

101 FERC ¶ 61,166  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
William L. Massey, Linda Breathitt,  
And Nora Mead Brownell.

Wisvest Corporation	Docket Nos. EC02-87-000
Wisvest-Connecticut, LLC	ER02-2204-000
PSEG Fossil LLC	ER99-967-002

ORDER AUTHORIZING DISPOSITION OF JURISDICTIONAL FACILITIES AND  
MARKET-BASED RATES

(Issued November 4, 2002)

1. In this order, we authorize a disposition of jurisdictional facilities wherein Wisvest Corporation (Wisvest) will transfer its ownership interest in Wisvest-Connecticut, LLC (Wisvest-Connecticut) to PSEG Fossil LLC (PSEG Fossil). We also approve Wisvest-Connecticut's request for market-based rate authority necessitated by the change in ownership.

Background

2. On June 28, 2002, Wisvest, Wisvest-Connecticut, and PSEG Fossil (collectively, Applicants) filed an application seeking authority under section 203 of the Federal Power Act (FPA)<sup>1</sup> for Wisvest to transfer its membership interest in Wisvest-Connecticut to PSEG Fossil. In addition, on June 28, 2002, Wisvest-Connecticut and PSEG Fossil filed an application seeking authority under section 205 of the FPA for a change in status for approval of market-based rate authority, filing of conforming changes to its market-based rates tariff, and a request for waivers to address the proposed transfer of Wisvest-Connecticut to PSEG Fossil.

3. Wisvest is a wholly-owned subsidiary of Wisconsin Energy Corporation (Wisconsin Energy), an exempt public utility holding company under the Public Utility Holding Company Act of 1935. Wisconsin Energy is the parent company of Wisconsin Electric Power Company, a public utility providing electric power and energy to customers in Wisconsin and Michigan. Wisconsin Energy is also the parent company of

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<sup>1</sup>16 U.S.C. § 824b (2000).

Edison Sault Electric Company, a public utility providing electric power and energy to customers in the Upper Peninsula of Michigan.

4. Wisvest-Connecticut is designed to own and operate generating assets and interconnection facilities and to sell electric power and energy at market-based rates.<sup>2</sup> Wisvest is currently the sole member of Wisvest-Connecticut. Wisvest-Connecticut owns the Bridgeport Harbor Station (approximately 553 MW) and the New Haven Harbor Station (approximately 466 MW), both in Connecticut.

5. PSEG Fossil is a wholly-owned subsidiary of PSEG Power LLC (PSEG Power). PSEG Fossil was granted EWG status by the Commission in 1999.<sup>3</sup> It owns or operates approximately 8,614 MW of electric generation in PJM Interconnection, LLC (PJM). PSEG Fossil sells the output of its generation facilities to its affiliate PSEG Energy Resources and Trade LLC (ER&T). PSEG Fossil also indirectly owns and operates 400 MW of generating capacity located in Albany County, New York. PSEG Fossil does not own any generation capacity in Connecticut; however, its affiliates own, but do not operate, approximately 8 MW of generation capacity in the New England market. According to Applicants, this 8 MW of power and energy is not under PSEG Fossil's control because it is committed under long-term power sales agreements.<sup>4</sup>

#### Notice of Filing and Responsive Pleadings

6. Notice of Applicants' filings was published in the Federal Register,<sup>5</sup> with motions to intervene and protests due on or before July 19, 2002. On July 19, 2002, Connecticut Municipal Electric Energy Cooperative (CMEEC) filed a motion to intervene and a motion to reject Applicants' filing in Docket No. EC02-87-000, or, in the alternative, a protest to Applicants' filing in that Docket. CMEEC also protests Applicants' filings in

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<sup>2</sup>Wisvest-Connecticut, LLC, 86 FERC ¶ 61,113 (1999).

<sup>3</sup>PSEG Fossil LLC, 89 FERC ¶ 62,237 (1999), PSEG Fossil LLC, 95 FERC ¶ 61,405 (2000) and PSEG Fossil LLC, 99 FERC ¶ 62,167 (2001).

