

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Tucson Electric Power Company

Docket Nos. ER98-1150-002
ER98-1150-003
EL05-87-000

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

(Issued April 14, 2005)

1. On February 7, 2005, Tucson Electric Power Company (Tucson) submitted for filing an updated market power analysis in compliance with the Commission's order issued on May 13, 2004.¹ The May 13 Order addressed the procedures for implementing the generation market power analysis announced on April 14, 2004 and clarified on July 8, 2004.²
2. The February 7, 2005 filing indicates that Tucson passes the pivotal supplier screen but fails the wholesale market share screen for each of the four seasons in Tucson's control area.³
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

¹ *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004) (May 13 Order). The Commission has previously accepted Tucson's revised market-based rate tariff incorporating the Commission's market behavior rules. *Tucson Electric Power Co.*, unpublished letter order dated February 9, 2004, in Docket No. ER04-360-000.

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

³ Tucson's analysis shows market shares as high as 39.4 percent.

instituting a proceeding under section 206 of the Federal Power Act (FPA)⁴ and establishes a rebuttable presumption of market power in the section 206 proceeding. Accordingly, as discussed below, the Commission institutes a proceeding pursuant to section 206 of the FPA to determine whether Tucson 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 Tucson control area because the filing indicates that this is the geographic market for which Tucson fails the wholesale market share screen.

4. In addition, Tucson states that it passes the pivotal supplier and wholesale market share screens in each of the directly interconnected first-tier control areas examined. However, as discussed below, the Commission is unable to conclude that Tucson satisfies the Commission's generation market power standard for market-based rate authority in the first-tier control areas of Tucson. Accordingly, in this order, the Commission directs Tucson 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.

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 October 31, 2003, Tucson filed an updated market power analysis utilizing a Supply Margin Assessment.

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 of the initial screens by submitting a Delivered Price Test. Alternatively, an applicant may accept the presumption of market power or forego the generation market power analysis altogether and go directly to mitigation.⁵ The May 13 Order directed Tucson to

⁴ 16 U.S.C. § 824e (2000).

⁵ 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 the applicant does or does not possess market power. *See* April 14 Order, 107 FERC ¶ 61,018 at P 37.

file within 270 days of the issuance of that order revised generation market power analyses based on the two indicative screens.⁶

8. On February 7, 2005, Tucson filed an updated market power analysis, amending its earlier analysis in compliance with the Commission's May 13 Order.

Description of Tucson's February Filing

9. In its filing, Tucson submitted the results of the two generation market power screens. As required in the May 13 Order, Tucson also provided updated information on the other three parts of the Commission's four-part analysis. Tucson states it continues to be unable to exercise transmission market power, erect barriers to entry, or engage in affiliate abuse or reciprocal dealing.

10. Tucson states that it passes the pivotal supplier screen in the Tucson control area and in each directly interconnected control area. Tucson further states that it passes the wholesale market share screen in each directly interconnected control area but fails the wholesale market share screen in the Tucson control area. Tucson argues that, despite the screen failures, Tucson does not have market power because the screen does not provide full credit for its native load obligations.

Notice of Filing and Responsive Pleadings

11. Notice of the October 31, 2003, filing of Tucson's updated market power analysis was published in the *Federal Register*, 68 Fed. Reg. 64,880 (2003), with interventions or protests due on or before November 21, 2003. None was filed.

12. Notice of the February 7, 2005, filing of Tucson's revised updated market power analysis was published in the *Federal Register*, 70 Fed. Reg. 8,357 (2005), with interventions or protests due on or before February 28, 2005. On February 28, 2005, El Paso Electric Company (El Paso) filed a motion to intervene.

Procedural Matters

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the timely, unopposed motion to intervene of El Paso serves to make it a party to this proceeding.

⁶ See May 13 Order at Ordering Paragraph (A).

Discussion

Market-Based Rate Authorization

14. 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.⁷

Generation Market Power

15. Tucson states that Tucson's share of uncommitted capacity in the Tucson control area exceeds 20 percent for each of the four seasons during the relevant time period. Consequently, Tucson fails the wholesale market share screen in the Tucson control area.

16. As outlined in the April 14 Order, Tucson'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 Tucson control area, to determine whether Tucson 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.

17. The Commission's decision to institute the instant section 206 proceeding does not constitute a definitive finding by the Commission that Tucson has market power in the Tucson control area. 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, Tucson 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.⁸ In addition, as the Commission stated in the April 14 Order, the applicant or intervenors

⁷ 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).

⁸ See April 14 Order, 107 FERC ¶ 61,018 at P 201, 207-209.

may present evidence such as historical sales data to support whether Tucson does or does not possess market power.⁹

18. 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,¹⁰ 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. EL05-87-000 is published in the *Federal Register*. In addition, section 206 requires that, if no final 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 August 31, 2005.

19. The filing indicates that Tucson passes the pivotal supplier screen and the wholesale market share screen in each of the directly interconnected first-tier control areas examined. However, the Commission is unable to find here that Tucson satisfies the Commission's generation market power standard for market-based rate authority in the first-tier control areas of Tucson without a compliance filing, as discussed below.

20. Regarding import capability for its first-tier control areas, Tucson states that it utilized the results of simultaneous transmission import capability studies submitted to the Commission by Public Service Company of New Mexico (PNM), Arizona Public Service (APS), and Nevada Power Company.¹¹ However, because Tucson did not file a simultaneous transmission import capability study and simply stated an import capability number for each control area, the Commission requires further information in order to

⁹ *Id.* at P 37.

