

122 FERC ¶ 61,139
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 Nos. ER91-195-000

Western Systems Power Pool Agreement

EL07-69-000

ORDER ON THE WESTERN SYSTEMS POWER POOL AGREEMENT RATES

(Issued February 21, 2008)

1. On June 21, 2007, the Commission issued an order¹ instituting a proceeding under section 206 of the Federal Power Act (FPA)² to investigate whether the Western Systems Power Pool (WSPP) Agreement rate for coordination energy sales is just and reasonable for a public utility seller that has been found to have market power, or is presumed to have market power, in a particular market. In this order, we find that it is not just and reasonable to allow a seller to use the WSPP-wide “up to” demand charge as a ceiling rate in markets where the seller does not have market-based rate authority unless such a seller can cost-justify the use of the “up to” demand charge based on its own fixed costs.

Background

2. The WSPP Agreement was initially accepted by the Commission on a non-experimental basis in 1991,³ and provided for flexible pricing for coordination sales and

¹ *Western Sys. Power Pool*, 119 FERC ¶ 61,302 (2007) (Order Instituting Hearing).

² 16 U.S.C. § 824e (2000).

³ *Western Sys. Power Pool*, 55 FERC ¶ 61,099, *order on reh'g*, 55 FERC ¶ 61,495 (1992) (Initial Order), *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) (*Environmental Action*). 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).

transmission services. In accepting the WSPP Agreement, the Commission rejected WSPP's proposed system of price caps based on the costs of its highest cost participants, and instead developed energy and transmission rate ceilings based on the costs of a subset of the original parties to the WSPP Agreement.⁴ The U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) upheld the Commission's acceptance of the WSPP Agreement, noting that "for almost a decade, [FERC] has been experimenting with power pooling arrangements capable of delivering surplus electricity on a flexible, market-priced basis. In this case, we are asked to review two FERC rulings that authorized, apparently for the first time, the permanent operation of such a pool."⁵ The court noted that the Commission was "relying on market forces to keep most individual prices at reasonable levels" and that "the only limitations on these arrangements are that the trades be short-term . . . and that they be priced at or below the pre-set [cost-based] ceilings."⁶ The court affirmed the Commission's rejection of WSPP's proposal to cap prices at the costs of the highest-cost WSPP member in favor of ceilings based on the costs of a sub-set of the original parties to the WSPP Agreement set at about half the level of the ceilings in force during the experimental period. The court, in rejecting petitioners' arguments that the Commission should have required company- and product-specific caps, nonetheless agreed with the Commission that "stricter regulation would foreclose transaction opportunities," "reduc[e] efficiency savings," and create "administrative burdens of establishing and implementing petitioners' complicated rate structure."⁷ The court found reasonable the Commission's efforts "to preserve the Pool's efficiencies even as it guarded against price gouging."⁸

3. Currently, there are over 300 parties to the WSPP Agreement located throughout 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 to do so, they must have obtained separate market-based rate authorization from the Commission), or a cost-based rate that is no higher than an "up to" cost-based ceiling rate. For sellers without market-based rate authority, the cost-based 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

⁴ See Initial Order, 55 FERC ¶ 61,099 at 61,321-25.

⁵ *Environmental Action*, 996 F.2d 401 at 403.

⁶ *Id.* at 408.

⁷ *Id.* at 408-409.

⁸ *Id.* at 410.

sub-set (18 sellers) of the original parties to the WSPP Agreement, rather than 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 the parties to the WSPP Agreement. As noted above, the only limitations for use of the WSPP “up to” rate by WSPP members are: (1) that the trades by Commission-regulated public utilities must be short-term; and (2) that they are priced at or below the ceilings for sellers without market-based rate authority.

4. On June 21, 2007 the Commission instituted a section 206 proceeding 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 or is presumed to have market power.⁹ The Commission limited the investigation 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. The Commission sought comment on whether the Commission should set a just and reasonable “up to” rate 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.

Interventions and Comments

5. In the Order Instituting Hearing, the Commission directed that comments or evidence be submitted by July 20, 2007, and reply comments be submitted by August 6, 2007. Xcel Energy Services Inc. (Xcel), Midwest Energy, Inc. (Midwest Energy), Golden Spread Electric Cooperative (Golden Spread), and WSPP filed comments.

