

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

Tucson Electric Power Company	Docket Nos. ER10-2564-009
UNS Electric, Inc.	ER10-2600-009
UniSource Energy Development Company	ER10-2289-009
	EL19-44-000

ORDER ON UPDATED MARKET POWER ANALYSIS AND TERMINATING
SECTION 206 PROCEEDING

(Issued October 17, 2019)

1. On March 8, 2019, the Commission issued an order addressing an updated market power analysis filed by Tucson Electric Power Company (Tucson Electric), UNS Electric, Inc. (UNS Electric), and UniSource Energy Development Company (Applicants).¹ In that order, the Commission instituted a proceeding under section 206 of the Federal Power Act (FPA)² to determine whether Applicants' market-based rate authority in the Tucson Electric balancing authority area remains just and reasonable. In this order, as discussed below, we find that Applicants satisfy the Commission's standards for market-based rate authority. Accordingly, we accept Applicants' updated market power analysis and terminate the section 206 proceeding instituted in Docket No. EL19-44-000.

¹ *Tucson Electric Power Co.*, 166 FERC ¶ 61,175 (2019) (March Order).

² 16 U.S.C. § 824e (2018).

I. Background

2. On December 21, 2018,³ Applicants filed an updated market power analysis in compliance with the regional reporting schedule.⁴ With respect to the Tucson Electric balancing authority area, Applicants represent that they pass the pivotal supplier indicative screen in all four seasons but fail the wholesale market share indicative screen in one of the four seasons. Applicants' filing includes a delivered price test (DPT) analysis to rebut the presumption of horizontal market power in the Tucson Electric balancing authority area.

3. In the March Order, the Commission found that Applicants' failure of the wholesale market share indicative screen in the Tucson Electric balancing authority area establishes a rebuttable presumption of horizontal market power. Thus, the Commission instituted a proceeding pursuant to section 206 of the FPA concerning the justness and reasonableness of Applicants' market-based rates in the Tucson Electric balancing authority area.⁵ The Commission directed Applicants to show cause as to why the Commission should not revoke Applicants' market-based rate authority in the Tucson Electric balancing authority area.

4. On May 6, 2019, Applicants filed a response to the March Order. Applicants represent that the DPT analysis submitted with their December 21, 2018 filing, as well as other information submitted therewith, demonstrate that they lack horizontal market

³ On January 7, 2019, Applicants filed workpapers associated with the updated market power analysis.

⁴ See *Refinements to Policies and Procedures for Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 816, 153 FERC ¶ 61,065, at P 353 (2015), *order on reh'g*, Order No. 816-A, 155 FERC ¶ 61,188 (2016); *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 119 FERC ¶ 61,295, at P 882, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, 123 FERC ¶ 61,055, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, 125 FERC ¶ 61,326 (2008), *order on reh'g*, Order No. 697-C, 127 FERC ¶ 61,284 (2009), *order on reh'g*, Order No. 697-D, 130 FERC ¶ 61,206 (2010), *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 26 (2012).

⁵ Notice establishing March 15, 2019 as the refund effective date in Docket No. EL19-44-000 was published in the *Federal Register*, 84 Fed. Reg. 9512 (2019).

power in the Tucson Electric balancing authority area. On May 10, 2019, Applicants filed updated workpapers in support of their market power analysis.

II. Notice of Filings

5. Notice of Applicants' December 21, 2018 filing was published in the *Federal Register*,⁶ with interventions and protests due on or before February 19, 2019. None was filed.

6. Notice of the institution of the section 206 proceeding in Docket No. EL19-44-000 was published in the *Federal Register*.⁷ In the March Order, the Commission stated that any interested persons desiring to be heard in Docket No. EL19-44-000 should file a notice of intervention or motion, as appropriate, within 30 days of the date of the March Order.⁸ None was filed.

7. Notice of Applicants' May 6, 2019 filing was published in the *Federal Register*,⁹ with interventions and protests due on or before May 28, 2019. None was filed.

8. Notice of Applicants' May 10, 2019 filing was published in the *Federal Register*,¹⁰ with interventions and protests due on or before May 31, 2019. None was filed.

III. Discussion

9. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, horizontal and vertical market power.¹¹ As discussed below, we conclude that Applicants satisfy the Commission's standards for market-based rate authority.

