

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suedeem G. Kelly.

Westar Energy, Inc.

Docket Nos. ER03-9-002

ER03-9-003

Kansas Gas and Electric Company

ER98-2157-002

ER98-2157-003

ER98-2157-004

EL05-64-000

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

(Issued March 23, 2005)

1. On September 27, 2004, as amended on September 30, 2004, Westar Energy, Inc. (Westar Energy) and Kansas Gas and Electric Company (Kansas Gas and Electric) (collectively, Westar) submitted for filing an updated market power analysis in compliance with the Commission's order issued on May 13, 2004.<sup>1</sup> The May 13 Order addressed the procedures for implementing the generation market power screens announced on April 14, 2004 and clarified on July 8, 2004.<sup>2</sup> Westar Energy has also revised its market-based rate tariff to incorporate the market behavior rules.<sup>3</sup>

2. The filing indicates that Westar passes the pivotal supplier screen in all markets considered, and that it passes the wholesale market share screen in the Associated Electric Cooperative, Inc., Central and Southwest Services, The Empire District Electric Company, Kansas City Power & Light Company, Missouri Public Service, Oklahoma Gas and Electric, and Omaha Public Power District control areas. Westar acknowledges that it fails the wholesale market share screen for each season in its home control area and in the Midwest Energy (Midwest) and Aquila Networks-West Plains Kansas (WPEK) control areas.

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<sup>1</sup> *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004) (May 13 Order).

<sup>2</sup> *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, *AEP Power Marketing, Inc.*, 108 FERC ¶ 61,026 (2004) (July 8 Order),

<sup>3</sup> *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003).

3. 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 under section 206 of the Federal Power Act (FPA)<sup>4</sup> and establishes a rebuttable presumption of market power in the section 206 proceeding. Accordingly, as discussed below, in this order, the Commission institutes a proceeding pursuant to section 206 of the FPA to determine whether Westar may continue to charge market-based rates and establishes a refund effective date pursuant to the provisions of section 206. The instant section 206 proceeding, as well as any resulting mitigation or refunds, is limited to the Westar, Midwest and WPEK control areas because the filing indicates that these are the geographic markets for which Westar fails the wholesale market share screen.

4. In addition, Westar states that it passes the pivotal supplier screen and the wholesale market share screen in its first-tier control areas (excluding the Midwest and WPEK control areas). However, as discussed below, the Commission is unable to conclude that Westar satisfies the Commission's generation market power standard for market-based rate authority in Westar's first-tier control areas (excluding the Midwest and WPEK control areas). Accordingly, in this order, the Commission directs Westar to make a compliance filing within 30 days of the date of this order to revise its generation market power analysis for its first-tier control areas, (excluding the Midwest and WPEK control areas).

5. This order, including the refund effective date, will protect customers from excessive rates and charges that may result from the exercise of market power.

### **Background**

6. On May 1, 2001, Western Resources, Inc., the predecessor to Westar, filed an updated market power analysis employing a hub-and-spoke analysis.

7. In the April 14 Order, as clarified by the July 8 Order, the Commission adopted two indicative screens for assessing generation market power: a pivotal supplier screen and a wholesale market share screen. The Commission 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. The Commission further stated that applicants and intervenors may, however, rebut the presumption established by the results

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<sup>4</sup> 16 U.S.C. § 824e (2000).

of the initial screens by submitting a Delivered Price Test. Alternatively, an applicant may accept the presumption of market power or forgo the generation market power analysis altogether and go directly to mitigation.

8. On April 28, 2004, Westar notified the Commission that it would not be filing its triennial market power analysis, which was due on May 1, 2004, pending direction from the Commission in a yet-to-be-issued order implementing the April 14 Order. The May 13 Order, which implemented the April 14 Order, directed Westar to file within 135 days of the issuance of that order revised generation market power analyses based on the two indicative screens adopted in the April 14 Order.<sup>5</sup>

9. On September 27, 2004, as amended on September 30, 2004, Westar filed an updated market power analysis in compliance with the Commission's May 13 Order.

#### **Description of Westar's Filings**

10. In its filing, Westar submitted the results of the two generation market power screens. Westar states that it passes the pivotal supplier screen in its home control area and each of its first-tier control areas. Westar also submitted the results of the wholesale market share screens for Westar's home control area and its first-tier control areas. Westar indicates that it passes the wholesale market share screen in seven of its nine first-tier control areas but fails the wholesale market share screen, for each of the four seasons considered, in Westar's home control area and in the Midwest and WPEK first-tier control areas.