<sup>4</sup>Applicants state that one of PSEG Fossil's affiliates, Quonset Point Cogen, L.P., is constructing a 7.5 MW facility in Rhode Island, but they anticipate that this additional capacity will not be configured to sell into the interstate grid.

References to PSEG are meant to be inclusive of PSEG Fossil, PSEG Power, ER&T, and other affiliates.

<sup>5</sup>67 Fed. Reg. 46,493 (2002) and 67 Fed. Reg. 45,976 (2002), respectively.

Docket No. ER02-2204-000 and ER99-967-002. CMEEC states that the disposition of facilities will not improve the "load pocket" situation in Connecticut. It says that Applicants' argument that the disposition of facilities does not require an Appendix A market concentration analysis is flawed and that the application thus should be rejected as incomplete. CMEEC also states that PSEG controls considerable generation and transmission assets in three interconnected ISO-operated regions and will have the incentive to use these assets to influence prices in those markets.

7. On July 19, 2002, The United Illuminating Company (UIC) filed a timely motion to intervene raising no substantive issues.
8. On July 26, 2002, Applicants filed an answer to CMEEC's motion.
9. On August 7, 2002, Select Energy, Inc. (Select Energy) filed a motion to intervene out of time requesting to become a party to this proceeding, but raising no substantive issues.

## Discussion

### Procedural Matters

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,<sup>6</sup> CMEEC's timely motion to intervene, protest and motion to reject, and UIC's timely motion to intervene serve to make them parties to this proceeding. We will also accept Select Energy's motion, filed out of time, which will serve to make it a party to this proceeding. Finally, we will reject Applicant's July 26 answer because it is an impermissible answer to a protest.<sup>7</sup>

### Section 203 Determination - Docket No. EC02-87-000

11. Section 203(a) of the FPA provides that the Commission must approve a disposition of jurisdictional facilities if it finds that the disposition "will be consistent with the public interest."<sup>8</sup> The Commission's Merger Policy Statement and Order No. 642 provide that the Commission will generally take account of three factors in analyzing

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<sup>6</sup>See 18 C.F.R. § 385.214 (2002).

<sup>7</sup>See 18 C.F.R. § 385.213(a)(2) (2002).

<sup>8</sup>16 U.S.C. § 824b (2000).

whether a proposed disposition is consistent with the public interest: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.<sup>9</sup>

### Arguments

12. Applicants request Commission Authorization pursuant to section 203 of the FPA to permit Wisvest to transfer the membership interests in Wisvest-Connecticut to PSEG Fossil. Regarding the effect on competition, they argue that the transaction presents no horizontal market power issues and does not require an Appendix A market concentration analysis, since PSEG Fossil and its affiliates do not currently operate generation in ISO-NE, the geographic market where Wisvest-Connecticut's generating capacity is located. Applicants cite to the Merger Policy Statement and to the Revised Filing Requirements, which exempt a section 203 applicant from the Appendix A requirement if the applicant:

Affirmatively demonstrates that the merging entities do not currently conduct business in the same geographic market or that the extent of the business transactions in the same geographic markets is de minimis . . . .<sup>10</sup>

13. Applicants state that the 8 MW of capacity in ISO-NE owned by a PSEG Fossil affiliate is not under the control of that affiliate because it is committed under long-term contracts. While a PSEG Fossil power marketing affiliate does engage in some sales of energy and capacity in ISO-NE, these sales have not on average exceeded 100 MW per peak day since 2000, which Applicants characterize as de minimis. Although PSEG Fossil and its affiliates own substantial amounts of generating capacity in the New York ISO control area (1907 MW) and the PJM ISO control area (10,501 MW), very little (48 MW) would be deemed to make it into ISO-NE under an Appendix A-type analysis allocating the limited New York-to-New England tie capability of 900 MW among all of the potential New York ISO capacity (42,061 MW) and the potential PJM ISO capacity (65,604 MW). This allocation follows from the *pro-rata* method that the Commission

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<sup>9</sup> See Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), order on reconsideration, Order No. 592-A, 79 FERC ¶ 61,321 (1997); see also Revised Filing Requirements Under Part 33 of the Commission's Regulations, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), order on reh'g, Order No. 642-A, 94 FERC ¶ 61,289 (2001).

