

98-174 - PSC 100 - GHOLESALE
MECHANICAL PLANTS

WISCONSIN LEGISLATIVE COUNCIL STAFF

LCRC
FORM 2

RULES CLEARINGHOUSE

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CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE 98-174

AN ORDER to create subchapters I (title) and II of chapter PSC 100, relating to wholesale merchant plants.

Submitted by **PUBLIC SERVICE COMMISSION**

11-03-98 RECEIVED BY LEGISLATIVE COUNCIL.

12-02-98 REPORT SENT TO AGENCY.

RNS:JES:kjf;wu

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

Comment Attached YES NO

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

Comment Attached YES NO

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

Comment Attached YES NO

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS
[s. 227.15 (2) (e)]

Comment Attached YES NO

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

Comment Attached YES NO

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL
REGULATIONS [s. 227.15 (2) (g)]

Comment Attached YES NO

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

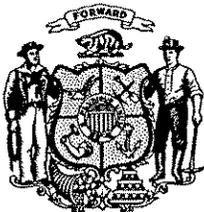
Comment Attached YES NO

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CLEARINGHOUSE RULE 98-174

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]

2. Form, Style and Placement in Administrative Code

a. The arrangement of the rule does not conform to the preferred drafting style. In particular, the arrangement of the rule-making order does not conform to s. 1.02, Manual, as the draft order does not include an introductory clause, plain language analysis or effective date clause. Also, ch. PSC 100 should be repealed and recreated in a SECTION 1, which would state: "SECTION 1. Chapter PSC 100 is repealed and recreated to read:". [See s. 1.04 (1), Manual.]

b. Both subchapter titles immediately follow the chapter title. The title to subch. II should be moved to the location in ch. PSC 100 where subch. II begins.

c. Once a term is defined in a rule, the defined term should be used, and its use should be consistent. This drafting principle was not followed in the definition of "available economic capacity" in s. PSC 100.12 (4). In this definition, "economic capacity" should be substituted for the phrase "amount of generating capacity meeting the definition of economic capacity." Also, a second definition of "native load" should not be provided within the definition of "available economic capacity," as "native load" is defined in s. PSC 100.12 (10).

d. The preferred drafting style is not to parenthetically embed the definition of a second term within the definition of another term. This style was not followed in the definition of "economic capacity" in s. PSC 100.12 (6), which also contains a definition of "long-term firm purchase contracts." If the latter term is used only in sub. (6), a separate sentence in that subsection should state: "In this subsection, "long-term firm purchase contract" means a contract with"

e. Mandatory duties should be noted in a rule through the use of “shall”; an optional provision or discretionary authority should be denoted through the use of “may.” A prohibition should be stated as “no person may . . .” or “a person may not . . .” In addition, “should,” “could,” “would,” “will” or “must” should not be used to express a mandatory or permissive action. [See s. 1.01 (2), Manual.] This drafting style was not followed in numerous provisions throughout the rule. See, for example, ss. PSC 100.13 (1) (b) (intro.), 100.15 (1) (intro.) and (a) and 100.165 (2).

f. The use of parentheses is not the preferred drafting style. [See s. 1.01 (6), Manual.] Parentheses were used, for example, in ss. PSC 100.12 (6) and 100.15 (1) (a). The parenthetical material throughout the rule should be deleted or worked into the text of the rule or, if it is not substantive, placed in a note.

g. The rebuttable presumption in the definition of “passive investor” in s. PSC 100.12 (11) (a) is a substantive provision that should not be included in a definition. [See s. 1.01 (7) (b), Manual.]

h. In s. PSC 100.12 (11) (b), “par.” should precede “(a).”

i. In s. PSC 100.13 (1) (intro.), “pars. (a) and (b)” should replace “par. a and b of this subsection.”

j. Internal and external references to multiple provisions should be in the plural and references to alternative provisions should be in the singular. [See s. 1.07 (2), Manual.] This drafting style was not followed with the use of “ss.” in s. PSC 100.13 (1) (b) 3. and “ss.” in s. PSC 100.15 (2).

k. The subsection titles in s. PSC 100.14 should be in solid capital letters. The paragraph titles in s. PSC 100.15 (1) (e) and (i) should be written with only an initial capital letter. [See s. 1.05 (2), Manual.] In addition, since s. PSC 100.15 (1) and (3) have no titles, sub. (2) should not have a title. Also, for all of the section titles in the rule, only the first letter of the title should be capitalized.

l. The subdivisions in s. PSC 100.15 (1) (d) should begin in the left margin and be numbered 1., 2., and 3. [See s. 1.03 (5), Manual.]

