

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Wisconsin Public Service Corporation	Docket Nos. ER95-1528-010 ER95-1528-009 ER95-1528-008 ER95-1528-006
WPS Power Development, Inc. WPS Energy Services, Inc.	ER96-1088-035 ER96-1088-034 ER96-1088-033 ER96-1088-031
Combined Locks Energy Center, LLC	Docket No. ER01-2659-004
WPS Empire State, Inc.	Docket No. ER02-2199-002
WPS Beaver Falls Generation, LLC	Docket No. ER03-54-002
WPS Niagara Generation, LLC	Docket No. ER03-55-002
WPS Syracuse Generation, LLC	Docket No. ER03-56-002
Mid-American Power, LLC	Docket Nos. ER96-1858-015 ER96-1858-014
Quest Energy, LLC	Docket No. ER03-674-002
Sunbury Generation, LLC	Docket Nos. ER99-3420-004 ER99-3420-003
WPS Canada Generation, Inc. and WPS New England Generation, Inc.	Docket Nos. ER99-1936-003 ER99-1936-002
WPS Westwood Generation, LLC	Docket Nos. ER01-1114-003 ER01-1114-002
Advantage Energy, Inc.	Docket Nos. ER97-2758-010 ER97-2758-009
Upper Peninsula Power Company	Docket Nos. ER05-89-002 ER05-89-001 ER05-89-000

ORDER ACCEPTING UPDATED MARKET POWER ANALYSIS
AND MARKET-BASED RATE TARIFF

(Issued March 25, 2005)

1. In this order we accept an updated market power analysis filed by Wisconsin Public Service Corporation (Wisconsin Public Service) and its affiliates (collectively, WPS).¹ We also accept revisions to those entities' market-based rate tariffs to include the Commission's market behavior rules.² In addition, we accept for filing Upper Peninsula Power Company's (UPPCO) market-based rate tariff to allow UPPCO to sell capacity, energy, and ancillary services at market-based rates, reassign transmission capacity, and resell financial transmission rights (FTRs).³ UPPCO's market-based rate tariff is accepted for filing effective on the date that Midwest Independent Transmission System Operator, Inc. (Midwest ISO) becomes a single market and performs functions such as single central commitment and dispatch with Commission-approved market monitoring and mitigation, currently scheduled for April 1, 2005 (hereinafter referred to as the Midwest ISO Energy Market). Lastly, we accept UPPCO's Rate Schedule FERC No. 53 (Rate Schedule No. 53), to be effective December 28, 2004, and terminate, as requested, Rate Schedule No. 53 on the same date.⁴ As discussed below, we conclude that, with the

¹ WPS's affiliates include WPS Power Development, Inc.; WPS Energy Services, Inc.; Combined Locks Energy Center, LLC; Mid-American Power, LLC; WPS New England Generation, Inc.; WPS Canada Generation, Inc.; WPS Empire State, Inc.; WPS Beaver Falls Generation, LLC; WPS Niagara Generation, LLC; WPS Syracuse Generation, LLC; Sunbury Generation, LLC; WPS Westwood Generation, LLC; Quest Energy, LLC; and Advantage Energy, Inc..

² WPS, FERC Electric Tariff, Third Revised Volume No. 1, Original Sheet Nos. 7 and 8; WPS Development, FERC Electric Tariff, Second Revised Volume No. 1, Original Sheet Nos. 7 and 8; WPS Energy, FERC Electric Tariff, First Revised Volume No. 1, Original Sheet Nos. 7 and 8; Mid-American Power, LLC, FERC Electric Tariff, First Revised Volume No. 1, Original Sheet Nos. 7 and 8; Sunbury Generation, LLC, FERC Electric Tariff, First Revised Volume No. 1, Original Sheet Nos. 7 and 8; WPS Canada Generation, Inc., FERC Electric Tariff, First Revised Volume No. 1, Original Sheet Nos. 7 and 8; WPS New England Generation, Inc., FERC Electric Tariff, First Revised Volume No. 1, Original Sheet Nos. 7 and 8; WPS Westwood Generation, LLC, FERC Electric Tariff, Second Revised Volume No. 1, Original Sheet Nos. 8 and 9; and Advantage Energy, Inc., FERC Electric Tariff, First Revised Volume No. 1, Original Sheet Nos. 1 through 3.

