

109 FERC ¶61,279  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Consumers Energy Company	Docket Nos.	ER98-4421-005
		ER98-4421-004
		ER98-4421-003
		ER98-4421-002
CMS Energy Resource Management Company		ER96-2350-025
		ER96-2350-024
		ER96-2350-023
Grayling Generating Station Limited Partnership		ER99-791-003
		ER99-791-002
Genesee Power Station Limited Partnership		ER99-806-002
		ER99-806-001
CMS Generation Michigan Power L.L.C.		ER99-3677-004
		ER99-3677-003
Dearborn Industrial Generation, L.L.C.		ER01-570-005
		ER01-570-004
		ER01-570-003

ORDER ACCEPTING UPDATED MARKET POWER ANALYSIS AND TARIFF  
SHEETS

(Issued December 17, 2004)

1. In this order the Commission accepts an updated market power analysis filed by Consumers Energy Company (Consumers) on behalf of itself and its affiliates CMS Energy Resource Management Company (CMS ERM), Grayling Generating Station Limited Partnership (Grayling), Genesee Power Station Limited Partnership (Genesee), CMS Generation Michigan Power L.L.C. (Michigan Power), and Dearborn Industrial Generation, L.L.C. (DIG), (collectively, MI Affiliates). The Commission also accepts, effective December 17, 2003, certain revised tariff sheets filed by Consumers and the MI Affiliates. As discussed below, the Commission concludes that Consumers and the MI Affiliates satisfy the Commission's standards for market-based rate authority. This order benefits customers by reviewing the conditions under which market-based rate

authority is granted, thus ensuring that the prices charged for jurisdictional sales are just and reasonable. Consumers' and the MI Affiliates' next updated market power analysis is due three years from the date of this order.

### **Background**

2. On October 26, 2001, Consumers filed an updated market power analysis (October 2001 market power analysis) pursuant to the Commission's order granting Consumers authority to sell electric energy and capacity at market-based rates.<sup>1</sup> On August 11, 2004, as amended on October 1, 2004, Consumers submitted for filing an updated market analysis pursuant to the Commission's order issued on May 13, 2004<sup>2</sup> and revised tariff sheets<sup>3</sup> to include the Commission's market behavior rules.<sup>4</sup> The May 13 Order addressed the procedures for implementing the generation market power analysis announced on April 14, 2004, and clarified on July 8, 2004.<sup>5</sup>

3. On August 12, 2004, as amended on October 1, 2004, CMS ERM, Michigan Power, and DIG submitted updated generation market power analyses pursuant to the May 13 Order and revised tariff sheets<sup>6</sup> to include the Commission's market behavior

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<sup>1</sup> See *Consumers Energy Company*, 85 FERC ¶ 61,121 (1998).

<sup>2</sup> *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004) (May 13 Order).

<sup>3</sup> Consumers Energy Company FERC Electric Tariff, Second Revised Volume No. 8 Original Sheet Nos. 1-21.

<sup>4</sup> *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).

<sup>5</sup> *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

<sup>6</sup> Consumers Energy Resource Management Company FERC Electric Tariff, First Revised Volume No. 9, Original Sheet Nos. 1-7; CMS Generation Michigan Power, L.L.C., FERC Electric Tariff, First Revised Volume No. 1, Original Sheet Nos. 1-6; Dearborn Industrial Generation L.L.C., FERC Electric Tariff, First Revised Volume No. 1, Original Sheet Nos. 1-5.

rules.<sup>7</sup> On September 10, 2004, as amended on October 1, 2004, Grayling and Genesee each filed a generation market power analysis pursuant to the May 13 Order and revised tariff sheets<sup>8</sup> to include the Commission's market behavior rules.<sup>9</sup>

4. On October 29, 2004, the Director, Division of Tariffs and Market Development – South, acting pursuant to delegated authority, issued a data request seeking additional information relating to Consumers' and the MI Affiliates' submittals. On November 18, 2004, Consumers and the MI Affiliates jointly filed a response to the data request.

### **Notice of Filings and Responsive Pleadings**

5. Notice of Consumers' October 2001 market power analysis was published in the *Federal Register*, 66 Fed. Reg. 56,096 (2001), with interventions and protests due on or before November 16, 2001. None was filed. Notice of the Consumers and MI Affiliates October 1, 2004 compliance filing was published in the *Federal Register*, 69 Fed. Reg. 64,042 (2004), with interventions or protests due on or before October 15, 2004. None was filed. Notice of the Consumers and MI Affiliates November 18, 2004 filing was published in the *Federal Register*, 69 Fed. Reg. 69,596 (2004), with interventions or protests due on or before December 7, 2004. None was filed.

