

113 FERC ¶ 61,049
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

WFEC GENCO, L.L.C.

Docket Nos. ER01-388-002
ER01-388-003

ORDER CONDITIONALLY ACCEPTING UPDATED MARKET POWER
ANALYSIS AND MITIGATION MEASURES

(Issued October 17, 2005)

1. In this order the Commission conditionally accepts a revised updated market power analysis, proposed mitigation measures, and corresponding tariff revisions filed by WFEC GENCO, L.L.C. (GENCO). As discussed below, the Commission concludes that, subject to the tariff modifications and Commission acceptance of the compliance filing directed herein, and in light of the Commission's acceptance of GENCO's proposed mitigation, GENCO satisfies the Commission's standards for market-based rate authority. GENCO's next updated market power analysis is due three years from the date of this order.
2. The Commission also accepts revisions to the market-based rate tariff of GENCO to include the Commission's market behavior rules.¹

Background

3. On December 1, 2003, GENCO filed an updated market power analysis based on the Commission's Supply Margin Assessment. On March 24, 2005, GENCO filed a revised market power analysis pursuant to the Commission's order issued on May 13,

¹ *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) (Market Behavior Rules Order).

2004.² The May 13 Order addressed the procedures for implementing the generation market power analysis announced on April 14, 2004, and clarified on July 8, 2004.³

4. GENCO states that it is a wholly owned subsidiary of Western Farmers Electric Cooperative (Western Farmers), an electric generation and transmission cooperative that owns and operates over 1200 MW of generation capacity in Oklahoma. GENCO states that it owns and operates a 90 MW gas-fired facility located in Anadarko, Oklahoma and that the entire output from this facility is committed under two power purchase agreements (PPA) that have been accepted by the Commission.⁴ GENCO states that under the PPAs, it sells the capacity and energy from its facility to Coral Power, L.L.C. (Coral) and to GENCO's affiliate, Western Farmers.⁵ GENCO adds that it has made no other sales of electricity, and anticipates making no other sales.

5. On the issue of market power, GENCO states that it reported in its December 2003 updated market power analysis that, in 2002, Western Farmers entered into an agreement with Kiowa Power Partners, LLC (Kiowa) under which Western Farmers constructed a seventy-six-mile high voltage (345 kV) transmission line (interconnection line) connecting a Kiowa power generating station located in Kiowa, Oklahoma to transmission facilities in the Electric Reliability Council of Texas (ERCOT) grid and synchronized with ERCOT. GENCO states that this line is not under the Southwest Power Pool (SPP) tariff, and is not under any other open access transmission tariff (OATT) on file with the Commission. GENCO argues that Western Farmers' ownership of this line does not affect the transmission market power analysis for Western Farmers. It asserts that the line effectively is a generator lead line connecting Kiowa's generation facility to the ERCOT grid and that the Commission has held that lines connecting generating facilities to the transmission grid do not raise transmission market power issues.⁶ GENCO reports that Kiowa has reserved the entire capacity of the line to deliver its output to the ERCOT market and further states that Western Farmers has received no

² *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004) (May 13 Order).

³ *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

⁴ Acting through delegated authority, by order dated April 25, 2001, the Director of the Division of Tariffs and Rates - Central accepted the contracts for filing in Docket Nos. ER01-1480-000 (Western Farmers) and ER01-1481-000 (Coral).

⁵ Western Farmers is a generation and transmission cooperative that is not subject to our jurisdiction under section 205 of the Federal Power Act.

⁶ *See Termoelectrica U.S., LLC*, 105 FERC ¶ 61,087 (2003) (*Termoelectrica*) (granting waiver of open access requirements for nine-mile, 230 kV line owned by a utility's affiliate and interconnecting a 650 MW generating station in Mexico to the U.S. transmission grid).

request for transmission service on this line. GENCO adds that if Western Farmers does receive such a request, Western Farmers would offer comparable service on this line, if capacity is available.

