

114 FERC ¶ 61,280
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

MidAmerican Energy Company

Docket No. ER96-719-003
ER96-719-004
ER96-719-006
ER96-719-008
EL05-59-000

Cordova Energy Company LLC

ER99-2156-006

ORDER REJECTING COMPLIANCE FILING IN PART, CONDITIONALLY
ACCEPTING COMPLIANCE FILING IN PART, ESTABLISHING HEARING
PROCEDURES AND ACCEPTING CHANGE IN STATUS

(Issued March 17, 2006)

1. On August 1, 2005, MidAmerican Energy Company (MidAmerican) submitted a filing in compliance with the Commission's June 1, 2005 Order¹ on MidAmerican's market-based rate authority. MidAmerican's compliance filing contains: (1) proposed revisions to its market-based rate tariff prohibiting MidAmerican from making sales under the tariff to serve load that sinks within the MidAmerican control area; (2) a new power sales tariff to address concerns about its potential to exercise market power within its control area; and (3) additional information addressing transmission market power concerns raised in the June 1 Order. In this order, the Commission will: (1) accept MidAmerican's commitment to not make sales under its market-based rate tariff in the MidAmerican control area, but reject the specific language proposed by MidAmerican that would revise its market-based rate tariff to limit the prohibition on market-based rates sales in its control area to only those sales that sink within the MidAmerican control area; (2) set for trial-type evidentiary hearing the proposed rates for negotiated capacity and energy; (3) reject the proposed rates for short-term, non-firm energy; and (4) address and dismiss the transmission market power concerns raised earlier in this proceeding.

¹ *MidAmerican Energy Co.*, 111 FERC ¶ 61,320 (2005) (June 1 Order).

2. On October 14, 2005, MidAmerican and Cordova Energy Company LLC (Cordova) filed a notice of change in status regarding the ownership of certain generating facilities. The Commission accepts the notice of change in status.

I. Background

3. On October 29, 2004, as amended on November 23, 2004, MidAmerican submitted for filing an updated generation market power analysis in compliance with the Commission's orders issued on April 14, 2004 and July 8, 2004,² as well as an order on MidAmerican's market-based rate authority issued on July 12, 2004.³ The filing, as amended, indicated that MidAmerican passed the pivotal supplier screen but failed the wholesale market share screen for each of the four seasons considered in the MidAmerican control area. The filing, as amended, further indicated that MidAmerican passed the pivotal supplier screen and the wholesale market share screen in each of the directly interconnected first-tier control areas examined in each of the four seasons considered. 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 pursuant to section 206 of the Federal Power Act (FPA)⁴ and establishes a rebuttable presumption of market power in the section 206 proceeding.⁵ Accordingly, because MidAmerican's filing indicated that it failed the wholesale market share screen in its control area market, the Commission instituted, in the June 1 Order, a section 206 proceeding to investigate generation market power in the MidAmerican control area. The Commission also established a refund effective date of August 7, 2005, pursuant to the provisions of section 206.⁶

4. In the June 1 Order, the Commission directed MidAmerican, for the MidAmerican control area, 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-

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

³ *MidAmerican Energy Co.*, 108 FERC ¶ 61,043 (2004) (July 12 Order).

⁴ 16 U.S.C. § 824e (2000).

⁵ April 14 Order at P 201.

⁶ 70 Fed. Reg. 33,467 (2005).

based rates or propose other cost-based rates and submit cost support for such rates.⁷ MidAmerican was also given the opportunity to provide any additional information in response to the issues raised by intervenors concerning transmission market power.⁸

5. The June 1 Order also directed MidAmerican to file additional information regarding certain affiliated generators located in the United States.⁹ We directed MidAmerican to file revised tariff sheets to include certain affiliate sales prohibition language and to incorporate the change in status reporting requirement adopted in Order No. 652.¹⁰ MidAmerican filed these items on July 1, 2005 in Docket No. ER96-719-005. This filing was accepted in an unpublished delegated letter order on September 20, 2005.

II. Description of Filings

A. MidAmerican's Filing in Docket Nos. ER96-719-006 and EL05-59-000

6. MidAmerican's compliance filing proposes to revise its market-based rate tariff to provide that it will not sell capacity and energy under the tariff to serve load that sinks within the MidAmerican control area, and also proposes a new power sales tariff, providing rates, terms and conditions of service for sales within the MidAmerican control area. The power sales tariff proposes tailored mitigation, in the form of both cost-based rates and a market-based price cap, to address generation market power concerns that were raised in connection with MidAmerican's updated market power analysis. The filing also provides additional information addressing transmission market power concerns.

