95 FERC ¶ 61,397
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Curt Hébert, Jr., Chairman;
William L. Massey, and Linda Breathitt.

Ameren Energy Marketing Company — Docket No. ER01-1810-000 and ER01-1810-001

ORDER CONDITIONALLY ACCEPTING FOR FILING
PROPOSED POWER SALES AGREEMENT
AND GRANTING, IN PART, CONFIDENTIAL TREATMENT

(Issued June 14, 2001)

In this order, we will conditionally accept for filing, effective June 1, 2001, without hearing or suspension, the proposed market-based power sales agreement (PSA) filed by Ameren Energy Marketing Company (AEM), an affiliate of Union Electric Company d/b/a AmerenUE (AmerenUE). The request to deny confidential treatment of the rates under the PSA is moot. We will grant the request for confidential treatment of the supporting documentation. We will also grant the request for waiver of the Commission's regulations relating to the filing of certain cost information.

I. Background

On April 17, 2001, AEM submitted for filing a PSA with AmerenUE which provides for the sale of capacity and energy by AEM to AmerenUE, at market-based rates. The PSA was the result of a request for proposal (RFP) for supplies by AmerenUE. While AEM has authorization to make sales at market-based rates, it is submitting the PSA for approval because it involves the market-based sale to an affiliate with a franchised service area.[1] AmerenUE, a public utility serving retail customers located in Missouri and Illinois and wholesale customers in Missouri, and AEM, a power marketer, are subsidiaries of Ameren Corporation (Ameren). According to AEM's application, the PSA is necessary in order for AmerenUE to meet its planning reserve margin

[1] AEM was granted market-based rate authority in Madison Gas & Electric Company, et al., 90 FERC ¶ 61,115 at 61,350 (2000).

requirements and MAIN accreditation requirements for summer 2001. AEM will use power from Ameren Energy Generating Company (AEG), an exempt wholesale generator and affiliate of AEM, to serve AmerenUE under the PSA and will also rely on "certain generation units owned by Electric Energy Inc.," a partially owned subsidiary of Ameren.

AEM requests confidential treatment of the PSA until June 1, 2001. AEM argues that the Commission should conditionally allow the terms of the PSA to remain confidential, at least until the remaining potential supplier has had an opportunity to procure transmission service, so that negotiations between AmerenUE and other suppliers are not adversely affected by the public filing of this information. In support of this argument AEM states that the Commission has granted privileged treatment in the past when necessary to protect similar information.[2] In addition, in a May 14, 2001 filing, AEM requests confidential treatment beyond June 1, 2001, for Attachment 1 to the Voytas Affidavit[3] on the basis that the document contains commercially sensitive information submitted to AmerenUE in strict confidence. AEM states that this document reveals the prices at which other suppliers responding to the RFP are willing to provide power, the public release of which could place AmerenUE at a disadvantage in contract negotiations. On June 1, 2001, AEM and AmerenUE submitted public copies of the PSA and of Attachment 4 to the Voytas Affidavit (containing a benchmark price analysis) that AmerenUE included confidentially in its motion to intervene.

The proposed PSA resulted from a selection process initiated by AmerenUE's issuance of an RFP for suppliers to provide AmerenUE with power for the summer of

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[2]Applicant cites to Texas Gas Transmission Corporation, 83 FERC ¶ 61,239 at 62,040 (1998), Western Systems Power Pool, 59 FERC ¶ 61,249 at 61,906 (1992) and Jersey Central Power & Light Company, 87 FERC ¶ 61,014 at 61,040 (1999).

[3]Attachment 1 to the Voytas Affidavit is the report issued by Burns & McDonnell which describes and evaluates the bids received in response to the request for proposal.

2001. AEM claims that the "process that resulted in the PSA was designed to ensure that any contract would be awarded through an unbiased, competitive bidding and evaluation process in which unaffiliated suppliers competed, and which was structured to ensure that all bidders were provided equal information and bidding opportunities." In support of its position, AEM cites to several prior Commission orders. See, e.g., Boston Edison Re: Edgar Electric Energy Company, 55 FERC ¶ 61,382 (1991) (Edgar), Ocean State Power II, 59 FERC ¶ 61,360 (1992), reh'g denied, 69 FERC ¶ 61,146 (1994).

