

119 FERC ¶ 61,302
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Western Systems Power Pool

Docket No. ER91-195-000

Western Systems Power Pool Agreement

Docket No. EL07-69-000

ORDER INSTITUTING HEARING PROCEDURES REGARDING THE WESTERN
SYSTEMS POWER POOL AGREEMENT RATES

(Issued June 21, 2007)

1. The Commission is concerned that the use of the Western Systems Power Pool Agreement (WSPP Agreement) for coordination energy sales by a public utility seller that has been found to have market power, or is presumed to have market power in a particular market, may not be just and reasonable, and may be unjust, unreasonable, or unduly discriminatory or preferential. To address this concern, the Commission hereby institutes a proceeding pursuant to section 206 of the Federal Power Act (FPA)¹ to investigate whether the WSPP Agreement rate for coordination energy sales is just and reasonable for a public utility seller in a market in which such seller has been found to have market power, or is presumed to have market power.

Background

2. In a Notice of Proposed Rulemaking on market-based rate sales by public utilities (Market-Based Rates NOPR), the Commission noted that sellers that are found to have market power or that accept a presumption of market power can either accept the Commission's default cost-based rate mitigation measures or propose alternative methods of mitigation.² With regard to alternative methods of mitigation, the Commission asked in the Market-Based Rate NOPR whether it should allow as a means of mitigating market

¹ 16 U.S.C. § 824e (2000).

² *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Notice of Proposed Rulemaking, 71 Fed. Reg. 33,102 (June 7, 2006), FERC Stats. & Regs. ¶ 32,602 at P 137 (2006).

power the use of agreements that are not tied to the cost of any particular seller but rather to a group of sellers. The Commission asked whether the use of such agreements as a mitigation measure would satisfy the just and reasonable standard of the FPA.

3. In response, several commenters favored allowing alternative mitigation methods tied to the costs of a group of sellers or transparent competitive market prices in regional markets. In particular, several entities suggested that the use of the rates under the WSPP Agreement would be an appropriate alternative method of mitigating market power by a seller found to have market power (or that has accepted the presumption of market power).³ On the other hand, the American Public Power Association and Transmission Access Policy Study Group (jointly, APPA/TAPS) and the American Association of Retired Persons (AARP) opposed the use of alternative mitigation methods tied to the costs of a group of sellers on the basis that there is no assurance that the group rate would reflect the costs of the seller subject to mitigation.

Discussion

4. In the Market-Based Rates Final Rule being issued concurrently with this order, the Commission concludes that use of the WSPP Agreement for sellers found to have market power or presumed to have market power in a particular market may be unjust, unreasonable, or unduly discriminatory or preferential in such market.

5. The WSPP Agreement was initially accepted by the Commission on a non-experimental basis in 1991,⁴ providing for flexible pricing for coordination sales and transmission services. Currently, there are over 300 members of the WSPP Agreement located from coast to coast in the United States and Canada, including private, public and governmental entities, financial institutions and aggregators, and wholesale and retail customers. The WSPP Agreement as it exists today permits sellers of electric energy to charge either an uncapped market-based rate (for public utility sellers, they must have obtained separate market-based rate authorization from the Commission to do this), or an “up to” cost-based ceiling rate. For sellers without market-based rate authority, the cost-

³ See, e.g., Xcel Energy Services Inc. Comments, Docket No. RM04-7-000, at 8; Pacific Gas & Electric Co. Comments at 22; Ameren Services Co., Inc. Comments at 16-17; Westar Energy, Inc. and Kansas Gas and Electric Co. Comments at 26-27 (all filed Aug. 7, 2006).