7. Specifically, MidAmerican's proposed power sales tariff offers two power supply products: (1) negotiated capacity and energy (Schedule A), providing for sales of capacity, at a negotiated rate and level of firmness, and associated energy for periods of one week to one year; and (2) short term energy (Schedule B), which are defined by

⁷ June 1 Order at P 25.

⁸ *Id.* at P 29.

⁹ *Id.* at P 27.

¹⁰ *Id.* at P 31 and P 34; *see also Reporting Requirements 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 (2005), *order on reh'g*, 111 FERC ¶ 61,413 (2005).

MidAmerican as sales of non-firm energy for periods of one hour to one month. MidAmerican states that the power sales tariff provides for voluntary sales to buyers who enter into service agreements.

8. The proposed charges for negotiated capacity and energy (Schedule A) are negotiated amounts subject to “up to” caps calculated as the sum of (i) MidAmerican’s system incremental cost of supplying such energy, plus 10 percent, and (ii) the maximum capacity charge, multiplied by the amount of capacity reserved for a given transaction. The maximum capacity charges are \$122,000/MW per year, \$10,200/MW per month, and \$2,300/MW per week. Schedule A provides that if MidAmerican enters into a capacity and/or energy purchase transaction specifically for the purpose of reselling such capacity and/or energy pursuant to a transaction arranged under the tariff, the maximum rate shall be the sum of (a) MidAmerican's out-of-pocket costs of purchasing such capacity and/or energy, including all charges incurred for transmission service, ancillary services and transmission losses, (b) \$1.00 per megawatt-hour multiplied by the total megawatt-hours scheduled during the transaction, and (c) any applicable taxes or assessments based on the revenues received or quantities sold under the transaction.

9. The power sales tariff defines system incremental cost as the costs incurred by MidAmerican to supply energy under the tariff. System incremental cost would include the forecasted costs of replacement fuel, operating and maintenance expenses, purchased or interchange power costs, emission allowances and other environmental compliance costs, and any applicable taxes or assessments based on revenues received or quantities sold under the tariff, plus either: (a) the costs of starting and operating any generating units which must be started to supply such energy (including costs incurred due to minimum run times or loadings), or (b) its cost to purchase energy (including transmission charges) if the purchase is specifically arranged to sell energy under the tariff. MidAmerican states that to determine system incremental cost, it will use an order of priority wherein capacity and energy provided under the tariff will be the increment immediately above MidAmerican’s (1) forecasted retail and wholesale load requirements, including operating reserves, (2) previously arranged sales of capacity and energy, and (3) other transactions previously arranged under the tariff.

10. Schedule A also provides that if MidAmerican enters into a capacity and/or energy purchase transaction specifically for the purpose of reselling such capacity and/or energy pursuant to a transaction arranged under the tariff, the maximum rate shall be the sum of (a) MidAmerican's out-of-pocket costs of purchasing such capacity and/or energy, including all charges incurred for transmission service, ancillary services and transmission losses, (b) \$1.00 per megawatt-hour multiplied by the total megawatt-hours scheduled during the transaction, and (c) any applicable taxes or assessments based on the revenues received or quantities sold under the transaction.

11. MidAmerican states that its proposed capacity charge is based on the weighted fixed cost of its generating resources that are most likely to provide service under the tariff. To determine the generation resources likely to participate in such sales, MidAmerican has stacked its generating units in increasing order based on fuel costs and select the units likely to participate in off-system sales based on minimum and maximum monthly peak demands for service to retail and wholesale requirements customers. MidAmerican adjusts for the cost of reserves by dividing the cost of each unit by that unit's equivalent availability factor. It used a fixed charge rate of 14.58 percent, including a return on equity of 12.25 percent.

12. For sales of short term energy (hourly, daily, weekly and monthly transactions) (Schedule B), MidAmerican proposes negotiated rates capped at the weighted average of the hourly locational marginal prices (LMP) calculated by PJM Interconnection, LLC (PJM) for the applicable hours and days of the individual transactions. According to MidAmerican, "[t]he weighted average of the hourly prices will be computed by (1) summing the products of the hourly prices multiplied by the hourly transaction volumes, and (2) dividing that sum by the total of the hourly energy sold under the transactions."¹¹ MidAmerican states that it intends to apply the posted LMPs for the interface between MidAmerican and PJM, referred to as the Northwest Interface. The power sales tariff also provides for a rate floor for short term energy equal to MidAmerican's system incremental cost, regardless of the projected or actual PJM LMPs.

