

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Kansas City Power and Light Company and
Great Plains Power, Inc.

Docket Nos. ER99-1005-001
ER99-1005-002
ER99-1005-003
ER02-725-003
ER02-725-004
EL05-3-000

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

(Issued December 17, 2004)

1. On August 11, 2004, as amended on November 19, 2004, Kansas City Power and Light Company, on behalf of itself and its affiliate, Great Plains Power, Inc. (GPP), (collectively, KCPL), submitted for filing an updated market power analysis in compliance with the Commission's order issued on May 13, 2004¹. 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 filing, as amended, indicates that KCPL passes the pivotal supplier screen in all markets considered but fails the wholesale market share screen for each of the four seasons in KCPL's control area as well as for two seasons in the control area of The

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

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

Board of Public Utilities of Kansas City, Kansas (KACY).³ In addition, intervenors have filed protests requesting customer protection.

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)⁴ 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 KCPL 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 KCPL and KACY control areas because the filing indicates that these are the geographic markets for which KCPL fails the wholesale market share screen.

4. 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

5. On December 27, 2001, KCPL filed an updated market power analysis utilizing a Supply Margin Assessment and a hub-and-spoke analysis (December 2001 market power analysis). In addition, KCPL stated that no material changes had occurred to affect the Commission's previous finding that KCPL satisfies the standards for transmission market power, barriers to entry, and affiliate abuse or reciprocal dealing.

6. 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

³ KCPL's analysis shows market shares as high as 53 percent and 33 percent, respectively.

⁴ 16 U.S.C. § 824e (2000).

analysis altogether and go directly to mitigation.⁵ The May 13 Order directed KCPL to file within ninety days of the issuance of that order, revised generation market power analyses pursuant to these two indicative screens.⁶

7. On August 11, 2004, KCPL filed an updated market power analysis in compliance with the Commission's May 13 Order. On October 29, 2004, the Director, Division of Tariffs and Market Development – South, acting pursuant to delegated authority, issued a data request seeking additional information relating to KCPL's submittal. On November 19, 2004, KCPL filed its response to the data request.

Description of KCPL's Filings

8. In its filing, KCPL submitted the results of the two new generation market power screens. KCPL also filed revisions to its market-based rate tariff incorporating the market behavior rules required by the Commission.⁷ As required in the May 13 Order, KCPL also provided updated information on the other three parts of the Commission's four-part analysis, concluding that KCPL continues to be unable to exercise transmission market power, erect barriers to entry, or engage in affiliate abuse or reciprocal dealing.

9. KCPL states that it passes the pivotal supplier screen in KCPL's control area and in each directly interconnected control area. KCPL further states that it passes the wholesale market share screen in each directly interconnected control area but fails the wholesale market share screen in both the KCPL and KACY control areas.

10. KCPL argues that the screen failures are not evidence of any actual market power and that an investigation using different tools will show that KCPL lacks market power. KCPL states an intention to file a Delivered Price Test but has not yet done so.

11. KCPL included in its filing a simultaneous transmission import capability study performed by Southwest Power Pool using the methodology laid out in the April 14

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. April 14 Order, 107 FERC ¶ 61,018 at P 37.

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

⁷ *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218, *order on reh'g*, 107 FERC ¶ 61,175 (2004) (Market Behavior Rules Order).

Order. KCPL subsequently filed documentation and work papers supporting the study. The Commission finds that KCPL has complied with the directives in the April 14 Order, as clarified by the July 8 Order, regarding performing a simultaneous transmission import capability study and relies on the results of that study herein.

12. In its response to the data request, KCPL provided amended screens for its first-tier markets using nameplate capacity and load data that does not exclude weekends and holidays. KCPL also submitted data and work papers supporting the simultaneous transmission import capability studies.⁸ KCPL states that these amendments did not materially change the results of the screens.

Notice of Filing and Responsive Pleadings

13. Notice of the December 17, 2001, filing of KCPL's updated market power analysis was published in the *Federal Register*, 67 Fed. Reg. 729 (2002), with interventions or protests due on or before January 17, 2002.

14. On January 17, 2002, Missouri Joint Municipal Electric Utility Commission (Missouri Municipal Commission) filed a motion to intervene and protest of KCPL's December 2001 updated market analysis. Missouri Municipal Commission argued that since KCPL failed the SMA, it should be denied the authority to charge market-based rates and made subject to mitigation measures, in order to protect Missouri Municipal Commission's members – the cities of Higginsville, Independence and Marshall.

15. On January 31, 2002, KCPL submitted an answer to Missouri Municipal Commission's protest, arguing, among other things, that the relief requested by Missouri Municipal Commission was not related to the market power issues in the proceeding. On February 14, 2002, Missouri Municipal Commission filed a reply to KCPL's answer to its January 17 protest, urging the Commission to reject KCPL's answer and preserve flexibility when establishing mitigation.

16. Notice of the August 11, 2004, filing was published in the *Federal Register*, 69 Fed. Reg. 52,005 (2004), with interventions or protests due on or before September 1, 2004. None was filed.