<sup>10</sup> 18 C.F.R § 33.3(a)(2)(I) (2002).

routinely has accepted in Appendix A analyses, when potential importable capacity from all suppliers located outside the geographic market exceeds the import capability. As a result, market concentration in ISO-NE would change by only 1 (and by only 19 if the entire 900 MW of NY-to-NE import capability were assigned to PSEG Fossil).

Applicants acknowledge that their analysis of total capacity does not use the Economic Capacity measure in the Commission's Competitive Analysis Screen, but argue that because PSEG Fossil would be attributed very little capacity in the New England market pre-transaction, "it is inconceivable that significantly different results would be obtained from a more refined analysis that used the Economic Capacity measure." Application, Frame Affidavit at 7, note 12.

14. Applicants recognize that in a previous section 203 proceeding,<sup>11</sup> the Commission and intervenors raised competitive concerns regarding effects in the Southwestern Connecticut (SWCT) geographic market, as well as other markets within Connecticut, that are delineated by internal transmission limits within the ISO-NE control area. They note, however, that in that case the acquiring firm already owned generating capacity within the transmission-constrained areas and, thus, the acquisition of Wisvest-Connecticut would have increased concentration in the defined market areas. Here, Applicants point out, PSEG Fossil does not currently own generating capacity inside either SWCT or Connecticut and, thus, concentration will be the same after the transaction as before.

15. CMEEC urges the Commission to reject the application for failing to provide an Appendix A analysis. It notes that the Revised Filing Requirements allow merger applicants to not file such an analysis only if they show that the merging entities do not currently conduct business in the same geographic markets or that the extent of the business in the same geographic markets is de minimis and no intervenor has alleged that one of the merging entities is a perceived potential competitor in the same geographic market of the other. CMEEC states that PSEG Fossil's own website states that PSEG Fossil trades in ISO-NE, thus indicating that PSEG Fossil is a potential competitor of Wisvest. Also, Applicants have not shown that average peak day trading of 100 MW is de minimis, since no data is provided for PSEG Fossil's annual physical sales or the range of sales that compose the average. CMEEC also dismisses as irrelevant Applicants' use of total capacity in ISO-NE as a basis for their assertion that the transaction raises no market power concerns; the proper comparison is with the transmission-constrained SWCT region within ISO-NE.

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<sup>11</sup>Wisvest-Connecticut, LLC, 96 FERC ¶ 61,101 (2001).

16. CMEEC describes at length transmission-related problems within SWCT that limit import capability, create reliability concerns and raise the prospect of higher prices. Specific transmission limitations within SWCT will tend to cause most new generation to be located at existing sites, and PSEG Fossil would be able to use its position as owner of the Wisvest-Connecticut generator site to hinder efforts by other entities to add new generation to relieve near-term congestion within SWCT. CMEEC is also concerned that PSEG Fossil's acquisition of generating resources in Connecticut, when combined with its existing position in PJM and New York, will provide PSEG Fossil with the incentive and ability to engage in and manipulate transactions in multiple ISOs. CMEEC asserts that because Wisvest does not own facilities in New York or PJM, it does not have the same ability as PSEG Fossil to influence prices to its advantage in multiple markets.