13. MidAmerican argues that its proposal to use PJM LMPs as a proxy for competitive market prices is just and reasonable because it will provide wholesale customers with access to supplies at competitive prices when MidAmerican has energy for sale. It also asserts that customers arranging sales under Schedule B will pay prices that do not exceed what they would have paid if they had bought directly from PJM's competitive wholesale market. According to MidAmerican, customers purchasing short term energy will generally not face transmission constraints, since MidAmerican will sell the energy from generating resources within the MidAmerican control area. MidAmerican also provides expert testimony contending that the Commission should rely on cost-based rates only as a last resort because when market prices are higher than the default rates, MidAmerican will have a strong disincentive to sell energy within its own control area. MidAmerican argues, in short, that its proposal extends the benefits of PJM's market to its wholesale customers, holds customers harmless from otherwise binding transmission constraints that would prevent them from reaching the PJM market, and provides customers with protection from prices that may turn out to be higher.¹²

¹¹ MidAmerican Transmittal Letter at 9-10.

¹² *Id.* at 10-12.

14. MidAmerican requests an effective date of August 7, 2005, for the power sales tariff and an effective date of September 1, 2005 for the revisions to its market-based rate tariff. It says that some wholesale customers in its control area may not be able to obtain necessary authorizations to execute service agreements under the power sales tariff by August 7, 2005, and therefore would have no contract in place in the meantime to allow them to purchase capacity and energy. During the interim between August 7, 2005 and September 1, 2005, MidAmerican commits to transact with customers in the MidAmerican control area under the market-based rate tariff at prices that do not exceed the caps described in Schedules A and B in the proposed power sales tariff. It states that doing so is consistent with the August 7, 2005 refund effective date established by the June 1 Order.

15. With regard to the transmission market power concerns raised earlier in this proceeding, MidAmerican states that it has reached separate agreements with Resale Power Group of Iowa (RPGI) and Midwest Municipal Transmission Group (MMTG) (the two intervenors raising transmission market power issues) that resolve such concerns. It states that the agreement with RPGI involves terminating the contract between MidAmerican and RPGI for power supply to the City of Hudson, Iowa allowing RPGI to enter into a new contract with an alternate supplier (with MidAmerican providing transmission service). The agreement with MMTG, according to MidAmerican, involves participation and investment by MMTG member Iowa Public Power Agency in new transmission projects and upgrades on MidAmerican's system.

16. Further, MidAmerican argues that the transmission market power concerns are also addressed by its proposal for an independent third party (a transmission service coordinator) to administer certain Open Access Transmission Tariff (OATT)-related functions for the MidAmerican transmission system.¹³ It states that the transmission service coordinator will enhance independent and transparent operation of the MidAmerican transmission system and will address any concern with regard to transmission market power. MidAmerican also notes that as part of its application to merge with Scottish Power plc, PacifiCorp Holdings, Inc. and PacifiCorp, it proposed to install an independent market monitor.¹⁴

¹³ The Commission conditionally accepted MidAmerican's transmission service coordinator proposal, subject to further orders. *See MidAmerican Energy Co.*, 113 FERC ¶ 61,274 (2005).

¹⁴ The Commission authorized the merger in *MidAmerican Energy Holdings Co.*, 113 FERC ¶ 61,298 (2005).

B. MidAmerican and Cordova's Filing in Docket Nos. ER96-719-008 and ER99-2156-006

17. In their change in status filing, MidAmerican and Cordova report that MidAmerican has placed into service, or will place into service, several new generation projects since it most recently submitted its market power analysis. Additionally, they report that the status of two purchases by MidAmerican has changed since that market power analysis. They assert that these changes in status have a *de minimis* effect on the pivotal supplier and market area screens and do not affect the results of the Commission's four-pronged market power analysis when applied to MidAmerican or Cordova, respectively.

III. Notice of Filing and Responsive Pleadings

A. Docket Nos. ER96-719-003, ER96-719-004, ER96-719-006 and EL05-59-000

18. On June 10, 2005, RPGI filed a notice of withdrawal of comments in Docket Nos. ER96-719-003 and ER96-719-004, stating that it no longer has an objection to MidAmerican's updated market power analysis. On June 23, 2005, MMTG filed a notice of withdrawal of its motion to intervene, protest and request for hearing in the same dockets, stating that it no longer opposes MidAmerican's market-based rate authority.

19. Notice of the August 1, 2005 compliance filing was published in the *Federal Register*, with comments, interventions, and protests due on or before August 29, 2005.¹⁵ RPGI filed a protest. On September 13, 2005, MidAmerican filed an answer to RPGI's protest. On September 28, 2005, RPGI filed an answer to MidAmerican's answer.