11. As required in the May 13 Order, Westar also provided updated information on the other three parts of the Commission's four-part analysis; Westar states that it continues to be unable to exercise transmission market power, erect barriers to entry, or engage in affiliate abuse or reciprocal dealing.

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

12. Notice of the May 2001 updated market power analysis was published in the *Federal Register*, 66 Fed. Reg. 23,910 (2001), with interventions and protests due on or before May 22, 2001. None was filed. Notice of Westar's September 2004 Filings was published in the *Federal Register*, 69 Fed. Reg. 60,386 and 69 Fed. Reg. 62,041 (2004), with interventions or protests due on or before October 25, 2004. None was filed.

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<sup>5</sup> May 13 Order, 107 FERC ¶ 61,168 at Ordering Paragraph (A).

## **Discussion**

### **Market-Based Rate Authorization**

13. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. The Commission also considers whether there is evidence of affiliate abuse or reciprocal dealing.<sup>6</sup>

### **Generation Market Power**

14. Westar states that its share of uncommitted capacity in the Westar, Midwest, and WPEK control areas exceeds 20 percent for each of the four seasons during the relevant time period.<sup>7</sup> Consequently, Westar fails the wholesale market share screen in those control areas.

15. In its submission, Westar presents a “contestable load analysis” which it believes to be relevant to rebut the presumption of market power established by its failure of the wholesale market share screen. According to Westar, it does not have market power because customers have the potential to “shop” for power from other suppliers. Westar also states that the contestable load is exceedingly small compared to the total of rival uncommitted capacity both within Westar’s control area and imports of uncommitted capacity from its first-tier control areas.

16. The Commission stated in the April 14 and July 8 Orders that applicants may present historical evidence to show that the applicant satisfies the generation market power concerns. The evidence that will be considered is historical sales and/or access to transmission to move supplies within, out of, and into a control area.<sup>8</sup> The Commission will further examine the contestable load analysis Westar submitted in conjunction with other evidence submitted in the section 206 proceeding we institute herein.

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<sup>6</sup> See, e.g., *Progress Power Marketing, Inc.*, 76 FERC ¶ 61,155, at 61,919 (1996); *Northwest Power Marketing Co., L.L.C.*, 75 FERC ¶ 61,281, at 61,899 (1996); accord *Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223, at 62,062-63 (1994).

<sup>7</sup> Westar’s analysis shows market shares as high as 51 percent, 78 percent, and 37 percent, respectively.

<sup>8</sup> April 14 Order, 107 FERC ¶ 61,018 at P 102, and July 8 Order, 108 FERC ¶ 61,026 at P 181.

17. As outlined in the April 14 Order, Westar's failure of the wholesale market share screen provides the basis for the Commission to institute the instant section 206 proceeding, which is limited to the Westar, Midwest, and WPEK control areas, to determine whether Westar may continue to charge market-based rates and establishes a rebuttable presumption of market power. This order establishes a refund effective date in order to put in place the necessary procedural framework to promptly impose an effective remedy, in case the Commission determines that such a remedy is required. Our decision to establish a refund effective date does not constitute a determination that refunds will be ordered.

18. The Commission's decision to institute the instant section 206 proceeding does not constitute a definitive finding by the Commission that Westar has market power in the Westar, Midwest, and WPEK control areas. As discussed in the April 14 and July 8 Orders, the screens are conservatively designed to identify the subset of applicants who require closer scrutiny. Accordingly, for the Westar, Midwest, and WPEK control areas, Westar will have 60 days from the date of issuance of this order finding a screen failure to: (1) file a Delivered Price Test analysis; (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 April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates.<sup>9</sup> In addition, as the Commission stated in the April 14 Order, the applicant or intervenors may present evidence such as historical sales data to support whether Westar does or does not possess market power.<sup>10</sup> In this regard, as discussed above, the Commission will further examine in conjunction with other evidence submitted in the section 206 proceeding the information that Westar submitted to support its contestable load analysis.

19. In cases where, as here, the Commission institutes a section 206 proceeding on its own motion, section 206(b) requires that the Commission establish a refund effective date that is no earlier than 60 days after publication of notice of the initiation of the Commission's proceeding in the *Federal Register*, and no later than five months subsequent to the expiration of the 60-day period. In order to give maximum protection to customers, and consistent with Commission precedent,<sup>11</sup> the Commission will establish a refund effective date at the earliest date allowed. This date will be 60 days from the date on which notice of the initiation of the proceeding in Docket No. EL05-64-000 is published in the *Federal Register*. In addition, section 206 requires that, if no final

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<sup>9</sup> See April 14 Order, 107 FERC ¶ 61,018 at P 201, 207-209.

<sup>10</sup> *Id.* at P 37.