17. Applicants also argue that the proposed transaction will have no adverse effect on rates paid by customers of the Applicants or their affiliates because after the transaction Wisvest-Connecticut will maintain its market-based rate tariff and continue to honor its existing third-party power agreements. Likewise, the transaction will have no adverse effect on state or federal regulation. Because its assets are not in the a state retail rate base and the transaction does not affect the separate corporate existence of Wisvest-Connecticut, the proposed transaction will not reduce the Connecticut's regulatory authority. And because Wisvest-Connecticut's wholesale power sales will remain subject to Commission regulation under the FPA, Applicants claim that the transaction does not diminish federal regulatory authority.

### Discussion

18. Regarding the effect on competition, the Commission disagrees with CMEEC that Applicants should be required to file an Appendix A analysis. We note that PSEG or its affiliates own very little generating capacity located in New England (all of which is committed under long-term sales agreements), and do not control any generating capacity in New England. Within New York, PSEG or its affiliates own, or will own, over 1,900 MW of capacity. However, because this capacity must compete with the generating capacity owned by all other suppliers within New York for the limited transfer capability into ISO-NE, the likelihood that screen failures (increases in concentration that exceed thresholds) using the economic capacity measure would occur in the ISO-NE market as a whole is extremely small. The HHI change would be even smaller within SWCT, since the PSEG capacity would be further reduced, in competition with other New England capacity, to reflect its pro-rata share the 1700 MW of import capability from the rest of ISO-NE into SWCT.

19. Applicants also state that PSEG's marketing affiliate has made sales into ISO-NE, but that these sales have not on average exceeded 100 MW per peak day since year 2000. Moreover, this capacity was purchased from others. If the PSEG's affiliated marketer does not have operational control over the capacity, the capacity would not be attributed to PSEG Fossil in an HHI analysis and PSEG could not withhold the capacity from the market. Even if it is assumed that PSEG has operational control and could withhold the capacity, the capacity would have to compete with other New England generation for the use of the 1700 import capability into the SWCT from the rest of New England. In that circumstance, based on total capacity data submitted by CMEEC, the resulting HHI change would be just 7.<sup>12</sup> An analysis using economic capacity would require similar adjustments in PSEG capacity to reflect the limited transfer capability from New York into ISO-NE and from the rest of ISO-NE into SWCT and would be very unlikely to yield significantly different results.

20. Furthermore, a concentration analysis of economic capacity within SWCT is likely to yield little useful information that would assist in evaluating the competitive concerns that CMEEC raises. CMEEC alleges that severe transmission constraints exist in SWCT, but does not convince us that an Appendix A analysis would show that the transaction would significantly worsen either transmission constraints or concentration within SWCT. CMEEC also does not explain how an Appendix A analysis would shed any light on whether PSEG Fossil is more likely than Wisvest-Connecticut to use control of the generating site on which one Wisvest-Connecticut generator is located to deter the entry of new generation in SWCT. In addition, CMEEC does not suggest how an Appendix A analysis could prove PSEG Fossil's alleged ability to manipulate transactions in the Connecticut, New York and PJM market areas. Therefore, we find the disposition does not adversely effect competition.

21. We also find no evidence that the proposed transaction would adversely affect rates or federal or state regulation. As a result, we conclude that the proposed transaction is consistent with the public interest under section 203, and we approve the proposed disposition of facilities.

Section 205 Determination - Docket Nos. ER02-2204-000 and ER99-967-002

22. Applicants filed a change in status under Wisvest-Connecticut's market-based rate authority granted under section 205 of the Federal Power Act (FPA), in Docket Nos.

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<sup>12</sup>This calculation ignores Applicants' contention that CMEEC improperly included the 464 MW Wisvest generator as SWCT in-area generation.

ER02-2204-000 and ER99-967-002. At the completion of the transaction, Wisvest-Connecticut will become a direct subsidiary of PSEG Fossil and an indirect subsidiary of PSEG Power.

### Arguments

23. Applicants state that this change in Wisvest-Connecticut's ownership constitutes a material change from the facts upon which the Commission originally relied in granting Wisvest-Connecticut its market-based rate authority. However, Applicants believe this change in ownership does not raise market power concerns and should not affect Wisvest-Connecticut's current grant of authority to charge market-based rates under section 205. Applicants further state that neither Wisvest nor its PSEG Fossil affiliates will have acquired market power in generation or transmission and they will not be able to erect other barriers to entry. Applicants indicate that they will take adequate steps to safeguard against affiliate abuse.