m. The use of “thereof” in s. PSC 100.165 (intro.) and elsewhere in the rule is vague and should be avoided. [See s. 1.01 (9) (c), Manual.]

n. The preferred format to instruct the Revisor of Statutes to insert a date within the text of a rule is to refer to the “effective date of this (section, subsection, paragraph, subdivision) . . . (revisor inserts date).” This style was not followed in s. PSC 100.165 (1) to (3).

o. The preferred drafting style is to place a number other than “one” in the text of a rule in numeric form. It is redundant to also provide the same number in a text format. [See s. 1.01 (5), Manual.] This style was not followed in s. PSC 100.15 (1) (c), 100.165 (1) to (3) and 100.17 (2) (a) and (b).

p. References to subdivisions should include a period after each subdivision number. This was not done in ss. PSC 100.13 (1) (b) (intro.) and 100.17 (4) (b). [See s. 1.03 (5), Manual.] Also, in that paragraph, “such” should be deleted.

4. Adequacy of References to Related Statutes, Rules and Forms

a. The rule incorporates two standards by reference. See the “DOJ guidelines” in s. PSC 100.12 (5) and “FERC Order 592” in s. PSC 100.12 (7). Consent for incorporation of these standards must be obtained from the Revisor of Statutes and the Attorney General pursuant to s. 227.21 (2) (a), Stats. The analysis accompanying the rule should indicate that this consent has been given.

b. Depending upon the size of the Department of Justice (DOJ) guidelines and Federal Energy Regulatory Commission (FERC) Order 592, references in the rule to these two standards could be vague and difficult for an interested reader to find. The commission should review the rule to ensure that the references to applicable portions of these standards are unambiguous. See, for example, the reference to the definition of “adverse competitive effects” in the DOJ guidelines in s. PSC 100.13 (1) (b) 2., and the reference to mitigation remedies in FERC Order 592 in s. PSC 100.13 (2) (b). As another example, in s. PSC 100.13 (1) (b) 2. and (2) (a), it is not clear what is meant by “provided, however, that the commission has examined the issues in section 2 of the DOJ guidelines.”

c. The reference to “subsequent thresholds” in s. PSC 100.165 (1) is potentially confusing. If the commission intends that the 100 megawatt threshold be automatically revised whenever the threshold in s. 196.491 (3) (a), Stats., is amended, then sub. (1) should reference the threshold in s. 196.491 (3) (a), Stats., and indicate in the note that at the time that the rule was adopted, the threshold was 100 megawatts.

d. The reference in s. PSC 100.165 (1) to the over three year contract prohibition under s. 196.491, Stats., is vague; it should be to a more specific provision in s. 196.491, Stats.

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. The commission should review the following undefined terms and phrases to determine if a definition of them should be provided in the rule to improve the clarity of the rule:

- (1) “Non-passive investor” in s. PSC 100.12 (11).
- (2) “Eastern Wisconsin Utility transmission-constrained area” and “market power clearance” in s. PSC 100.165 (2).
- (3) “Wholesale merchant peaker plant” in s. PSC 100.165 (3).
- (4) “Complex contracts” in s. PSC 100.17 (3).

b. The commission should review the entire rule to ensure that treatment of lists of provisions are clear, grammatically correct and conform to preferred drafting style. Under the

preferred drafting style, an introduction to the list indicates whether the elements of the list are inclusive or exclusive, i.e., “. . . all of the following:”, or “any of the following:”, and each element ends with a period. This style was not followed in a number of provisions in the rule, including ss. PSC 100.12 (11), 100.13 (1) (a) and (b), 100.15 (1), 100.16 (1), 100.165 (intro.) and 100.17 (2).

c. Placement of “to a seller” before “means” in the definition of “market power” in s. PSC 100.12 (9) makes this definition ambiguous. Should “of a seller” follow “ability” in this definition?

d. It is not apparent why the note following s. PSC 100.12 (13) indicates where Appendix B of FERC Order 592 may be obtained when the text of the rule is not limited to Appendix B but includes all of the order. See s. PSC 100.13 (2) (b).

e. In s. PSC 100.13 (1) (a) 2., “their” should replace “its.”

f. To improve the grammar of the rule, the commission should place an article such as “the” before “applicant” in a number of provisions in the rule. See, for example, ss. PSC 100.14 (2) (b) and (3), 100.15 (1) (f) and 100.16 (1) (a) and (b).

g. The circumstances under which the commission will waive information requirements under s. PSC 100.15 (3) (c) are vague. Can the commission specify criteria that it will use to waive these requirements? Also, “at its discretion” is unnecessary since the word “may” is used.

h. In the last sentence of s. PSC 100.165 (1), (2) and (3), “made” should replace “requested.”

i. In s. PSC 100.17 (4) (a) (intro.), the final clause is ambiguous. If the commission is given discretion to take any of the three actions, the clause should state “the commission may do any of the following:”. If the commission is required to take one or more of the three actions, the clause should state “the commission shall do at least one of the following:”.