6. Motions to intervene were timely filed by: Midwest Energy; Arkansas Electric Cooperative Corporation; PacifiCorp; Mirant Energy Trading, LLC, Mirant California, LLC, Mirant Delta, LLC and Mirant Potrero, LLC; Powerex Corp.; Public Service Company of New Mexico; Southern Company Services, Inc.;¹⁰ El Paso Electric Company; Municipal Energy Association of Nebraska; West Texas Municipal Power Agency; Tucson Electric Power Company and UNS Electric, Inc.; the Metropolitan Water District of Southern California; the Northern California Power Agency; Morgan Stanley Capital Group Inc.; the Modesto Irrigation District; Nevada Power Company and

⁹ Order Instituting Hearing, 119 FERC ¶ 61,302 at P 9.

¹⁰ Southern Company Services, Inc. filed on behalf of itself and Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Southern Power Company.

Sierra Pacific Power Company; Arizona Public Service Company and Pinnacle West Marketing & Trading; and Reliant Energy, Inc.

7. The City of Vernon, California filed a motion to intervene out-of-time.

8. WSPP states that the WSPP Agreement remains just and reasonable, and filed data that it claims supports this contention. Specifically, WSPP includes an updated analysis of cost caps, using the same cost method that the Commission developed in its 1991 orders, but reflecting updated costs as well as a larger group of public utility members. WSPP states that this analysis looks at the costs of the members that are generation-owning Commission-jurisdictional public utilities that submitted the necessary information on the FERC Form 1, and uses the most current Form 1 data from 2006. WSPP explains that this analysis used a 20 percent fixed charge rate and also reflects reserves. Also, WSPP states the analysis does not include transmission costs but compares production costs. WSPP contends that this analysis shows that the WSPP cost caps are not unjust and unreasonable when compared to updated data using the Commission's own methodology.

9. WSPP argues that the Commission may only eliminate the WSPP-wide cost cap methodology and require another approach, such as an individual company approach, if the Commission can demonstrate that the practice of WSPP-wide cost caps for fixed costs is unjust and unreasonable. WSPP states that the Commission cannot make this demonstration. It argues that continued use of WSPP-wide cost caps is appropriate because the Commission and the D.C. Circuit previously found that a WSPP-wide cost cap methodology for fixed costs was just and reasonable. First, WSPP notes that the Commission developed the specific methodology for the cost caps and found that pool-wide composite rates are consistent with Commission precedent.¹¹ Additionally, WSPP states that the D.C. Circuit specifically rejected an argument that the cost caps should not be on a WSPP-wide basis and also rejected the argument that "company-by-company" rates be established.¹² WSPP points out that the D.C. Circuit determined that the company-by-company approach would decrease efficiencies and would constitute a disincentive to both joining and using the pool.¹³ Second, WSPP argues that the Commission has continued to allow reliance on regional costs rather than requiring individual company-by-company analysis of costs. It states that the Commission, in a recent order involving reactive power costs for the Southwest Power Pool, Inc. (SPP)

¹¹ WSPP Comments at 2 (citing *Western Sys. Power Pool*, 55 FERC ¶ 61,099 at 61,320-322, *order on reh'g*, 55 FERC ¶ 61,495 at 62,718).

¹² *Id.* (citing *Env'tl. Action*, 996 F.2d at 408-10).

¹³ *Id.*

region, accepted the use of a proxy based on one new generating unit rather than requiring that each public utility with generation file and have accepted a schedule with its individual costs.¹⁴ WSPP similarly states that regional transmission organization (RTO) markets accepted by the Commission have set charges in each hour based upon a marginal or single unit rather than on an individual unit basis.¹⁵ Third, WSPP contends that allowing WSPP-wide cost caps improves efficiencies and encourages WSPP membership, and allows more sellers to transact in more areas under the WSPP Agreement. WSPP submits that, if the caps are developed on an individual company basis, then some sellers may be precluded from selling under the WSPP Agreement because they have not completed the regulatory requirements for establishing individual company rates. Fourth, WSPP contends that individual company caps may adversely affect liquidity because chain transactions that provide greater liquidity do not work well if the terms and conditions are not standardized, particularly on price. Lastly, WSPP maintains that individual company caps create additional complexities associated with the administration of contracts.

