Chapter PSC 100

AFFILIATIONS BETWEEN PUBLIC UTILITIES AND OTHER PERSONS

Subchapter I — General

PSC 100.01 Person defined. Under s. 196.52 (1), Stats., "person" includes trustees, lessees, holders of beneficial equitable interest, voluntary associations, receivers and partnerships. "Person" does not include a telecommunications provider, as defined in s. 196.01 (8p), Stats. This definition should be observed in filing information in response to this order.

History: 1–2–56; correction made under s. 13.93 (2m) (b) 7., Stats., Register, July, 2000, No. 535; **CR 13–025: am. Register January 2014 No. 697, eff. 2–1–14.**

PSC 100.02 Validity of contracts. Section 196.52 (3), Stats., provides that no contract or arrangement between a public utility and any affiliated interest shall be valid or effective until such contract or arrangement shall have received the written approval of the commission. Pursuant to this provision any new contracts or revisions of former contracts between a public utility and an affiliated interest must be submitted to the commission for approval before they can become effective.

PSC 100.03 Information to be furnished. All class A, B, and C privately owned public utilities in Wisconsin shall furnish the following information on or before June 1, 1937:

(1) A list of all corporations and persons which own or hold, directly or indirectly, 5% or more of the voting securities of the reporting public utility. Such list shall show the number of units of each class of securities held, the percent which the individual holding of each class is to the total outstanding of that class, and the state of incorporation of each corporation.

(2) A list of all corporations and persons which own or hold, directly or indirectly, 5% or more of the voting securities of any corporation in a chain of successive ownership of the reporting public utility. Such list shall show the number of units of each class of securities held, the percent which the individual holding of each class is to the total outstanding of that class, and the state of incorporation of each corporation.

(3) A list of all corporations 5% or more of whose voting securities are owned by any corporation or person owning 5% or more of the voting securities of the reporting public utility, or by any corporation or person in any chain of successive ownership of each public utility, as defined in sub. (2). Such list should indicate the name of the affiliated corporation or person which owns 5% or more of the voting securities of each corporation listed.

(4) A list of all corporations which have one or more officers or one or more directors in common with the reporting public utility. This list should show for each corporation listed the names of the officers and directors which serve in common with the reporting public utility.

(5) A list of all contracts and arrangements, written or unwritten, in effect between the reporting utility and all affiliated interests as defined in s. 196.52, Stats. Such list shall state a descriptive title of each contract or arrangement, and the date of the original contract and of all amendments thereto.

PSC 100.04 Verification of report. The information furnished in response to this order must be verified under oath by the president or secretary of the reporting utility. The information furnished is to be effective as of the date of verification.

Subchapter II — Affiliated Wholesale Merchant Plant Market Power

PSC 100.11 Purpose. The purpose of this subchapter is to effectuate and implement s. 196.491 (3m), Stats., as enacted by 1997 Wis. Act 204, generally effective May 12, 1998. The rules promulgated in this subchapter establish requirements and procedures to be applied to the ownership, control, or operation of an affiliated wholesale merchant plant.

History: Cr. Register, July, 2000, No. 535, eff. 8–1–00.

PSC 100.12 Definitions. In this subchapter:

(1) "Affiliated interest" has the meaning set forth in s. 196.52 (1), Stats.

(2) "Affiliates" means the public utilities with which the applicant is affiliated and all other affiliated interests of the public utilities.

(3) "Applicant" means any affiliated interest of a public utility seeking approval under s. 196.491 (3m), Stats., to own, operate, or control a wholesale merchant plant.

(4) "Available economic capacity" means economic capacity less the amount of generating capacity reasonably necessary to serve, in commercially viable increments, the potential supplier's native load.

(5) "DOJ guidelines" means the U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, as revised April 8, 1997.

(6) "Economic capacity" means the amount of generating capacity owned or controlled by a potential supplier with variable costs low enough that energy from the capacity could be delivered to the relevant geographic market at a price no more than 5% above the pre–transaction market clearing price; less any capacity that is committed under long–term firm sales contracts; plus any capacity that is acquired under long–term firm purchase contracts, and any generating capacity that is under the operational control of a third–party but the potential supplier receives the economic benefit of the capacity. In this subsection, a long–term sales or purchase contract means a sales or purchase contract which has a remaining commitment of more than one year.

