

UNITED STATES OF AMERICA 107 FERC ¶ 61,098
FEDERAL ENERGY REGULATORY COMMISSION

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

Wisconsin Energy Corporation Operating
Companies

Docket No. ER04-607-000

ORDER ACCEPTING AND SUSPENDING PROPOSED AMENDMENTS
TO THE JOINT ANCILLARY SERVICES TARIFF AND ESTABLISHING
HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued April 30, 2004)

1. On March 1, 2004, Wisconsin Electric Power Company (Wisconsin Electric), on behalf of the Wisconsin Energy Corporation Operating Companies (Wisconsin Energy),¹ filed proposed amendments to Wisconsin Energy's Joint Ancillary Services Tariff (JAST). As discussed below, we accept the proposed amendments and suspend them for a nominal period, to become effective April 1, 2004, subject to refund, and establish hearing and settlement judge procedures. This order benefits customers by ensuring a timely inquiry into whether the proposed amendments are just and reasonable.

Background

2. Wisconsin Energy provides ancillary services from its generation resources to American Transmission Company, LLC (ATC). Wisconsin Energy seeks to augment its JAST by implementing a new Generator Imbalance Service (GIS). Wisconsin Energy's proposed amendments seek to effectuate two goals: (1) establish a new GIS (Schedule F) and (2) make conforming revisions to the JAST reflecting the proposed new GIS. The proposed service will accommodate differences in hourly scheduled output and actual output of generating units located in the Wisconsin Electric and Edison Sault control areas.

¹ Wisconsin Electric and Edison Sault Electric Company (Edison Sault) are wholly-owned subsidiaries of Wisconsin Energy.

3. Under Wisconsin Energy's proposed new GIS, each customer will be required to pay a fixed monthly charge of \$250 for the services detailed in Schedule F and a variable charge of \$50 for each day that a schedule exists for the generator. Wisconsin Energy's customers will be given an estimate of charges associated with the initial costs incurred by Wisconsin Energy to modify its Energy Management, Energy Accounting, Scheduling, and other related systems in order to accommodate the provision of the proposed new GIS. For every hour that the customer's actual energy delivered is greater than the customer's scheduled generation of energy, Wisconsin Energy will pay the customer for the resulting Positive Energy Imbalance. For every hour that the customer's actual energy delivered is less than the customer's scheduled generation of energy, Wisconsin Energy will charge the customer for energy required to cover the Negative Generator Imbalance based on a tiered structure.
4. Wisconsin Energy seeks waiver of the Commission's 60-day prior notice requirement and requests that the Commission make the proposed amendments effective April 1, 2004.

Notice of Filing and Responsive Pleadings

5. Notice of the filing was published in the Federal Register, 69 Fed. Reg. 11,613 (2004), with comments, interventions and protests due on or before March 11, 2004. Wisconsin Public Power, Inc. and ATC filed timely motions to intervene. Wisconsin Public Service Corporation filed a motion to intervene out-of-time. Electric Power Supply Association (EPSA) and Duke Energy North America, LLC and Duke Energy Trading Marketing, LLC (collectively, Duke) filed timely motions to intervene and protests. On March 31, 2004, Wisconsin Energy filed an answer to both EPSA's and Duke's protests. On April 5, 2004, ATC filed an answer to EPSA's protests.

Discussion

Procedural Matters

6. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), we will grant the unopposed motion to intervene out-of-time filed by the Wisconsin Public Service Commission given its interest in this proceeding, the early stage of this proceeding, and the absence of undue prejudice or delay.

7. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2003), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the answers of Wisconsin Energy and ATC because they provide information that has assisted us in our decision-making.

Generator Imbalance Service

1. Who Should Provide Generator Imbalance Service

8. Both EPSA and Duke state that Wisconsin Energy's proposal should be rejected because any GIS should be designed and implemented by the transmission provider, not by a market participant.

9. EPSA contends that either the Midwest Independent Transmission System Operator (Midwest ISO) or ATC should manage the GIS, thereby inserting Midwest ISO or ATC between Wisconsin Energy and the other market participants. The insertion of Midwest ISO or ATC would separate the potential competing interests and incentives; EPSA explains that the relationship between a load serving entity possessing its own fleet of generators (such as Wisconsin Energy) and other generators creates an incentive for Wisconsin Energy to manage imbalance outcomes to advance its own interests. EPSA also characterizes the proposal as an attempt to divert critical operational functions away from a Commission-approved RTO and ITC.

10. Duke states that Wisconsin Energy sold its transmission to ATC, which is a member of the Midwest ISO. Duke states that since Midwest ISO is the transmission provider, Midwest ISO is in the best position to determine how to balance load and generation. Duke also states that Wisconsin Energy is a market participant within the footprint of Midwest ISO and is uniquely ill-suited to make unilateral decisions as to the balancing needs of the transmission provider and how to best meet those needs. Duke, like EPSA, contends that either Midwest ISO or ATC is the appropriate entity to implement and manage the GIS.

11. ATC states in its answer that EPSA makes the assumption that the proposed service is a transmission service required to be provided by ATC, that is, by stating that the Commission direct ATC to perform some or all of the elements of the proposed GIS. However, ATC states that the proposed GIS to be offered by Wisconsin Energy requires capabilities that ATC currently does not have since it does not own or control generation. While ATC procures energy balancing service and passes through the charges for Energy Imbalance Service, ATC is not required to control generation. ATC also states that it is not staffed or equipped to provide the

proposed GIS, and more importantly, is not organized to manage the necessary information in the manner that EPSA suggests.

