

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Cincinnati Gas & Electric Co.	Docket No. ER05-1366-000
PSI Energy, Inc.	Docket No. ER05-1367-000
Union Light Heat & Power Company	Docket No. ER05-1368-000
Cinergy Marketing & Trading, LP	Docket Nos. ER05-1369-000 ER05-1369-001
Brownsville Power I. L.L.C.	Docket No. ER05-1370-000
Caledonia Power I. L.L.C.	Docket No. ER05-1371-000
CinCap IV, LLC	Docket No. ER05-1372-000
CinCap V, LLC	Docket No. ER05-1373-000
Cinergy Capital & Trading, Inc.	Docket No. ER05-1374-000
Cinergy Power Investments, Inc.	Docket No. ER05-1375-000
St. Paul Cogeneration, LLC	Docket No. ER05-1376-000

ORDER ON MARKET-BASED RATE APPLICATION AND MARKET-BASED  
RATE TARIFF REVISIONS

(Issued November 22, 2005)

1. In this order, the Commission accepts the proposed market-based rate tariffs, and accompanying codes of conduct filed by PSI Energy, Inc. (PSI), Union Light Heat & Power Company (Union), and Cinergy Marketing & Trading, LP (Cinergy Marketing) (collectively, Applicants), effective January 1, 2006, as requested.<sup>1</sup> The Commission

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<sup>1</sup> PSI, FERC Electric Tariff, Original Volume No. 1, Original Sheet Nos. 1-6; Union, FERC Electric Tariff, Original Volume No. 1, Original Sheet Nos. 1-6; Cinergy Marketing, FERC Electric Tariff, Original Volume No. 1, Original Sheet Nos. 1-6.

also accepts tariff revisions filed by Cincinnati Gas & Electric Co. (Cincinnati), Brownsville Power I, L.L.C. (Brownsville), Caledonia Power I, L.L.C. (Caledonia), CinCap IV, LLC (CinCap IV), CinCap V, LLC (CinCap V), Cinergy Capital & Trading, Inc. (Cinergy Capital), Cinergy Power Investments, Inc. (Cinergy Power), and St. Paul Cogeneration, LLC (St. Paul) (collectively, Revising Companies, together with Applicants, Cinergy Companies), effective January 1, 2006, as requested.<sup>2</sup>

2. As discussed below, the Commission concludes that, with the tariff modification directed herein, PSI, Union, and Cinergy Marketing satisfy the Commission's standards for market-based rate authority.

### **Background**

3. On August 19, 2005, as amended October 24, 2005<sup>3</sup>, Applicants' filed an application for market-based rate authority, with accompanying tariffs and market-based rate codes of conduct. Applicants' tariffs provide for the sale of capacity and energy at market-based rates and the reassignment of transmission capacity. Applicants' tariffs include the Commission's market behavior rules<sup>4</sup> and change in status reporting

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<sup>2</sup> Cincinnati, FERC Electric Tariff, Original Volume No. 1, First Revised Sheet Nos. 1-3 (supersedes Original Sheet Nos. 1-3), and Original Sheet Nos. 11-12; Brownsville, FERC Electric Tariff, First Revised Volume No. 1, Second Revised Sheet No. 1 (supersedes Substitute First Revised Sheet No. 1), and First Revised Sheet No. 3 (supersedes Original Sheet No. 3); Caledonia, FERC Electric Tariff, First Revised Volume No. 1, Second Revised Sheet No. 1 (supersedes Substitute First Revised Sheet No. 1), and First Revised Sheet No. 3 (supersedes Original Sheet No. 3); CinCap IV, Rate Schedule FERC No. 1, First Revised Volume No. 1, Second Revised Sheet Nos. 1-2 (supersedes First Revised Sheet Nos. 1-2), and Original Sheet Nos. 2A, 2B, and 2C; CinCap V, First Revised Rate Schedule FERC No. 1, Second Revised Sheet No. 1 (supersedes First Revised Sheet No. 1), and First Revised Sheet Nos. 1A, and 2-4 (supersedes Original Sheet Nos. 1A, and 2-4); Cinergy Capital, First Revised Rate Schedule FERC No. 1, Second Revised Sheet No. 2 (supersedes Substitute First Revised Sheet No. 2), and First Revised Sheet No. 4 (supersedes First Substitute Sheet No. 4); Cinergy Power, FERC Electric Tariff, Original Volume No. 1, Second Revised Sheet Nos. 2-4 (supersedes First Revised Sheet Nos. 2-4); St. Paul, FERC Electric Tariff, Original Volume No. 1, Second Revised Sheet Nos. 1-2 (supersedes First Revised Sheet Nos. 1-2), and First Revised Sheet No. 3 (supersedes Original Sheet No. 3).