(7) "FERC Order 592" means the December 18, 1996, Federal Energy Regulatory Commission Order 592.

(8) "HHI statistic" means the Herfindahl–Hirschman Index for the market.

(9) "Market power" means the ability of a seller in the relevant geographic market to profitably maintain prices for comparable products above competitive levels for a significant period of time. Sellers with market power also may be able to reduce product quality, quantity, service, or innovation.

(10) "Native load" means load attributable to customers on whose behalf the potential supplier, by statute, franchise, or regulatory requirement, has undertaken an obligation to construct and operate its system to meet their electricity needs.

(11) "Passive investor" is any applicant whose investment the commission determines does not permit control or influence by the affiliated utility of the merchant plant and who receives no more information regarding plant operations, and who receives such information no earlier, than is publicly available to any investor. In making a determination whether an investor may exercise control or influence over a wholesale merchant plant, the commission shall consider, where applicable, such factors as the fiduciary responsibilities of the operator, manager and other investors in the wholesale merchant plant to the investor; the ability of the wholesale merchant plant to raise capital independently of the investor; the ability of the wholesale merchant plant to make investment and financing decisions independently of the investor; governance provisions; the number, identity and interests of other investors; if the investor may exert control or influence over generation rates, terms, conditions and production, including outage schedules; any services that will be provided by the investor or its employees to the wholesale merchant plant; the terms of any agreements between the investor and the wholesale merchant plant, any party managing or operating the wholesale merchant plant, any other investor or lender in the wholesale merchant plant or any purchaser of output from the plant; and any other factors which the commission deems relevant.

(a) An ownership interest of 5% or less shall be irrebuttably presumed not to create the ability to control or influence. An ownership interest of 50% or more shall be irrebuttably presumed to create the ability to control or influence. The ability of investors that loan funds to the merchant plant to control or influence shall be judged upon the terms of the loan agreements and the other factors listed above.

(b) A passive investor must undertake and propose to the commission processes for a compliance audit by the commission to ensure the independence of the decision making process of the wholesale merchant plant from the passive investor and the continued status of the investor as passive. The first compliance audit will be required 2 years after initial approval under s. 196.491 (3m), Stats., and as necessary thereafter. The compliance audit information must be submitted to the commission without any requirement for approval by the wholesale merchant plant.

(c) A passive investor must immediately report changes to the commission in the ownership, operation, management or control of the wholesale merchant plant that may affect the status of the investor as passive.

(12) "Total capacity" means the total amount of installed electric generating capacity, measured in megawatts, with respective seasonal ratings.

(13) "Wholesale merchant peaker plant" means any wholesale merchant plant anticipated to have an annual capacity factor of less than 10%.

(14) "Wholesale merchant plant" has the meaning set forth in s. 196.491 (1) (w), Stats.

Note: Copies of the DOJ guidelines and FERC Order 592 can be obtained by writing to the Public Service Commission of Wisconsin, P.O. Box 7854, Madison, WI 53707–7854. Copies are on file at the offices of the Public Service Commission of Wisconsin, the Secretary of State, and the Legislative Reference Bureau.

History: Cr. Register, July, 2000, No. 535, eff. 8–1–00**; correction made in (14) under s. 13. 92 (4) (b) 6., Stats., Register January 2014 No. 697.**

PSC 100.13 Approval requirements. (1) The commission shall grant the approval required under s. 196.491 (3m) (a), Stats., necessary for an affiliated interest of a public utility to own, operate, or control a wholesale merchant plant if pars. (a) and (b) are met.

(a) The applicant's public utility affiliates have done any of the following:

1. Transferred control over their transmission facilities, as defined in s. 196.485 (1) (h), Stats., to an independent system operator, as defined in s. 196.485 (1) (d), Stats., that is approved by the federal energy regulatory commission.

2. Divested their interest in the transmission facilities to an independent transmission owner, as defined in s. 196.485 (1) (dm), Stats.

(b) The commission has determined that any of the following, which constitutes a finding that the ownership, control, or operation will not have a substantial anticompetitive effect on electricity markets for any classes of customers, has been met. For purposes of subds. 1. and 2., the DOJ guidelines shall be applied as if the proposed merchant plant existed in the market and was merging with the public utility or affiliate.