³ FERC Electric Tariff, Substitute Original Volume No. 1, Original Sheet Nos. 1 through 7.

⁴ Original Rate Schedule FERC No. 53, Original Sheet Nos. 1 through 5, and First Revised Sheet No. 1.

tariff modification directed herein, WPS and UPPCO satisfy the Commission's standards for market-based rate authority. This order benefits customers by reviewing the conditions under which market-based rate authority is granted, thus ensuring that the prices charged for jurisdictional sales are just and reasonable. WPS's and UPPCO's next updated market power analysis is due three years from the date of this order.

Background

2. On December 20, 2001, Wisconsin Public Service and certain affiliates⁵ submitted an updated market power analysis using the Supply Margin Assessment. In the December 20 Filing, WPS and SMA affiliates state that they do not have generation market power.
3. On September 27, 2004, as amended on January 24, 2005, WPS submitted an updated market power analysis pursuant to the Commission's order issued on May 13, 2004.⁶ The May 13 Order addressed the procedures for implementing the generation market power analysis announced on April 14, 2004, and clarified on July 8, 2004.⁷
4. On November 5, 2004, Wisconsin Public Service and its affiliates filed revised tariff sheets to their market-based rate tariffs to include the Commission's market behavior rules.⁸ On January 3, 2005, the Director, Division of Tariffs and Market Development – South, acting pursuant to delegated authority, issued a data request seeking additional information relating to WPS's submittal. On January 24, 2005, WPS filed a response to the data request, amending its September 27 Filing.

⁵ WPS Power Development, Inc.; WPS Energy Services, Inc.; Mid-American Power, LLC; WPS New England Generation, Inc.; WPS Canada Generation, Inc.; Sunbury Generation, LLC; and WPS Westwood Generation, LLC (collectively, SMA affiliates).

⁶ *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004) (May 13 Order).

⁷ *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

⁸ *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003), *order on reh'g*, 107 FERC ¶ 61,175 (2004).

5. In its September 27 Filing WPS argued that Wisconsin Upper-Michigan System (WUMS) region should be used as the relevant geographic market for the purposes of the generation dominance screens. In the event the Commission did not accept WUMS as WPS's relevant geographic market, WPS proposed cost-based mitigation primarily consisting of offering to sell energy under its cost-based coordination sales tariff when transfer capability in its control area is not available. However, in its January 24 amendment, WPS revised its screens to use the Midwest ISO as the relevant geographic market. WPS's amendment shows it passes both indicative screens for the Midwest ISO market.

6. On October 28, 2004, in Docket No. ER05-89-000, UPPCO filed a request for the Commission to: (1) grant waiver of the Commission's notice requirements and accept for filing Rate Schedule No. 53 regarding cost-based transactions between UPPCO and PJM Interconnection, L.L.C. (PJM) with a retroactive effective date of May 14, 2004, for transactions that occurred between May 14, 2004, and July 23, 2004; and (2) accept for filing a proposed embedded cost tariff to make sales in the Midwest ISO Energy Market and PJM spot markets. On December 7, 2004, UPPCO asked the Commission to defer action on the embedded cost tariff so that UPPCO could make a filing with the Commission to convert the embedded cost tariff into a tariff based on market-based rate authority.

7. On January 4, 2005, as amended on March 2, 2005, UPPCO filed, under section 205 of the Federal Power Act (FPA),⁹ an application for market-based rate authority with an accompanying tariff. The proposed market-based rate tariff provides for the sale of energy, capacity, and ancillary services at market-based rates, the reassignment of transmission capacity, and the resale of FTRs or their equivalent. UPPCO states that it does not seek authority to sell at market-based rates in Midwest ISO before implementation of the Midwest ISO Energy Market.