<sup>3</sup> Applicants submitted supplemental information consisting of the indicative screens for the PJM Interconnection, LLC and Ohio Valley Electric Corporation areas.

<sup>4</sup> *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)

requirement.<sup>5</sup> PSI's and Union's proposed tariffs provide for power sales to Revising Companies at rates no lower than the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) Cinergy Hub locational marginal price (LMP). Cinergy Marketing's proposed tariff provides for sales to PSI and Union at rates no higher than the Midwest ISO Cinergy Hub LMP.

4. On August 19, 2005, Revising Companies filed revisions to their market-based rate tariffs to be consistent with the Commission's *pro forma* market-based rate code of conduct, to adopt language that provides for power sales to PSI and Union at rates no higher than the Midwest ISO Cinergy Hub LMP, and to make the market-based rate tariffs of Cinergy Companies more uniform.

5. Cinergy Services, Inc. is a public utility holding company created as part of the October 1994 merger of Cincinnati and PSI. Cincinnati is an Ohio corporation and a wholly owned direct subsidiary of Cinergy Services, Inc. Cincinnati is an electric and gas public utility company that provides services in the southwestern portion of Ohio, and through its affiliate Union, in nearby areas of Kentucky. PSI is an Indiana corporation and a wholly owned direct public utility subsidiary of Cinergy Services, Inc. PSI provides service in north central, central, and southern Indiana. Currently, PSI is authorized to make market-based rate sales under two joint market-based rate tariffs it holds with Cincinnati. Cinergy Companies state that PSI's and Cincinnati's wholesale merchant functions will be separated, and no future sales will be entered into under the joint market-based rate tariffs. Additionally, Cinergy Marketing is an existing gas marketing subsidiary of Cinergy Corp located in Houston, Texas. Cinergy Marketing intends to expand its services and become a power marketer.

6. Cinergy Services, Inc. has approximately 12,000 MW of capacity located in Midwest ISO, 900 MW of merchant peaking capacity in the Tennessee Valley Authority (TVA) control area, and interests in generation capacity in the Ohio Valley Electric Corporation (Ohio Valley) control area totaling 215 MW and the market administered by PJM Interconnection, LLC (PJM) totaling approximately 1500 MW.

### **Notice and Responsive Pleadings**

7. Notice of the Cinergy Companies' August 19, 2005 filing was published in the *Federal Register*, 70 Fed. Reg. 52,093 (2005), with protests and interventions due on or before September 9, 2005. None was filed.

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<sup>5</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).

8. Notice of the Cinergy Companies' October 24, 2005 filing was published in the *Federal Register*, 70 Fed. Reg. 67,157 (2005), with protests and interventions due on or before November 7, 2005. None was filed.

## **Discussion**

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

9. 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>

10. As discussed below, the Commission concludes that, with the tariff modification directed herein, Applicants satisfy the Commission's standards for market-based rate authority.

### **Generation Market Power**

11. In its order issued in *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004), the Commission adopted two indicative screens for assessing generation market power. Also, section 35.27(a) of the Commission's regulations provides that applicants shall not be required to demonstrate any lack of market power in generation with respect to sales from capacity constructed after July 9, 1996.<sup>7</sup> If an applicant sites generation in an area where it or its affiliates own or control other generation assets, the applicant must study whether its new capacity, when added to existing capacity, raises generation market power concerns.<sup>8</sup>

12. Applicants state that their affiliates own generation in the TVA control area. Applicants state that construction of the facilities in the TVA control area commenced after July 9, 1996. Applicants further state that they do not own any other generation in the TVA control area. No intervenor has raised generation market power concerns.