1. The ownership, operation, or control of the wholesale merchant plant will meet the appropriate horizontal market power safe harbor provisions in the DOJ guidelines and the commission has approved any contracts or agreements, as may be necessary under ss. 196.52 and 196.795, Stats., provided, however, that the commission has examined the issues in section 2 of the DOJ guidelines. An appropriate horizontal market power safe harbor exists if either an HHI statistic no higher than 1,000 or an increase in the HHI statistic of no more than 50 occurs in the market power screen analysis as a result of the operation of the affiliated wholesale merchant power plant.

2. The ownership, operation, or control of the wholesale merchant plant will have minimal potential for adverse competitive effects as defined in section 1.51, "General Standards" of the DOJ guidelines and the commission has approved any contracts or agreements, as may be necessary under ss. 196.52 and 196.795, Stats., provided, however, that the commission has examined the potential for adverse competitive effects as defined in section 2 of the DOJ guidelines. There is a minimal potential for adverse competitive effects when both an HHI statistic no higher than 1,800 and an increase in the HHI statistic of no more than 100 occurs in the market power screen analysis as a result of the operation of the affiliated wholesale merchant power plant.

3. The conditions for s. PSC 100.16 safe harbor exceptions are met and the commission has approved any contracts or agreements, as may be necessary under ss. 196.52 and 196.795, Stats. Approval of any application, based on a commission finding of safe harbor exception under s. PSC 100.16, shall be conditioned upon the continued applicability of the safe harbor conditions.

(2) The commission may approve a request by an affiliated interest of a public utility to own, operate, or control a wholesale merchant plant in which a properly constructed market power screen analysis, as set forth in s. PSC 100.15, and supporting analyses indicates a moderate or high potential for adverse competitive effects as defined in section 1.51, "General Standards" of the DOJ guidelines upon holding a public hearing at which a showing is made that the significant potential and concern for adverse competitive effects can be overcome by any of the following. The DOJ guidelines shall be applied as if the proposed merchant plant existed in the market and was merging with the public utility or affiliate:

(a) An appropriate showing of factors as set forth in sections 2, 3, and 5 of the DOJ guidelines, provided, however, that the commission has examined the potential for adverse competitive effects as defined in section 2 of the DOJ guidelines.

(b) Sufficient mitigation remedies proposed by either the applicant or other parties to the hearing which are acceptable to the commission. In conditionally approving an application, the commission shall establish any mitigation remedies as deemed in the public interest and may consider those mitigation remedies as identified in the hearing record or Appendix A Section D, "Remedy" of the FERC Order 592.

(3) The commission may include in its order granting its approval to own, control or operate a wholesale merchant plant, any reporting requirements or conditions which it deems necessary to carry out its jurisdiction under ch. 196, Stats.

(4) An applicant may request that the commission issue a declaratory ruling to determine whether the applicant's proposed ownership, control or operation of a wholesale merchant plant will have a substantial anti−competitive effect on electricity markets for any classes of customers and whether the mitigation remedies proposed by the applicant or other parties effectively mitigate such anti−competitive effects. The application shall describe the proposed wholesale merchant plant, including the mitigation remedies, in sufficient detail to permit the commission to determine whether the proposed mitigation remedies effectively mitigate any such anti−competitive effects. The commission shall have the right to obtain any additional information or data which it deems necessary under this section. The commission shall, after notice and the opportunity for interested persons to submit comments, issue a declaratory ruling no earlier than 45 days and no later than 60 days from the date that the commission has determined that the application is complete.

History: Cr. Register, July, 2000, No. 535, eff. 8−1−00.

PSC 100.14 Approval procedure. (1) APPLICATION. An applicant making application for approval under s. 196.491 (3m) (a), Stats., shall file a market power screen analysis, as set forth in s. PSC 100.15, no later than the date on which it files its application for a certificate of public convenience and necessity under s. 196.491 (3) (a), Stats.

(2) HEARINGS ON PROPOSALS TO OWN, OPERATE, OR CONTROL A WHOLESALE MERCHANT PLANT. The commission may waive a hearing on the proposal unless any of the following occurs:

(a) A party to the proceeding, as defined in s. PSC 2.02, files a written request for a hearing, pursuant to s. 227.42, Stats., within 10 days of the issuance of a notice of investigation regarding an application of an affiliated interest to own, operate, or control a wholesale merchant plant.