⁶ 84 Fed. Reg. 82 (2019).

⁷ 84 Fed. Reg. 9512 (2019).

⁸ March Order, 166 FERC ¶ 61,175 at ordering para. (C).

⁹ 84 Fed. Reg. 20,877 (2019).

¹⁰ 84 Fed. Reg. 22,491 (2019).

¹¹ Order No. 697, 119 FERC ¶ 61,295 at PP 62, 399, 408, 440.

A. Market-Based Rate Authorization

1. Horizontal Market Power

10. The Commission has adopted two indicative screens for assessing horizontal market power: the pivotal supplier screen and the wholesale market share screen.¹² The Commission has stated that passage of both screens establishes a rebuttable presumption that the applicant does not possess horizontal market power, while failure of either screen creates a rebuttable presumption that the applicant has horizontal market power.¹³ An applicant that fails one or both of the indicative screens is provided with several procedural options including the right to challenge the market power presumption by submitting a DPT analysis, or, alternatively, sellers can accept the presumption of market power and adopt some form of cost-based mitigation.¹⁴

a. Indicative Screens

11. Applicants prepared the pivotal supplier and wholesale market share screens for the Tucson Electric, Arizona Public Service Company, El Paso Electric Company, Public Service Company of New Mexico, Salt River Project, Western Area Power Administration- Colorado Missouri, and Western Area Power Administration- Lower Colorado balancing authority areas. Applicants represent that they pass the pivotal supplier and wholesale market share indicative screens in each of these balancing authority areas with the exception of the Tucson Electric balancing authority area.¹⁵ Applicants represent that, in the Tucson Electric balancing authority area, they pass the pivotal supplier indicative screen in all four seasons but fail the wholesale market share

¹² *Id.* P 62.

¹³ *Id.* PP 33, 62-63.

¹⁴ *Id.* P 63.

¹⁵ Applicants represent that their indicative screen market shares range as follows: for the Arizona Public Service Company balancing authority area, 0 to 0.3 percent; for the El Paso Electric Company balancing authority area, 0 to 8.1 percent; for the Public Service Company of New Mexico balancing authority area, 0 to 1.3 percent; for the Salt River Project balancing authority area, 0 to 0.3 percent; for the Western Area Power Administration- Colorado Missouri balancing authority area, 0 to 0.4 percent; and for the Western Area Power Administration- Lower Colorado balancing authority area, 0 to 3.0 percent. Applicants' indicative screen market shares for the Tucson Electric balancing authority area are 47.2 percent in the Winter, 0 percent in the Spring, 0 percent in the Summer, and 17.4 percent in the Fall.

indicative screen in the winter season. Therefore, Applicants performed a DPT for the Tucson Electric balancing authority area.

12. We have reviewed Applicants' pivotal supplier and wholesale market share screens and we find that Applicants pass both the pivotal supplier and wholesale market share screens in the Arizona Public Service Company, El Paso Electric Company, Public Service Company of New Mexico, Salt River Project, Western Area Power Administration- Colorado Missouri, and Western Area Power Administration- Lower Colorado balancing authority areas.¹⁶ Accordingly, we find that Applicants satisfy the Commission's requirements for market-based rate authority regarding horizontal market power in those balancing authority areas. Applicants' DPT for the Tucson Electric balancing authority area is discussed below.

b. Delivered Price Test

13. As the Commission has previously explained, the DPT analysis identifies potential suppliers based on market prices, input costs, and transmission availability, and calculates each supplier's economic capacity and available economic capacity¹⁷ for each season/load level.¹⁸ The results of the DPT are used for pivotal supplier, market share, and market concentration analyses.¹⁹ Under the DPT, applicants must calculate market

¹⁶ For the indicative screens and the DPT analysis, Applicants rely on Simultaneous Transmission Import Limit (SIL) values prepared by transmission owners in the Southwest region. On September 3, 2019, the Commission accepted SIL values for balancing authority areas in the Southwest region. *See Arizona Public Service Co.*, 168 FERC ¶ 61,142 (2019). In that order, the Commission adjusted the SIL values for the El Paso Electric Company balancing authority area. Here, Applicants continue to pass the indicative screens in the El Paso Electric Company balancing authority area when the Commission-adjusted SIL values are used.

