

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.

The Empire District Electric Company

Docket Nos. ER99-1757-008  
ER99-1757-009  
ER99-1757-010  
EL05-67-000

ORDER ON PROPOSED MITIGATION MEASURES AND COMPLIANCE FILINGS

(Issued August 15, 2006)

1. In this order, the Commission conditionally accepts for filing The Empire District Electric Company's (Empire) mitigation proposal applicable to sales of electric power at wholesale for transactions in its home control area (Empire control area) to become effective May 16, 2005, the refund effective date in this proceeding, subject to Commission acceptance of the compliance filings directed herein.
2. Also in this order, the Commission accepts Empire's revised market-based rate tariff sheets which incorporate the Commission's change in status reporting requirement<sup>1</sup> and a revised tariff sheet prohibiting Empire from making market-based rate power sales to any public utility affiliate without first receiving Commission authorization pursuant to section 205 of the Federal Power Act (FPA).<sup>2</sup>

**Background**

3. On May 13, 2004,<sup>3</sup> the Commission addressed the procedures for implementing the generation market power screens announced on April 14, 2004 and clarified on July 8, 2004.<sup>4</sup> On September 27, 2004, and September 28, 2004, as amended on December

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<sup>1</sup> *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 (2005) (Order No. 652).

<sup>2</sup> 16 U.S.C. § 824d (2000).

<sup>3</sup> *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004) (May 13 Order).

<sup>4</sup> *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 at P 151-55 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

15, 2005, Empire submitted its updated market power analysis in compliance with the May 13 Order. In its order issued March 3, 2005,<sup>5</sup> the Commission found that Empire failed the wholesale market share screen for each of the four seasons considered in Empire's control area. As we stated in the April 14 Order, where an applicant is found to have failed either generation market power screen, such failure provides the basis for instituting a proceeding under section 206 and establishes a rebuttable presumption of market power in the resulting section 206 proceeding.<sup>6</sup>

4. In the March 3, 2005 Order, the Commission instituted a proceeding under section 206 of the FPA<sup>7</sup> to investigate generation market power in the Empire control area, and to determine whether Empire may continue to charge market-based rates within the Empire control area. The Commission also established a refund effective date pursuant to the provisions of section 206.

5. In the March 3, 2005 Order, the Commission directed Empire to either: (1) file a Delivered Price Test analysis; (2) file a mitigation proposal tailored to its particular circumstances that would eliminate the ability to exercise market power; or (3) inform the Commission that it will adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates. The Commission also directed Empire to revise section 5 of its market-based rate tariff to include a statement that Empire will not make any sales to affiliates without first receiving Commission authorization of the transaction under section 205 of the FPA and to incorporate the change in status reporting requirement adopted in Order No. 652.

6. On March 31, 2005, Empire filed revised tariff sheets to reflect: (1) a revision to include language regarding first receiving authority from the Commission pursuant to section 205 of FPA before Empire engages in any affiliate transactions under its tariff, and (2) inclusion of the change in status reporting requirement adopted in Order No. 652.

7. On May 2, 2005, Empire submitted a mitigation proposal that Empire states will eliminate its ability to exercise market power within its control area. Empire proposes to amend its market-based rate tariff to prohibit sales that sink in Empire's control area. Specifically, Empire proposes to amend section 3 of its market-based rate tariff to provide that no Mitigated Sales shall be made under this tariff. The term "Mitigated Sales" is defined in the tariff as "physical sales of power and/or energy that sink in the control area presently operated by Empire within Southwest Power Pool, Inc. (SPP)."<sup>8</sup>

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<sup>5</sup> *The Empire District Electric Company*, 110 FERC ¶ 61,214 (2005) (March 3, 2005 Order).

<sup>6</sup> April 14 Order, 107 FERC ¶ 61,018 at P 201.

<sup>7</sup> 16 U.S.C. § 824e (2000).

<sup>8</sup> Empire May 2, 2005 Compliance Filing at 2.