8. In its January 4 Filing, UPPCO renews its request that the Commission grant a retroactive effective date to allow Rate Schedule No. 53 to take effect on May 14, 2004, and accept a notice of cancellation request for Rate Schedule No. 53, effective on July 24, 2004, the last day transactions took place. UPPCO requests that the Commission allow it to withdraw its pending embedded cost tariff and replace it with its proposed market-based rate tariff.

⁹ 16 U.S.C. § 824d (2000).

Notice and Responsive Pleadings

9. Notice of Wisconsin Public Service's and the SMA affiliates' December 20, 2001 Filing was published in the *Federal Register*, 67 Fed. Reg. 580 (2002), with protests and motions to intervene due on or before January 10, 2002. On January 10, 2002, Madison Gas and Electric Company (MGE) and Wisconsin Public Power, Inc. (Wisconsin Public Power) filed a protest and a request for a hearing. On January 22, 2002, Manitowoc Public Utilities and Marshfield Electric & Water Development (Municipals) filed a motion to intervene out-of-time and comments in support of MGE's and Wisconsin Public Power's protest and request for hearing. On January 25, 2002, Wisconsin Public Service and the SMA affiliates filed an answer. On February 11, 2002, MGE and Wisconsin Public Power filed a response to Wisconsin Public Service's and the SMA affiliates' answers.

10. Notice of WPS's September 27, 2004 Filing was published in the *Federal Register*, 69 Fed. Reg. 60,851 (2004), with protests and motions to intervene due on or before October 18, 2004. On October 18, 2004, Algoma Group¹⁰ filed a motion to intervene and protest. Also on October 18, 2004, Wisconsin Public Power filed a protest. WPS filed an answer on November 2, 2004.

11. Notice of WPS's November 5, 2004 Filing modifying their market-based rate tariffs to add the Commission's market behavior rules was published in the *Federal Register*, 69 Fed. Reg. 67,715 (2004), with protests and motions to intervene due on or before November 26, 2004. None was filed.

12. Notice of WPS's January 24, 2005 Filing amending the September 27, 2004 Filing was published in the *Federal Register*, 70 Fed. Reg. 5,990 (2005), with protests and motions to intervene due on or before February 14, 2005. On February 14, 2005, Wisconsin Public Power filed a protest.

13. Notice of UPPCO's October 28, 2004 Filing was published in the *Federal Register*, 69 Fed. Reg. 65,168 (2004), with protests and motions to intervene due on or before November 18, 2004. None was filed.

¹⁰ The Algoma Group consists of the Wisconsin cities of Manitowoc and Marshfield; the Alger Delta Electric Cooperative; and the Badger Power Marketing Authority, a Wisconsin municipal electric company whose members include the cities of Shawano and Clintonville.

14. Notice of UPPCO's December 7, 2004 Filing requesting deferral was published in the *Federal Register*, 69 Fed. Reg. 75,944 (2004), with protests and motions to intervene due on or before December 28, 2004. None was filed.

15. Notice of UPPCO's January 4, 2005 Filing requesting market-based rate authority was published in the *Federal Register*, 70 Fed. Reg. 3,694 (2005), with protests and motions to intervene due on or before January 25, 2005. None was filed.

16. Notice of UPPCO's March 2, 2005 supplemental filing in Docket No. ER05-89-002 was published in the *Federal Register*, 70 Fed. Reg. 12,863 (2005), with protests and motions to intervene due on or before March 14, 2005. None was filed.

Discussion

Procedural Matters

17. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We will grant Municipals' motion to intervene out-of-time given their interest, the early stage in the proceeding, and the absence of undue prejudice or delay.

18. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the answers because they have provided information that assisted us in our decision-making process.

Market-Based Rate Authorization

19. 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.¹¹ As discussed below we find that, with the modifications directed herein, Applicants satisfy the Commission's standards for market-based rate authority.

¹¹ 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).