⁴ *Western Sys. Power Pool*, 55 FERC ¶ 61,099, *order on reh'g*, 55 FERC ¶ 61,495 (1991), *aff'd in relevant part and remanded in part sub nom. Environmental Action and Consumer Federation of America v. FERC*, 996 F.2d 401 (D.C. Cir. 1992), *order on remand*, 66 FERC ¶ 61,201 (1994). Prior to 1991, the WSPP Agreement was used for three years on an experimental basis. See *Western Sys. Power Pool*, 50 FERC ¶ 61,339 (1990) (extending the initial two-year period for an additional year).

based ceiling rate under the WSPP Agreement consists of an individual seller's forecasted incremental cost plus an "up-to" demand charge based on the costs of a sub-set (eighteen sellers) of the original WSPP Agreement members, not necessarily the costs of any one seller. The "up to" demand charge is based on the average fixed costs of the generating facilities of that sub-set of WSPP Agreement members; it was designed to reflect the costs of a hypothetical average utility member in 1989. The only limitations are: (1) that the trades by Commission-regulated public utilities must be short-term, and (2) that they be priced at or below the ceilings for sellers without market-based rate authority.

6. In a number of recent orders, the Commission has accepted the use of the WSPP Agreement as a mitigation measure subject to the outcome of the Market-Based Rate rulemaking proceeding and any determinations that the Commission makes regarding mitigation in that proceeding. In those cases, the Commission explained that the WSPP Agreement contains a Commission-approved cost-based rate schedule that has been found to be just and reasonable.⁵ Further, we noted that parties to the WSPP Agreement have "the option of transacting under the WSPP Agreement and thus can make sales under the WSPP Agreement without any further authorization from the Commission."⁶

7. Though the Commission has allowed sellers to charge flexible cost-based ceiling rates that are not necessarily based on a particular seller's own costs (such as the WSPP Agreement ceiling rate), we are concerned that the evolution and use of the WSPP Agreement ceiling rate and the evolution of competitive markets have resulted in circumstances in which the WSPP rate may no longer be just and reasonable for sellers that are found to have market power or are presumed to have market power in a particular market. Accordingly, we are instituting this proceeding with respect to public utility sellers under the WSPP Agreement that do not have market-based rate authority or that lose or relinquish market-based rate authority. Such sellers either are presumed to have market power, have specifically been found by the Commission to have market power, or have accepted a presumption of market power in a market-based rate proceeding. In the case of sellers under the WSPP Agreement that use the cost-based WSPP Agreement ceiling rate and have never sought Commission market-based rate authorization, such sellers are presumed to have market power, and the WSPP Agreement rate is intended to establish a just and reasonable cost-based rate for such sellers. However, we are

⁵ *Westar Energy, Inc.*, 116 FERC ¶ 61,219 at P 33 (2006); *Empire Dist. Elec. Co.*, 116 FERC ¶ 61,150 at P 12 (2006) (both accepting the WSPP Agreement to mitigate sales of one year or less in the applicants' control areas subject to the outcome of the Market-Based Rates rulemaking proceeding in Docket No. RM04-7-000). *See also Xcel Energy Services, Inc.*, 117 FERC ¶ 61,180 at P 49 (2006).

⁶ *Id.*

concerned that the rate may no longer be just and reasonable for any jurisdictional sellers that have not met the Commission's market power test in markets in which they have market power.

8. We recognize that the ceiling rate under the WSPP Agreement has been found to be a just and reasonable cost-based rate by this Commission as well as by the U.S. Court of Appeals for the D.C. Circuit,⁷ and that it has been in use for over 15 years by sellers irrespective of whether they have market power. Nevertheless, the WSPP Agreement ceiling rate contains extensive pricing flexibility and relies in part on market forces to set the rate at or below the cap, and we believe the WSPP Agreement rate needs to be revisited in light of its widespread use and changes in electric markets since 1991. When originally approved by the Commission in 1991, there were 40 members under the WSPP Agreement; now there are over 300 members. Additionally, the WSPP Agreement is now used by entities not only in the Western Interconnection, but throughout the continental United States. Further, the demand charge component of the WSPP Agreement ceiling rate is based on the costs of only 18 of the original WSPP members in 1991 (utilizing 1989 data). Finally, the Commission has gained extensive experience since 1991 in analyzing market power of individual sellers, in both organized markets and bilateral markets. While "cost-based" ceiling rates for a particular seller may be just and reasonable without having to reflect the actual costs of that seller, in the specific context of the WSPP Agreement, the factors discussed above, and the experience we have gained with respect to analyzing market power since 1991, we conclude that it is appropriate to reexamine the use of the WSPP Agreement by public utility sellers that are not found by the Commission to satisfy its market power test.