(b) The applicant requests a hearing as required under s. PSC 100.13 (2) for commission approval.

(3) APPROVAL. The commission shall approve or disapprove the applicant's request no later than the earlier of the date it issues or denies a certificate of public convenience and necessity under s. 196.491 (3) (a), Stats., or 150 days after the commission determines that the market power screen analysis was complete. In the event the wholesale merchant plant is exempt from requiring a certificate of public convenience and necessity, the commission shall approve or disapprove the applicant's request no later than 150 days after determining that the market power screen analysis was complete.

History: Cr. Register, July, 2000, No. 535, eff. 8−1−00.

PSC 100.15 Market power screen analysis. (1) Except as provided for in sub. (2), an applicant shall submit a market power screen analysis, which shall provide, at minimum, all of the following information:

(a) *Relevant products*. Using the principles of analysis outlined in the DOJ guidelines; the information shall identify and define all relevant electricity products sold by the applicant and its affiliates. Those relevant products which are good substitutes from the buyer's perspective shall be grouped together. An initial grouping of wholesale products may consist of non−firm energy, short−term capacity, and long−term capacity with a contractual commitment of more than one year. However, other capacity and energy groupings reflecting developments in an evolving wholesale market are acceptable as long as the groupings are reasonable or simply mirror the state of art in product packaging. The information provided shall identify the relevant products by relevant hourly, daily, monthly, and seasonal time periods. If there are substantial variations in demand and supply of capacity or energy between time periods, then load supply and demand conditions shall be analyzed separately.

(b) *Relevant geographic markets*. Using the principles of analysis outlined in the DOJ guidelines, the information shall identify the relevant geographic markets which shall include each power sales customer or set of customers plausibly affected by the proposed construction. Affected customers are those entities directly interconnected to the applicant or any of its affiliates, as well as those entities that have purchased relevant electricity products from the applicant or any of its affiliates during the 2 years prior to the date of filing. Identification of relevant geographic markets shall factor in appropriate transmission capabilities and constraints. In addition, the relevant geographic markets shall include any markets formally identified by the commission or the federal energy regulatory commission.

(c) *Potential suppliers*. A supplier may be included in a geographic market only to the extent that it can economically and physically deliver relevant electricity products to the relevant geographic market, taking into consideration appropriate transmission capabilities, fees, rights, reservations, tariffs, and constraints. The information shall include, for the relevant geographic market, the amount of relevant electricity product a potential supplier could deliver to the relevant geographic market from owned or controlled capacity at a price, including all costs associated with making physical delivery over the electrical transmission system as well as ancillary services costs, that is no more than 5% above the pre−transaction market clearing price in the relevant geographic market. The information shall measure each potential supplier's presence in the relevant geographic market in terms of generating capacity, using economic capacity, available economic capacity, and total capacity measures. In addition, the information shall measure, where possible, each potential supplier's presence in the relevant geographic market in terms of electrical energy sold or expected to be sold.

(d) *Market concentration*. The information shall include all of the following for each relevant electricity product in the relevant geographic market, based on the generating capacity determined in par. (c):

1. The market share, both pre− and post−construction, for each potential supplier.

2. The HHI statistic for the market.

3. The change in the HHI statistic.

(e) *Forward looking analysis*. The market power screen analysis shall generally be forward looking and reflect all known, important developments with respect to electric industry restructuring, and electric generation and transmission construction or operation. The market power screen analysis shall examine the first 5 years of commercial in−service for the proposed electric generating facility and address whether applicant's proposed ownership, control or operation of a wholesale merchant plant will have a substantial anti−competitive effect on relevant electricity markets that are reasonably anticipated to exist for any class of customers, including those with market−based rates under s. 196.192, Stats. Any such forward−looking analysis shall not preclude the commission from mitigating retail market power or otherwise addressing retail market power in the future in connection with the introduction of competition in the retail market.

(f) *Historical data*. The information shall include historical trade data and historical transmission data for the applicant and all of its affiliates for the two−year period preceding the filing of the application.

(g) *Regulatory filings.* The information shall include all material filed with the federal energy regulatory commission related to any issue of market power associated with an applicant's proposal to own, operate, or control a wholesale merchant plant.