Generation Market Power

20. In the April 14 Order, the Commission adopted two indicative screens for assessing generation market power, the pivotal supplier screen and the wholesale market share screen. WPS and UPPCO have prepared indicative screens for the Midwest ISO and PJM markets. WPS has provided a streamlined application preparing screens for the following subsets of larger default markets where its generation assets are located: WUMS for Midwest ISO,¹² Central PJM for PJM,¹³ Western New York for New York Independent System Operator, Inc. (New York ISO),¹⁴ and Northern Maine Independent System Administrator Region (NMISA) for ISO New England, Inc. (ISO New England).¹⁵

21. The Commission stated in the April 14 Order that when performing the generation market power screens adopted herein, applicants located in ISO/RTOs with sufficient market structure and a single energy market may consider the geographic region under the control of the ISO/RTO as the default relevant geographic market for purposes of completing their analyses. We also stated in the April 14 Order that it is acceptable for an applicant to offer a simplifying assumption as long as it does not affect the underlying methodology utilized by our screens and would not change the results.¹⁶ The

¹² The WUMS region consists of most of central and eastern Wisconsin and the Upper Peninsula of Michigan. The utilities in WUMS that operate control areas have sold their transmission assets to the American Transmission Company (ATCo). WPS and its affiliates own about 2,300 MW of generation in this region.

¹³ Central PJM is the portion of PJM that is located west of PJM's eastern transmission constraint which runs through the Chesapeake Bay, west of Philadelphia, and northward to New York near the Pennsylvania/New Jersey border. WPS and its affiliates own about 470 MW of generation in this region.

¹⁴ WPS and its affiliates own about 257 MW of generation in the Western New York region, which consists of the West, Genesee, Central, North, and Mohawk Valley load zones.

¹⁵ NIMSA is part of the Maritime control area, and reserves and load balancing functions are handled by market participants including New Brunswick Power Corporation. NIMSA includes the service territory of Maine Public Service Company and Eastern Maine Electric Cooperative. WPS and its affiliates own 19 MW of generation in this region.

¹⁶ April 14 Order, 107 FERC ¶ 61,018 at P 113-17 and 187.

Commission has reviewed WPS's simplifying assumption and has determined that WPS and UPPCO pass the screens in the Midwest ISO, PJM, ISO New England, and New York ISO markets.

22. Regarding Wisconsin Public Service's and the SMA affiliates' December 20, 2001 updated SMA market analysis, Wisconsin Public Power, Municipals, and MGE argue that Wisconsin Public Service and the SMA affiliates should not be authorized to charge market-based rates within the WUMS region because: (1) WUMS requires mitigation because it is increasingly isolated and constrained both externally and internally; (2) WUMS transmission constraints are unlikely to be eliminated; and (3) WPS exerts generation market power within WUMS. Wisconsin Public Power, Municipals, and MGE believe the Commission should revoke Wisconsin Public Service's market-based rate authority or, at a minimum, set for hearing the justness of Wisconsin Public Service's market rates. In its answer, Wisconsin Public Service's and the SMA affiliates argue that Wisconsin Public Power, Municipals, and MGE have ignored Wisconsin Public Service's unique circumstance as a native load serving utility that owns generation and distribution facilities, but has sold its transmission facilities to the ATCo, which has joined Midwest ISO. Wisconsin Public Power and MGE responded to Wisconsin Public Service's answer restating their arguments in the January 10, 2002 protest. Similarly, Wisconsin Public Service did not present any new arguments in its February 11, 2002 response.

23. Wisconsin Public Power and Algoma Group also argue in their October 18, 2004 protests that it is unclear from WPS's application whether the proposed mitigation applies to all load located both physically and electrically within the WPS service area. They ask that Commission approval of WPS's continued market-based rate authority be conditioned on the inclusion of Wisconsin Public Power and Algoma Group in WPS's proposed mitigation. In its answer, WPS has agreed to extend its mitigation to both Wisconsin Public Power and Algoma Group.