10. Xcel filed a motion in support of the WSPP Agreement, stating that the Commission should continue to allow mitigated sellers the option of using the WSPP Agreement ceiling rates for mitigated pricing purposes, either as those rates are presently calculated or with slight modification.¹⁶ Xcel argues that the WSPP Agreement ceiling rates are long-established cost-based rates and the Commission's reliance on the use of those rates as a mitigation approach is appropriate.

11. In addition to administrative efficiencies associated with rate filings for sellers and supply options for buyers, Xcel states that the changes that have occurred in the industry since the Commission accepted the levels of the ceiling rates in the WSPP Agreement warrant greater, not less, reliance on them. Xcel states, however, that, if the Commission is concerned that the pool of utilities used to derive current WSPP Agreement rate levels does not reflect WSPP's current nationwide membership, that problem could be corrected by expanding the pool used to calculate the WSPP Agreement ceiling rates to include the system costs of a sampling of members outside of the Western Electricity Coordination Council. Xcel asserts that, given that the original WSPP pricing pool includes certain

¹⁴ *Sw. Power Pool, Inc.*, 119 FERC ¶ 61,199, at P 33 (SPP), *order on reh'g*, 121 FERC ¶ 61,196 (2007).

¹⁵ *Sw. Power Pool, Inc.*, 114 FERC ¶ 61,289, at P 59, 72 (SPP Order on Pricing and Congestion), *order on reh'g*, 116 FERC ¶ 61,289 (2006); Midwest Independent Transmission System Operator, Inc., FERC Electric Tariff, Third Revised Vol. No. 1, Original Sheet No. 93A at section 1.174, Attachment DD.

¹⁶ Xcel Comments at 4.

hydro-based utilities, expansion of the pool could very well justify an increase in the ceiling rates.

12. Golden Spread states that use of the WSPP Agreement and the cost caps contained therein for the purposes of mitigation, whether with respect to a market power concern or otherwise, should be narrowly tailored to the specific facts of the jurisdictional seller. Golden Spread contends that such determinations should be made on a case-by-case basis, with the burden on the seller to justify the use of the WSPP Agreement's cost caps, including a demonstration that the cost caps bear some relationship to the individual utility's cost. Golden Spread cites two previous proceedings in which it argued that mitigation should not lead to further opportunity to exercise market power. Golden Spread argues that the use of the WSPP Agreement would allow a higher price than the unchecked rates because the WSPP Agreement is based on a hypothetical utility and not the specific utility that has the ability to wield market power in a constrained area.

13. Midwest Energy urges the Commission to consider the need to encourage sellers to make sales of electricity into markets where such sellers have been found to have, or presumed to have, market power. Midwest Energy states that it should be able to purchase adequate supplies of electric energy at reasonable prices in order to serve the Midwest's 45,000 retail and 11 municipal customers with their full requirements of electricity. Midwest Energy contends that suppliers are reluctant to sell power at cost-mitigated rates for two reasons: (1) the uncertainty caused by the imposition of a refund obligation; and (2) the ability to sell power in adjacent markets at market-based rates.

14. Midwest Energy also seeks clarification of whether the Commission intends to make any modifications to the WSPP Agreement applicable on a prospective basis, or subject to refund. Midwest Energy states that the Commission's Order Instituting Hearing seems to state that any modifications to the WSPP Agreement as a result of this hearing would be applied on a prospective basis, but at the same time also states that sellers may continue to use the WSPP Agreement ceiling rate as mitigation, subject to refund. Midwest Energy states that clarification of this point would encourage sellers who currently use the WSPP rate as a cost mitigation tool to continue making sales into control areas where they are presumed to have market power. Additionally, Midwest Energy states that, *if* the Commission finds that the existing WSPP rate is unjust and unreasonable, Midwest Energy supports the use of a new agreement-wide "up to" rate based on the costs of a representative group of WSPP sellers. Midwest Energy asserts that a generally applicable cost-based rate, as compared to individual cost-justified rates, is administratively less burdensome and will thereby serve to encourage sellers to make sales of cost-based rates. Midwest Energy urges the Commission to continue utilizing a mechanism, such as the WSPP Agreement, to mitigate market power.