20. With regard to the proposed energy charge for negotiated capacity and energy (Schedule A), RPGI first notes that MidAmerican's method of calculating the units most likely to provide service, for purposes of determining the capacity charge cap for negotiated capacity and energy, appears to comply with the April 14 Order. However, RPGI argues that MidAmerican incorrectly calculates the energy charge. RPGI takes issue with MidAmerican's proposal to base its energy charge on its system incremental cost, rather than on the cost of the generating units that MidAmerican has selected as likely to provide the service and upon which MidAmerican has calculated the proposed capacity charges. According to RPGI, the central principle of the Commission's decision in the April 14 Order and July 8 Order to permit sellers to adopt embedded "up-to" cost-

¹⁵ 70 Fed. Reg. 48,117 (2005).

based rates is that the capacity and energy charges should be based on the costs of the units expected to run to meet the sales.¹⁶ To meet this principle, RPGI contends that MidAmerican should have based its energy charge for negotiated capacity and energy on the same units that are used to calculate the capacity charge. RPGI argues that, instead, MidAmerican proposes to base the energy charge on the highest priced units on its system, while the capacity charge is based on base-load units that tend to have lower energy costs. RPGI asserts that the results are inconsistent with “the cost-causation principles that underlie the Commission’s ratemaking policies.”¹⁷ RPGI further argues that the energy charge should be based on the production costs of the same units used to calculate the capacity charges or, alternatively, the capacity charges should be based on the same units used to calculate the system incremental cost energy charge.

21. RPGI also protests MidAmerican’s proposal to base short term energy (Schedule B) prices on LMPs at the PJM-MidAmerican interface. It first contends that under the present circumstances, where MidAmerican is the only supply option for transmission-dependent wholesale purchasers in the MidAmerican control area, MidAmerican has an obligation to serve. RPGI contends that this obligation is recognized in both Order No. 888¹⁸ and the April 14 Order and July 8 Order.¹⁹ Thus, MidAmerican’s argument that it should be able to use the LMP at the PJM-MidAmerican interface in order to remove a disincentive for MidAmerican to sell power within its control area is based on a flawed assumption. RPGI argues that the April 14 Order and July 8 Order make clear that just and reasonable rates for public utilities that have market power will almost universally be based on their cost of service.²⁰ Accordingly, RPGI asserts that MidAmerican’s rates

¹⁶ Protest of RPGI at 9-10.

¹⁷ *Id.* at 10.

¹⁸ *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 at 31,682 (1996), *order on reh’g*, Order No. 888-A, 62 Fed. Reg. 12,274 (March 14, 1997), FERC Stats & Regs. ¶ 31,048 (1997), *order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002).

¹⁹ Protest of RPGI at 6-7.

²⁰ *Id.* at 8, *citing* April 14 Order at P 148 and July 8 Order at P 152.

should be based on its cost of service and not on LMPs calculated at the PJM-MidAmerican interface. According to RPGI, MidAmerican has not made an effort to show how the prices produced by LMPs at the PJM and MidAmerican interface relate to its cost of service to wholesale customers in the MidAmerican control area.

22. RPGI also notes that MidAmerican's proposed tariff does not address sales for one year or longer. It argues that the April 14 Order and the July 8 Order require that rates for sales of one year or longer be filed on a case-by-case basis and based on embedded costs.²¹ Accordingly, RPGI argues that MidAmerican's tariff should be amended to make clear that it will offer long-term service at rates based on an embedded cost-of-service, and that such transactions will be submitted to the Commission for approval.

23. Finally, noting that the filing was submitted on August 1, 2005, yet MidAmerican requests an effective date of August 7, 2005, RPGI argues that the Commission should not waive the 60-day prior notice requirement to permit the requested effective date. RPGI observes that MidAmerican has not presented any "showing of good cause" as required by the Commission in order to grant waiver of its prior notice requirements.

B. Docket Nos. ER96-719-008 and ER99-2156-006

24. Notice of the October 14, 2005 change in status filing was published in the *Federal Register*, with comments, interventions, and protests due on or before October 27, 2005.²² None was filed.

IV. Discussion

A. Procedural Matters

25. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,²³ the timely, unopposed motion to intervene filed by RPGI serves to make it a party to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure²⁴

²¹ *Id.* at 12, *citing* July 8 Order at P 145.

²² 70 Fed. Reg. 61,972 (2005).

²³ 18 C.F.R. § 385.214 (2005).

²⁴ 18 C.F.R. § 385.213(a)(2) (2005).

prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers filed by MidAmerican and RPGI and will, therefore, reject them.

B. Analysis

26. As described in more detail below, in this order the Commission: (1) rejects the specific language proposed by MidAmerican that would revise its market-based rate tariff to limit the prohibition on market-based rates sales in its control area to only those sales that sink within the MidAmerican control area; (2) sets the portions of MidAmerican's proposed power sales tariff concerning the charges for negotiated capacity and energy (Schedule A) for trial-type evidentiary hearing; (3) rejects the portions of MidAmerican's power sales tariff concerning short-term energy sales (Schedule B); and (4) accepts the change in status filing of MidAmerican and Cordova. We also address other issues raised by RPGI and dismiss the transmission market power concerns raised earlier in this proceeding.