24. Wisconsin Public Power argues in its February 14, 2005 protest that the Commission should not use a Midwest ISO market-wide generation market power analysis as a basis to review WPS's application because: (1) the analysis will not be relevant even after commencement of the Midwest ISO Energy Market; and (2) the Commission expressly recognized in the July 8 Order that even in an RTO with Commission-approved market monitoring, an RTO-wide geographic market is rebuttable on a case specific basis, especially in the case of load pockets.¹⁷ In this regard, Wisconsin Public Power argues that the highly-constrained WUMS load pocket cannot be considered part of the same geographic market as the remainder of Midwest ISO

¹⁷ July 8 Order, 108 FERC ¶ 61,026 at P 177.

because there is no uncommitted long-term firm transfer capability into eastern Wisconsin from any direction and, within WUMS, there is no uncommitted long-term transfer capability between any of its five control areas. To support its argument, Wisconsin Public Power submits that the Midwest ISO's Independent Market Monitor's (IMM) 2003 State of the Market Report¹⁸ has concluded that the Hirschman-Herfindahl Index in WUMS is a highly concentrated 2,656, and that WUMS and North WUMS are Narrow Constrained Areas within Midwest ISO. Also, the Midwest ISO IMM indicated that "actual congested levels experienced within and into Midwest ISO exceeded 2000 hours," which exceeds the five hundred hour limit stated in Midwest ISO's OATT.¹⁹

25. As noted above, Wisconsin Public Power, Municipals, and MGE have raised concerns regarding WPS's ability to exercise generation market power in the WUMS area. The Commission has recognized that transmission may be constrained in the WUMS region during certain hours. Although WPS passes the indicative screens when the geographic market is restricted to WUMS, the concerns of Wisconsin Public Power, Municipals, and MGE are further addressed by Midwest ISO's monitoring and mitigation provisions. In our August 6, 2004 and November 8, 2004 orders in *Midwest Independent System Operator, Inc.*,²⁰ the Commission accepted for filing Midwest ISO's open access Transmission and Energy Markets Tariff (TEMT), which contains provisions that address Wisconsin Public Power's concerns regarding Midwest ISO's mitigation of transmission constraints and load pockets in WUMS. The TEMT establishes threshold levels for offers, with mitigation of bids that exceed such thresholds. In highly constrained areas such as the WUMS Narrow Constrained Area and North WUMS Narrow Constrained Area, the conduct and impact thresholds are set more tightly than in less constrained areas, providing for more frequent mitigation because market power is more likely to be

¹⁸ Independent Market Monitor Midwest ISO, *Highlights of the Midwest ISO 2003 State of the Market Report 7* (Apr. 2004), available at <http://www.ferc.gov/EventCalendar/Files/1>.

¹⁹ Article 63.4.1 of Midwest ISO's Open Access Transmission and Energy Markets Tariff defines Narrow Constrained Area as "an electrical area identified by the IMM that is defined by one or more Binding Transmission Constraints that are expected to be binding for at least five hundred (500) hours per year during a given twelve month period and within which one (1) or more suppliers are pivotal."

²⁰ *Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,163 (2004), *order on reh'g*, 109 FERC ¶ 61,157 (2004).

exercised on a recurring basis in these areas.²¹ In this regard, we find that Wisconsin Public Power's, Municipals', and MGE's concerns should be adequately addressed by the monitoring and mitigation in the Midwest ISO Energy Market.²²

Transmission Market Power

26. When a transmission-owning public utility seeks market-based rate authority, the Commission has required the public utility have an open access transmission tariff (OATT) on file before granting such authorization. WPS and UPPCO indicate that they have sold their transmission facilities to the ATCo,²³ which owns and operates the transmission system in the WUMS region. ATCo is a for-profit transmission company that has transferred control of its transmission assets to Midwest ISO. WPS states that these transmission assets are under Midwest ISO's OATT. Further, no intervenors have raised transmission market power concerns. Based on WPS's and UPPCO's representations, the Commission finds that WPS and UPPCO satisfy the Commission's transmission market power standard for the grant of market-based rate authority.