6. On August 26, 2005, GENCO filed an amendment to its March 24, 2005 filing that provided additional analysis and information concerning its interconnecting line, as well as clarification concerning its market power mitigation proposal, which is described below.

7. In its amendment, GENCO discusses *Termoelectrica*, in which the Commission waived the requirement that the line at issue be covered under an OATT.⁷ In that case, the Commission based its decision on four factors; namely: (1) there was no electrical break anywhere in the line between these two points;⁸ (2) neither the Mexican generation plant nor the interconnection line was interconnected to Mexico's transmission or distribution grid; (3) the interconnection line likewise was not interconnected to any U.S. transmission or distribution facilities (other than a substation); and (4) the interconnection line was not interconnected to any load or other generation facilities.

8. Referring to the factors outlined in *Termoelectrica*, GENCO first states that there is no electrical break in the interconnection line between the Kiowa generating plant and the substation owned and operated by TXU, where the line interconnects with the ERCOT grid. Secondly, GENCO states that the Kiowa interconnection line is not interconnected with any other transmission or distribution grid; it is solely interconnected with the Kiowa plant on one end and the ERCOT grid on the other end. GENCO also states that no GENCO or Western Farmers facilities are involved in the event that the Kiowa plant implements synchronous operations with SPP. In the event that the Kiowa plant is switched to operate synchronously with SPP, the line at issue is not used; the power plant in that case is physically separated from the Kiowa line. Thirdly, GENCO states that the interconnection line is not interconnected with any U.S. transmission or distribution facilities other than the TXU substation at the ERCOT end of the line. Like the *Termoelectrica* line, the interconnection line serves solely to interconnect the generating plant to the transmission grid. Fourthly, GENCO states that the Kiowa line is not connected with any load; it serves solely to interconnect the Kiowa generating plant to the ERCOT grid.

9. GENCO adds that there are other factors not present in *Termoelectrica* that make its case even stronger. In *Termoelectrica*, affiliates of the generator owned and operated

⁷ See *id.* P 7, 8, 10.

⁸ We note that "no electrical break" means that there are no interconnection points between the end points of the line; it is a single continuous line. As such, additional generators or load between the end points of the line cannot be served by the line.

the line, owned and operated the power plant, and owned the substation with which the line was interconnected. GENCO states that here, in contrast, the owner of the line (Western Farmers) is not affiliated with the generator and does not operate the interconnection line. GENCO further states that Western Farmers does not own or operate the Kiowa plant or the TXU substation where the line interconnects with the ERCOT grid. According to GENCO, that means that the interconnection line is not part of Western Farmers' integrated transmission system (which is under SPP's OATT), and is not used to serve Western Farmers' load with Western Farmers' resources. GENCO asserts that in the event that the Kiowa power plant is switched to synchronous operations with the SPP grid, Western Farmers has no role in the decision to switch the plant, nor is Western Farmers involved in the operations of the plant.

10. Explaining why it wishes to keep its market-based rate authority, GENCO maintains that continuing to treat the PPAs as market-based rate service agreements will avoid any questions being raised under the PPAs about whether there has been a material change in GENCO's regulatory status as it pertains to its performance obligations under the PPAs. Accordingly, GENCO requests that the Commission permit the PPAs to remain effective as market-based rate service agreements, as discussed below.

Procedural Matters

11. Notice of GENCO's December 1, 2003 filing was published in the *Federal Register*, 68 Fed. Reg. 70,009 (2003), with interventions or protests due on or before December 22, 2003. None was filed.

12. Notice of GENCO's March 24, 2005 filing was published in the *Federal Register*, 70 Fed. Reg. 17,442 (2005), with interventions or protests due on or before April 14, 2005. None was filed.

13. Notice of GENCO's August 26, 2005 amendment was published in the *Federal Register*, 70 Fed. Reg. 53,653 (2005), with interventions or protests due on or before September 16, 2005. None was filed.