Empire states that Mitigated Sales do not include sales into markets administered by the SPP. Empire states that Mitigated Sales for periods of one year or less will be made under Schedules A or C, as applicable, of Western Systems Power Pool (WSPP) Rate Schedule FERC No. 6, as it may be amended from time to time (WSPP Agreement). Empire also states that Mitigated Sales of greater than one year will not be made prior to Empire first submitting a separate filing and receiving Commission authorization of the transaction under section 205 of the FPA. Empire adds that the foregoing provisions governing Mitigated Sales shall end upon such date as the Commission allows these provisions to terminate or to be superseded by other measures. Empire requests that the revised tariff be made effective on May 16, 2005, the refund effective date established in Docket No. EL05-67-000.

8. On December 8, 2005, the Director, Division of Tariffs and Market Development – South, acting pursuant to delegated authority, issued a data request directing Empire to answer various questions pertaining to the WSPP Agreement and its applicability in this proceeding.

9. On January 9, 2006, Empire submitted a response to the December 8, 2005, data request. Empire asserted that the WSPP Agreement is a Commission-approved cost-based rate schedule. Empire stated that the Commission has approved the use of the WSPP Agreement for purposes of mitigating market power in other cases.<sup>9</sup> Empire stated that the WSPP Agreement’s cost-based rate ceilings are based on the “calculation of average costs for [18 public utilities] within the WSPP which are subject to the Commission’s jurisdiction, using data from the 1989 FERC Form No. 1 filings.”<sup>10</sup> Empire stated that the WSPP Agreement’s demand charge is consistent with Empire’s costs for the units expected to provide the service, is consistent with long-standing Commission precedent concerning the pricing of cost-based power sales, and is, therefore, tailored to Empire’s particular circumstances. Empire stated that if a non-WSPP member requests to transact with Empire for a sale that would sink in the Empire control area, Empire will file an appropriate rate schedule with the Commission prior to consummating the transaction.

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<sup>9</sup> Citing *Western Resources, Inc.*, 94 FERC ¶ 61,050 (2001) (accepting WSPP Agreement to mitigate potential affiliate preference concerns between prospective merger partners); *Portland General Elec. Co.*, Docket No. ER04-199-000 (December 31, 2003) (unpublished letter order) (accepting revised market-based rate settlement that used cost-based rate caps under the WSPP Agreement to address code of conduct issues); *El Paso Elec. Co.*, 105 FERC ¶ 61,107 (2003) (accepting sales under the cost-based rate caps of the WSPP Agreement during two-year suspension of the utility’s market-based rate tariff).

<sup>10</sup> Jan. 9, 2006 Compliance Filing at 2 (quoting *Western Sys. Power Pool*, 55 FERC ¶ 61,495 at 62,712 (1991)).

### **Notice of Filings and Responsive Pleadings**

10. Notice of Empire's March 31, 2005, May 2, 2005, and June 23, 2005, filings was published in the *Federal Register*, 70 Fed. Reg. 19,748 (2005), 70 Fed. Reg. 25,564 (2005) and 70 Fed. Reg. 38,907 (2005), respectively with interventions and protests due on or before April 21, 2005, May 13, 2005 and July 6, 2005. None was filed.

11. Notice of Empire's January 9, 2006 filing was published in the *Federal Register*, 71 Fed. Reg. 3,285 (2006), with comments, interventions, and protests due on or before January 30, 2006. None was filed.

### **Discussion**

#### **Mitigation Proposal**

12. The Commission will accept Empire's proposed use of the WSPP Agreement as mitigation for sales made in the Empire control area. The Commission has previously accepted the WSPP Agreement and found it to be a just and reasonable cost-based rate. Furthermore, we note that Empire has the option of transacting under the WSPP Agreement and thus can make sales under the WSPP Agreement without any further authorization from the Commission. Our action in this regard is subject to the outcome of the Market-based Rate Rulemaking in RM04-7-000 and any determinations that the Commission makes regarding mitigation in that proceeding.<sup>11</sup>

13. We will also accept Empire's proposed revisions to its market-based rate tariff subject to the modifications directed below. We accept Empire's proposal to revise its tariff to eliminate Empire's ability to exercise market power within Empire's control area. However, we reject the specific tariff language that Empire proposes to use to implement the sales prohibition in Empire's control area.

