

FEDERAL ENERGY REGULATORY COMMISSION
Washington, D.C. 20426

March 25, 2005

In Reply Refer To:
Dow Pipeline Company
Docket No. ER00-2529-002

John & Hengerer
Attn: Douglas F. John, Esq.
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Suite 600
Washington, D.C. 20036-3013

Dear Mr. John:

1. On November 1, 2004, Dow Pipeline Company (DPL) filed an updated market power analysis pursuant to the requirements of the Commission's order granting DPL market-based rate authority.¹ DPL requests limited waiver of the requirement to file an updated market analysis within three years of the date of that order to the extent necessary to allow it to file its updated market analysis out of time.² DPL also revised its market-based rate schedule to include the Commission's market behavior rules.³ As discussed below, the Commission concludes that, with the tariff modification directed herein, DPL satisfies the Commission's standards for market-based rate authority.

2. DPL is a power marketer, headquartered in Houston, Texas. DPL is an indirect wholly-owned subsidiary of The Dow Chemical Company (TDCC). DPL states that TDCC and its affiliates are a leader in science and technology, providing innovative

¹ *Citing AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 at P 113-117, *order on reh'g*, 108 FERC ¶ 61,026 (2004). The Commission granted DPL market-based rate authority in *Dow Pipeline Company*, Docket No. ER00-2529-000 (August 2, 2000) (unpublished letter order)(August 2000 order).

² DPL was required to file an updated market analysis by August 2, 2003.

³ *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003), *order on reh'g*, 107 FERC ¶ 61,175 (2004).

chemical, plastic, and agricultural products and services to many essential consumer markets. DPL states that its affiliates do not own or control any generation sites, other than Qualifying Facilities (QFs), that it is not affiliated with any franchised public utilities, nor does it own any construction or engineering firms engaged in power plant development, except with regard to affiliated QFs, or QFs to which a Dow entity serves as the thermal host.⁴ DPL states that its affiliates do not own facilities used for the transmission of electric power in North America, other than facilities that qualify as QFs. DPL states that there were no material changes to report regarding the characteristics relied upon by the Commission when it granted DPL market-based rate authority.

3. DPL states that its affiliates own QF facilities throughout Texas and Louisiana, and that an affiliate owns a 7.5 percent partnership interest in a cogeneration facility in Michigan. DPL states that it utilizes its power marketing authorization to support TDCC and its subsidiaries by marketing at wholesale surplus QF power that is not required for manufacturing and industrial activities at the Dow plant sites. It also uses its power marketing authorization for purchasing backup power and/or energy from third party sources in order to assure that a firm supply of power is available to support such open market sales. DPL states that it owns and operates facilities used for the transportation of natural gas within the state of Texas, and is an “intrastate pipeline” within the meaning of section 2(16) of the Natural Gas Policy Act. DPL states that it owns interests in and/or is affiliated with various other entities that own and/or operate intrastate natural gas pipelines. DPL states that over ninety percent of DPL’s services facilitate the delivery of fuel and feedstock gas to manufacturing facilities at the Dow plant sites

Procedural Matters

4. Notice of DPL’s filing was published in the *Federal Register*, 69 Fed. Reg. 67,342 (2004), with interventions and protests due on or before November 22, 2004. None was filed.

Discussion

Market-Based Rate Authorization

5. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. The Commission also considers

⁴ DPL’s affiliates have certain generation interests in Canadian facilities, such as gas-fired cogeneration facilities at Fort Saskatchewan, Alberta, Canada.

whether there is evidence of affiliate abuse or reciprocal dealing.⁵ As discussed below, the Commission concludes that, with tariff modification directed herein, DPL satisfies the Commission's standards for market-based rate authority.

6. In its order issued in *AEP Power Marketing, Inc., et al.*, 107 FERC ¶ 61,018 (April 14 Order), order *on reh'g*, 108 FERC ¶ 61,026 (2004), the Commission adopted two indicative screens for assessing generation market power. DPL states that it does not own any generation and all of the generation capacity owned and operated by its affiliates are QFs, which is predominantly used to support industrial and manufacturing activities at the Dow plant sites. DPL states that a significant percentage of the excess output from its affiliates' generation is subject to long-term contracts. DPL notes that any output from these facilities that is not required by manufacturing and industrial activities at the Dow plant sites, and not otherwise sold into wholesale markets, is eligible for sale to the local electric utility at the utility's "avoided cost", as prescribed by the Commission's regulations and Public Utility Regulatory Policies Act of 1978 (PURPA), and as implemented by state commissions.