24. Applicants have submitted as Appendix B to the application a Supply Market Assessment (SMA) screen. The SMA screen is an interim, Commission-approved generation market power screen and mitigation policy designed to determine whether an applicant for market-based rate authority is a pivotal supplier such that the aggregate potential supplies of the applicant and other market participants cannot meet peak market demand.<sup>13</sup> Applicants state that Wisvest-Connecticut, after completion of the transaction, passes the SMA screen with respect to the ISO-NE market.

25. Applicants note that the SMA screen was submitted voluntarily in order to remove any possible concerns with respect to the impact of the proposed transaction on Wisvest-Connecticut's authority to charge market-based rates. Applicants further note that all sales into markets operated by an independent system operator or regional transmission organization with Commission-approved market monitoring and mitigation are exempt from the SMA screen.<sup>14</sup> Since Wisvest-Connecticut will sell into markets administered by ISO-NE, which has Commission-approved market monitoring and mitigation currently in place, Applicants submit that the SMA screen does not apply to them.

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<sup>13</sup>See, AEP Power Marketing, Inc., 97 FERC ¶ 61,219 (2001), reh'g pending; see also Notice Delaying Effective Date of Mitigation and Announcing Technical Conference, Docket Nos. ER96-2495-016, et al. (Dec. 20, 2001).

<sup>14</sup>See, e.g., New England Power Pool, 85 FERC ¶ 61,379 (1998), reh'g denied, 95 FERC ¶ 61,074 (2001).

Applicants believe their market-based power sales into New England are governed by the specific thresholds and mitigation approved for ISO-NE.

26. Applicants state that Wisvest-Connecticut does not own or control facilities for the transmission of power other than those necessary to interconnect the Bridgeport Harbor Station and the New Haven Harbor Station to the interstate transmission grid. Applicants further state, in Mr. Frame's affidavit, that there are no vertical market power concerns associated with transmission facilities owned or controlled by affiliates of PSEG Fossil. Applicants state that the only integrated domestic transmission asset owned by affiliates of PSEG Fossil is the transmission system owned by PSE&G, which is located within the PJM ISO and is under the operational control of PJM ISO and subject to the PJM ISO Open Access Tariff.

27. Applicants state that neither Wisvest-Connecticut nor PSEG Fossil and its affiliates own or control fuel supplies in the ISO-NE market, any unique land sites or any other inputs to electric power generation that could be used to prevent competitors from entering the market.

28. Applicants state that Wisvest-Connecticut currently has a Code of Conduct included as part of its existing tariff for market-based rate authority. This Code of Conduct will become effective as to interactions between Wisvest-Connecticut, PSEG Fossil and affiliates of PSEG Fossil following completion of the acquisition transaction. Applicants believe that this action satisfies the Commission's requirement that procedures be in place to guard against the possibility of affiliate abuse.

29. Applicants believe that the Commission's previous determinations regarding waivers of certain filing requirements, grants of blanket authorizations and reporting requirements as applied to Wisvest-Connecticut will not be affected by the change in Wisvest-Connecticut's status.

30. Applicants request that the Commission remove the limitation that prohibits Wisvest Connecticut from engaging in transactions within the Wisconsin Upper Michigan Systems subregion of the Mid-America Interconnected Network and the eastern region of the Upper Peninsula of Michigan. Wisvest-Connecticut's current market-based rate tariff prohibits it from engaging in transactions in this Restricted Area. Applicants state that since Wisvest-Connecticut will no longer be affiliated with entities in this region, upon completion of the acquisition transaction these restrictions should be removed.