¹⁷ "Economic capacity" is the total generation capacity of a potential supplier that can compete in the destination market, given its costs and transmission availability. "Available economic capacity" is derived by subtracting each potential supplier's native load obligation from its total capacity and adjusting transmission availability accordingly. *See Order No. 697*, 119 FERC ¶ 61,295 at P 96 n.78.

¹⁸ The seasons/load periods are as follows: super-peak, peak, and off-peak, for winter, shoulder, and summer periods and an additional highest super-peak for the summer.

¹⁹ *See Order No. 697*, 119 FERC ¶ 61,295 at P 106.

concentration using the Hirschman-Herfindahl Index (HHI).²⁰ An HHI of less than 2,500 in the relevant market for all season/load levels, in combination with a demonstration that the applicants are not pivotal and do not possess more than a 20 percent market share in any of the season/load levels, would constitute a showing of a lack of horizontal market power, absent compelling contrary evidence from interveners. A detailed description of the mechanics of the DPT analysis is provided in Order No. 697.²¹

14. As with the indicative screens, applicants and interveners may present evidence, such as historical sales and transmission data, which may be used to calculate market shares and market concentration and to refute or support the results of the DPT analysis. In Order No. 697, the Commission encouraged applicants to present the most complete analysis of competitive conditions in the market as the data allow.²²

i. Applicants' DPT

15. Applicants' DPT analysis for the Tucson Electric balancing authority area indicates that, under the available economic capacity measure, for all 10 season/load periods, Applicants are not pivotal, their market shares are under 20 percent, and the market's HHI does not exceed the 2,500 threshold. When the economic capacity measure is used, Applicants are pivotal in 6 of the 10 season load periods, and have market shares above 20 percent in all season/load periods, and the market's HHIs exceed the 2,500 threshold in 6 of the 10 season load periods.

ii. Commission Determination Concerning the Tucson Electric Balancing Authority Area

16. After weighing all of the relevant factors, we find that, on balance, Applicants have rebutted the presumption of market power for the Tucson Electric balancing authority area. The results of Applicants' DPT analysis vary depending on whether the economic capacity or available economic capacity measure is used. The Commission has stated that the DPT does not function like the initial screens – i.e., failure of either the economic capacity or available economic capacity analyses does not result in an

²⁰ The HHI is the sum of the squared market shares. For example, in a market with five equal size firms, each would have a 20 percent market share. For that market, $HHI = (20)^2 + (20)^2 + (20)^2 + (20)^2 + (20)^2 = 400 + 400 + 400 + 400 + 400 = 2,000$.

²¹ Order No. 697, 119 FERC ¶ 61,295 at PP 104-117.

²² *Id.* PP 71, 111.

automatic failure of the test as a whole.²³ The Commission weighs the results of the economic capacity and the available economic capacity analyses and considers the arguments of the parties.²⁴ In the DPT analysis, available economic capacity accounts for native load requirements. As the Commission explained in Order No. 697:

[I]n markets where utilities retain significant native load obligations, an analysis of available economic capacity may more accurately assess an individual seller's competitiveness, as well as the overall competitiveness of a market, because available economic capacity recognizes the native load obligations of the sellers. On the other hand, in markets where the sellers have been predominantly relieved of their native load obligations, an analysis of economic capacity may more accurately reflect market conditions and a seller's relative size in the market.²⁵

17. In light of Applicants' native load obligations, we find that the available economic capacity measure of the DPT more accurately captures conditions in the relevant market. As noted above, using the available economic capacity measure, Applicants' base case analysis indicates that Applicants are not pivotal in any season/load period, their market shares are under 20 percent, and the market's HHI is under the 2,500 threshold in all 10 season/load periods.

18. In addition, Applicants provided sensitivity analyses, which separately analyze what effect, if any, an increase of 10 percent or a decrease of 10 percent of the market price would have on the results of the DPT analysis. Under the available economic capacity measure, when prices are increased by 10 percent, Applicants' market shares for Winter Peak and Winter Off-Peak season/load periods increase to 22 percent and 37 percent, respectively. However, Applicants are not pivotal, and the market's HHI remains below the 2,500 threshold in all season/load periods. When prices are decreased by 10 percent, under the available economic capacity measure, Applicants are not pivotal, their market shares do not exceed the 20 percent threshold, and market's HHI remains below the 2,500 threshold. Applicants' sensitivity analyses indicate that the overall results from the sensitivity DPT analyses are only slightly different than those reported

²³ See *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018, *order on reh'g*, 108 FERC ¶ 61,026, at P 26 (2004); *Kansas City Power and Light Co.*, 113 FERC ¶ 61,074, at P 30 (2005).