14. A component of Empire's proposal to mitigate its ability to exercise generation market power in the Empire control area is a revision of its market-based rate tariff to provide that no Mitigated Sales shall be made under its tariff. The term "Mitigated Sales" is defined in the tariff as "physical sales of power and/or energy that sink in the control area presently operated by Empire within SPP."<sup>12</sup> The tariff further states that Mitigated Sales do not include sales into markets administered by SPP. The tariff provides that Mitigated Sales for periods of one year or less shall be made under

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<sup>11</sup> See *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Notice of Proposed Rulemaking*, 71 Fed. Reg. 33,102 (June 7, 2006), FERC Stats. & Regs. ¶ 32,602 (2006).

<sup>12</sup> Empire May 2, 2005 Compliance Filing at 2.

Schedules A or C of the WSPP Agreement, as may be amended,<sup>13</sup> and that Mitigated Sales of greater than one year shall not be made prior to Empire first submitting a separate filing and receiving Commission authorization of the transaction under section 205 of the FPA.

15. First, 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.<sup>14</sup> Further, the Commission's recent orders accepting mitigation proposals are clear that the mitigation is to apply to sales in the geographic market where a seller is found (or presumed) to have market power, not only to sales to end users in the control area.<sup>15</sup> In order to put in place adequate mitigation that eliminates the ability to exercise market power and ensure that rates are just and reasonable,<sup>16</sup> 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.

16. Empire's proposed tariff language (which defines Mitigated Sales as physical sales of power and/or energy that sink in the Empire control area) would improperly limit mitigation to certain customers in the Empire control area, namely, only to sales to those buyers that serve end-use customers in the Empire control area. Empire'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 Empire control area. Such a limitation would not mitigate Empire's ability to attempt to exercise market power over sales in the mitigated control area.

17. 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.<sup>17</sup> For example, on rehearing of the April 14

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<sup>13</sup> *Western Sys. Power Pool*, 55 FERC ¶ 61,099, *order on reh'g*, 55 FERC ¶ 61,495 (1991), *aff'd in relevant part and remanded in part sub nom. Environmental Action and Consumer Federation of America v. FERC*, 996 F.2d 401 (D.C. Cir. 1992), *order on remand*, 66 FERC ¶ 61,201 (1994); *Western Sys. Power Pool*, 83 FERC ¶ 61,099 (1998); *Western Sys. Power Pool*, 85 FERC ¶ 61,363 (1998); *Western Sys. Power Pool, Inc.*, 95 FERC ¶ 61,483 (2001).

<sup>14</sup> July 8 Order at P 146.

<sup>15</sup> *See Oklahoma Gas and Electric Company*, 114 FERC ¶ 61,297 (2006), *reh'g pending*; *Carolina Power and Light Company*, 114 FERC ¶ 61,294 (2006) (CP&L); *Duke Energy Trading and Marketing, L.L.C.*, 114 FERC ¶ 61,056 (2006); and *MidAmerican Energy Company*, 114 FERC ¶ 61,280 (2006).

<sup>16</sup> *See* April 14 Order at P 144.

<sup>17</sup> *See, e.g., MidAmerican Energy Company*, 114 FERC ¶ 61,280 (2006).

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.<sup>18</sup> 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, and has rejected tariff language that proposes to do so.<sup>19</sup> That is precisely what Empire is now proposing.

18. Accordingly, the Commission rejects this proposed tariff language, and directs Empire to file, within 30 days of the date of issuance of this order, revisions to its market-based tariff to provide that service under the tariff applies only to sales outside the Empire control area, effective as of the refund effective date in this proceeding, May 16, 2005.