31. CMEEC believes the Commission should reject Applicants' request to transfer market-based rate authority to Wisvest-Connecticut, under its new ownership structure. CMEEC states that although the new entity will sell into markets administered by ISO-NE, which has Commission-approved market monitoring and mitigation measures, the Commission should reject Applicants' assertion that no further analysis is required. CMEEC believes the Commission should reject the SMA presented by Applicants as inadequate. CMEEC believes an SMA screen that looks at Total Supply and peak demand in the relevant load pocket region would provide a more accurate and useful indication of the extent to which the Bridgeport and New Haven Harbor Stations are pivotal in the market.

32. CMEEC recommends that if the Commission decides to approve the proposed transaction, the Commission must devise structural solutions that will assure that PSEG Fossil's interests are aligned with maintaining reliability and protecting consumer welfare within the load pocket. CMEEC recommends that a significant portion of the PSEG Fossil generation be committed to benefit and financially support entities with load serving obligations within the load pocket. This may be achieved through long-term bilateral contracts with such entities. CMEEC further recommends that PSEG Fossil could be required to assume load serving responsibility within the load pocket at standard offer prices.

33. CMEEC further recommends the Commission impose a "must offer" condition on any approval of market-based rate authority for the former Wisvest units. This condition would require PSEG to offer all power at cost-based rates not committed from the units for sale for a period through at least 2008.

34. CMEEC suggests that the Commission consider conditioning any approval granted in either proceeding on the adoption of an automatic mitigation procedure for southwest Connecticut, as previously approved by the Commission for New York and California.

#### Discussion

35. The Commission does not agree with CMEEC that Applicants' request for change in status should be rejected or accepted with certain conditions. The Commission acknowledges CMEEC's concern that the existing transmission constraints in the areas where Applicants will operate may create an opportunity for the exercise of market power. However, the existing Commission-approved market monitoring and mitigation measures provide protection against any participants in the market attempting to exercise market power. The adoption of a standard market design within ISO-NE provides

additional protection against the exercise of market power by market participants.<sup>15</sup> In this regard, we note that both Wisvest-Connecticut units (Bridgeport and New Haven Harbor) are located in Southwest Connecticut. This load pocket has been identified by ISO-NE as a potential Designated Congested Area. Units in DCAs can have their bids capped, under certain market conditions, by either a reference price or a safe harbor bid cap estimate of what a typical combustion turbine unit would receive.

36. Accordingly, the Commission accepts Applicants' Notice of Change in Status and continuation of the market-based rate authorization previously granted to Wisvest-Connecticut.

The Commission orders:

(A) The proposed disposition of jurisdictional facilities is hereby authorized, as discussed in the body of this order.

(B) The Commission retains authority under section 203(b) of the FPA to issue supplemental orders as appropriate.

(C) Applicants are hereby directed to notify the Commission within 15 days of the date service commences, as discussed within the body of this order.

(D) The foregoing authorization is without prejudice to the authority of this Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of cost, or any other matter whatsoever now pending or which may come before this Commission.

(E) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted.

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<sup>15</sup>On July 15, 2002, the New England Power Pool (NEPOOL) Participants Committee and ISO-NE submitted a proposed standard market design for ISO-NE. This proposal, included improvements to the day-ahead and real-time market, locational marginal pricing, mechanisms to mitigate market power, demand response programs, and a capacity resource mechanism. The proposal, with modifications, was accepted by the Commission. New England Power Pool, 100 FERC ¶ 61,287 (2002), reh'g pending.

Docket Nos. EC02-87-000, et al.

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(F) Applicant is hereby ordered to notify the Commission and submit Order 614-compliant rate schedules reflecting the new company name within 15 days of the completion of the transaction.

(G) Applicants' Notice of Change in Status is accepted and continuation of Wisvest-Connecticut's market-based rate authority is hereby granted.

(H) All previous waivers of certain filing requirements, grants of blanket authorizations and reporting requirements as applied to Wisvest-Connecticut are hereby granted to PSEG Power Connecticut LLC.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.