Discussion

Procedural Matters

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

16. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedures, 18 C.F.R. § 385.214(d) (2007), the Commission will grant the City of Vernon, California's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

Commission Determination

17. We instituted this proceeding because we were concerned that continued use of the WSPP Agreement ceiling rate for any jurisdictional seller that is found to have, or presumed to have, market power in a particular market, might no longer be just and reasonable in light of the evolution of competitive markets. This includes sellers under the WSPP Agreement that do not have market-based rate authority.¹⁷ This also includes sellers that lose or relinquish market-based rate authority in a particular market as a result of a failure of the Commission's screens for horizontal market power or a failure of the delivered price test analysis and that propose to use the WSPP Agreement ceiling rate as a means of mitigating their market power.¹⁸ As we explain below, we find herein that use of the WSPP-wide "up to" demand charge is no longer just and reasonable in markets where these sellers do not have market-based rate authority unless they cost-justify the use of the "up to" demand charge based on their own fixed costs.

18. When the D.C. Circuit affirmed the use of the Commission's acceptance of the WSPP Agreement cost cap for the demand charge, the court viewed the WSPP rate as a balance between various goals, somewhere between a seller-specific cost-based rate approach and a market-based rate approach. The D.C. Circuit noted that, when the Commission accepted the WSPP Agreement, while it approved one set of rate ceilings to

¹⁷ We noted that, 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 was intended to establish a just and reasonable cost-based rate for such sellers.

¹⁸ See *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 72 Fed. Reg. 39,904 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252 (2007), *clarified*, 121 FERC ¶ 61,120 (2007).

apply to all sales of energy products, it was “relying on market forces to keep most individual prices at reasonable levels.”¹⁹

19. However, since the Commission’s acceptance of the WSPP Agreement in 1991, and since the D.C. Circuit’s decision, markets have continued to develop and the Commission has obtained considerable experience with market-based pricing. As a result, the Commission has continued to develop and refine its market-based rate program for electric energy and capacity which, among other things, evaluates market power on a seller-specific basis.²⁰ As part of its continuing efforts to refine its market-based rate policy, the Commission issued Order No. 697. As the Commission stated, Order No. 697 represented a major step in the Commission’s efforts to clarify and codify its market-based rate policy by providing a rigorous up-front analysis of whether market-based rates should be granted, including protective conditions and ongoing filing requirements in all market-based rate authorizations, and reinforcing its ongoing oversight of market-based rates. The specific components of Order No. 697, in conjunction with other regulatory activities, are designed to ensure that market-based rates charged by public utilities are just and reasonable.

20. Under the Commission’s market-based rate program, before the Commission authorizes a seller to sell at market-based rates, we must find that the seller lacks, or has mitigated, its market power. During the past three years, based on its review of updated market power analyses filed by sellers with market-based rate authority, the Commission has found that numerous sellers fail the Commission’s horizontal market power screens. Such screen failures create a rebuttable presumption of market power. The Commission has initiated over 20 investigations under section 206 of the FPA because of concerns of possible market power based on these screen failures. Several of those investigations led to the revocation or voluntary relinquishing of market-based rate authority and the payment of refunds by sellers. Moreover, several of the sellers that recently have been found or presumed to have market power have proposed to mitigate their market power by making sales pursuant to the WSPP Agreement.²¹ These requests to use the WSPP Agreement as mitigation have led the Commission to take a second look at the WSPP “up to” demand charge to determine whether use of such rate continues to be just and reasonable.

¹⁹ *Environmental Action*, 996 F.2d 401 at 408.

²⁰ Order No. 697, FERC Stats. & Regs. ¶ 31,252.

²¹ *See, e.g., Westar Energy, Inc.*, 116 FERC ¶ 61,219, at P 33 (2006); *Empire Dist. Elec. Co.*, 116 FERC ¶ 61,150, at P 12 (2006); *Xcel Energy Services, Inc.*, 117 FERC ¶ 61,180, at P 49 (2006).