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Public Service Commission of Wisconsin
Proposed Administrative Rules
Affiliated Wholesale Merchant Plant Market Power
Docket I-AC-174

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Chapter PSC 100

AFFILIATIONS BETWEEN PUBLIC UTILITIES AND OTHER PERSONS

SUBCHAPTER I - GENERAL

SUBCHAPTER II - AFFILIATED WHOLESALE MERCHANT PLANT

MARKET POWER

where does II begin?

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PSC 100.11 Purpose. The purpose of this subchapter is to effectuate and implement s. 196.491 (3m), Stats., as enacted by 1997 Wisconsin 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.

PSC 100.12 Definitions. In this subchapter:

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

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(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.

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(4) "Available economic capacity" means the amount of generating capacity meeting the definition of economic capacity less the amount of generating capacity reasonably necessary to serve, in commercially viable increments, the potential supplier's native load; i.e., the capacity needed to serve wholesale and retail power customers on whose behalf the potential supplier, by statute, franchise, regulatory requirement, or long-term contract, has undertaken an obligation to construct and operate its system to meet their electricity needs.

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

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(6) "Economic capacity" means the amount of generating capacity owned or controlled by a potential supplier with variable costs low enough that energy from such capacity could be delivered to the relevant geographic market at a price no more than five (5) percent 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 (i.e.,

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contracts with a remaining commitment of more than one year), 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.

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

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

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(9) "Market power" ^{of a sale} to a seller means the ability 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 the electric load that the public utility has an obligation to serve.

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(11) "Passive investor" is ^{measure on} (a) ^{on impact policy!} any applicant who, in combination with its affiliates, does not own or is not invested in 25 percent or more of the wholesale merchant plant and who the commission has not otherwise determined to be a non-passive investor. In addition, applicant and its affiliates do not hold options which would allow them to make additional investments without commission approval, that would result in the applicant, in combination with its affiliates, owning or being invested in 25 percent or more of the wholesale merchant plant. Ownership or investment in 10 percent or more of the wholesale merchant plant creates a rebuttable presumption of control or influence such that the applicant or its affiliates would not be a passive investor.

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(b) Any applicant not meeting the requirements of (a) whose investment the commission determines does not permit control by the affiliated utility of the operational decisions of the merchant plant and has no more information regarding plant operations than is available to any other market participant, and which is obtained through the same means and at the same time.

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

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

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Note: Copies of the DOJ guidelines and Appendix B of FERC Order 592 can be obtained by writing to the Public Service Commission of Wisconsin, P.O. Box 7854, Madison, WI 53707.

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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 ^{FDe} par. a and b of this subsection are met. *bad intro.*

(a) Applicant's public utility affiliates have either: ^{done any...} (a) and (b)

1. Transferred control over its 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; or

2. Divested ^{to} ~~its~~ 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 one 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 subd. 1, and 2, the DOJ guidelines will be applied as if the proposed merchant plant existed in the market and was merging with the public utility or affiliate.

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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. These values shall be updated to reflect any changes resulting from successor DOJ guidelines;

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2. The ownership, operation, or control of the wholesale merchant plant will have minimal potential for adverse competitive effects as defined 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. 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. These values shall be updated to reflect any changes resulting from successor DOJ guidelines; or

3. The conditions for ss. PSC 100.16 or PSC 100.165 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.

(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 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 either of the following. The DOJ guidelines

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will 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 issues in section 2 of the DOJ guidelines, or

(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 such mitigation remedies as deemed in the public interest and may consider those mitigation remedies as identified in the hearing record or the FERC Order 592.

Sub. Title for next

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.

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(2) Hearings on proposals to own, operate, or control a wholesale merchant plant. The commission may waive a hearing on the proposal unless:

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(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; or

any...

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

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(3) Approval. The commission shall approve or disapprove 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 applicant's request no later than 150 days after determining that the market power screen analysis was complete.

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PSC 100.15 Market Power Screen Analysis.

