

173 FERC ¶ 61,229
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James P. Danly, Chairman;
Neil Chatterjee and Richard Glick.

Basin Electric Power Cooperative

Docket No. ER20-2590-000

ORDER ACCEPTING REVISED MARKET-BASED RATE TARIFF

(Issued December 17, 2020)

1. In this order, we grant the request of Basin Electric Power Cooperative (Basin Electric) to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates, effective September 30, 2020.¹
2. In addition, we find that Basin Electric meets the criteria for a Category 1 seller in the Southwest, Southeast, and Northeast regions and a Category 2 seller in the Northwest region and is so designated.²

I. Background

3. On July 31, 2020, as amended on October 30, 2020, pursuant to section 205 of the Federal Power Act (FPA),³ Basin Electric filed an application for authorization to make

¹ Basin Electric Power Cooperative, FERC FPA Electric Tariff, Market Based Rate Tariff; [MBR, Market-Based Rate Tariff, 1.0.0](#).

² See *Refinements to Policies & Procedures for Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity & Ancillary Servs. by Pub. Utils.*, Order No. 816, 153 FERC ¶ 61,065, at P 320 (2015), *order on reh'g*, Order No. 816-A, 155 FERC ¶ 61,188 (2016); *Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity & Ancillary Servs. by Pub. Utils.*, Order No. 697, 119 FERC ¶ 61,295, at PP 848-50, *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). The Commission designated Basin Electric a Category 2 seller in the Central and Southwest Power Pool (SPP) regions in *Basin Elec. Power Coop.*, 171 FERC ¶ 61,198 (2020) (June Order).

³ 16 U.S.C. § 824d.

wholesale sales of electric energy, capacity, and ancillary services at market-based rates in the Southwest, Southeast, Northeast, and Northwest regions.⁴ Basin Electric is already authorized to make sales at market-based rates in the Central and SPP regions.

4. Basin Electric is a consumer-owned rural electric generation and transmission cooperative corporation engaged in the business of providing wholesale electric service to its Members. Basin Electric states that, as a cooperative, Basin Electric is owned and governed by its Members, which are also its retail or wholesale customers. Basin Electric has three subsidiaries: Basin Cooperative Services, Dakota Coal Company (Dakota Coal), and Dakota Gasification Company (Dakota Gas).

5. Basin Electric currently owns or operates, directly or indirectly, approximately 4,430 megawatts (MW) of generating capacity in the SPP and Western Area Power Administration Colorado-Missouri (WACM) balancing authority areas. Basin Electric also has power purchase agreements in the MISO, SPP, Northwestern Energy Montana (NWMT), WACM, and Western Area Power Administration Upper Great Plains West (WAUW) balancing authority areas that supply Basin Electric with approximately 4,518 MW of power.

6. Basin Electric states that in November 2019, Basin Electric ceased to qualify for an exemption from Commission jurisdiction under the FPA because: (1) it readmitted a Class A Member that does not qualify under FPA section 201(f) for an exemption from Commission regulation (Tri-State Generation and Transmission Association, Inc. (Tri-State)); and (2) an existing Class A Member ceased to qualify for such an exemption (Upper Missouri G & T Electric Cooperative Inc.).

7. In anticipation of becoming subject to the Commission's full jurisdiction under the FPA, Basin Electric submitted a series of filings on September 30, 2019 and October 1, 2019 to ensure that it would be in compliance with the Commission's rules and regulations. On November 26, 2019, the Commission issued an order rejecting Basin Electric's filings, including a request for market-based rate authorization, without prejudice.⁵ On April 7, 2020, Basin filed a request for market-based rate authority in the Central and SPP regions. On June 5, 2020, the Commission issued an order granting

⁴ Basin Electric requests authorization to sell ancillary services in the following markets: California Independent System Operator Corporation; ISO New England, Inc.; PJM Interconnection, L.L.C.; and New York Independent System Operator, Inc. Basin Electric is already authorized to sell ancillary services at market-based rates in the Midcontinent Independent System Operator, Inc. (MISO) and SPP markets. Basin Electric also requests authorization to engage in the sale of certain ancillary services as a third-party provider in other markets.