21. As the D.C. Circuit noted in 1992, the WSPP Agreement rate allows pricing flexibility. Because the WSPP Agreement's "up to" demand charge is not based upon a seller's specific costs, its use by a seller may be unjust and unreasonable in markets where the seller does not have market-based rate authority to the extent that such seller is only able to cost justify a demand charge lower than that contained in the WSPP Agreement. While technically the WSPP rate is a cost-based ceiling rate, it nevertheless has some of the flexibility of a market-based rate to the extent an individual seller is allowed to negotiate a rate above its own cost-justified demand charge, albeit subject to a ceiling. Our concern is that such a seller may be able to exercise market power with respect to such transactions. Thus, we find that it is unjust and unreasonable to allow a seller that has been found to have, or is presumed to have, market power to in essence side-step the Commission's market-based rate requirements and use the WSPP Agreement demand charge to determine the price it can charge to buyers. Our finding in this regard applies to sellers under the WSPP Agreement that do not have market-based rate authority as well as to sellers that lose or relinquish market-based rate authority and seek to use the WSPP Agreement ceiling rate as a means of mitigating their market power.

22. Accordingly, we no longer find the WSPP Agreement demand charge ceiling rate just and reasonable in markets where jurisdictional sellers do not have market-based rate authority, unless such sellers, on an individual basis, can justify the demand charge in the WSPP Agreement based upon the sellers' own costs. If such sellers wish to continue to make sales pursuant to the WSPP Agreement in markets where the sellers do not have market-based rate authority, they must provide cost justification to demonstrate that use of the "up to" demand charge for that particular seller is just and reasonable for that seller. Accordingly, we direct all sellers under the WSPP Agreement that lack market-based rate authorization, or that have lost or relinquished their market-based rate authority in some or all markets (including those sellers currently using the WSPP Agreement as mitigation), who wish to continue transacting under the WSPP Agreement, to make a filing within 60 days of the date of issuance of this order providing cost justification²² to demonstrate that use of the WSPP Agreement "up to" demand charge is just and reasonable for that particular seller. If a seller provides cost support demonstrating that the "up to" demand charge under the WSPP Agreement does not exceed the demand charge that the seller can cost-justify based on its own fixed costs, the seller may continue to use the WSPP Agreement. Otherwise, such seller must file a separate stand-alone rate schedule, to be effective as of the date of the compliance filing, that is cost-justified based on the individual seller's own costs. In the latter case, such seller could propose to use the non-rate terms and conditions of the WSPP Agreement but

²² Such changes should be filed pursuant to section 35.13 of the Commission's regulations. 18 C.F.R. § 35.13 (2007).

would have to include those provisions as part of its stand-alone rate schedule. As we indicated in the Order Instituting Hearing, 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 under the WSPP Agreement; nor are we investigating the transmission rates under the WSPP Agreement. Notwithstanding the refund effective date established by the Order Instituting Hearing, we will exercise our discretion and not direct the payment of refunds which might have accrued prior to the date of the compliance filing.

23. We emphasize that the finding we reach here will affect only a limited number of sellers. We are not requiring *each* WSPP member public utility to cost-justify the use of the WSPP Agreement demand charge or to file an individual cost-based rate. Instead, we are requiring only those jurisdictional sellers that lack market-based rate authorization, or those sellers that lose or relinquish their market-based rate authority (including those sellers currently using the WSPP Agreement as mitigation), to provide cost justification to demonstrate that use of the WSPP “up to” demand charge is just and reasonable.

24. As noted above, WSPP filed an updated analysis of the demand charge and states that it remains just and reasonable, and filed data which WSPP says supports this contention. We agree that it is not necessary to update the demand charge as it applies to sellers that have market-based rate authority. Many members of the WSPP Agreement have market-based rate authority and thus are not subject to the demand charge ceiling rate contained therein in the first instance, thus allowing them to use the WSPP Agreement as a market-based rate. We are only seeking justification of the demand charge for markets where jurisdictional sellers lack market-based rate authorization.

25. In light of the foregoing discussion, we believe we have fully explained the basis for our finding that continued use of the WSPP Agreement “up to” demand charge is unjust and unreasonable in markets where a seller is found to have or presumed to have market power. Although WSPP presents a number of arguments in support of its position that continued use of the WSPP-wide cost caps continue to be appropriate for all sellers, as discussed below, the cases WSPP cites are distinguishable from the instant case.