### **Discussion**

#### **Market-Based Rate Authority**

6. 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 whether there is evidence of affiliate abuse or reciprocal dealing.<sup>10</sup>

7. As discussed below, the Commission concludes that Consumers and the MI Affiliates satisfy the Commission's standards for market-based rate authority.

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<sup>7</sup> See *supra* note 4.

<sup>8</sup> Grayling Generating Station Limited Partnership, FERC Electric Tariff, First Revised Volume No. 1, Original Sheet Nos. 1-4; Genesee Power Station Limited Partnership FERC Electric Tariff, First Revised Volume No. 1, Original Sheet Nos. 1-4.

<sup>9</sup> See *supra* note 4.

<sup>10</sup> See, e.g., *Progress Power Marketing, Inc.*, 76 FERC ¶ 61,155, at 61,921-22 (1996); *Northwest Power Marketing Co., L.L.C.*, 75 FERC ¶ 61,281, at 61,899-900 (1996); *accord Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223, at 62,062-63 (1994).

### **Generation Market Power**

8. In the April 14 Order, the Commission adopted two indicative screens for assessing generation market power: the pivotal supplier screen and the wholesale market share screen.<sup>11</sup>

9. Consumers and the MI Affiliates define the relevant markets for performing the generation market power analysis as the Michigan Electrical Coordinated System (MECS) and the four control areas connected to MECS; namely, AEP-East,<sup>12</sup> FirstEnergy Corporation, Northern Indiana Public Service Company (NIPSCO), and Ontario (Independent Market Operator, or IMO). Consumers and the MI Affiliates state that data is available for all investor-owned utilities and independent power producers in these control areas, however, Consumers and the MI Affiliates state they do not have access to daily peak demand values for the municipalities and cooperatives. As a result, Consumers and the MI Affiliates assume that the relationship between the annual peak demand and the average of the daily peak demand for these municipalities and cooperatives is identical to the relationship experienced by Consumers. Consumers and the MI Affiliates believe this assumption to be valid because of the similarity in economic and weather conditions between the Consumers and municipal/cooperative customer bases.

10. In the Commission's April 14 Order, the Commission stated that appropriate simplifying assumptions are those assumptions that do not affect the underlying methodology utilized by these screens.<sup>13</sup> Due to the similarity in economic and weather conditions between Consumers' customer base and municipal/cooperative customer bases, the Commission accepts the assumptions made by Consumers and the MI Affiliates.

11. In its October 1, 2004, submittal, Consumers and the MI Affiliates excluded weekends and North American Electric Reliability Council (NERC) holidays when determining the minimum peak load day for each season. However, the Commission's April 14 Order states that the proxy for native load used in the wholesale market share

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<sup>11</sup> April 14 Order, 107 FERC ¶ 61,018 at P 71-72.

<sup>12</sup> "AEP-East" refers to American Electric Power Company, Inc.'s service territory in PJM Interconnection, L.L.C.

<sup>13</sup> April 14 Order, 107 FERC ¶ 61,018 at P 117.

analysis is the minimum peak load day for each season considered.<sup>14</sup> Accordingly, in its request for additional data, the Commission directed Consumers and the MI Affiliates to revise their wholesale market share screen using load data that does not exclude weekends and holidays.

12. Consumers and the MI Affiliates submit two wholesale market share screens, one using load data that does not exclude weekends and NERC holidays and the other using load data that does exclude weekends and NERC holidays. Consumers and the MI Affiliates argue that including weekends and NERC holidays when determining the minimum peak load day for each season is contrary to standard industry practice. Consumers and the MI Affiliates state that during off-peak periods, capacity is in great abundance and has little economic value and load serving utilities that have supplier of last resort obligations have to maintain excessive reserves during off-peak periods. According to Consumers and the MI Affiliates, having an excessive share of reserves during weekends and NERC holidays is not an advantage in a competitive market because those periods do not provide opportunities for abuse and should not be the basis for failing the Commission's indicative screen.

13. With regard to Consumers' and the MI Affiliates' exclusion of weekends and NERC holidays when determining the minimum peak load day for each season, the Commission clarifies that weekends and NERC holidays may be excluded when determining the peak load day for each season because weekends and holidays are not typical load days.