27. In the April 14 Order, the Commission adopted three default rates for three distinct products. Sales of power of one week or less must be priced at the applicant's incremental cost plus a 10 percent adder. Sales of power of more than one week but less than one year will be priced at an embedded cost "up to" rate reflecting the costs of the unit(s) expected to provide the service. All long-term sales (one year or more) into any market where the applicant has market power must be priced on an embedded cost of service basis and each such contract must be filed with the Commission for approval before service begins. The Commission stated that it will set the just and reasonable rate at the default rate unless it approves different cost-based rates for that applicant based on case-specific circumstances.²⁵

28. MidAmerican's proposed tariff sheets providing for the sale of negotiated capacity and energy (Schedule A) are generally consistent with the Commission's default cost-based rates (although we set the specific rates proposed in Schedule A by MidAmerican for hearing, as discussed below). However, the proposed tariff sheets providing for sales of short-term non-firm energy (Schedule B) do not. They would be subject to a ceiling rate based on LMPs at the PJM-MidAmerican interface, rather than on MidAmerican's costs to provide the service.

²⁵ April 14 Order at P 148.

1. Market-Based Rate Tariff Revisions

29. A component of MidAmerican's proposal to mitigate its ability to exercise generation market power in the MidAmerican control area is revision of its market-based rate tariff to provide that "[s]eller will not sell capacity and energy under this Tariff to serve load that sinks within the MidAmerican control area." The Commission will accept MidAmerican's commitment to not make sales under its market-based rate tariff in the MidAmerican control area, but rejects its proposed tariff language.

30. The Commission has stated that its role is to assure customers that sellers who are authorized to sell at market-based rates do not have market power or have adequately mitigated it.²⁶ Further, the Commission's recent orders accepting mitigation proposals are clear that the mitigation is to apply to sales in the geographic market where an applicant is found (or presumed) to have market power.²⁷ In order to put in place adequate mitigation that eliminates the ability to exercise market power and ensure that rates are just and reasonable,²⁸ all market-based rate sales in a control area where an applicant is found or presumed to have the ability to exercise market power must be subject to mitigation approved by the Commission.

31. MidAmerican's proposed tariff language would improperly limit mitigation to certain customers in the MidAmerican control area, namely, only to sales to those buyers that serve end-use customers in the MidAmerican control area. MidAmerican's proposal would improperly allow it to make market-based rate sales within its control area (where it has the presumption of market power) to any entities that do not serve end-use customers in the MidAmerican control area. Such a limitation would not mitigate MidAmerican's ability to attempt to exercise market power over sales in its control area.

32. This proposed tariff language is inconsistent with our direction in the April 14 Order and July 8 Order, as well as our recent precedent approving mitigation for other entities that failed the indicative screens. The Commission authorizes sales of electric energy at market-based rates only if the seller and its affiliates do not have, or have adequately mitigated, market power in the generation and transmission of such energy, and cannot erect other barriers to entry by potential competitors.²⁹ Where, as here, there

²⁶ July 8 Order at P 146.

²⁷ See *Duke Energy Trading and Marketing, L.L.C.*, 114 FERC ¶ 61,056 (2006).

²⁸ See April 14 Order at P 144, and P 147.

²⁹ See *Id.* at P 144; see also, e.g., *Heartland Energy Servs., Inc.*, 68 FERC ¶ 61,223 at 62,060 (1994); *Louisville Gas & Elec. Co.*, 62 FERC ¶ 61,016 at 61,143-44 (1993).

is a presumption of market power within a control area, the applicant has the ability to “raise the market price above competitive levels” and charge “excessive rates” on the market-based rate sales it makes in that control area.³⁰ In previous orders, the Commission has addressed proposals similar to what MidAmerican proposes here. For example, on rehearing of the April 14 Order, it was argued that access to power sold under mitigated prices should be restricted to buyers serving end-use customers within the relevant geographic market in which the applicant has been found to have market power. In particular, arguments were made that an applicant should not be required to make sales at mitigated prices to power marketers or brokers without end-use customers in the relevant market.³¹ In the July 8 Order, the Commission rejected the suggestion that we restrict mitigated applicants to selling power only to buyers serving end-use customers. That is precisely what MidAmerican is now proposing.

33. Accordingly, the Commission rejects this proposed tariff language, and directs MidAmerican to file (within 30 days of the date of issuance of this order) revisions to its market-based tariff to reflect its commitment to not make any sales at market-based rates in the MidAmerican control area.