⁵ *Basin Elec. Power Coop.*, 169 FERC ¶ 61,158 (2019).

Basin Electric's request for limited market-based rate authority and noting Basin Electric's intention to file another application for market-based rate authority in the other markets in which it operates once it has an OATT on file with the Commission for those markets.⁶

8. In the instant proceeding, Basin Electric requests that the Commission grant waiver of the 60-day prior notice requirement and grant Basin Electric's request for authority to make sales at market-based rates in the Southwest, Southeast, Northeast, and Northwest regions effective November 1, 2019, the date on which Basin Electric became subject to the Commission's jurisdiction. In addition to granting waiver of the prior notice requirement, Basin Electric also requests that the Commission waive any obligation of Basin Electric to pay refunds given the circumstances leading up to this filing.

II. Notice of Filing

9. Notice of Basin Electric's July 31, 2020 filing was published in the *Federal Register*,⁷ with interventions and protests due on or before August 21, 2020. Corn Belt Power Cooperative and Northwest Iowa Power Cooperative filed timely motions to intervene.

10. Notice of Basin Electric's October 30, 2020 filing was published in the *Federal Register*,⁸ with interventions and protests due on or before November 20, 2020. None were filed.

III. Discussion

A. Procedural Matters

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2020), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

B. Substantive Matters

12. As discussed below, we grant Basin Electric's request for authorization to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates

⁶ June Order, 171 FERC ¶ 61,198 at PP 1, 10, 17.

⁷ 85 Fed. Reg. 47,782 (Aug. 6, 2020).

⁸ 85 Fed. Reg. 71,646 (Nov. 10, 2020).

in the Southwest, Southeast, Northeast, and Northwest regions and accept its market-based rate tariff, effective September 30, 2020.⁹

1. Market-Based Rate Authorization

13. 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.¹⁰

a. Horizontal Market Power

14. The Commission has adopted two indicative screens for assessing horizontal market power: the pivotal supplier screen and the wholesale market share screen.¹¹ 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.¹²

15. Basin Electric submits a horizontal market power analysis for the NWMT, PacifiCorp East (PACE), WACM, WAUW, and Public Service Company of Colorado (PSCO) balancing authority areas, and states that it passes the pivotal supplier and wholesale market share screens.¹³

⁹ We note that Basin Electric is not being granted authority to make third-party sales of operating reserves to a public utility that is purchasing ancillary services to satisfy its own Open Access Transmission Tariff (OATT) requirements to offer ancillary services to its own customers. If Basin Electric seeks such authority, it must make the required showing and receive Commission authorization prior to making such sales. *See Third-Party Provision of Ancillary Servs.; Accounting & Fin. Reporting for New Elec. Storage Techs.*, Order No. 784, 144 FERC ¶ 61,056, at PP 200-02 (2013), *order on clarification*, Order No. 784-A, 146 FERC ¶ 61,114 (2014).

¹⁰ Order No. 697, 119 FERC ¶ 61,295 at PP 62, 399, 408, 440.

¹¹ *Id.* P 62.

¹² *Id.* PP 33, 62-63.

¹³ Basin Electric's market shares are as follows: for the NWMT balancing authority area, zero percent; for the PACE balancing authority area, 1.6% to 2.8%; for the WACM balancing authority area, 6.3% to 7.9%; for the WAUW balancing authority area, 9.4% to 13.4%; and for the PSCO balancing authority area, 2.0% to 5.2%.

