements of Part 45 in *OGE Energy Resources*, 81 FERC ¶ 61,049 (1997).