34. Additionally, we reject MidAmerican’s proposed September 1, 2005 effective date for the revisions to its market-based rate tariff. MidAmerican’s proposal would result in an overlap between when MidAmerican’s proposed cost-based power sales tariff, providing mitigation for the MidAmerican control area, becomes effective and the continued effectiveness of its market-based rates in the MidAmerican control area. MidAmerican has made a mitigation proposal, which we here accept (although we reject the specific proposed language), to prohibit sales in the MidAmerican control area under its market-based rate tariff. The Commission has indicated that when mitigation is approved, sales made on or after the refund effective date will be subject to the approved mitigated rate.³² Thus, in compliance with the April 14 Order and July 8 Order, MidAmerican’s authority to charge market-based rates in the MidAmerican control area must cease on the date on which its mitigated rates in that control area take effect. In other proceedings, we have accepted an effective date for similar revisions to market-based rate tariffs that coincides with the effective date of the proposed cost-based tariff

³⁰ See April 14 Order at P 103, 152.

³¹ July 8 Order at P 134.

³² *Id.* at P 158.

and the refund effective date.³³ We require MidAmerican to continue that practice here. Accordingly, we direct MidAmerican to file the revisions to its market-based rate tariff discussed above to be effective August 7, 2005.

2. Power Sales Tariff

a. Effective Date

35. MidAmerican proposes an effective date of August 7, 2005 for the power sales tariff. As noted above, RPGI objects to this requested effective date, arguing that the standards set out in *Central Hudson Gas & Electric Corporation*³⁴ for granting waiver of the 60-day prior notice requirement have not been met, and that MidAmerican has made no showing of good cause to waive the 60-day notice requirement.

36. The Commission will grant MidAmerican's requested effective date of August 7, 2005, which is also the refund effective date established by the June 1 Order. In response to RPGI, we note that the 60-day prior notice requirement and the standards in *Central Hudson* are applicable to proceedings under section 205 of the FPA. In this case, however, the Commission is acting under section 206 of the FPA. Furthermore, we find that it is appropriate for MidAmerican's mitigation proposal to become effective on a date that corresponds with the refund effective date, since MidAmerican will be required to refund any amounts it charged after the refund effective date that exceed the rates that are approved in this proceeding (following the hearing procedures directed below).³⁵ Additionally, since the refund effective date remains in place during the hearing procedures we direct in this order, wholesale purchasers and consumers will be adequately protected.

b. Charges for Negotiated Capacity and Energy (Schedule A)

37. As noted above, RPGI asserts that MidAmerican's proposed rates for negotiated capacity and energy do not meet the principle in the April 14 Order and July 8 Order that "up-to" cost-based rates be based on the costs of the units expected to meet the sales. We permit rates for coordination power sales to include an energy charge based on the seller's system incremental costs, determined pursuant to a formula, plus 10 percent for

³³ See, e.g., *Duke Power*, 113 FERC ¶ 61,192 at P 41 (2005).

³⁴ 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992) (*Central Hudson*).

³⁵ See, e.g., *LG&E Energy Marketing Inc.*, 113 FERC ¶ 61,229 at P 32 (2005).

difficult to quantify costs,³⁶ and a capacity charge based on the cost of units expected to be used to make the sale.³⁷ Thus, the Commission will not reject MidAmerican's proposal to adopt an energy charge based on system incremental costs.

38. However, we agree with RPGI that when energy is priced incrementally for sales of more than one week but less than one year, any capacity charges should reflect the fixed costs of the units likely to be used to price energy. RPGI's protest essentially challenges MidAmerican's selection of the units likely to be used to make sales under the tariff.³⁸ The Commission is unable to decide this material issue of fact based on the existing record before us. This issue is more appropriately considered in the trial-type evidentiary hearing that we direct below.

39. MidAmerican's August 1, 2005 filing includes an Attachment C, setting forth a proposed cost-based rate calculation for negotiated capacity and energy for periods of one week to one year (Schedule A). This attachment does not provide sufficient cost support for the Commission to determine that the proposed rates are just and reasonable and not unduly discriminatory or preferential. In particular, we note that MidAmerican includes a return on equity of 12.25 percent, but provides no support for this return on equity.

40. Based on the foregoing, our preliminary analysis indicates that MidAmerican's proposed cost-based rates for negotiated capacity and energy for periods of one week to one year (Schedule A) have not been shown to be just and reasonable and may be unjust,

³⁶ The 10 percent adder is intended to allow the recovery of difficult-to-quantify costs for services that are provided on an intermittent basis. The adder is intended to provide a margin for error in the incremental cost because off-system transactions are often settled on the basis of quotes and are not trued up to reflect the actual incremental cost. *See PacifiCorp*, 54 FERC ¶ 61,296 at 61,853, *reh'g denied*, 55 FERC ¶ 61,461 (1991).