16. Based on Basin Electric's representations, we find that Basin Electric satisfies the Commission's requirements for market-based authority regarding horizontal market power in the NWMT, PACE, WACM, WAUW and PSCO balancing authority areas.

b. Vertical Market Power

17. 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 OATT on file or that the seller has received waiver of the OATT requirement under 18 C.F.R. § 35.28(d)(1) (2020) or satisfies the requirements for blanket waiver under 18 C.F.R. § 35.28(d)(2).¹⁴

18. Basin Electric states that service over its electric transmission facilities is provided pursuant to Commission-filed OATTs. Basin Electric states that it provides electric transmission service in both the Eastern Interconnection and the Western Interconnection. It states that the transmission facilities that Basin Electric owns are located in three separate areas: (a) the Common Use System; (b) the Missouri Basin Power Project (MBPP); and (c) SPP. Basin Electric states that it also leases certain transmission facilities from its Members and that those facilities are located in SPP and MISO.

19. Basin Electric states that the Common Use System is a joint transmission system Basin Electric participates in with Black Hills Power, Inc., and PRECorp and that there is a joint-OATT on file with the Commission for the Common Use System.¹⁵

20. Basin Electric States that the MBPP is a jointly owned public power project consisting of the Laramie River Station, the Grayrocks dam and reservoir, and associated high voltage transmission facilities. Basin Electric states that the MBPP is jointly owned by five utilities – Basin Electric, Tri-State, the City of Lincoln, Nebraska, Wyoming Municipal Power Agency, and the Western Minnesota Municipal Agency. Basin Electric states that transmission service over Basin Electric's Entitlement Share of the MBPP

¹⁴ See *Open Access & 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).

¹⁵ Basin Electric notes that revisions to the joint-OATT were most recently accepted in *Black Hills Power, Inc.*, 151 FERC ¶ 61,147 (2015). July 31 Filing at 24 n.42.

Western Interconnection facilities will be governed by the OATT that Basin Electric submitted in Docket No. ER20-2365-000.¹⁶

21. Basin Electric states that it has turned over functional control of its transmission facilities in the Eastern Interconnection to MISO and SPP, which provide service to customers located in their respective regions pursuant to the terms and conditions of the MISO and SPP OATTs. Basin Electric states that in addition to those facilities Basin Electric owns, Basin Electric leases certain transmission facilities from its Members and serves as the Transmission Customer on their behalf in both SPP and MISO. Basin Electric states that for the Member facilities in SPP, Basin Electric has transferred functional control over those facilities to SPP and recovers the costs under the SPP OATT and for the Member facilities in MISO, Basin Electric has transferred functional control over the leased facilities to MISO and receives revenue credits under the MISO OATT.

22. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.¹⁷ 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).¹⁸ The 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.¹⁹ 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.²⁰

23. Basin Electric states that it owns approximately 26 miles of limited intrastate natural gas transportation facilities that are used exclusively by Basin Electric to serve its

¹⁶ The Commission accepted the OATT filing in an order issued on September 8, 2020. *Basin Elec. Power Coop.*, 172 FERC ¶ 61,210 (2020).

¹⁷ Order No. 697, 119 FERC ¶ 61,295 at P 440.

¹⁸ Order No. 697-A, 123 FERC ¶ 61,055 at P 176; *see also* Order No. 816, 153 FERC ¶ 61,065 at PP 207-12.

¹⁹ Order No. 697, 119 FERC ¶ 61,295 at P 447; *see also* Order No. 816, 153 FERC ¶ 61,065 at PP 354, 356.

²⁰ Order No. 697, 119 FERC ¶ 61,295 at P 446.

generation facilities. Basin Electric states that its subsidiary, Dakota Gas, also owns gas pipelines and operates the Great Synfuels Plant through Dakota Gas. Basin Electric states that its subsidiary, Dakota Coal, controls rights to lignite reserves in North Dakota and provides financing for the Freedom Mine in North Dakota. Basin Electric states that Dakota Coal is responsible for marketing Freedom Mine lignite production. Basin Electric states that Basin Electric owns industrial rail track and that the MBPP (with Basin Electric acting as Operating Agent) owns tracks, roadbed and grading, bridges, sidings, draining, and related equipment.