The RFP was designed as a two-step process. Once bids for power were submitted and evaluated, the bidders on the short list were then told to arrange for transmission service to the Ameren border and AmerenUE would submit to the Ameren OASIS requests for network transmission service for the transmission of energy within the Ameren system. The RFP provided that an independent consulting firm would be evaluating offers for the procurement of capacity and energy during the months of June 2001 through September 2001. The RFP required the offer to include the cost of firm transmission for the entire period and that Ameren must be able to secure network service transmission from the delivery point(s). The RFP stated that only fixed price offers would be considered and that award of the contract will be contingent upon the approval of firm transmission delivery to the Ameren system and approval of network service within the Ameren system. The RFP also specified that bidders propose a mechanism for an adjustment to the energy component of the offer they deem necessary between the bid due date (February 1, 2001) and the time of transmission service approvals, at which point the energy price will become firm. The RFP provided that the bid evaluation would include consideration of any proposed adjustment mechanism on energy pricing. Finally, the RFP included a note stating that the evaluation of the offers of the RFP was intended to comply with the requirements of the Missouri Commission order in Case No. EA-2000-37.[4]

AEM states that it submitted a proposal in response to the RFP, was notified it was the successful bidder and subsequently entered into the proposed PSA. After arriving at the terms of the PSA with AEM, AmerenUE undertook its own benchmark analysis to determine the market value of the energy and capacity underlying the PSA and to verify that the pricing terms were fair and reasonable. The term of the PSA is from June 1,

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[4]Union Electric Company, d/b/a AmerenUE, Missouri Commission Case No. EA-2000-37, Order approving Unanimous Stipulation and Agreement, Making Findings Under the Public Utility Holding Company Act, and Closing Case (January 13, 2000) (Missouri Commission Order).

2001 through May 31, 2002. The PSA provides for the sale of up to 450 MW of firm capacity and energy, establishes fixed prices for capacity through the entire term of the contract, and a fixed price for energy during the months of July and August 2001. During all other periods, the energy price will be the current market price.

AEM requests a waiver of the Commission's notice requirements to allow an effective date of June 1, 2001. AEM also requests a waiver of the Commission's regulations relating to the filing of cost information, along with any other regulations that are customarily waived in connection with market-based sales.

II. Notice of Filing

Notice of AEM's filing was published in the Federal Register, 66 Fed. Reg. 21,134 (2001), with comments, protests and interventions due on or before May 8, 2001. On April 27, 2001, AmerenUE filed a motion to intervene in support of the filing. In that motion, confidential treatment was requested for Attachments 1 and 4 of the Affidavit of Mr. Richard A. Voytas.[5] On May 8, 2001, the Missouri Public Service Commission (Missouri Commission) and Missouri Office of the Public Counsel (Public Counsel) separately filed protests. The Missouri Commission and Public Counsel both raise concerns as to whether there was direct head-to-head competition between AEM and other power sellers due to the inability of other power sellers to obtain transmission service. Missouri Commission states that it does not seek rejection of the contract and requests that the Commission reject the proposed market-based rates and set for hearing the appropriate level of cost-based rates or, in the alternative, set for hearing whether AEM has demonstrated that its proposed market-based rates will be just and reasonable. On May 14, 2001, AEM requested continued confidential treatment for Attachment 1 beyond June 1, 2001 and for Attachment 4 until June 1, 2001. On May 23, 2001, AEM and AmerenUE filed answers to the protest and comments of the Missouri Commission and Public Counsel. AEM and AmerenUE request confidential treatment of the attachment to the affidavit of Mr. Richard A. Voytas submitted with the answer.

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[5]As noted above, Attachment 1 is the report issued by Burns & McDonnell which describes and evaluates the bids received in response to the RFP. Attachment 4 is the benchmark price analysis of AEM's PSA.

III. Discussion

A Procedural Matters

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2000), the timely, unopposed motions of AmerenUE, Missouri Commission, and the Public Counsel make them parties to this proceeding. Although Rule 214 generally prohibits an answer to a protest, in light of the various representations made by AEM and AmerenUE in their Answers that assist us in our resolution of the issues raised, the Commission finds that good cause exists to accept the Answers of both AEM and AmerenUE.

B. Proposed Market-Based Power Sale to Affiliate

1 Competitive Bidding Process and Benchmarking Analysis

Transactions between traditional public utilities, such as AmerenUE, and an affiliated power marketer, such as AEM, can raise concerns of cross-subsidization and market power gained through the affiliate relationship. In Edgar,[6] the Commission held that in analyzing market rate transactions between an affiliated buyer and seller, the Commission must ensure that the buyer has chosen the lowest cost supplier from among the options presented, taking into account both price and non-price terms (i.e., that the buyer has not preferred its affiliate without justification). The Commission noted several ways for a utility to show it has not unduly favored its affiliates, two of which are relied upon in this case by AEM: (1) evidence of direct head-to-head competition between the seller and competing unaffiliated suppliers in either a formal solicitation or an informal negotiation process; and (2) benchmark evidence of the price and terms and conditions, of contemporaneous sales made by non-affiliated sellers for similar services in the relevant market.[7]

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[6]See 55 FERC ¶ 61,382 at 62,168-69. See also Aquila Energy Marketing Corp., 87 FERC ¶ 61,217 at 61,857 (1999) and MEP Pleasant Hill, LLC, 88 FERC ¶ 61,027 (1999).