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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> 18 C.F.R. § 35.27(a) (2005). The Commission intends to address as part of the generic rulemaking proceeding in Docket No. RM04-7-000 whether to retain or modify section 35.27(a) of its regulations.

<sup>8</sup> April 14 Order, 107 FERC ¶ 61,018 at P 69.

13. Applicants have prepared both the pivotal supplier and the wholesale market share screens for the Midwest ISO, PJM, and the Ohio Valley control area. Applicants state that they pass the pivotal supplier screen and the wholesale market share screen in each of those markets. The Commission has reviewed the Applicants' generation market power analysis and has determined that the Applicants pass the wholesale market share screen and the pivotal supplier screen in those markets.

14. Accordingly, based on the Applicants' representation, the Commission finds that the Applicants satisfy the Commission's generation market power standard for the grant of market-based rate authority.

### **Transmission Market Power**

15. The Applicants state that their affiliated transmission assets, all located in Midwest ISO, are under the functional control of Midwest ISO, and service over the transmission assets are subject to the terms and conditions of Midwest ISO's Open Access Transmission Tariff.<sup>9</sup> Further, no intervenor has raised transmission market power concerns. Based on these representations, the Commission finds that the Applicants satisfy the Commission's transmission market power standard for the grant of market-based rate authority.

### **Other Barriers to Entry**

16. Applicants state that they exercise no control over sites for generating capacity. Applicants further state that Cinergy Services, Inc. owns local distribution companies. Applicants state that the ownership of these local distribution companies does not represent a degree of control or access to types of information that would give rise to barriers to entry concerns. Applicants additionally state that affiliates own and operate an interstate natural gas pipeline, which they state does not serve any competing gas-fired generation either directly or indirectly. Further, no intervenor has raised concerns regarding barriers to entry. Based on the Applicants' representation, the Commission is satisfied that the Applicants cannot erect barriers to entry.

17. However, should the Applicants or any of their affiliates deny, delay, or require unreasonable terms, conditions, or rates for natural gas service to a potential electric competitor in bulk power markets, then that electric competitor may file a complaint with the Commission that could result in the suspension of the Applicants' authority to sell power at market-based rates.<sup>10</sup> In *Enron Power Marketing, Inc.*, 65 FERC ¶ 61,305 (1993), the Commission determined that a power marketer may be affiliated with an

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<sup>9</sup> See *Midwest Independent System Operator, Inc.*, 84 FERC ¶ 61,231 (1998).

<sup>10</sup> See, e.g., *Louisville Gas & Electric Co.*, 62 FERC ¶ 61,016 (1993).

interstate natural gas pipeline because, under the Commission's requirements, such pipelines must offer open access services on a non-discriminatory basis. Also, in *Vantus Energy Corporation*, 73 FERC ¶ 61,099 (1995), the Commission further explained that affiliation with an interstate natural gas pipeline does not raise market power concerns because the pipeline is subject to the Commission's natural gas pipeline open access requirements.

### **Affiliate Abuse**

18. Applicants state that each of their market-based rate tariffs includes a code of conduct that meets the Commission requirements and, therefore, no issues are raised with regard to affiliate abuse or reciprocal dealing. No intervenor has raised affiliate abuse concerns. Applicants however do allow for sales to affiliates based on the Midwest ISO Cinergy Hub LMP. As further discussed below we are satisfied that customers are protected. Based on Applicants' representations, Applicants satisfy the Commission's concerns with regard to affiliate abuse.