17. Notice of the November 19, 2004, data request response was published in the *Federal Register*, 69 Fed. Reg. 69,596 (2004), with interventions or protests due on or before December 7, 2004. None was filed.

⁸ KCPL states that it also corrected minor errors to its August 11 filing.

Procedural Matters

18. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. 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 and to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers filed in this proceeding and will, therefore, reject them.

Discussion

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.⁹

Generation Market Power

20. KCPL states that KCPL's share of uncommitted capacity in the KCPL control area exceeds 20 percent for each of the four seasons during the relevant time period, and exceeds 20 percent for fall and winter in the KACY control area. Consequently, KCPL fails the wholesale market share screen in those control areas.

21. As outlined in the April 14 Order, KCPL's failure of the wholesale market share screen provides the basis for the Commission to institute the instant section 206 proceeding to determine whether KCPL 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.

22. The Commission's decision to institute the instant section 206 proceeding does not constitute a definitive finding by the Commission that KCPL has market power. As

⁹ See, e.g., *Progress Power Marketing, Inc.*, 76 FERC ¶ 61,155 at 61,921-22 (1996); *Northwest Power Marketing Co., L.L.C.*, 75 FERC ¶ 61,281 at 61,899-900 (1996); *accord Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223 at 62,062-63 (1994).

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, KCPL 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.¹⁰ 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 KCPL does or does not possess market power.¹¹

23. 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,¹² 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. EL05-3-000 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 April 29, 2005. Our decision to establish a refund effective date does not constitute a determination that refunds will be ordered.

24. The Commission intends to examine the issue of market power in generation in the control areas of KCPL and KACY in the instant 206 proceeding discussed above. The filing indicates that other than KACY, KCPL passes the pivotal supplier screen and the wholesale market share screen in each of the directly interconnected first-tier control areas examined. The Commission finds that KCPL satisfies the Commission's

¹⁰ See 107 FERC ¶ 61,018 at P 201, 207-209.

¹¹ 107 FERC ¶ 61,018 at P 37.

¹² See, e.g., *Canal Electric Company*, 46 FERC ¶ 61,153, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

generation market power standard for the grant of market-based rate authority in the first-tier markets of KCPL excluding KACY.

Transmission Market Power

25. 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. KCPL states that it has an OATT on file with the Commission and that it is a member of the Southwest Power Pool. We note that KCPL's OATT was approved by Commission Order in Docket No. OA96-4-000. Further, no intervenor has raised transmission market power concerns. The Commission finds that KCPL satisfies the Commission's transmission market power standard for the grant of market-based rate authority.

Other Barriers to Entry

26. KCPL states that it does not exercise control over sites for generating plants that could restrict entry by competitors, nor does it otherwise possess the ability to raise barriers to entry. Further, no intervenor has raised concerns regarding barriers to entry. Based on these representations, the Commission is satisfied that KCPL cannot erect barriers to entry.

Affiliate Abuse

27. KCPL has on file Commission-approved codes of conduct as part of its market-based rate tariffs. Furthermore, KCPL's market-based rate tariffs contain restrictions on transactions with affiliates. In addition, no intervenor has raised concerns regarding affiliate abuse. Based on these representations, we find that KCPL satisfies the Commission's concerns with regard to affiliate abuse.

Market Behavior Rules

28. 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. On August 11, 2004, KCPL amended its tariff to include the market behavior rules set forth

in Appendix A to the Market Behavior Rules Order.¹³ Accordingly, KCPL has complied with this directive.

Reporting Requirements

29. 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.¹⁴ Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.¹⁵

30. With regard to reporting changes in status that would reflect a departure from the characteristics the Commission has relied upon in approving market-based pricing, in a Notice of Proposed Rulemaking in Docket No. RM04-14-000, the Commission is proposing to amend its regulations and to modify the market-based rate authority of current market-based rate sellers to establish a reporting obligation for changes in status that apply to public utilities authorized to make wholesale power sales in interstate

¹³ GPP's market behavior rules were previously accepted by the Commission. *Acadia Power Partners, LLC*, unpublished letter order dated March 29, 2004 in Docket No. ER03-1372-001, *et al.*

¹⁴ *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/Electric/eqr/eqr.htm>.

¹⁵ 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.

commerce at market-based rates.¹⁶ Accordingly, the change in status reporting obligation for KCPL is subject to the outcome of the rulemaking.

The Commission orders:

(A) KCPL's updated market power analysis for all relevant markets not subject to the section 206 proceeding is hereby accepted for filing, as discussed in the body of this order.

(B) KCPL's revised tariff sheets are accepted for filing, effective December 17, 2003, as discussed in the body of this order.

(C) 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 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. EL05-3-000 concerning the justness and reasonableness of KCPL's market-based rates, as discussed in the body of this order.

(D) 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. EL05-3-000.

(E) 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.

¹⁶ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, 69 Fed. Reg. 61,180 (Oct. 15, 2004), FERC Stats. & Regs. ¶ 32,576 (2004).

(F) KCPL 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.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.