[7]When such evidence is presented, the Commission seeks assurance that (1) the solicitation was designed and implemented without undue preference for the affiliate, (2)

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the analysis of the bids or responses did not favor the affiliate, particularly with respect to evaluation of non-price factors, and (3) the affiliate was selected based on some reasonable combination of price and nonprice factors. Id. at 62,168.

In support of its filing, AEM states that the bidding process initiated by AmerenUE involved the participation of AEM and many other bidders[8] and that an independent consultant evaluated the bids. AEM claims that the PSA resulted from a competitive bidding process and that there is benchmark evidence of market value of contemporaneous sales by non-affiliate sellers for similar services in the relevant market. AEM asserts that this satisfies the Commission's concerns about affiliate abuse.

The Missouri Commission and Public Counsel raise essentially two concerns. First, they argue that AEM did not participate in head-to-head competition because AEM had an advantage over competitors that had to acquire transmission service. They believe that AEM may have market power due to transmission constraints on the Ameren transmission system. In support of their contention, Missouri Commission and Public Counsel both state that Ameren acknowledges that the reason AmerenUE did not pursue any of the other short listed bidders was because of their inability to obtain the transmission services necessary to support the transactions.[9]

Second, Missouri Commission states that it is difficult to evaluate whether the benchmark transactions offered by AmerenUE are appropriate and whether comparable

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[8] AmerenUE, in its motion to intervene in support, states that the RFP was sent to 41 power sellers with whom AmerenUE, or a subsidiary, had past contracts or believed to be capable of meeting contractual obligations. Of the 41, nine responded; three of the nine were eliminated due to non-compliance with the requirements or being the high bid.

[9] Missouri Commission cites AmerenUE's Comments at 7(citing Voytas Affidavit).

transactions exist by which to evaluate whether the rates in the PSA are as low as those charged by non-affiliate sellers,[10] because the information was filed under seal, the transaction is inherently unusual, and the industry's preference for confidential contracts makes public data scarce. Missouri Commission states that, for example, because there is no readily available transparent market for capacity, AmerenUE had to base its benchmark analysis on its "past market experience and its knowledge as a power seller and purchaser." Public Counsel adds that it is not convinced that there is sufficient competition in Midwest power markets to allow benchmarking of the prices in the PSA against market prices in regional markets to protect against affiliate abuse.

To the first concern, AEM responds that the Missouri Commission reviewed the RFP and understood at that time the transmission advantage of AEM as a result of its network resources. In addition, AEM states that the mere existence of constrained transmission into Ameren does not evidence reduced competition within the Ameren service area, but rather clearly demonstrates the maximized utilization of the Ameren system by numerous third party competitors. With respect to the second concern that Missouri Commission and Public Counsel are unable to evaluate the appropriateness of the benchmark transactions, AEM responds that in calculating the energy price bid, it relied on "the active, competitive and transparent "Into-Cinergy" market and the state-approved pricing methodology to determine an "Into Ameren" energy market price. AEM believes that this removes any potential for affiliate abuse.

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[10] AmerenUE filed its benchmark analysis under seal, explaining that the analysis contains confidential information "about the prices at which AmerenUE is willing to enter into contracts in response to the RFP." See AmerenUE Comments at 8; Voytas Affidavit at 9.

The Missouri Commission, Public Counsel, and independent consultant had a role in the development and/or execution of the RFP. On the basis of the independent RFP process in conjunction with the benchmark evidence offered by the independent consultant, as well as that of AmerenUE, as discussed below, we find that there is no affiliate abuse. AEM offers benchmark evidence as described in the Voytas Affidavit that shows AEM's price is at or below the "Into-Cinergy" market price adjusted for "Into Ameren" (June 1, 2001 filing).[11] AEM states that in calculating its energy bid price, AEM relied on prices for the "Into-Cinergy" market and then adjusted this market price to capture the differential between the Cinergy and Ameren markets. According to AEM, the methodology used in determining the differential is the same one as approved by the Illinois Commerce Commission in proceedings related to retail choice. In addition, AmerenUE undertook its own benchmark analysis in which it compared energy bids it received (including AEM's bid) to pricing information available for contracts for deliveries for the same period, as posted on EnronOnline.[12] For capacity bids, both AEM

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[11]In addition, the independent consultant performed an analysis that involved calculating the total cost of energy to Ameren and ranking the bidders on a cost per block basis in 50MW increments.