(h) *Supplemental data or analysis*. The information may include any additional data or analysis, as long as the additional

information accords with the principles of market power analysis, identification, and interpretation contained in the DOJ guidelines.

(i) *Source of data*. In constructing the market power screen analysis, the applicant shall use the sources of data as outlined in Appendix B of FERC Order 592.

(2) An affiliated interest may forgo filing a market power screen analysis if any of the safe harbor exceptions in s. PSC 100.16 are met, or if it proposes mitigation remedies which effectively mitigate any substantial anti−competitive effect on electricity markets for any class of customer, as provided in s. PSC 100.13 (4). The applicant shall file documentation and data supporting the applicable safe harbor exemption or proposed mitigation remedies in lieu of the market power screen analysis. The applicability of the safe harbor exemption is left with the commission.

(3) (a) The commission shall use the DOJ guidelines when measuring the extent of market power, or analyzing the potential for adverse competitive effects, of any proposal of an affiliated interest of a public utility to own, operate, or control a wholesale merchant plant, pursuant to s. 196.491 (3m), Stats. In addition, the commission may consider the extent to which timely, effective entry into the relevant wholesale generation market can mitigate market power concerns.

(b) Any market power screen analysis shall analyze concentration as if a merger of the proposed plant and the existing generation owner occurred after construction of the proposed plant, shall aggregate ownership of a public utility and all its affiliates, and shall aggregate successive construction by public utilities and their affiliates for a period covering no more than three years.

(c) The commission may waive information requirements after providing interested parties the opportunity to provide comments. In addition, the commission may require the applicant to supplement the data filed under this subchapter by submitting additional information, as needed to evaluate the market power screen analysis, applicable safe harbor exemptions, or proposed mitigation remedies.

History: Cr. Register, July, 2000, No. 535, eff. 8−1−00.

PSC 100.16 Bright line safe harbors. Any of the following bright line safe harbors are available to affiliated wholesale merchant plants and are subject to all provisions of ss. 196.491 (3m) (c) and 196.52, Stats.

(1) The applicant is a passive investor in the wholesale merchant plant. The applicant and its affiliates do not participate in the decisions regarding the operation of the plant.

(2) The applicant's and its affiliates' combined ownership interest is less than 5%.

(3) The affiliated wholesale merchant plant facility has a capacity of less than 20 megawatts. This safe harbor may be elected only once per calendar year in aggregate for all affiliated interests of a public utility, irrespective of multiple affiliated interests or combinations.

(4) The commission shall have the right to obtain any information or data which it deems necessary in order to exercise its authority under this section.

History: Cr. Register, July, 2000, No. 535, eff. 8−1−00.

PSC 100.17 Affiliated electric sales. (1) For purposes of this subsection:

(a) "Electric sale" has the meaning set forth in s. 196.491 (3m) (c) 1. a., Stats.

(b) "Firm sale" has the meaning set forth in s. 196.491 (3m) (c) 1. b., Stats.

(2) An applicant may not make any firm sale to a public utility with which it is affiliated, if any of the following applies:

(a) The firm sale is for a period of 3 years or more.

(b) The firm sale is for a period of less than 3 years and either party to the sale has an option to extend the period to 3 or more years.

(3) The commission shall review all electric sale transactions by any affiliate to any affiliated public utility of electricity generated at a wholesale merchant plant owned, operated, or controlled by an affiliate of the purchasing public utility. Commission approval of all contracts and agreements for public utility affiliate electric sales to an affiliated public utility are required prior to initiation of sales.

(4) (a) If at any time the commission finds that the electric sale is not in the public interest or if the commission finds that the purchasing public utility failed to provide the contract to the commission, the commission shall do at least one of the following:

1. Disallow the public utility's costs related to the sales in a rate−setting proceeding.

2. Order the public utility to provide a refund, in an amount determined by the commission, to its customers.

3. Order the public utility or affiliated interest to take such action as the commission may determine is in the public interest.

(b) Except for non−routine or non−repetitive transactions, the amount of disallowance or refund that may be ordered by the commission under par. (a) 1. and 2. shall be limited to costs associated with affiliated sales made on or after the commission initiates its review.

(5) The commission may not void the sale of electricity to a public utility made under a contract or agreement approved by the commission.

History: Cr. Register, July, 2000, No. 535, eff. 8−1−00.