Discussion

Market-Based Rate Authorization

14. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, market power in generation and

transmission and cannot erect other barriers to entry. The Commission also considers whether there is evidence of affiliate abuse or reciprocal dealing.⁹

15. As discussed below, the Commission concludes that, with the tariff modifications and compliance filing directed herein, and the proposed mitigation, GENCO satisfies the Commission's standards for market-based rate authority.

Generation Market Power

16. In the April 14 Order, as clarified by the July 8 Order, the Commission adopted two indicative screens for assessing generation market power, the pivotal supplier screen and the wholesale market share screen. GENCO has prepared both the pivotal supplier and the wholesale market share screens for the Western Farmers control area, its home control area. GENCO states that it passes the pivotal supplier screen in its home control area, but fails the wholesale market share screen in that control area.¹⁰

17. Passing 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. Applicant and intervenors may, however, rebut the presumption established by the results of the initial screens by submitting a Delivered Price Test. Alternatively, an applicant may accept the presumption of market power or forego the generation market power analysis altogether and go directly to mitigation. GENCO states that it did not perform the generation market power screen analyses for its first-tier markets because any market power indicated by those analyses would be mitigated by GENCO's proposed mitigation measure.

18. GENCO proposes the following mitigation. First, GENCO's market-based rate sales under its two PPAs, the terms of which cannot be changed without Commission approval, would continue undisturbed; GENCO's market-based rate authorization would continue to permit it to satisfy its sales obligations to Coral and Western Farmers under the PPAs. GENCO commits to making no other power sales at market-based rates as long as the output of GENCO's facility is fully committed under the PPAs. If either of the PPAs is terminated or canceled, GENCO would file an updated market power analysis (using the then-applicable Commission screens or tests), and propose, as may be necessary based on the results of that analysis, further mitigation measures, cost-based rates, or other appropriate measures.

⁹ 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).

¹⁰ GENCO's analysis shows market shares as high as 57 percent.

19. Finally, GENCO states that the only change in status to report is the purchase of wind energy by GENCO's affiliate, Western Farmers.¹¹ GENCO asserts that the generation owned and purchased by Western Farmers is committed principally to sales to Western Farmers' member distribution cooperatives and Altus Air Force Base under long-term all-requirements contracts.

20. GENCO states in its compliance filing, as amended, that GENCO's share of uncommitted capacity in the Western Farmers control area exceeds 20 percent for the year 2004. Consequently, GENCO's compliance filing indicates that it fails the wholesale market share screen for the Western Farmers control area.

21. With regard to GENCO's proposed mitigation, the Commission accepts GENCO's proposal. The terms and conditions, including the specific rates, under GENCO's PPAs with Coral and Western Farmers have previously been accepted by the Commission. Accordingly, GENCO will retain its market-base rate authority as it relates to GENCO's two existing PPAs, but will not make sales to other buyers at market-based rates or make additional sales to Coral and Western Farmers at market-based rates without first receiving Commission authorization.

22. In this regard, GENCO proposes a new paragraph 11 to its market-based rate tariff adopting its proposed mitigation. We note that, with respect to an applicant that has been found to have market power or has accepted a presumption of market power, any mitigation will be prospective only.¹²

23. The Commission will require GENCO to modify the provision. As proposed, paragraph 11 states "GENCO is authorized to sell electric power at market-based rates only to satisfy its obligations under Service Agreements Nos. 1 and 2 under this tariff. GENCO otherwise is not authorized to sell electric power at market-based rates." We will require GENCO to make a compliance filing within 30 days of the date of issuance of this order to conform the use or terms contained in its market-based rate tariff. In particular, GENCO is directed to replace the term "power" (paragraph 11) with the term "energy and capacity" (paragraph 1). In addition, GENCO is directed to conform to the

¹¹ Western Farmers is under contract to purchase approximately 280,000 MWh annually of wind energy from an unaffiliated third party, Blue Canyon Windpower, LLC. Blue Canyon's wind project has a nameplate rating of 74 MW and a five-year average expected energy production of 280,000 MWh per year.