24. Finally, Basin Electric states that it and its affiliates have not and will not erect barriers to entry in any relevant wholesale electric markets.

25. Based on Basin Electric's representations, we find that Basin Electric satisfies the Commission's requirements for market-based rate authority regarding vertical market power.

2. Waiver of the Prior Notice Requirement and Refunds

26. We deny Basin Electric's request for waiver of the prior notice requirement. Section 205 of the FPA explicitly requires that proposed rates be filed with the Commission at least 60 days in advance of their proposed effective date.²¹ While the statute and the Commission's regulations give the Commission the discretion to grant waiver of the 60-day prior notice requirement for good cause shown,²² the Commission has explicitly stated that, absent extraordinary circumstances, it would not grant waiver of notice when an agreement for new service is filed on or after the day service has commenced.²³

27. Basin Electric has not demonstrated extraordinary circumstances warranting waiver of the prior notice requirement. Thus, we deny Basin Electric's request for waiver of the 60-day prior notice requirement and an effective date of November 1, 2019. Basin Electric's market-based rate tariff is accepted effective September 30, 2020, 61 days after filing.

28. The Commission has noted that, if a utility files a market-based rate tariff less than 60 days prior to the proposed effective date of new service, and waiver is denied, the

²¹ 16 U.S.C. § 824d(d); *see also El Paso Elec. Co.*, 105 FERC ¶ 61,131, at PP 9-11 (2003).

²² 16 U.S.C. § 824d(d); 18 C.F.R. §§ 35.3(a), 35.11 (2020).

²³ *Central Hudson Gas & Elec. Co.*, 60 FERC ¶ 61,106, at 61,339, *reh'g denied*, 61 FERC ¶ 61,089 (1992).

Commission will require the utility to refund to its customers the time-value of the gross revenues collected, calculated pursuant to 18 C.F.R. § 35.19(a) (2020) of the Commission's regulations,²⁴ for the entire period that the rate was collected without Commission authorization.²⁵ In addition to returning the time value of the revenues collected for the period the rate was charged without Commission authorization, when dealing with market-based rates that are not timely filed, the Commission has stated that:

the utility will be required to refund all revenues resulting from the difference, if any, between the market-based rate and the cost-justified rate. . . . [T]he late-filing utility will receive the equivalent of a cost-based rate, less the time value remedy applicable to the unauthorized filing of cost-based rates, until the date of Commission authorization.²⁶

29. Although we are not granting Basin Electric's request for waiver of the prior notice requirement, we will not require refunds given the unique facts in this case.²⁷ Specifically, in light of the unique circumstance of Basin Electric becoming subject to the Commission's jurisdiction, we will not require Basin Electric to calculate or pay refunds for sales made without market-based rate authorization during the time between November 1, 2019 and September 30, 2020. Recognizing this circumstance and noting that Basin Electric's customers do not ask that the Commission require Basin Electric to pay refunds for sales made without authorization, we are exercising our discretion to not order refunds here.

²⁴ 18 C.F.R. § 35.19(a).

²⁵ *Prior Notice & Filing Requirements Under Part II of the Fed. Power Act*, 64 FERC ¶ 61,139, at 61,980, *order on reh'g*, 65 FERC ¶ 61,081 (1993).

²⁶ *Id.*

²⁷ *See, e.g., Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) ("the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily . . . to the fashioning of policies, remedies and sanctions, including enforcement and voluntary compliance programs in order to arrive at maximum effectuation of Congressional objectives.").

3. Reporting Requirements

30. An entity with market-based rate authorization must file Electric Quarterly Reports (EQRs) with the Commission, consistent with Order Nos. 2001²⁸ and 768,²⁹ to fulfill its responsibility under FPA section 205(c)³⁰ to have rates on file in a convenient form and place.³¹ Basin Electric must file EQRs electronically with the Commission consistent with the procedures set forth in Order No. 770.³² Failure to timely and accurately file an EQR is a violation of the Commission's regulations for which Basin Electric may be subject to refund, civil penalties, and/or revocation of market-based rate authority.³³

²⁸ *Revised Pub. Util. 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).