Other Barriers to Entry

27. WPS and UPPCO state that neither they, nor their affiliates, have dominant control over sites or other scarce inputs into generation. WPS states that it operates natural gas distribution facilities in Wisconsin and Michigan but does not own any gas transmission facilities in the WUMS region. WPS points to the fact that five interstate pipelines operate in the region. UPPCO states that it does not own any natural gas pipelines or other fuel supplies in its region and claims it cannot impede entry through the control of supplies. WPS and UPPCO conclude that they cannot erect barriers to entry that would prevent competitors from participating in the relevant geographic markets. In addition, no intervenors have raised barrier to entry concerns. Based on these representations, we are satisfied that WPS and UPPCO cannot erect barriers to entry. However, if WPS,

²¹ *See Id.*

²² On this basis, we will deny Wisconsin Public Power's January 10, 2002 request for hearing.

²³ *See Upper Peninsula Power Co.*, 95 FERC ¶ 61,487 (2001); *Wisconsin Public Service Corp.*, 93 FERC ¶ 61,215, *clarified*, 93 FERC ¶ 62,201 (2000).

UPPCO, or their affiliates deny, delay, or require unreasonable rates, terms, or conditions for natural gas service to a potential electric competitor, then the Commission may suspend their authority to sell electricity at market-based rates.²⁴

Affiliate Abuse

28. WPS and UPPCO state that their affiliates operate under codes of conduct, which are consistent with the Commission's requirements.²⁵ No intervenors have raised affiliate abuse concerns. However, the affiliate sales language in the market-based rate tariff belonging to WPS Canada Generation, Inc. does not state that it will not make sales to its affiliates "without first receiving" Commission authorization of the transaction under section 205 of the FPA. Therefore, consistent with Commission precedent, WPS Canada Generation, Inc. 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.²⁶

29. Based on WPS's and UPPCO's representations, and subject to the tariff revision we direct herein, we find that WPS and UPPCO satisfy the Commission's concerns with regard to affiliate abuse.

Reporting Requirements

30. 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 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.²⁷ Each

²⁴ See, e.g., *Louisville Gas & Electric Co.*, 62 FERC ¶ 61,016 (1993).

²⁵ See *WPS Resources Corp.*, Docket No. ER02-1059-000 (Apr. 12, 2002) (unpublished letter order).

²⁶ See *Aquila, Inc.*, 101 FERC ¶ 61,331, at P 7-9, 12 (2002).

²⁷ *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>.

Electric Quarterly Report must be filed quarterly no later than 30 days after the end of the reporting quarter.²⁸ UPPCO must file its first Electric Quarterly Report no later than 30 days after the first quarter UPPCO's rate schedule is in effect.²⁹

31. WPS and UPPCO 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.³⁰ 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, WPS and UPPCO are 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.

32. WPS and UPPCO are directed to file an updated market power analysis within three years of the date of this order, and every three years thereafter. The Commission also reserves the right to require such an analysis at any intervening time.

²⁸ The exact dates for these reports are prescribed in 18 C.F.R. § 35.10b (2004).

²⁹ 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.

³⁰ *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).

Other Authorizations

33. UPPCO requests authority to engage in the sale of certain ancillary services (listed in the proposed rate schedule) at market-based rates into the markets administered by PJM and Midwest ISO. UPPCO also proposes to sell additional ancillary services in PJM and Midwest ISO as the Commission may specify and authorize in the future in orders that extend such authority to all sellers previously authorized to sell energy and/or capacity at market-based rates. Consistent with Commission precedent granting authority to sellers to engage in such transactions in the PJM market, the Commission will grant UPPCO's request with regard to PJM.³¹ With regard to additional ancillary services the Commission may specify and authorize in the future, we will grant UPPCO's request for the PJM market; however, our grant does not relieve UPPCO of the requirement to have current and complete tariffs on file with the Commission, pursuant to 18 C.F.R. § 35.1 (2004).³²

34. There is no organized market in Midwest ISO for the sale of ancillary services at market-based rates. Therefore, we direct UPPCO to make a compliance filing within 30 days of the date of issuance of this order revising the ancillary services section of its market-based rate tariff to remove the reference to sales in the Midwest ISO market including the provision of the proposed market-based rate tariff allowing the sale of any ancillary services that the Commission may authorize in the future in the Midwest ISO. We note that if the Commission does authorize such sales, UPPCO may then revise its market-based rate tariff to allow the sale of ancillary services in the Midwest ISO

35. UPPCO also requests authority to reassign transmission capacity, and resell FTRs or their equivalent. We find these provisions consistent with the Commission's requirements.³³ Accordingly, we grant these requests.