26. WSPP argues that the Commission has continued to allow reliance on regional costs rather than requiring individual company-by-company analysis of costs. In support, WSPP notes that, in *SPP*, the Commission recently accepted SPP’s use of a proxy rate for reactive power based on one new generating unit rather than requiring that each public utility with generation file and have accepted a schedule with its individual costs. WSPP also points to the Commission’s acceptance of set hourly charges based on a marginal or single unit, rather than on an individual unit basis, for RTO markets, specifically for SPP and the Midwest ISO.

27. We disagree. With regard to reactive power, it is important to bear in mind that reactive power is essential to the operation of interconnected electric generation and

transmission systems; without sufficient reactive power, real power (the portion of the power that does real work – and thus the power that sellers are looking to sell and that buyers are looking to buy) cannot be transmitted from a generator to a customer. In short, if a generator is to sell (and be able to deliver) its power to a customer, reactive power is essential to the transaction. In Order No. 2003, the Commission emphasized that an interconnecting generator “should *not* be compensated for reactive power when operating its Generating Facility *within* the established power factor range, since it is *only* meeting its obligation.”²³ Providing reactive power within the power factor range is an obligation of a generator, and is as much an obligation of a generator as, for example, operating in accordance with Good Utility Practice.²⁴ Generators interconnected to a transmission provider’s system thus need only be compensated when the transmission provider directs the generator to operate *outside* the power factor range.²⁵

28. In *SPP*, the reactive compensation rate was based on the cost of reactive power production from recently constructed generators so as to reflect the upper end of the range of reactive power costs.²⁶ However, in *SPP*, our concern was how to compensate a generator that is required by SPP to operate outside the power factor range. Market power in this instance is mitigated because it is SPP that decides whether a generator is

²³ See *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 546 (2003) (emphasis added), *order on reh’g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh’g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh’g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff’d sub nom. Nat’l Ass’n of Regulatory Util. Comm’rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007). The Commission recognized certain limited exceptions, including comparability for payment for reactive power provided within the power factor range explained in Order No. 2003-A, that are not applicable here.

²⁴ Compare *id.* at P 546 with *id.* at P 537; accord *Entergy*, 114 FERC ¶ 61,303, at P 17. Indeed, section 9.6.2 of the Commission’s Order No. 2003 *pro forma* Large Generator Interconnection Agreement expressly provided that generators are required “to operate...to produce or absorb reactive power within the design limitations” of the facility.

²⁵ *Michigan Electric Transmission Co.*, 96 FERC ¶ 61,214, at 61,906 (2001) (*METC*), *order on reh’g*, 97 FERC ¶ 61,187, at 61,852 (2001) (“[T]o the extent that reactive power is provided...outside reactive design limitations, Generators would be entitled to compensation.”). Section 9.6.3 of the Commission’s Order No. 2003 *pro forma* Large Generator Interconnection Agreement expressly provided that payment for reactive power is only for reactive power “outside the agreed upon deadband.”

²⁶ 119 FERC ¶ 61,199 at P 33.

needed to operate outside the power factor range and not the generator itself. The Commission found that a uniform price that compensates generators at the upper end of the range of reactive power costs (with periodic review) is just and reasonable in situations in which a generator provides reactive power outside the power factor range. That is not the case here, however. In this case we address the issue of market power in the context of a voluntary electric power sale. To the extent that a seller under the WSPP Agreement has not rebutted the presumption of market power in electric power sales, we cannot assume for a voluntary sale that a rate based on the costs of a group of sellers is just and reasonable; the seller may only be able to cost justify a lower rate. Accordingly, to allow a seller that has not rebutted the presumption of market power to charge the higher rate would, in effect, allow that seller to exercise market power.

29. Further, regarding WSPP's argument that the Commission has accepted setting hourly charges for RTO markets based on a marginal or single unit, rather than on an individual unit, basis, specifically for SPP and the Midwest ISO, we find that the WSPP Agreement is distinguishable from an organized market with Commission-approved market monitoring and mitigation. In particular, prices for energy in the markets operated by SPP and the Midwest ISO are set using single-clearing price auctions with locational marginal pricing. That is, the marginal unit dispatched at each specific location (node) sets the price for energy (and congestion) for all other generators bidding into the market at that location based on an algorithm that takes into account, among other things, the security constrained economic dispatch, the bids, and the characteristics of resources. In contrast, the WSPP Agreement allows for an "up to" cap that is not location-specific; rather, it can apply to sales across the entire Eastern and Western Interconnections. Nor has the "up to" cap varied since 1991, whereas the marginal unit that sets each locational marginal price (LMP) in SPP and the Midwest ISO is selected every five minutes.