¹² See April 14 Order, 107 FERC ¶ 61,018 at P 154, *order on reh'g*, July 8 Order, 108 FERC ¶ 61,026, P 145 (affirming mitigation of market power in long-term as well as shorter-term markets on a prospective basis).

pagination requirements of Order No. 614.¹³ Subject to the tariff revisions we direct herein, and given our acceptance of GENCO's proposed mitigation, the Commission finds that GENCO satisfies the Commission's generation market power standard for the grant of market-based rate authority for sales under its PPAs with Coral and Western Farmers.

Transmission Market Power

24. When a transmission-owning public utility seeks market-based rate authority, the Commission has required the public utility to have an OATT on file before granting such authorization. GENCO states that its generating units are connected to the transmission facilities of its affiliate, Western Farmers, and that GENCO does not own or control any transmission facilities in North America other than those required to interconnect generating facilities with the transmission grid. GENCO states that Western Farmers owns approximately 3,700 miles of transmission facilities in Oklahoma. It also states that Western Farmers has placed its transmission facilities under the control of SPP, which has a Commission-accepted OATT.¹⁴

25. GENCO cites factors in *Termoelectrica* as well as other factors that indicate it lacks transmission market power with regard to the interconnection line described above. The Commission agrees with GENCO's analysis in this regard and finds that, as represented, GENCO lacks transmission market power with regard to the interconnection line described above. Accordingly, the Commission finds that GENCO satisfies the Commission's transmission market power standard for the grant of market-based rate authority, pending Commission acceptance of the compliance filings directed herein. If, in the future, GENCO receives a request for transmission service over the interconnection line, then an OATT must be filed with the Commission within 60 days of the date of the request.

Other Barriers to Entry

26. In evaluating market-based rate applications, the Commission considers whether an applicant may be able to erect other barriers to market entry, for example, through

¹³ *Designation of Electric Rate Schedule Sheets*, Order No. 614, FERC Stats. & Regs. ¶ 31,096 (2000).

¹⁴ See *Southwest Power Pool, Inc.*, 82 FERC ¶ 61,267 (accepting short-term point-to-point transmission service under OATT), *order on reh'g*, 85 FERC ¶ 61,031 (1998); 86 FERC ¶ 61,090 (1999) (accepting long-term point-to-point transmission service under OATT); 89 FERC ¶ 61,284 (1999) (accepting network integration transmission service under OATT).

ownership of electric generation input facilities.¹⁵ GENCO states that neither it nor its affiliates own or control any other resources or facilities that would give it market power over the generation, transmission, or sale of electric energy or that could restrict market entry by competing suppliers. GENCO states that its affiliate Western Farmers owns natural gas pipelines that are connected with the intrastate grid, but these facilities only provide fuel for Western Farmers' generation facilities. GENCO also argues that these facilities do not give Western Farmers the ability to control electricity generation inputs other than to its own generation facilities. Based on GENCO's representations, the Commission is satisfied that GENCO cannot erect barriers to entry. However, it is not clear from GENCO's statements whether Western Farmers' natural gas pipelines are inter- or intrastate. We note that, should GENCO or its 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 GENCO's authority to sell power at market-based rates.¹⁶

Affiliate Abuse

27. GENCO states that the Commission's concern over affiliate abuse and reciprocal dealing arises when a seller is affiliated with an electric utility serving captive customers in a franchised service territory.¹⁷ GENCO sells power to its affiliate Western Farmers, which serves the electricity requirements of Western Farmers' nineteen member distribution cooperatives, each of which in turn serves its member-owners in franchised electric service territories. GENCO notes that the Commission has held that, because a cooperative's ratepayers are its owners, the Commission's traditional concerns with respect to affiliate abuse are not present.¹⁸ GENCO notes that it will not make any sales to any public utility with a franchised electric service territory that is controlled by, or under common control with, or that controls GENCO pursuant to the proposed tariff. Based on GENCO's representations, the Commission finds that GENCO satisfies the Commission's concerns with regard to affiliate abuse.