7. DPL states that whether the capacity is required at the Dow plant sites, is subject to existing long-term contracts, or is eligible for sale to local utilities at avoided costs, the capacity would be considered "committed" and thus, beyond the scope of the Commission's market power review. Further, DPL states that more than half of its affiliates' generation is located in Texas, within the Electric Reliability Council of Texas (ERCOT). DPL states that the Commission has determined that sales within ERCOT are beyond its jurisdiction under the Federal Power Act (FPA).⁶

8. DPL states that forty-three percent of its affiliates' excess generation in Louisiana is subject to a long-term contract with the Ohio Power Company. DPL also states that over fifty-one percent of the Louisiana generation was constructed after July 9, 1996 and is therefore subject to section 35.27 of the Commission's regulations, which provides that applicants shall not be required to demonstrate any lack of market power in generation with respect to sales from capacity constructed after July 9, 1996.⁷

⁵ See, e.g., *Progress Power Marketing, Inc.*, 76 FERC ¶ 61,155, at 61,919 (1996); 79 FERC ¶ 61,149 (1997); *Northwest Power Marketing Co., L.L.C.*, 75 FERC ¶ 61,281, at 61,899 (1996); *accord Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223, at 62,062-63 (1994).

⁶ See *Destec Power Services, Inc.*, 72 FERC ¶ 61,277 at 62,204-05 (1995).

⁷ 18 C.F.R. § 35.27(a) (2004). We note that the Commission intends to address as part of the generic rulemaking proceeding in Docket No. RM04-7-000 whether to retain or modify section 35.27(a) of its regulations.

9. DPL notes that it is required to demonstrate a lack of market power with regard to 873 MW in the Entergy control area. DPL notes that it has reviewed the market power study recently filed by Entergy for its control area, which included those portions of Louisiana where DPL's affiliates own generation. DPL states that the results of Entergy's study clearly demonstrate that DPL does not possess generation market power under the two indicative screens.⁸ Based on these representations, the Commission finds that DPL satisfies the Commission's generation market power standard for the grant of market-based rate authority.

10. DPL states that neither DPL nor its affiliates own transmission assets, except for those facilities that are considered part of the QF facilities. Based on this representation, the Commission finds that DPL satisfies the Commission's transmission market power standard for the grant of market-based rate authority.

11. DPL states that it owns and operates facilities used for the transportation of natural gas within the state of Texas and is an "intrastate pipeline" within the meaning of section 2(16) of the Natural Gas Policy Act (NGPA). DPL states that over ninety percent of DPL's services facilitate the delivery of fuel and feedstock gas to manufacturing facilities at the Dow plant sites. DPL states that it owns interests in and/or is affiliated with various other entities that own and/or operate intrastate natural gas pipelines, several of which have been authorized to provide service in interstate commerce pursuant to NGPA section 311(a)(2). Based on these representations, the Commission is satisfied that DPL cannot erect barriers to entry. However, should DPL or its affiliates deny, delay, or require unreasonable terms, conditions, or rates for natural gas service to a potential electric competitor in bulk power markets, then that electric competitor may file a complaint with the Commission that could result in the suspension of DPL's authority to sell power at market-based rates.⁹

12. DPL states that it is not affiliated with any entity that has a franchised service territory or that provides service to captive customers. In addition, DPL notes that it remains subject to the code of conduct imposed by Appendix B of the Commission's order granting DPL market-based rate authority as well as by the Commission's market behavior rules. Based on these representations, the Commission finds that DPL satisfies the Commission's concerns with regard to affiliate abuse.

⁸ See *Entergy Services, Inc.*, Docket No. ER91-569-023. DPL's total generation capacity in the Entergy control area is less than 6 percent.

⁹ *Louisville Gas & Elec. Co.*, 62 FERC ¶ 61,016 (1993).

13. DPL's rate schedule grants DPL authority to make sales of ancillary services to third party suppliers in other markets. In *Avista*,¹⁰ the Commission stated that, among other things, third party ancillary service sellers that cannot perform a market power study should be allowed to sell ancillary services at flexible rates, but only in conjunction with a requirement that such third parties establish an Internet-based OASIS-like site for providing information regarding the ancillary services transactions. However, DPL's rate schedule fails to provide that it will not make such sales unless it establishes an Internet-based OASIS-like site consistent with the applicable Commission requirements. Accordingly, the Commission will continue to grant DPL the authority to make sales of ancillary services to third party suppliers conditioned upon DPL establishing an Internet-based OASIS-like site, pursuant to *Avista*, and submitting within 30 days of the date of this order, a compliance filing to revise its rate schedule accordingly.