12. In its answer, Wisconsin Energy states that it does not intend to subvert the ultimate goal of competitive regional markets as envisioned by the Commission's policies; Wisconsin Energy's intent is to meet its reliability obligations by keeping its system in balance,² not to co-opt the responsibilities of ATC and Midwest ISO. Wisconsin Energy adds that Midwest ISO's energy market, which is not slated to be implemented until December 2004, will not meet the real-time balancing requirements that the proposed GIS would provide. Wisconsin Energy also states that the proposed GIS may diminish as Midwest ISO implements its markets. Thus, in the proposed GIS Wisconsin Energy states that it is attempting to fulfill a current need that cannot otherwise be met until such time as Midwest ISO is fully functional.

2. Rates for Generator Imbalance Service

13. Duke and EPSA also protest Wisconsin Energy's fixed monthly charge of \$250 and an additional charge of \$50 per day for each day a schedule exists. The proposed fees, packaged with new distinct and separate labels, are imposed on top of the existing, traditional fees generators pay for imbalance service received from transmission providers. In its answer, Wisconsin Energy responds that the \$250 fixed monthly charge represents the costs associated with monthly settlement and the average monthly costs incurred in other areas. Wisconsin Energy explains that the additional charge of \$50 per day only applies where a schedule exists; therefore, if a generator does not generate, a schedule would not apply and no fee would be assessed.

3. Dispatch-Cost Information

14. Duke and EPSA object to Wisconsin Energy's proposal to require generators to provide their dispatch-cost information, which is considered to be proprietary information. Duke and EPSA contend that such information should not be shared with Wisconsin Energy, whose affiliated companies are competing market participants as well as load serving entities. Duke states that providing proprietary information to a competitor or customer destroys the competitive process. EPSA states that access to this type of information must be limited to ensure that such access is granted only to those entities with a demonstrated need, and which are independent. EPSA recommends that the Commission require that any proprietary information

² Wisconsin Energy states that it anticipates that it will be certified as a Balancing Authority pursuant to the provisions in the North American Electric Reliability Council (NERC) Functional Model, version 2. Once certified, Wisconsin Energy will be required to perform tasks associated with that function.

necessary for the management of imbalance services instead be given to an independent transmission provider.

15. ATC states that it understands the need to protect confidentiality. However, while EPSA suggests that ATC be the repository of that information, ATC states that ATC should not be given this information because providing GIS is beyond what ATC does, can currently do, and should do.

16. In its answer, Wisconsin Energy contends that it has a legitimate need for dispatch-cost information. Without the ability to charge the generators taking the service the generators' actual cost, there is an incentive for a generator to "lean on" Wisconsin Energy at such times when Wisconsin Energy's cost-based rates are lower than a generator's cost to provide the service. Such dispatch information is needed to ensure that GIS does not turn into a generator replacement service, that is, to prevent the proposed service from becoming a de facto call option on Wisconsin Energy.

17. Moreover, Wisconsin Energy states that in 2002 Wisconsin Electric implemented a functional, physical, and organizational separation of its generation control area and wholesale merchant functions, and that it moved its generation control area functions from Milwaukee, Wisconsin to Wisconsin Electric's Pewaukee, Wisconsin Data Center. This separation of functions prevents discretionary sharing of information and prevents Wisconsin Energy from obtaining any competitive advantage from having access to the generators' dispatch-cost information.

4. Commission Response

18. Wisconsin Energy's proposed amendments present issues of material fact that cannot be resolved based on the record now before us. Such issues include, among others, whether it is appropriate for Wisconsin Energy, a market participant, to provide this service rather than the Midwest ISO and the cost justification for Wisconsin Energy's rates. An additional issue is Wisconsin Energy's request that each generator divulge operating and cost data to Wisconsin Energy as opposed to the Midwest ISO.³ These issues are more appropriately addressed in the hearing ordered below.⁴

³ For example, if Wisconsin Energy is the entity responsible for developing the hourly schedules, this may be considered by other market participants as a competitive advantage for Wisconsin Energy.

⁴ We note, in this regard, that the proposed new GIS apparently would be an interim measure until the Midwest ISO takes over this service.

19. Our preliminary analysis of Wisconsin Energy's filing indicates that it has not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful. Accordingly, we will accept Wisconsin Energy's proposed amendments to the JAST for filing, suspend them for a nominal period, to become effective April 1, 2004, subject to refund, and set them for hearing. In addition, we will grant Wisconsin Energy's request for waiver of the Commission's 60-day prior notice requirement.⁵

20. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, the hearing will be held in abeyance and a settlement judge shall be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.⁶ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise the Chief Judge will select a judge for this purpose.⁷ The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) The proposed amendments are hereby accepted for filing and suspended for a nominal period, to become effective April 1, 2004, subject to refund.

(B) 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 the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and

⁵See Central Hudson Gas & Electric Corp., 60 FERC ¶ 61,106, reh'g denied, 61 FERC ¶ 61,089 (1992).

⁶ 18 C.F.R. § 385.603 (2003).

⁷ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held to address the reasonableness of the proposed amendments, as discussed in the body of this order. However, the hearing will be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2003), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(D) Within sixty (60) days of the date of this order, the settlement judge shall file a report with the Chief Judge and with the Commission on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every 30 days thereafter, informing the Chief Judge and the Commission of the parties' progress toward settlement.

(E) If settlement judge procedures fail, and a trial-type evidentiary hearing is to be held, a presiding administrative law judge, to be designated by the Chief Administrative Law Judge, shall convene a conference in this proceeding, to be held within approximately fifteen (15) days of the date on which the Chief Judge designates the presiding judge, in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E. 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.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.