¹⁵ See *Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223, at 62,042 (1994).

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

¹⁷ Citing *Koch Power Louisiana, L.L.C.*, 86 FERC ¶ 61,029, at 61,127 (1999); *Morgan Stanley Capital Group Inc.*, 69 FERC ¶ 61,175 (1994), *order on reh'g*, 72 FERC ¶ 61,082 (1995).

¹⁸ E.g., *Competitive Utility Services Corp.*, 79 FERC ¶ 61,052, at 61,247 (citing *Hinson Power Co.*, 72 FERC ¶ 61,190, at 61,911 (1995)), *order granting clarification*, 80 FERC ¶ 61,206 (1997); *Northern/AES Energy LLC*, 81 FERC ¶ 61,370 (1997); *GEN~SYS Energy*, 81 FERC ¶ 61,045 (1997); *Old Dominion Elec. Coop.*, 81 FERC ¶ 61,044 (1997).

Market Behavior Rules

28. The Commission directed market-based rate sellers to include as an amendment to their market-based rate tariffs the market behavior rules when they file for continued authorization to sell at market-based rates. As discussed herein, GENCO submitted revised tariff sheets to amend its tariff to include the market behavior rules set forth in Appendix A to the Market Behavior Rules Order. The Commission accepts the revised tariff sheets for filing.

Reporting Requirements

29. 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 45.¹⁹ 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).²⁰ Thus, consistent with Order No. 664, GENCO will be required henceforth to comply with the full requirements of part 45.

30. 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.²¹ Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the

¹⁹ *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).

²⁰ *Id.* at P 36.

²¹ *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>.

reporting quarter.²² Accordingly, GENCO must file its first Electric Quarterly Report no later than 30 days after the first quarter GENCO's tariff is in effect.²³

31. GENCO 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.²⁴ Order No. 652 requires that the change in status reporting requirement be incorporated in the market-based rate tariff of each entity authorized to make sales at market-based rates. The tariff language proposed by GENCO does not comply with the requirements of Order No. 652. Specifically, the word "shall" in the first and last sentences of GENCO's filed change in status language should be replaced with "must," as provided below. Accordingly, GENCO is directed, within 30 days of the issuance of this order, to revise its market-based rate tariff to incorporate the following provision, without variation, consistent with Order No. 652, and to conform to the pagination requirements of Order No. 614:

[insert market-based rate seller name] must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority. A change in status includes, but is not limited to, each of the following: (i) ownership or control of generation or transmission facilities or inputs to electric power production other than fuel supplies, or (ii) affiliation with any entity not disclosed in the application for market-based rate authority that owns or controls generation or transmission facilities or inputs to electric power production, or affiliation with any entity that has a franchised service area. Any change in status must be filed no later than 30 days after the change in status occurs.

32. In addition, GENCO's First Revised Sheet No. 1 does not comply with Order No. 614. GENCO is directed to revise its First Revised Sheet No. 1 to conform to the pagination requirements of Order No. 614, within 30 days of the issuance of this order.

²² The exact dates for these reports are prescribed in 18 C.F.R. § 35.10b (2004).

²³ 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.

²⁴ *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 ¶ 61,143 (2005).

33. GENCO is directed to file an updated market power analysis within three years of the date of this order, and every three years thereafter. The Commission also reserves the right to require such an analysis at any intervening time.

The Commission orders:

(A) GENCO's updated market power analysis is hereby conditionally accepted for filing, pending Commission acceptance of the compliance filings directed below and as discussed in the body of this order.

(B) GENCO is directed, within 30 days of the date of the issuance of this order, to revise the tariff sheet incorporating its mitigation measures, as discussed in the body of this order, to be effective May 23, 2005.

(C) GENCO is directed, within 30 days of the date of issuance of this order, to revise its market-based rate tariffs to include the change in status reporting requirement adopted in Order No. 652, without variation.

(D) GENCO's tariff sheets incorporating the market behavior rules are hereby accepted for filing, effective December 17, 2003.

(E) GENCO's 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.