³⁷ *See, e.g., Florida Power & Light Company*, 66 FERC ¶ 61,227 at 61,531 (1994), *order on reh'g*, 70 FERC ¶ 61,158 (1995); *Southern Company Services, Inc.*, 59 FERC ¶ 61,238, *reh'g denied*, 60 FERC ¶ 61,297 (1992).

³⁸ While the general methodology used by MidAmerican to select the units likely to be used to make sales under the tariff has commonly been used in the industry, we note that MidAmerican has not reflected the cost of any of its power purchases in its production cost analysis. In addition, alternative methods, such as historical data showing resources used to make actual recent off-system sales, would allow verification of the results of MidAmerican's analysis.

unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Accordingly, the Commission will set the proposed rates for negotiated capacity and energy in Schedule A for a trial-type evidentiary hearing to determine the just and reasonable and not unduly discriminatory or preferential cost-based rates for negotiated capacity and energy. As discussed above and below, this is the only portion of MidAmerican's proposal that we are setting for hearing.

41. Section 206 of the FPA limits the period for which the Commission can order refunds to 15 months following the refund effective date.³⁹ In light of this time constraint, the Commission will direct that the presiding judge in the trial-type evidentiary hearings ordered here issue an initial decision by September 1, 2006.

c. Short-Term Energy Sales (Schedule B)

42. With regard to short-term energy sales, the proposed Schedule B permits parties to negotiate non-firm wholesale short-term (one hour up to one month) energy sales subject to caps based on PJM LMPs at the PJM-MidAmerican interface (Northwest Interface). As the April 14 Order stated, the Commission allows mitigation proposals tailored to the particular circumstances of an applicant that would eliminate the ability to exercise market power. Specifically, the Commission stated there that “[i]f an applicant does not pass the generation market power screens . . . the Commission will set the just and reasonable rate at the ‘default’ rate unless it approves different cost-based rates for the applicant based on case-specific circumstances.”⁴⁰

43. We will not accept MidAmerican's proposal to use a market-based LMP as a cap for its short-term energy sales. We agree with RPGI that our April 14 Order and July 8 Order contemplate that mitigation proposals based on rates will be cost-based.⁴¹ We have indicated that where, as here, the applicant accepts a presumption of market power, an order will be issued addressing whether default cost-based rates or case-specific cost-

³⁹ 16 U.S.C. § 824e(b) (2000).

⁴⁰ April 14 Order at P 148; *see also* P 149, n. 143 (“[t]he refund floor would be the default cost-based rates or, if applicable, any case-specific cost-based rates proposed by the applicant and accepted by the Commission”) and P 40 (“applicant will be subject to cost-based default rates or other cost-based rates that the applicant proposes and the Commission approves.”)

⁴¹ *See Id.*

based rates are to be applied.⁴² Thus, we do not find that the proposed rates in Schedule B are just and reasonable, and we reject that portion of MidAmerican's mitigation proposal. We have determined that where, as here, an applicant's proposed mitigation does not eliminate its ability to exercise market power, then the applicant's market-based rate authority will be revoked in geographic areas where market power is found, and the applicant will be subject to cost-based default rates *or other cost-based rates* that the applicant proposes and the Commission approves.⁴³ We direct MidAmerican to submit a compliance filing within 30 days of the date of this order that either revises the provisions of the power sales tariff providing for sales of short-term energy (Schedule B) to set the just and reasonable rate at the default rate or proposes different cost-based rates (together with cost-support) based on MidAmerican's specific circumstances, consistent with the April 14 Order and July 8 Order.

44. As noted above, MidAmerican contends that the Commission should rely on cost-based rates only as a last resort because when market prices are higher, MidAmerican will have a strong disincentive to sell energy within its own control area. The pleadings in this case do not indicate that MidAmerican has refused to sell energy to transmission-dependent purchasers in the MidAmerican control area so that it could sell the energy at a higher price outside that control area. Accordingly, we need not address the extent to which our decision to reject MidAmerican's proposal to use a market-based LMP cap for its short-term energy sales may or may not affect future sales within the MidAmerican control area. We believe that these issues are better considered generally as part of the generic rulemaking proceeding in Docket No. RM04-7-000.

3. Long-Term Sales

45. RPGI notes that MidAmerican's proposed power sales tariff does not refer to long-term sales and argues that the Commission should amend MidAmerican's tariff to make clear that it will offer long-term service at rates based on an embedded cost-of-service and that such transactions will be submitted to the Commission for approval. MidAmerican states that its rates for long-term sales (one year or more) will be negotiated on a case-by-case basis and will be filed for review and approval by the Commission, consistent with the Commission's direction in the April 14 Order.⁴⁴ The Commission accepts this commitment and finds that it addresses RPGI's concerns. We will hold MidAmerican to this commitment to individually file each long-term agreement

⁴² *See Id.* at P 149.