30. Moreover, SPP, the Midwest ISO, and all other RTOs employ the Commission-approved market monitoring and mitigation to ensure just and reasonable prices result from these organized markets.²⁷ Although the mitigation measures vary from RTO to RTO, most apply mitigation when there is an opportunity to exercise market power, when a generator's bid significantly deviates from its marginal costs (or a proxy for marginal

²⁷ See, e.g., *Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,163, *order on reh'g*, 109 FERC ¶ 61,157 (2004), *order on reh'g*, 111 FERC ¶ 61,043, *reh'g denied*, 112 FERC ¶ 61,086 (2005), *aff'd sub nom. Wisconsin Public Power, Inc. v. FERC*, 493 F.3d 239 (D.C. Cir. 2007); SPP Order on Pricing and Congestion, 114 FERC ¶ 61,289 at P 129-92.

costs), and when such bid would significantly impact the resulting LMP.²⁸ In contrast, WSPP's demand charge is based on the average fixed costs of the generating facilities of a sub-set of the parties to the WSPP Agreement and is not currently limited (by mitigation or otherwise) to the operating costs of the parties to the WSPP Agreement.

31. WSPP, Xcel, and Midwest Energy each explains the benefits of the WSPP Agreement with respect to liquidity and efficiency, and assert that individual rates would be more burdensome and create additional complexities when transacting. We recognize that commenters are concerned that changing the WSPP Agreement would decrease efficiency, discourage membership, decrease liquidity, and increase administrative complexities. However, given the limited scope of sellers affected by the determination we make in this order, coupled with the continuation of the WSPP Agreement non-rate terms and conditions without revision, our action in this proceeding should not serve to discourage WSPP membership nor should it increase administrative complexities significantly. While we recognize that there will be some additional burden on utilities that now need to support their individual rates, we believe the burden will be moderate, and is necessary to prevent unjust and unreasonable rates by sellers that lack market-based rate authority. Additionally, sellers that do not have market-based rate authorization, including those that lose such authorization because they failed to rebut the presumption of market power, may continue to make sales pursuant to the WSPP Agreement, and may use the "up to" demand charge, as long as they provide seller-specific cost justification to demonstrate that use of the "up to" demand charge is just and reasonable for that particular seller. Thus, we are able to protect against the potential exercise of market power while avoiding disruption to most market participants who use the WSPP Agreement.

The Commission orders:

(A) We hereby find that the "up to" demand charge in the WSPP Agreement can no longer be considered a just and reasonable rate for a public utility seller in markets where that seller does not have market-based rate authorization, unless such seller can justify the rate based on its own costs, as discussed in the body of this order.

²⁸ While SPP employs mitigation measures with an offer cap designed to recover the full operating and fixed costs of a hypothetical new peaking generator located in the SPP area, we note that other mitigation measures also apply in the SPP market. More importantly, SPP's real-time market is designed to provide imbalance energy and load-serving entities must have adequate resources available in real-time to meet their entire energy needs plus reserves. Thus the purchase of imbalance energy in SPP's real-time market is not comparable to the purchase of energy pursuant to the WSPP Agreement.

(B) All sellers under the WSPP Agreement that lack market-based rate authorization, including those sellers that have lost or relinquished previously granted market-based rate authority and those sellers that are currently using the WSPP Agreement as mitigation, and that wish to continue to make sales pursuant to the WSPP Agreement, are hereby directed to make a filing, within 60 days of the date of issuance of this order, providing cost support demonstrating that the “up to” demand charge in the WSPP Agreement does not exceed the demand charge that the seller can cost-justify based on its own fixed costs, as discussed in the body of this order.

(C) In the alternative, such sellers may file a separate stand-alone rate schedule, with necessary cost support or make sales under an existing cost-based rate tariff or rate schedule that has previously been approved by the Commission.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.