³¹ See, e.g., *Atlantic City Electric Co.*, 86 FERC ¶ 61,248, *clarified*, 86 FERC ¶ 61,310 (1999).

³² *Calhoun Power Co.*, 96 FERC ¶ 61,056 (2001).

³³ See *Southwestern Public Service Co.*, 80 FERC ¶ 61,245 (1997); *Calif. Indep. Sys. Operator, Inc.*, 89 FERC ¶ 61,153 (1999).

Rate Schedule No. 53

36. UPPCO explains that it believed through its execution of five PJM documents in December 2003 that it was authorized to engage in sales transactions with PJM in the PJM spot market. UPPCO states that it sold excess energy to PJM on fourteen occasions between May 14, 2004, and July 23, 2004. The price for each sale was the location marginal price (LMP) at the Wisconsin Electric Power Company (WEC) interface with PJM. The energy that PJM purchased from UPPCO was then sold to PJM Market Participants at the LMP. UPPCO submits that the effect of UPPCO's sale was to either: (1) hold PJM Market Participants cost neutral; or (2) reduce the cost to PJM Market Participants. UPPCO subsequently realized that it was required to have a market-based or cost-based wholesale tariff on file with the Commission in order to make such sales. UPPCO therefore requests waiver of the Commission's notice requirements to allow Rate Schedule No. 53 to become effective, without refund obligation, on May 14, 2004, and to permit the cancellation of the rate schedule, effective July 24, 2004.

37. In support of its waiver request, UPPCO argues that waiver is appropriate, stating: (1) UPPCO personnel in good faith believed that execution of the PJM documents gave them authority to make such sales; (2) the nature of the transactions and the price for which the power was sold preclude any concern that the UPPCO price received from PJM was excessive; (3) since UPPCO has a one-for-one fuel mechanism in place for service to its retail customers, any proceeds received from PJM in excess of UPPCO's delivery costs to PJM will flow to retail rate paying customers; (4) no party would be prejudiced or incur any detrimental consequence if the request is granted; and (5) the availability of this power at the PJM LMP had the effect of moderating costs paid by consumers for energy at the relevant nodes on the PJM system.

38. Section 205 of the FPA requires that rates be timely filed with the Commission.³⁴ In this regard, the Commission has explained that it cannot "ignore its statutory duty to determine whether rates are just and reasonable by permitting utilities to submit filings whenever convenient," and that it "must have the opportunity to examine proposed rates, terms, and conditions of jurisdictional service before that service commences."³⁵ Thus, a regulated entity must timely file its rates to allow the Commission to fulfill its statutory mandate, namely, determining whether the rates being charged are just and reasonable. The Commission has further stated that it "does not allow market-based rates to go into

³⁴ See *El Paso Electric Co.*, 105 FERC ¶ 61,131, at P 9-11 (2003).

³⁵ *Id.* P 14.

effect before a filing has been tendered with the Commission.”³⁶ In *Central Maine Power Co.*³⁷ and *Prior Notice*,³⁸ the Commission explained that it would grant waiver of prior notice for proposals to charge market-based rates only in extreme or extraordinary circumstances.

39. Based on the information presented by UPPCO, the Commission finds that UPPCO has not demonstrated the presence of extraordinary circumstances that would warrant a waiver of the Commission’s prior notice requirement.³⁹ Accordingly, the Commission denies UPPCO’s request for waiver of the 60-day prior notice requirement with regard to sales made under Rate Schedule No. 53. The Commission accepts Rate Schedule No. 53 for filing to be effective December 28, 2004, following 60 days notice from the date of the initial filing. Further, Rate Schedule No. 53 is hereby cancelled, as requested, effective December 28, 2004.