14. Consumers and the MI Affiliates have submitted a simultaneous import capability study for the MECS control area. The Commission finds that Consumers and the MI Affiliates have complied with the April 14 Order, as clarified by the July 8 Order, regarding performing a simultaneous transmission import capability study. The Commission relies on the results of that study herein.

15. The Commission has determined that Consumers and the MI Affiliates pass the wholesale market share screen in the MECS control area with a market share of no more than 19.8 percent of the uncommitted capacity in each of the four seasons considered. The Commission also finds that Consumers and the MI Affiliates pass the pivotal supplier screen for the MECS control area. Accordingly, the Commission finds that Consumers and the MI Affiliates satisfy the Commission's generation market power standard for the grant of market-based rate authority.

16. The Commission notes that Consumers and the MI Affiliates filed workpapers, the underlying analysis of which contains data for which Consumers and the MI Affiliates seek Critical Energy Infrastructure Information (CEII) status as defined in the

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<sup>14</sup> *Id.* at P 100.

Commission's Rules of Practice and Procedure.<sup>15</sup> The Commission notes that no parties in the instant case have protested Consumers and the MI Affiliates filing such information. Therefore, the Commission will allow the use of such data in this case. Should a person seek access to data filed in this case or in any future case under the CEII regulations, the procedures of 18 C.F.R. § 388.113 will govern.

### **Transmission Market Power**

17. In its August 11, 2004, submittal, as amended on October 1, 2004, Consumers informed the Commission that on May 1, 2002, Consumers transferred its transmission facilities to Michigan Electric Transmission Company, a non-affiliated independent transmission company. In their October 1, 2004, submittal, Consumers and the MI Affiliates stated that, as a result of the 2002 transfer, Consumers and the MI Affiliates do not own or control transmission facilities and are not affiliated with any transmission owning entity. Further, no intervenors have raised transmission market power concerns. Based on this representation, the Commission finds that Consumers and the MI Affiliates satisfy the Commission's transmission market power standard for the grant of market-based rate authority.

### **Other Barriers to Entry**

18. Consumers and the MI Affiliates state there have been no changes to the factual circumstances described in their most recent market power analysis regarding their inability to erect barriers to entry. Further, no intervenors have raised concerns regarding barriers to entry. Based on this representation, the Commission is satisfied that neither Consumers nor its affiliates can erect barriers to entry.

### **Affiliate Abuse**

19. Consumers and the MI Affiliates state there have been no changes to the factual circumstances described in their most recent market power analysis that would negate the adequacy of the protections/prohibitions that have been included in their market-based rate tariffs to protect against affiliate abuse and/or reciprocal dealing. Further, no intervenors have raised concerns regarding affiliate abuse. Based on this representation, Consumers and the MI Affiliates satisfy the Commission's standards with regard to affiliate abuse.

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<sup>15</sup> See 18 C.F.R. § 388.112-13 (2004).

### **Reporting Requirements**

20. 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 every 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.<sup>16</sup> Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.<sup>17</sup>

21. With regard to reporting changes in status that would reflect a departure from the characteristics the Commission has relied upon in approving market-based pricing, in a Notice of Proposed Rulemaking in Docket No. RM04-14-000, the Commission is proposing to amend its regulations and to modify the market-based rate authority of current market-based rate sellers to establish a reporting obligation for changes in status that apply to public utilities authorized to make wholesale power sales in interstate commerce at market-based rates.<sup>18</sup> Accordingly, the change in status reporting obligation for Consumers and the MI Affiliates is subject to the outcome of the rulemaking.

22. Consumers and the MI Affiliates are 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.

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<sup>16</sup> *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/Electric/eqr/eqr.htm>.

<sup>17</sup> The exact dates for these reports are prescribed in 18 C.F.R. § 35.10b (2004). Failure to file an Electric Quarterly Report (without an appropriate request for extension), or failure to report an agreement in an Electric Quarterly Report, may result in forfeiture of market-based rate authority, requiring filing of a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

<sup>18</sup> *See Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, 69 Fed. Reg. 61,180 (Oct. 15, 2004), FERC Stats. & Regs. ¶ 32,576 (2004).

Docket No. ER98-4421-005, *et al.*

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The Commission orders:

(A) The updated market power analysis filed by Consumers and the MI Affiliates is hereby accepted for filing as discussed in the body of this order.

(B) Consumers' and the MI Affiliates' revised tariff sheets are accepted for filing, effective December 17, 2003, as discussed in the body of this order.

(C) An updated market power analysis is due from Consumers and the MI Affiliates within three years of the date of this order.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.