19. Commission policy requires merging utilities to treat one another as affiliates pending the consummation of a merger.<sup>11</sup> In light of the announced merger between Duke Energy Corporation and Cinergy Corporation,<sup>12</sup> Cinergy Companies has committed to treating Duke Power and its affiliates as affiliates for purposes of the code of conduct.<sup>13</sup> Further, Cinergy Companies has committed that it will not make market-based rate sales to Duke Power and its affiliates without first receiving Commission approval under section 205 of the Federal Power Act. We note, however, that the market-based rate tariffs of Duke Power and its affiliates are not applicable to sales in the Duke Power control area.<sup>14</sup> The Commission imposes this same restriction on the Cinergy Companies' sales in the Duke Power control area.

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<sup>11</sup> *Consolidated Edison Energy, Inc.*, 83 FERC ¶ 61,236 at 62,034 (1998), *Central and South West Services, Inc.*, 82 FERC ¶ 61,101 at 61,103 (1998); *Delmarva Power & Light Company*, 76 FERC ¶ 61,331 at 62,582 (1996) ("[T]he self-interest of two merger partners converge sufficiently, even before they complete the merger, to compromise the market discipline inherent in arm's-length bargaining that serves as the primary protection against reciprocal dealing.")

<sup>12</sup> On July 12, 2005, Duke Energy Corporation and Cinergy Corporation filed in Docket No. EC05-103-000 an application for authorization of disposition of jurisdictional assets under section 203 of the Federal Power Act, 16 U.S.C. § 824b (2000). This proceeding is currently pending before the Commission.

<sup>13</sup> See submittal by Cinergy Companies on May 20, 2005 in Docket Nos. ER00-826-003, *et al.*

<sup>14</sup> *Duke Power*, 111 FERC ¶ 61,506 (2005).

### **Reassignment of Transmission Capacity**

20. The market-based rate tariffs proposed by Applicants also include a provision governing reassignment of transmission capacity. The Commission finds this provision to be consistent with the Commission's requirements.<sup>15</sup> Accordingly, the Commission will grant the Applicants request for the reassignment of transmission capacity.

### **Market Behavior Rules**

21. The proposed market-based rate tariffs are not consistent with the market behavior rules as established by the Commission.<sup>16</sup> Specifically, section 2(b) of Applicants market behavior rules should state, "(...or scheduling non-firm service for products sold as firm...)." Accordingly, Applicants are directed, within 30 days of the date of issuance of this order, to revise their market-based rate tariffs to include such language, without variation, consistent with the Commission's market behavior rules.

### **Affiliate Power Sales**

22. PSI's and Union's proposed tariffs provide for sales to Revising Companies at rates no lower than the Midwest ISO Cinergy Hub LMP. Cinergy Marketing's proposed tariff provides for sales to PSI and Union at rates no higher than the Midwest ISO Cinergy Hub LMP. Revising Companies propose to adopt tariff language that provides for sales to PSI and Union at rates no higher than the Midwest ISO Cinergy Hub LMP. In addition, Revising Companies propose to revise their market-based rate tariffs to be consistent with the Commission's *pro forma* market-based rate code of conduct, and to make the tariffs of Cinergy Companies more uniform.

23. The Commission has allowed sales between affiliates at market-based rates if it is satisfied that there are no affiliate abuse concerns. The Commission has stated that affiliate abuse takes place when the traditional public utility and its affiliate transact in ways that result in a transfer of benefits from the traditional public utility (and its captive customers) to the affiliate (and its shareholders).<sup>17</sup> Where a traditional public utility makes sales to an affiliated power marketer, the Commission is concerned that such sales not be made at a rate that is too low. Further, where a power marketer makes sales to its affiliated traditional public utility, the concern is that such sales not be made at a rate that

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<sup>15</sup> See, e.g., *Southwestern Public Service Co.*, 80 FERC ¶ 61,245 (1997).

<sup>16</sup> *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 at P 73 (2004).