<sup>11</sup> See, e.g., *Canal Electric Co.*, 46 FERC ¶ 61,153, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

decision has been rendered by that date, the Commission must provide its estimate as to when it reasonably expects to make such a decision. Given the times for filing identified in this order, and the nature and complexity of the matters to be resolved, the Commission estimates that it will be able to reach a final decision by July 29, 2005. The Commission intends to examine the issue of market power in generation in the control areas of Westar, Midwest and WPEK in the instant 206 proceeding discussed above. The filing indicates that other than in the Midwest and WPEK control areas, Westar passes the pivotal supplier screen and the wholesale market share screen in the remaining first-tier control areas. However, the Commission is unable to find here that Westar satisfies the Commission's generation market power standard for market-based rate authority in the first-tier control areas of Westar (excluding Midwest and WPEK) without a compliance filing, as discussed below.

20. The Commission has previously stated that uncommitted capacity is determined by adding the total nameplate capacity of generation owned or controlled through contact and firm purchases, less operating reserves, native load commitments and long-term firm non-requirement sales.<sup>12</sup> Further, applicants are required to prepare the screens as designed.<sup>13</sup> Westar states that summer capacity data was used for the indicative screens. The Commission directs Westar to revise its submittal for Westar's first-tier control areas (excluding Midwest and WPEK) using nameplate capacity for all generating capacity used in calculation of the screens (including Westar's capacity and competing suppliers' capacity), and submit the relevant work papers and documentation within 30 days of the date of this order.

21. Westar has submitted a one-page simultaneous transmission import capability study which, Westar states, was in turn developed by relying on a simultaneous import capability study conducted by SPP for the control areas in the region.<sup>14</sup> This study is appended to introductory/explanatory information which appears to be copied from the full SPP Import Study. However, the Commission requires further information in order to make a determination regarding the adequacy of Westar's transmission import capability study for its first-tier control areas (excluding Midwest and WPEK). Westar did not file supporting documents for its transmission import capability study, and the

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<sup>12</sup> April 14 Order, 107 FERC ¶ 61,018 at P 95.

<sup>13</sup> *Id.* at P 118.

<sup>14</sup> See Affidavit of Bohi at 8; see also *SPP Import Market Studies for FERC Docket No. ER02-1406-001* (Aug. 2004) (filed with Westar's September 27, 2004 Filing in the instant docket) (the SPP Import Study). According to the SPP Import Study, SPP's members asked SPP to run the import studies needed for the pivotal supplier and wholesale market share screens.

material copied from the SPP Import Study does not provide the Commission with sufficient information to make a determination. Therefore, Westar is directed to file data to support its transmission import capability study, consistent with the requirements set forth in Appendix E of the April 14 Order, for its first-tier control areas (excluding Midwest and WPEK), within 30 days of the date of this order.<sup>15</sup>

### **Transmission Market Power**

22. When a transmission-owning public utility seeks market-based rate authority, the Commission has required the public utility to have an open access transmission tariff (OATT) on file before granting such authorization. Westar states that it has an OATT on file with the Commission which governs certain grandfathered transactions that use its transmission facilities. Westar states that for new transmission transactions, as well as transmission for Westar's retail customers and the majority of its grandfathered transactions, Westar has placed its transmission facilities under the Southwest Power Pool, Inc. (SPP) OATT.<sup>16</sup> Westar states that as a participant in the planned SPP regional transmission organization (RTO), which has been conditionally approved by the Commission, there are no transmission market power concerns. Further, no intervenor has raised transmission market power concerns. Based on these representations, the Commission finds that Westar satisfies the Commission's transmission market power standard for the grant of market-based rate authority.

### **Other Barriers to Entry**

23. Westar states that none of its affiliates exercise control over sites for generating plants that could restrict entry by other suppliers or other barriers to entry. Westar also states that it does not own or operate any natural gas properties. Further, no intervenor has raised transmission market power concerns. Based on Westar's representations, the Commission is satisfied that Westar cannot erect barriers to entry.

### **Affiliate Abuse**

24. Westar states in its filing that although it does not have an affiliated wholesale power marketer, its market-based power sales tariff and code of conduct contain the Commission's standard restrictions on transactions with marketing affiliates. Westar concludes that its market-based wholesale power sales raise no affiliate abuse concerns.

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<sup>15</sup> April 14 Order, 107 FERC ¶ 61,018 at P 82-85; July 8 Order, 108 FERC ¶ 61,026 at P 122-125.

<sup>16</sup> *See Southwest Power Pool, Inc.*, 82 FERC ¶ 61,267 at 62,050 n.2 (1998).