19. Second, as stated above, Empire's proposed tariff language provides that Mitigated Sales do not include sales into markets administered by SPP. Empire provides no explanation of the basis for this exclusion. Furthermore, the Commission is accepting mitigation as it applies to the Empire control area. Thus, Empire is directed to file, within 30 days of the date of issuance of this order, revised tariff sheets removing this provision from the proposed tariff.

20. Third, Empire's proposed revisions to its market-based rate tariff include a reference to its proposal to use the WSPP agreement as the basis for mitigation. The Commission notes that Empire's cost-based mitigation proposal should not be referenced in the market-based rate tariff. Accordingly, we direct Empire to file, within 30 days of the date of issuance of this order, revised tariff sheets removing such references from the proposed revised market-based rate tariff.

21. Finally, we note that Empire states that it will transact under the WSPP Agreement for sales in the Empire control area of one year or less and commits that sales in the Empire control area greater than one year shall not be made prior to Empire first submitting a separate filing and receiving Commission authorization of the transaction under section 205 of the FPA. This commitment, however, is inconsistent with the April 14 Order, that the Commission required long-term mitigation to apply to sales of one year or longer.<sup>20</sup> Accordingly, our acceptance of Empire's use of the WSPP Agreement for mitigation purposes is conditioned on that proposal applying to sales of less than one year. Similarly, we accept Empire's commitment to seek prior authorization for long-

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<sup>18</sup> July 8 Order at P 134.

<sup>19</sup> *See, e.g., MidAmerican Energy Company*, 114 FERC ¶ 61,280 (2006).

<sup>20</sup> April 14, Order at P155.

term sales to the extent that such commitment applies to sales of one year or longer. Further, we interpret Empire's proposal to be that sales of one year or longer will be made at cost-based rates and we will accept Empire's proposal on the condition that any such sales be cost-justified.

22. Empire is directed, within 30 days of the date of issuance of this order, to state whether it accepts these modifications to its mitigation proposal.

23. To the extent that Empire made any sales under Empire's market-based rate tariff in the Empire control area since the refund effective date<sup>21</sup> in this proceeding at rates that were above the rates under the mitigation proposal accepted herein, Empire is directed, within 30 days of the date of issuance of this order, to make refunds, with interest. In addition, we direct Empire to file a refund report within 15 days after making refunds. If no refunds were due, Empire is expected to file with the Commission within 30 days of the date of issuance of this order so stating.

### **Other Tariff Revisions**

24. We accept as in compliance with the March 3, 2005 Order Empire's revisions to its market-based rate tariff incorporating the change in status reporting requirement and affiliate sales prohibition language.<sup>22</sup>

#### **The Commission orders:**

(A) Empire's proposal is conditionally accepted, to be effective on May 16, 2005, as requested, subject to Commission acceptance of the compliance filings directed herein.

(B) Empire is directed to file, within 30 days of the date of issuance of this order, revisions to its market-based tariff and to file a statement that it accepts the modifications to Empire's mitigation proposal as discussed in the body of this order.

(C) Empire is hereby ordered to make refunds within 30 days of the date of issuance of this order, with interest, calculated pursuant to 18 C.F.R. § 35.19(2) (2006), and to file a refund report with the Commission within 15 days of the date refunds are made, as discussed in the body of the order. If no refunds are due, Empire is directed to file with the Commission within 30 days of the date of issuance of this order a report so stating.

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<sup>21</sup> The refund effective date in this proceeding is May 16, 2005.

<sup>22</sup> FERC Electric Tariff, First Revised Volume No.3, First Revised Sheet No. 1 and Original Sheet No. 1A (Supersedes Original Sheet No. 1).

(D) Empire's revised tariff sheets incorporating the change in status reporting requirement is hereby accepted for filing, effective March 21, 2005, as requested.

(E) The tariff revision prohibiting Empire from making market-based power sales to any affiliate "without first receiving" Commission authorization pursuant to section 205 of the Federal Power Act is hereby accepted for filing, effective as of the date of this order.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.