⁴³ April 14 Order P 40.

⁴⁴ *See* Transmittal Letter at 6, n. 17.

with the Commission for review and approval prior to the commencement of service.⁴⁵ Furthermore, we agree with RPGI that the rates for long-term service must be based on MidAmerican's embedded costs.⁴⁶

4. Transmission Market Power Concerns

46. In the June 1 Order, the Commission noted that RPGI and MMTG had raised concerns regarding the issue of transmission market power that were sufficient to warrant further examination in the section 206 proceeding initiated in Docket No. EL05-59-000.⁴⁷ As noted above, RPGI and MMTG both reached agreements with MidAmerican to resolve the concerns raised in their earlier protests and subsequently withdrew those protests in Docket Nos. ER96-719-003 and ER96-719-004.

47. Additionally, on September 29, 2005, the Commission issued an order approving an audit report (prepared by the Commission's Division of Operation Audits, Office of Market Oversight and Investigation) resolving certain findings of non-compliance with the OATT by MidAmerican.⁴⁸ Further, on December 16, 2005, the Commission issued an order conditionally accepting MidAmerican's proposal to use an independent third-party transmission service coordinator to administer certain OATT-related functions.⁴⁹ The Commission found that, as conditioned, the proposal would produce considerable benefits and would aid in addressing concerns raised in the audit report regarding MidAmerican's non-compliance with its Standards of Conduct and OATT.⁵⁰

48. In light of these events, we will terminate the section 206 investigation with respect to transmission market power. We note that many of the transmission market power concerns raised by RPGI and MMTG in their earlier protests concerned non-compliance with the OATT by MidAmerican, which the Commission has now

⁴⁵ See April 14 Order at P 155.

⁴⁶ See *Id.*; see also, e.g., *Duke Power*, 113 FERC ¶ 61,192 at P 37 (2005).

⁴⁷ June 1 Order at P 29.

⁴⁸ *MidAmerican Energy Company*, 112 FERC ¶ 61,346 (2005).

⁴⁹ *MidAmerican Energy Company*, 113 FERC ¶ 61,274 (2005).

⁵⁰ See *Id.* at P 24.

addressed.⁵¹ Also, as we noted in the June 1 Order, 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. We noted there that MidAmerican has an approved OATT.⁵² Accordingly, the Commission finds that MidAmerican satisfies the Commission's transmission market power standard for the grant of market-based rate authority.

5. Change in Status Filing – Docket Nos. ER96-719-008 and ER99-2156-006

49. MidAmerican and Cordova state that after MidAmerican submitted the market power analysis most recently used by the Commission to evaluate its market-based rate authority, MidAmerican placed into service, or will shortly place into service, several generation projects. In addition, it reports that the status of two purchases has changed from the conditions used to develop that market power analysis. MidAmerican and Cordova state that these changes in status do not affect the results of the Commission's four-pronged market power analysis when applied to MidAmerican or Cordova. Based on these representations, the notice of change in status is accepted for filing.

The Commission orders:

(A) The proposed revisions to MidAmerican's market-based rate tariff to provide that it will not sell capacity and energy under the tariff to serve load that sinks within the MidAmerican control area are hereby rejected, as discussed in the body of this order.

(B) MidAmerican is hereby directed to submit a compliance filing within 30 days of the date of this order revising its market-based tariff to commit not to make sales at market-based rates in the MidAmerican control area, to be effective August 7, 2005, as discussed in the body of this order.

(C) 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

⁵¹ RPGI's December 14, 2004 comments in this proceeding, in fact, referenced the enforcement proceeding and allegations of OATT non-compliance.

⁵² June 1 Order at P 29.

and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held concerning the justness and reasonableness of MidAmerican's proposed rates for negotiated capacity and energy (Schedule A), as discussed in the body of this order.

(D) A presiding judge, to be designated by the Chief Judge, shall, within approximately fifteen (15) days of the presiding judge's designation, convene a pre-hearing conference in these proceedings in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(E) The presiding judge is directed to issue an initial decision no later than September 1, 2006, as discussed in the body of this order.

(F) MidAmerican's proposed power sales tariff provisions for sales of short-term energy (Schedule B) are hereby rejected, as discussed in the body of this order.

(G) MidAmerican is hereby directed to submit a compliance filing within 30 days of the date of this order that either revises the provisions of the power sales tariff providing for sales of short-term energy (Schedule B) to set the just and reasonable rate at the default rate or proposes different cost-based rates for that applicant based on case-specific circumstances, consistent with the April 14 Order and July 8 Order, as discussed in the body of this order.

(H) MidAmerican and Cordova's notice of change in status is hereby accepted for filing, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.