9. For these reasons, we are instituting in Docket No. EL07-67-000 a proceeding under section 206 of the FPA to investigate whether the WSPP Agreement ceiling rate is just and reasonable for a public utility seller in markets in which such seller has been found to have market power or is presumed to have market power. We clarify that we are not investigating whether sellers that are found to have market power or are presumed to have market power may continue to use the non-rate terms and conditions of the WSPP Agreement. Nor are we investigating the transmission rates under the WSPP Agreement. Rather, our investigation is limited to: (1) the justness and reasonableness of WSPP Agreement cost-based ceiling rates for coordination energy sales by public utility sellers that are found to have, or are presumed to have, market power; and (2) if the existing WSPP Agreement rates are unjust and unreasonable for such sellers, how the Commission should establish a just and reasonable rate. If the WSPP Agreement ceiling rate for coordination energy sales ultimately is found not to be just and reasonable, we seek comment on whether the Commission should set a just and reasonable "up to" rate

⁷ *Environmental Action and Consumer Federation of American v. FERC*, 996 F.2d 401 (D.C. Cir. 1993).

based on: (1) individual sellers' costs; (2) a new agreement-wide up-to rate based on the costs of a representative group of WSPP sellers (including how such agreement-wide rate should be calculated); or (3) or a different methodology. In undertaking a hearing on these issues, we are mindful of the efficiency and coordination benefits of the WSPP pooling arrangement, its role in facilitating market liquidity and price discovery, and the ease of contracting and transaction-savings under the WSPP Agreement. Should the Commission modify the WSPP Agreement as a result of this hearing, our intent is to do so in a way that preserves efficiencies and other benefits to the extent possible and to apply any modifications on a prospective basis.⁸

10. The Commission will provide all interested persons an opportunity to address these issues through a paper hearing. Any interested person desiring to be heard in this proceeding should file a notice of intervention or motion to intervene in the captioned dockets in accordance with Rule 214 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.214) and comments or evidence by July 20, 2007. Interested persons who wish to file reply comments must do so by August 6, 2007.

11. Pursuant to section 206(b) of the FPA, the Commission must establish a refund effective date that is no earlier than the publication of notice of the Commission's intent to institute a proceeding in the *Federal Register*, and no later than five (5) months after the publication date. In order to give maximum protection to customers, and consistent with our precedent, the Commission will establish a refund effective date at the earliest date allowed. This date will be the date of publication of notice of this investigation. The Commission is also required by section 206 to indicate when it expects to issue a final order. The Commission expects to issue a final order in this section 206 investigation within 180 days of the date of this order.

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter 1), a paper hearing shall be held in the dockets referenced in the caption concerning the coordination energy ceiling rates under the WSPP Agreement, as discussed in the body of the order.

⁸ As noted above, the Commission has accepted the use of the WSPP Agreement ceiling rate as mitigation by a number of sellers, subject to the outcome of the Market-Based Rates rulemaking proceeding. These sellers may continue to use the WSPP Agreement ceiling rate as mitigation, subject to refund.

(B) The Secretary is directed to publish in the *Federal Register* a notice of the Commission's initiation of this section 206 proceeding.

(C) Any interested person desiring to be heard in this proceeding should file a notice of intervention or motion to intervene with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C., 20426, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.214) by July 20, 2007; persons who wish to file reply comments must do so by August 6, 2007.

(E) A party's presentation should separately state the facts and arguments advanced by the party and include any and all exhibits, affidavits, and/or prepared testimony upon which the party relies. The statement of facts must include citations to the supporting exhibits, affidavits and/or prepared testimony. All materials must be verified and subscribed as set forth in 18 C.F.R. § 385.2005 (2006).

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

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.