²⁹ *Elec. Mkt. Transparency Provisions of Section 220 of the Fed. Power Act*, Order No. 768, 140 FERC ¶ 61,232 (2012), *order on reh'g*, Order No. 768-A, 143 FERC ¶ 61,054 (2013).

³⁰ 16 U.S.C. § 824d(c).

³¹ *See Revisions to Elec. 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).

³² Order No. 770, 141 FERC ¶ 61,120.

³³ The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2020). Forfeiture of market-based rate authority may require a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

31. Basin Electric 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.³⁴

32. In Order No. 697, the Commission created two categories of sellers.³⁵ Category 1 sellers are not required to file regularly scheduled updated market power analyses. Category 1 sellers are wholesale power marketers and wholesale power producers that own or control 500 MW or less of generation in aggregate per region; that do not own, operate, or control transmission facilities other than limited equipment necessary to connect individual generation facilities to the transmission grid (or have been granted waiver of the requirements of Order No. 888³⁶); that are not affiliated with anyone that owns, operates, or controls transmission facilities in the same region as the seller's generation assets; that are not affiliated with a franchised public utility in the same region as the seller's generation assets; and that do not raise other vertical market power issues.³⁷ Sellers that do not fall into Category 1 are designated as Category 2 sellers and are required to file updated market power analyses.³⁸

33. Basin Electric states that, with respect to the Southwest, Southeast, and Northeast regions: (i) Basin Electric and its affiliates do not own or control 500 MW or more of generation capacity in aggregate in those regions; (ii) Basin Electric does not own, operate, or control any transmission facilities in those regions; (iii) Basin Electric is not affiliated with anyone that owns, operates or controls transmission in those regions;

³⁴ 18 C.F.R. § 35.42 (2020); *see also Reporting Requirement for Changes in Status for Pub. Utils. with Mkt.-Based Rate Auth.*, Order No. 652, 110 FERC ¶ 61,097, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

³⁵ Order No. 697, 119 FERC ¶ 61,295 at P 848.

³⁶ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Servs. by Pub. Utils.; Recovery of Stranded Costs by Pub. Utils. & Transmitting Utils.*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996) (cross-referenced at 75 FERC ¶ 61,080), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (cross-referenced at 78 FERC ¶ 61,220), *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).

³⁷ 18 C.F.R. § 35.36(a) (2020).

³⁸ Order No. 697, 119 FERC ¶ 61,295 at P 850.

- (iv) Basin Electric is not affiliated with any franchised public utility in those regions; and
- (v) Basin Electric does not raise other vertical market power issues in those regions.

34. Based on Basin Electric's representations, we designate Basin Electric as a Category 1 seller in the Southwest, Southeast, and Northeast regions and a Category 2 seller in the Northwest region.³⁹ Basin Electric must file updated market power analyses for each region in which it is designated as a Category 2 seller in compliance with the regional reporting schedule adopted in Order No. 697.⁴⁰ The Commission reserves the right to require an updated market power analysis at any time for any region.⁴¹

The Commission orders:

(A) Basin Electric's market-based rate tariff is hereby accepted for filing, effective September 30, 2020, as discussed in the body of this order.

(B) Basin Electric is hereby required to file EQRs in compliance with Order Nos. 2001 and 768. If the effective date of Basin Electric's market-based rate tariff falls within a quarter of the year that has already expired, Basin Electric's EQRs for the expired quarter are due within 30 days of the date of this order.

By the Commission. Commissioner Clements is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

³⁹ As noted above, the Commission previously designated Basin Electric as a Category 2 seller in the Central and SPP regions.

⁴⁰ Order No. 697, 119 FERC ¶ 61,295 at PP 882-893; *see also* 18 C.F.R. § 35.37(a)(1) (2020).

⁴¹ Order No. 697, 119 FERC ¶ 61,295 at P 853.