25. Westar Energy's market-based rate tariff states, *inter alia*, that it will not sell electric energy or capacity to Kansas Gas and Electric or any affiliate with a franchised service territory pursuant to its tariff, and "will only engage in such sales pursuant to a separate filing approved by [the Commission] under Section 205 of the Federal Power Act".<sup>17</sup>

26. Although Westar's code of conduct satisfies the Commission's affiliate abuse concerns, Westar Energy's tariff does not state that it will not make sales to its affiliated public utility "without first receiving" Commission authorization of the transaction under section 205 of the FPA. Therefore, consistent with Commission precedent, Westar Energy is directed to make a compliance filing within 30 days of the date of issuance of this order to revise its market-based rate tariff to include such language.<sup>18</sup> In addition, the Commission notes that Kansas Gas and Electric's current market-based rate tariff on file with the Commission also does not include the "without first receiving" language. Therefore, consistent with Commission precedent, Kansas Gas and Electric is directed to make a compliance filing within 30 days of the date of issuance of this order to revise its market-based rate tariff to include such language. Based on Westar's representations, and subject to the tariff revision the Commission directs herein, the Commission finds that Westar satisfies the Commission's concerns with regard to affiliate abuse.

### **Market Behavior Rules**

27. In the Market Behavior Rules Order, the Commission directed market-based rate sellers to include as an amendment to their market-based rate tariff the market behavior rules at such time as they seek continued authorization to sell at market-based rates.<sup>19</sup> The Commission notes that Westar Energy has revised its tariff to include the market behavior rules, but that Kansas Gas and Electric has not. Accordingly, Kansas Gas and Electric is directed, within 30 days of the date of this order, to file its market behavior rules.

### **Reporting Requirements**

28. 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 containing: (1) a summary of the contractual terms and conditions in every effective service agreement for market-based power sales; and (2) transaction

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<sup>17</sup> See Westar Energy, Inc.'s FERC Electric Tariff, Third Revised Volume No. 6, Original Sheet No. 1.

<sup>18</sup> See *Aquila, Inc.*, 101 FERC ¶ 61,331 at P 7-9, 12 (2002).

<sup>19</sup> Market Behavior Rules Order, 105 FERC ¶ 61,218 at Ordering Paragraph (A).

information for effective short-term (less than one year) and long-term (one year or greater) market-based power sales during the most recent calendar quarter.<sup>20</sup> Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.<sup>21</sup>

29. 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.<sup>22</sup> 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. Accordingly, Westar is directed, within 30 days of the date of issuance of this order, to revise their market-based rate tariffs to incorporate the following provision:

[Market-based rate seller name] 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. A change in status includes, but is not limited to, each of the following: (i) ownership or control of generation or transmission facilities or inputs to electric power production other than fuel supplies, or (ii) affiliation with any entity not disclosed in the application for market-based rate authority that owns or controls generation or transmission facilities or inputs to electric power production, or affiliation with any entity that has a franchised service area. Any change in status must be filed no later than 30 days after the change in status occurs.

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<sup>20</sup> *Revised Public Utility Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31,043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002). Required data sets for contractual and transaction information are described in Attachments B and C of Order No. 2001. The Electric Quarterly Report must be submitted 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>.

<sup>21</sup> The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2004).

<sup>22</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 (2005).

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), the Commission hereby institutes a proceeding in Docket No. EL05-64-000 concerning the justness and reasonableness of Westar's market-based rates in the Westar, Midwest and WPEK control area markets, 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. EL05-64-000.

(C) The refund effective date established pursuant to section 206(b) of the FPA will be 60 days following publication in the *Federal Register* of the notice discussed in Ordering Paragraph (B) above.

(D) For the Westar, Midwest, and WPEK control areas, Westar is directed, within 60 days from the date of issuance of this order, to: (1) file a Delivered Price Test analysis; (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 April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates.

(E) Westar is directed, within 30 days of the date of issuance of this order, to revise its generation market power screens for its first-tier control areas (excluding Midwest and WPEK), as discussed in the body of this order.

(F) Westar's updated market power analysis for all relevant markets not subject to the section 206 proceeding instituted herein is hereby conditionally accepted for filing, pending Commission acceptance of the compliance filing directed in Ordering Paragraph (E), as discussed in the body of this order.

(G) Westar is directed, within 30 days of the date of issuance of this order, to revise its market-based rate tariffs to incorporate the change in status reporting requirement adopted in Order No. 652 and to revise the affiliate sales prohibition language, as discussed in the body of this order.

(H) Kansas Gas and Electric is directed, within 30 days of the date of issuance of this order, to file the market behavior rules.

By the Commission.

( S E A L )

Linda Mitry,  
Deputy Secretary.