²⁴ Order No. 697, 119 FERC ¶ 61,295 at P 112.

²⁵ *Id.*

for the base case DPT analysis, except market shares for Winter Peak and Winter Off-Peak season/load periods under the available economic capacity measure.

2. Vertical Market Power

19. In cases where a public utility, or any of its affiliates, owns, operates, or controls transmission facilities, the Commission requires that there be a Commission-approved Open Access Transmission Tariff (OATT) on file or that the seller has received waiver of the OATT requirement under 18 C.F.R. § 35.28(d)(1) (2019) or satisfies the requirements for blanket waiver under 18 C.F.R. § 35.28(d)(2).²⁶

20. Applicants state that Tucson Electric and UNS Electric own, operate, or control electric transmission facilities. Applicants state that access to these facilities is provided pursuant to the terms of these entities' OATTs on file with the Commission. Applicants also state that they have affiliates that own, operate, or control electric transmission facilities in other regions and open access to these facilities is provided pursuant to the terms of OATTs on file with the Commission.²⁷

21. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.²⁸ The Commission requires a seller to provide a description of its ownership or control of, or affiliation with an entity that owns or controls, intrastate natural gas transportation, storage or distribution facilities, and physical coal supply sources and ownership of or control over who may access transportation of coal supplies (collectively, inputs to electric power production).²⁹ The

²⁶ See *Open Access and Priority Rights on Interconnection Customer's Interconnection Facilities*, Order No. 807, 150 FERC ¶ 61,211, at P 57, *order on reh'g*, Order No. 807-A, 153 FERC ¶ 61,047 (2015) (waiving the OATT requirements of 18 C.F.R. § 35.28, the Open Access Same-Time Information System requirements of Part 37, and the Standards of Conduct requirements of Part 358, under certain conditions, for entities that own interconnection facilities). See also *Oildale Energy, LLC*, 153 FERC ¶ 61,013, at PP 12-14 (2015).

²⁷ In addition, Applicants state that they have affiliates that own, operate, or control electric transmission facilities in Canada but that none of these facilities are directly interconnected with transmission lines in the United States.

²⁸ Order No. 697, 119 FERC ¶ 61,295 at P 440.

²⁹ Order No. 697-A, 123 FERC ¶ 61,055 at P 176. See also Order No. 816, 153 FERC ¶ 61,065 at PP 207-212.

Commission also requires sellers to make an affirmative statement that they have not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.³⁰ The Commission adopted a rebuttable presumption that the ownership or control of, or affiliation with any entity that owns or controls, inputs to electric power production does not allow a seller to raise entry barriers but will allow intervenors to demonstrate otherwise.³¹

22. Regarding other barriers to entry, Applicants state that they neither own nor control natural gas assets other than limited facilities that interconnect natural gas lines to their electric generating facilities. Applicants state that Tucson Electric and UNS Electric are part owners of an approximately 19-mile intrastate gas transmission line in the Southwest region that serves the Gila River Power Station, which is co-owned by Tucson Electric, UNS Electric, and the Salt River Project Agricultural Improvement and Water District (SRP). Applicants state that their only other affiliate that owns or controls intrastate natural gas transportation, storage, or distribution facilities in the Southwest region is UNS Gas, Inc., which owns 30 miles of intrastate natural gas transmission lines. Applicants state that they are affiliated with Central Hudson Gas & Electric Corporation, a public utility in New York, which owns 165 miles of intrastate natural gas transmission lines. Applicants state that, of Applicants and their affiliates, only Tucson Electric owns or controls coal supplies or facilities for the transportation of coal.³²

³⁰ Order No. 697, 119 FERC ¶ 61,295 at P 447. *See also* Order No. 816, 153 FERC ¶ 61,065 at PP 354, 356.

³¹ Order No. 697, 119 FERC ¶ 61,295 at P 446.