<sup>17</sup> *Virginia Electric and Power Co.*, 108 FERC ¶ 61,242 at P39 (2004).

is too high. As the Commission stated in *Edgar*, “where affiliates are entering agreements for which approval of market-based rates is sought, it is essential that ratepayers be protected and that transactions be above suspicion in order to assure that the market is not distorted.”<sup>18</sup>

24. The Commission has previously approved provisions for other Cinergy affiliates allowing sales to affiliates based on the Midwest ISO Cinergy Hub LMP.<sup>19</sup> In *Brownsville Power I, L.L.C.*, 111 FERC ¶ 61,398, the Commission reiterated that a Day 2 Midwest ISO price<sup>20</sup> used as an index satisfies the conditions in *Edgar*. The Commission stated that tying the price of an affiliate transaction to an established, relevant market price adequately mitigates any affiliate abuse concerns.<sup>21</sup> Therefore, the Commission accepts the tariff revisions filed by the Revising Companies.

### **Other Waivers, Authorizations, and Reporting Requirements**

25. Cinergy Companies request waiver of section 35.3(a) of the Commission’s regulations to allow its tariffs to be filed with the Commission more than 120 days prior to its requested January 1, 2006 effective date. Cinergy Companies state that it is important to receive an order in advance of the requested January 1, 2006 effective date to provide time to reorganize its operations to implement the separation of Cincinnati and PSI associated with the termination of the Joint Generation Dispatch Agreement between them. The Commission finds good cause to grant waiver of section 35.3(a) of its regulations to allow Cinergy Companies’ tariffs to be filed more than 120 days in advance of the proposed effective date.

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<sup>18</sup> See *Boston Edison Co. Re: Edgar Electric Energy Co.*, 55 FERC ¶ 61,382 (1991)(*Edgar*), where we held that applicants can show that there is no affiliate preference in three ways: (1) evidence of direct head-to-head competition between the affiliate and competing unaffiliated suppliers in a formal solicitation or informal negotiation process; (2) evidence of the prices non-affiliated buyers were willing to pay for similar services from the affiliate; or (3) benchmark evidence that shows the prices, terms, and conditions of sales made by non-affiliated sellers. At least one of these conditions must be met to satisfy *Edgar*.

<sup>19</sup> *Union Light, Heat, and Power Co.*, 110 FERC ¶ 61,212 at P16 (2005). (Use of Midwest ISO Day 2 market prices meets the *Edgar* test and mitigates concerns regarding transactions between affiliates).

<sup>20</sup> Day 2 refers to the launch of the Midwest ISO energy markets on April 1, 2005.

<sup>21</sup> *Brownsville Power I, L.L.C.*, 111 FERC ¶ 61,398 at P10. See, also, *Portland General Elec. Co.*, 96 FERC ¶ 61,093 at 61,378 (2001); *FirstEnergy Trading Servs., Inc.*, 88 FERC ¶ 61,067 at 61,156 (1999).

26. In Order No. 664, the Commission stated that it intends to no longer 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>22</sup> With respect to an individual who 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>23</sup> Thus, consistent with Order No. 664, any of the Cinergy Companies who previously sought and were granted waiver of the full requirements of Part 45 will be required henceforth to comply with the full requirements of Part 45.

27. 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.<sup>24</sup> Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.<sup>25</sup>

28. The Applicants 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>26</sup>

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<sup>22</sup> *Commission Authorization to Hold Interlocking Positions*, Order No. 664, 70 Fed. Reg. 17,219 (Apr. 5, 2005), 112 FERC ¶ 61,298, at P 34 (2005) (discussing Part 45, 18 C.F.R. Part 45 (2005)).

<sup>23</sup> *Id.* P 36.

<sup>24</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>25</sup> The exact dates for these reports are prescribed in 18 C.F.R. § 35.10b (2005). 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.

<sup>26</sup> *See supra* note 5.

29. The Applicants are directed to file an updated market power analysis within three years of the date of this order. The Commission reserves the right to require such an analysis at any intervening time.

The Commission orders:

(A) Applicants market-based rate tariffs are hereby accepted for filing, as discussed in the body of this order.

(B) Revising Companies tariff revisions are hereby accepted for filing, as discussed in the body of this order.

(C) Applicants are directed to revise the market behavior rules in their market-based rate tariffs within 30 days of the date of issuance of this order, as discussed in the body of this order.

(D) Applicants' next updated market power analysis is due within three years of the date of this order.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.