[12]AEM Answer at 7.

and AmerenUE explain that there is a lack of a transparent capacity market, but offer that an existing contract with a non-affiliated party should serve as evidence of lack of affiliate abuse. AEM in its response provided further support for its capacity bid offering that discussions with non-affiliates that commenced in December 2000 for multi-year transactions, including July and August 2001, entailed price levels higher than those in the PSA.[13]

We agree with the Missouri Commission that the benchmark evidence was hard to evaluate in large part because of the complexity of the transaction. However, we are satisfied with AEM's demonstration of the stated prices for the capacity. The capacity charges were compared to the value of capacity based on an agreement between AEM and a non-affiliate and were compared to two offers that were in the process of being negotiated with third parties during the same time period AEM was preparing its bid. The capacity charges in the PSA are lower than these other offers.

As for the energy prices for July and August 2001, AEM relies on "Into-Cinergy" market and a state-approved pricing methodology to determine an "Into-Ameren" energy market price. AEM's bid was evaluated independently by both the independent consultant and AmerenUE. Furthermore, AmerenUE states that one of the competing bidders (Supplier A) in the RFP has received transmission service to the Ameren border for June 2001 through September 2001 and is finalizing pricing terms and conditions for the sale to AmerenUE during that period. AmerenUE offers that the energy prices in the AEM and Supplier A contracts were based on neutral and transparent market indicia at the time the pricing in each contract was agreed upon, and, therefore, the energy prices under each contract reflect the market prices to be expected in an arm's-length transaction between non-affiliates.

2 Pricing of Capacity and Energy in the PSA

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[13] Id. at 7-8

As stated above, the PSA establishes fixed prices for capacity through the entire term of the contract, and a fixed price for energy during the months of July and August 2001. During all other periods, the energy price will be the current market price. The Commission has repeatedly held that prices resulting from affiliate transactions by ~~reference to competitive prices at recognized market hubs is an effective mechanism to~~ prevent affiliate abuse.[14] However, AEM has not identified any market index that will determine the market price for energy.[15] AEM is directed to file a revised PSA to specify the market index that will determine the market price for energy.

3 Request for Confidential Treatment of Supporting Information

The request of AEM and AmerenUE for confidential treatment of the PSA and the Affidavits of both Mr. Serri and Mr. Voytas is moot. As stated above, AEM requested that the information be held confidentially until June 1, 2001. That date has since passed. In any event, the Commission has required companies to file their long-term service agreements (one year or more) in an unredacted, non-confidential form.[16] The request for confidential treatment of AmerenUE's benchmark price analysis, included as Attachment 4 to Mr. Voytas' Affidavit, under 18 C.F.R. § 388.112, is also moot per AEM and AmerenUE's June 1, 2001 filing in which Attachment 4 and the PSA were made public.

In addition, we will grant the request for confidential treatment of all portions of the Burns & McDonnell report, included as Attachment 1 to Mr. Voytas' Affidavit. No

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[14]We note that the Commission previously approved inter-affiliate sales for Ameren Operating Companies based on use of an established, relevant index (NYMEX "Into-Cinergy"). See Ameren Services Co., 86 FERC ¶ 61,212 (1999). See also First Energy Trading Services, Inc., 88 FERC ¶ 61,067 (1999); AYP Energy, Inc., 87 FERC ¶ 61,009 at 61,022 (1999).

[15]We note that Applicant's use of "Into-Ameren" and "Into-Cinergy" were used to benchmark the July and August 2001 energy prices in the PSA and are not offered as an index for prices after August 2001.

[16]See AES Huntington Beach, L.L.C., AES Alamitos, L.L.C. and AES Redondo Beach, L.L.C., 83 FERC ¶ 61,100 (1998), reh'g denied, 87 FERC ¶ 61,221 (1999).

party has contested the request. Moreover, we note that these materials are not FERC-jurisdictional rate schedules.[17]

C. Other Matters

The request for waiver of the Commission's notice regulations is granted to allow an effective date of June 1, 2001. We also grant the request for waiver of the Commission's regulations related to the filing of cost-of-service information, as set forth in the ordering paragraphs, consistent with those waivers granted to other sellers of power at market-based rates.

The Commission orders:

(A) The PSA submitted by AEM is hereby accepted for filing, subject to modification, as discussed in the body of this order, to become effective on June 1, 2001

(B) AEM and AmerenUE's requests for confidential treatment are hereby granted.

(C) AEM's request for waiver of the provisions of Subparts B and C of Part 35 of the Commission's regulations, with the exception of sections 35.12(a), 35.13(b), 35.15 and 35.16, is hereby granted.

By the Commission.

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[17] See Jersey Central Power & Light Company, et al., 87 FERC ¶ 61,014 (1999).

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Linwood A. Watson, Jr.,
Acting Secretary.