³² Applicants state that Tucson Electric purchases coal under various supply agreements but does not own any coal mines or coal mineral rights and that these coal purchase contracts are used exclusively to supply coal to power plants owned and operated by Tucson Electric. Applicants state that, in addition, Tucson Electric leases railcars for use at its Springerville Generating Facility. Applicants state that Tucson Electric also holds: (i) a 50 percent ownership interest in the Lee Ranch Coal Spur Line that connects the Lee Ranch and El Segundo Mines to railroad lines owned by BNSF Railway Company (BNSF); (ii) an approximate 41.48 percent ownership interest in the Springerville/Coronado Spur Line that connects SRP's Coronado Generating Station to lines owned by BNSF; and (iii) an approximate 82.95 percent ownership interest in the Springerville Spur Line that runs between the Coronado and Springerville Generating Stations.

23. Finally, consistent with Order No. 697, Applicants state that they and their affiliates have not erected barriers to entry into any relevant market and will not erect barriers to entry into any relevant market.

24. Based on Applicants' representations, we find that Applicants satisfy the Commission's requirements for market-based rates regarding vertical market power.

3. Reporting Requirements

25. An entity with market-based rate authorization must file Electric Quarterly Reports (EQRs) with the Commission, consistent with Order Nos. 2001³³ and 768,³⁴ to fulfill its responsibility under FPA section 205(c)³⁵ to have rates on file in a convenient form and place.³⁶ Applicants must file EQRs electronically with the Commission consistent with the procedures set forth in Order No. 770.³⁷ Failure to timely and accurately file an EQR is a violation of the Commission's regulations for which Applicants may be subject to refund, civil penalties, and/or revocation of market-based rate authority.³⁸

³³ *Revised Public Utility Filing Requirements*, Order No. 2001, 99 FERC ¶ 61,107, *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reh'g denied*, Order No. 2001-B, 100 FERC ¶ 61,342, *order directing filing*, Order No. 2001-C, 101 FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001-D, 102 FERC ¶ 61,334, *order refining filing requirements*, Order No. 2001-E, 105 FERC ¶ 61,352 (2003), *order on clarification*, Order No. 2001-F, 106 FERC ¶ 61,060 (2004), *order revising filing requirements*, Order No. 2001-G, 120 FERC ¶ 61,270, *order on reh'g and clarification*, Order No. 2001-H, 121 FERC ¶ 61,289 (2007), *order revising filing requirements*, Order No. 2001-I, 125 FERC ¶ 61,103 (2008). *See also Filing Requirements for Electric Utility Service Agreements*, 155 FERC ¶ 61,280 (2016) (order clarifying reporting requirements and updating data dictionary).

³⁴ *Electricity Mkt. Transparency Provisions of Section 220 of the Federal Power Act*, Order No. 768, 140 FERC ¶ 61,232 (2012), *order on reh'g*, Order No. 768-A, 143 FERC ¶ 61,054 (2013).

³⁵ 16 U.S.C. § 824d(c) (2018).

³⁶ *See Revisions to Electric Quarterly Report Filing Process*, Order No. 770, 141 FERC ¶ 61,120, at P 3 (2012) (citing Order No. 2001, 99 FERC ¶ 61,107 at P 31).

³⁷ Order No. 770, 141 FERC ¶ 61,120.

³⁸ The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2019). Forfeiture of market-based rate authority may require a new application for

26. Applicants 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.³⁹

27. Additionally, Applicants must file updated market power analyses for all regions in which they are designated as a Category 2 seller in compliance with the regional reporting schedule. The Commission also reserves the right to require such an analysis at any intervening time.⁴⁰

4. Docket No. EL19-44-000

28. Based on the above discussion, we find that there is no further need for the FPA section 206 proceeding instituted in Docket No. EL19-44-000. Accordingly, we will terminate this FPA section 206 proceeding.

The Commission orders:

(A) Applicants' updated market power analysis is hereby accepted, as discussed in the body of this order.

(B) The section 206 proceeding in Docket No. EL19-44-000 is hereby terminated, as discussed in the body of this order.

(C) Applicants are hereby directed to file updated market power analyses according to the regional reporting schedule, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

market-based rate authority if the applicant wishes to resume making sales at market-based rates.

³⁹ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 110 FERC ¶ 61,097, *order on reh'g*, 111 FERC ¶ 61,413 (2005); 18 C.F.R. § 35.42 (2019).

⁴⁰ Order No. 697, 119 FERC ¶ 61,295 at P 853.