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

shall

(a) Relevant products. Using the principles of analysis outlined in the DOJ guidelines; the information shall identify and define all electricity products sold by the applicant and its affiliates which are not required to be provided by statute, franchise, regulatory requirements, or

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long-term contract. Those products which are good substitutes from the buyer's perspective should be grouped together. An initial grouping of products could consist of non-firm energy, short-term capacity (or firm energy), and long-term capacity (a contractual commitment of more than one year). However, other groupings reflecting developments in an evolving market are acceptable as long as such groupings are reasonable or simply mirror the state of art in product packaging. The information provided must identify the products by relevant time periods (hourly, daily, monthly, seasonal). If there are substantial variations in demand and supply of energy between time periods, then load supply and demand conditions must be analyzed separately. *parens*

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(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 who have purchased electricity at wholesale from the applicant or any of its affiliates during the two years prior to the date of filing, and retail customers. Identification of relevant geographic markets must 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 generation services to the defined geographic market, taking into consideration appropriate transmission capabilities, rights, reservations, tariffs, and constraints. The information shall include, for the geographic market, the amount of relevant product a potential supplier could deliver to the 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 five (5) percent above the pre-transaction market clearing price in the relevant geographic market. The information must 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.

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all of the following
(d) Market concentration. The information shall include for each 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; and 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 year of commercial in-service for the proposed electric generating facility.

(f) Historical data. The information shall include historical trade data and historical transmission data for 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 such 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, applicant shall use the sources of data as outlined in Appendix B of FERC Order 592.

(2) An affiliated interest ^{5.} may forgo filing a market power screen analysis if any of the safe harbor exceptions in ss. PSC 100.16 or PSC 100.165 are met.

(3) Analysis. (a) The commission shall use the latest 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 at its discretion. In addition, the commission may require applicant to supplement the data filed under this subchapter by submitting additional information, as needed to evaluate the market power screen analysis.

PSC 100.16 Bright Line Safe Harbors. (1) The following bright line safe harbors are available to affiliated wholesale merchant plants and are subject to all provisions of s. 196.52, Stats. :

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

(b) Applicant's and its affiliates' combined ownership interest is less than 5 percent.

(2) Applicant shall file documentation and data supporting the applicable safe harbor exemption in lieu of the market power screen analysis.

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PSC 100.165 Bright Line Safe Harbors Associated with Electrical System *+ lower case*
Reliability Enhancement. The following bright line system reliability safe harbors are available to new construction and are subject to all provisions of s. 196.52, Stats. Renovations or transfers of ownership of existing facilities are not eligible. *in addition*, only one of the safe harbor options may be elected in aggregate for all affiliated interests of a public utility, *bad intro.* irrespective of multiple affiliated interests or combination thereof.

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(1) For the first five (5) years from the date of adoption of these rules, a request for approval under s. 196.491(3m)(a), Stats., would automatically be granted by the commission if the wholesale merchant plant was less than 100 MW (or subsequent thresholds applicable to generating units not requiring a certificate of public convenience and necessity under s. 196.491(3)(a), Stats.) and the applicant agrees to not sell under contract a majority of its firm or non-firm power to any regulated affiliate such as a public utility. The over three (3) year contract prohibition under s. 196.491, Stats., also applies. For any public utility a request for use of this safe harbor may be requested no more than twice in aggregate by its affiliated interests, irrespective of multiple affiliated interests or combination thereof.

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(2) For wholesale merchant plants to be constructed in the Eastern Wisconsin Utility transmission-constrained area during the first five (5) years from the date of the adoption of these rules, a request for market power clearance for an affiliated merchant power would be automatically granted if the power plant was less than 275 MW (about 3 percent of Eastern Wisconsin Utility transmission constrained area load) and the applicant agreed to not sell any of its power under contract during the subsequent five (5) years to any regulated affiliate such as a public utility. For any public utility a request for use of this safe harbor may be requested no more than once in aggregate by its affiliated interests, irrespective of multiple affiliated interests or combination thereof.

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request made dated
(3) For the first five (5) years from the date of the adoption of these rules, a request for approval under s. 196.491(3m)(a), Stats., would automatically be granted by the commission if the wholesale merchant peaker plant was less than 175 MW and the applicant agreed to not sell under contract a majority of its firm or non-firm power to any regulated affiliate such as a public utility. The over three (3) year contract prohibition under s. 196.491, Stats., also applies. For any public utility a request for use of this safe harbor may be requested no more than once in aggregate by its affiliated interest, irrespective of multiple affiliated interests or combination thereof.

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.

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if:
- (2) An applicant may not make any firm sale to a public utility with which it is affiliated,
 - (a) The firm sale is for a period of three (3) years or more, or
 - (b) The firm sale is for a period of less than three (3) years and either party to the sale has an option to extend the period to three (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. Complex contracts for public utility affiliate sales to a public utility shall be submitted for commission review by the purchasing public utility within 30 days after the date the contract was executed.

(4)(a) If at the time of the review, or upon subsequent reviews, 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 any or all 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 such 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.