40. Under the Commission’s time value remedy, for a cost-based rate, in cases where service commences before filing, and where waiver of the 60-day prior notice requirement is denied, the utility must refund the time value of the revenues collected, calculated pursuant to section 35.19a of the Commission’s regulations,⁴⁰ for the entire period that the rate was collected without Commission authorization to the date that the utility ultimately issues refunds.⁴¹ Additionally, we will limit the application of the time value of remedy formula to an amount that permits a public utility to recover its variable costs. Such information, when pertinent, must be submitted with a utility’s refund report.

³⁶ *El Segundo Power, LLC*, 84 FERC ¶ 61,011, at 61,060, *order on reh’g*, 85 FERC ¶ 61,123 (1998), *order on reh’g*, 87 FERC ¶ 61,208 (1999), *order on reh’g*, 90 FERC ¶ 61,036 (2000).

³⁷ 56 FERC ¶ 61,200, *order on reh’g*, 57 FERC ¶ 61,083 (1991).

³⁸ 64 FERC ¶ 61,139, *clarified*, 65 FERC ¶ 61,081.

³⁹ *See Idaho Power Co.*, 95 FERC ¶ 61,482, at 62,718 & n.16.

⁴⁰ 18 C.F.R. § 35.19a (2004).

⁴¹ *Prior Notice*, 64 FERC at 61,979-80; *see also Carolina Power & Light Co.*, 84 FERC ¶ 61,103, at 61,522 (1998), *order on reh’g*, 87 FERC ¶ 61,083, at 61,356 (1999) (*Carolina Power*).

41. Whether or not a party actually suffered any harm is irrelevant to our inquiry here. The injury being remedied by refunds for late filing is not merely redress for the customer but particularly “the Commission’s ability to enforce FPA section 205’s requirement that there be prior notice and that the rates charged be just and reasonable at the time they are being charged.”⁴²

42. UPPCO is directed to refund to its customers the time value of the revenues for the entire period that the rate was collected without Commission authorization within 30 days of the date of this order. We note that the Commission limits the application of the time value formula to an amount that permits the public utility to recover its variable costs.⁴³ UPPCO is also directed to file a refund report with the Commission within 15 days of the date refunds are made.

The Commission orders:

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

(B) UPPCO’s proposed market-based rate tariff is accepted for filing, as modified, effective on the date Midwest ISO begins operation of its Energy Market, as discussed in the body of this order.

(C) UPPCO is directed to make a compliance filing within 30 days of the date of issuance of this order revising the ancillary services section of its market-based rate tariff to remove sales in the Midwest ISO market, as discussed in the body of this order.

(D) WPS’s and UPPCO’s revised tariff sheets incorporating the market behavior rules are hereby accepted for filing, effective December 17, 2003.

(E) WPS and UPPCO are hereby directed to file an updated market analysis within three years of the date of this order and every three years thereafter.

(F) WPS and UPPCO are hereby directed to revise their market-based rate tariffs within 30 days of the date of issuance of this order to include the change in status reporting requirement adopted in Order No. 652.

⁴² *El Paso*, 105 FERC ¶ 61,131 at P 21 (footnote omitted) (*citing Carolina Power*, 87 FERC at 61,356).

⁴³ *See Carolina Power*, 87 FERC at 61,357.

(G) WPS Canada Generation, Inc. is directed to revise the affiliate sales prohibition language in its market-based rate tariff within 30 days of the date of issuance of this order, as discussed in the body of this order.

(H) UPPCO's Rate Schedule No. 53 is hereby accepted for filing, effective December 28, 2004, and cancelled on the same date, as discussed in the body of this order.

(I) UPPCO is hereby ordered to make refunds regarding sales made pursuant to Rate Schedule No. 53, with interest, within 30 days of the date of issuance of this order, as discussed in the body of this order, and to file a refund report with the Commission within 15 days of the date refunds are made.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.