¹⁰ *See, e.g., Canal Electric Company*, 46 FERC ¶ 61,153, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

¹¹ Tucson states that it relied upon the study submitted by PNM, in Docket No. ER96-1551-007 on August 11, 2004, for the screens concerning the El Paso and PNM control areas; by APS, in Docket No. ER00-2268-005 on August 11, 2004, for the APS and Salt River Project control areas; and by Nevada Power Company, in Docket No. ER01-1527-004 on October 28, 2004, for the Western Area Power Administration - Lower Colorado control area.

make a determination regarding Tucson's first-tier control areas.¹² While Tucson states that it used studies submitted by other applicants, the studies on which it relies have not been accepted by the Commission. Therefore, Tucson is directed to file a simultaneous transmission import capability study, including data and work papers supporting the study, consistent with the requirements set forth in Appendix E of the April 14 Order, for its first-tier control areas, within 30 days of the date of this order. To the extent that Tucson finds that the simultaneous transmission import capability amounts are different than that filed here, Tucson is further directed to revise its generation market power screens to reflect the correct import capability.

21. In addition, Tucson did not submit any data or work papers to support its indicative screens. The Commission stated that applicants are required to submit the data used to conduct the screens, including appropriate support and work papers.¹³ Therefore, Tucson is directed to file data and work papers as required in Appendix G of the April 14 Order, for its first-tier control areas, within 30 days of the date of this order.

22. The Commission finds that Tucson conditionally satisfies the generation market power standard with respect to Tucson's first-tier control areas, pending Commission acceptance of the compliance filings directed above.

Transmission Market Power

23. 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. Tucson states that it has an OATT on file with the Commission.¹⁴ Tucson states that its transmission-owning affiliate, UNS Electric, Inc., also has an OATT on file with the Commission.¹⁵ Further, no intervenor has raised transmission market power concerns. The Commission finds that Tucson

¹² Tucson did not include a simultaneous transmission import capability study pursuant to the methodology discussed in the April 14 Order for the Tucson control area. Although Tucson's statement of import capability is deficient for its home control area, Tucson is only directed to revise its analysis for those markets where Tucson claims it passes the two indicative screens.

¹³ See April 14 Order at Appendix G.

¹⁴ *Tucson Electric Power Co.*, 82 FERC ¶ 61,128 (1998).

¹⁵ *UNS Electric, Inc.*, unpublished letter order dated August 26, 2003, in Docket No. ER03-1064-000. Tucson states that UNS Electric, Inc., provides retail electric service to approximately 85,000 customers in Mohave County in northwest Arizona and in Santa Cruz County in southeast Arizona.

satisfies the Commission's transmission market power standard for the grant of market-based rate authority.

Other Barriers to Entry

24. Tucson states that it does not have the ability to erect barriers to entry. Tucson states that neither it nor its affiliates are engaged in the manufacture of electric equipment, except for solar panels and fiberglass power poles, nor does it or its affiliates have the ability to hinder the siting of generating plants or block others from siting new plants. While Tucson is affiliated with UNS Gas, Inc., a local distribution company in northern and southeast Arizona, it notes that UNS Gas, Inc. is regulated by the Arizona Corporation Commission. No intervenor has raised concerns regarding barriers to entry. Based on Tucson's representations, the Commission is satisfied that Tucson cannot erect barriers to entry. However, should Tucson or any of its affiliates deny, delay or require unreasonable terms, conditions or rates for natural gas service to a potential electric competitor in bulk power markets, that electric competitor may file a complaint with the Commission that could result in the suspension of Tucson's authority to sell power at market-based rates.¹⁶

Affiliate Abuse

25. Tucson states that it is not affiliated with any power marketer or any other entity with market-based rate authority. Furthermore, we note that Tucson's market-based rate tariff contains a prohibition on transactions with affiliates. In addition, no intervenor has raised concerns regarding affiliate abuse. Based on these representations, the Commission finds that Tucson satisfies the Commission's concerns with regard to affiliate abuse.

Reporting Requirements

26. 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

¹⁶ See, e.g., *Louisville Gas & Electric Co.*, 62 FERC ¶ 61,016 (1993).

greater) market-based power sales during the most recent calendar quarter.¹⁷ Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.¹⁸

27. Tucson 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.¹⁹ 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, Tucson is directed, within 30 days of the date of issuance of this order, to revise its market-based rate tariff to incorporate the following provision:

Tucson 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.

¹⁷ *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>.

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

¹⁹ *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) Tucson is directed, within 30 days of the date of issuance of this order, to file data and work papers to support its generation market power analysis for its first-tier control areas, as discussed in the body of this order.

(B) Tucson is directed, within 30 days of the date of issuance of this order, to file a simultaneous transmission import capability study for its first-tier control areas, revising its generation market power analysis as necessary and appropriate, as discussed in the body of this order.

(C) Tucson'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 filings directed in Ordering Paragraphs (A) and (B), as discussed in the body of this order.

(D) Tucson is directed, within 30 days of the date of issuance of this order, to revise its market-based rate tariff to incorporate the change in status reporting requirement adopted in Order No. 652.

(E) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and by the FPA, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R., Chapter I), the Commission hereby institutes a proceeding in Docket No. EL05-87-000 concerning the justness and reasonableness of Tucson's market-based rates in the Tucson control area, as discussed in the body of this order.

(F) 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. EL05-87-000.

(G) 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 (F) above.

(H) For the Tucson control area, Tucson 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, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.