Other Waivers, Authorizations and Reporting Requirements

14. DPL requests waiver of the requirement to file its updated market analysis within three years of the date it received market-based rate authorization. DPL should have filed its analysis by August 2, 2003, but states that failure to submit the updated analysis was the result of an administrative oversight. DPL states that it is not a typical power marketer in that its wholesale power and energy transactions are incidental to related manufacturing and industrial activities. As such, DPL states it does not devote significant resources to power marketing. DPL states that good cause exists to permit it to file the instant market analysis out of time. The Commission will grant this request.

15. DPL requests the following waivers and authorizations: (1) waiver of Subparts B and C of Part 35 of the Commission's regulations requiring the filing of cost-of-service information, except as to sections 35.12(a), 35.13(b), 35.15, and 35.16; (2) waiver of Parts 41, 101, and 141 of the Commission's accounting and periodic reporting requirements; (3) abbreviated filings with respect to interlocking directorates under Part 45 of the Commission's regulations; and (4) blanket authorization under Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability.

¹⁰ See *Avista Corp.*, 87 FERC ¶ 61,223, *order on reh'g*, 89 FERC ¶ 61,136 (1999) (*Avista*).

16. The Commission will grant the requested waivers and authorizations consistent with those granted other entities with market-based rate authorizations.¹¹ Notwithstanding the waiver of the accounting and reporting requirements here, we expect DPL to keep its accounting records in accordance with generally accepted accounting principles.

17. Within 30 days of the date of the issuance of this order, any person desiring to be heard or to protest the Commission's blanket approval of issuances of securities or assumptions of liabilities by DPL should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.211 and 385.214 (2004).

18. Absent a request to be heard within the period set forth above, DPL is hereby authorized to issue securities and assume obligations or liabilities as guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issue or assumption is for some lawful object within the corporate purposes of DPL, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

19. Until further order of this Commission, the full requirements of Part 45 of the Commission's regulations, except as noted below, are hereby waived with respect to any person now holding or who may hold an otherwise proscribed interlocking directorate involving DPL. Any such person instead shall file a sworn application providing the following information:

- (1) full name and business address; and
- (2) all jurisdictional interlocks, identifying the affected companies and the positions held by that person.

¹¹ It should be noted that the Commission is examining the issue of continued applicability of the waivers of its accounting and reporting requirements (18 C.F.R. Parts 41, 101, and 141), as well as continued applicability of the blanket authorization for the issuance of securities and the assumption of obligations and liabilities (18 C.F.R. Part 34). *See Accounting and Reporting of Financial Instruments, Comprehensive Income, Derivatives and Hedging Activities*, Order No. 627, 67 Fed. Reg. 67,691 (Nov. 6, 2002), FERC Stats. & Regs. ¶ 31,134, at P 23 and P 24 (2002).

20. The Commission reserves the right to modify this order to require a further showing that neither the public nor private interests will be adversely affected by continued Commission approval of DPL's issuances of securities or assumptions of liabilities, or by the continued holding of any affected interlocks.

21. Consistent with the procedures the Commission adopted in Order No. 2001, an entity with market-based rates must file electronically with the Commission an Electric Quarterly Report containing: (1) a summary of the contractual terms and conditions in very effective service agreement for market-based power sales; and (2) transaction information for effective short-term (less than one year) and long-term (one year or greater) market-based power sales during the most recent calendar quarter.¹² Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.¹³

22. DPL 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.¹⁴ Order No. 652 requires that the change in status reporting requirement be incorporated in the market-based rate tariff of each entity authorized to make sales at market-based rates. Accordingly, DPL is directed, within 30 days of the date of issuance of this order, to revise its market-based rate tariff to incorporate the following provision:

DPL 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. A change in status includes, but is not limited to, each of the following: (i) ownership or control of generation or transmission

¹² *Revised Public Utility Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31,043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002). Required data sets for contractual and transaction information are described in Attachments B and C of Order No. 2001. The Electric Quarterly Report must be submitted to the Commission using the EQR Submission System Software, which may be downloaded from the Commission's website at <http://www.ferc.gov/docs-filing/eqr.asp>.

¹³ The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2004).

¹⁴ *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).

facilities or inputs to electric power production other than fuel supplies, or (ii) affiliation with any entity not disclosed in the application for market-based rate authority that owns or controls generation or transmission facilities or inputs to electric power production, or affiliation with any entity that has a franchised service area. Any change in status must be filed no later than 30 days after the change in status occurs.

23. In addition, DPL is directed to file an updated market power analysis within three years of the date of this order, and every three years thereafter. The Commission also reserves the right to require such an analysis at any intervening time.

By direction of the Commission.

Linda Mitry,
Deputy Secretary.