

# **SECURITIES AND EXCHANGE COMMISSION**

**(Release No. 35-27965;70-10276)**

**Wisconsin Energy Corporation, et al.**

**Order Authorizing Acquisition of Utility Assets and Granting Exemptions**

**May 2, 2005**

Wisconsin Energy Corporation ("Wisconsin Energy") an exempt public utility holding company under section 3(a)(1) and W.E. Power, LLC, Wisconsin Energy's wholly owned intermediate holding company subsidiary ("W.E. Power" and together, "Applicants"), both of Milwaukee, WI, have filed an application ("Application") with the Securities and Exchange Commission ("Commission") under sections 9(a)(2), 10 and 3(a)(1) of the Public Utility Holding Company Act of 1935, as amended ("Act"). The Commission issued a notice of the Application on February 11, 2005 (HCAR No. 27946).

## **I. Introduction**

Applicants request authorization to acquire Port Washington Generating Station, LLC ("Project Company"), a subsidiary company of W.E. Power. Once Project Company's generating and interconnection facilities located in Port Washington, Wisconsin ("Port Washington Units") become operational, it will be an electric utility company under the Act. In addition, Applicants state that since W.E. Power's ownership of Project Company will cause it to become a holding company under the Act, W.E. Power requests an order of exemption under section 3(a)(1). Applicants further request that Wisconsin Energy continue to be exempt under section 3(a)(1) after its indirect acquisition of Project Company.

## II. Description of the Applicants

### A. Wisconsin Energy

Applicants state that Wisconsin Energy is a Wisconsin Corporation and an exempt public utility holding company under section 3(a)(1) of the Act.<sup>1</sup> Wisconsin Energy's utility subsidiaries include Wisconsin Electric Power Company ("Wisconsin Electric"), Wisconsin Gas LLC ("Wisconsin Gas"), Edison Sault Electric Company ("Edison Sault"), American Transmission Company LLC ("ATC"), and ATC Management Inc. ("ATC Management"). Applicants state that, on a consolidated basis for the year ended December 31, 2004, Wisconsin Energy had total operating revenues of \$3.431 billion. Applicants further state that, as of December 31, 2004, Wisconsin Energy had consolidated total assets of \$9.565 billion.

### B. Wisconsin Electric

Wisconsin Electric, a Wisconsin corporation, is a wholly owned, direct, public utility company subsidiary of Wisconsin Energy. Wisconsin Electric owns electric generation and distribution facilities located in Wisconsin and the Upper Peninsula of Michigan and natural gas distribution facilities located in Wisconsin. Applicants state that Wisconsin Electric claims exemption under section 3(a)(1) by rule 2 and is also the subject of S.E.C. File No. 70-10110, requesting an exemption by order.

Wisconsin Electric generates, distributes, and sells, both at wholesale and retail, electric energy in a territory of approximately 12,000 square miles, with a population estimated at 2,300,000 in southeastern Wisconsin, east central, and northern Wisconsin,

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<sup>1</sup> See Wisconsin Energy Corp., HCAR No. 24267 (Dec. 18, 1986), as most recently confirmed in Wisconsin Energy Corp., *et al.*, HCAR No. 27329 (Dec. 28, 2000) ("2000 Order").

and in the upper peninsula of Michigan. Applicants state that, as of and for the year ended December 31, 2004, Wisconsin Electric had approximately 1,081,400 electric customers and electric operating revenues of \$2.071 billion and total operating revenues of \$2.617 billion. Applicants further state that, on a consolidated basis, as of December 31, 2004, Wisconsin Electric had total assets of \$7.050 billion.

Wisconsin Electric also purchases, distributes and sells natural gas to retail customers and transports customer-owned gas in three distinct service areas of approximately 3,800 square miles in Wisconsin. Applicants state that Wisconsin Electric's gas service territory has an estimated population of 1,200,000 and as of December 31, 2004, Wisconsin Electric served approximately 437,800 gas customers. Applicants state that Wisconsin Electric's gas distribution system includes approximately 8,983 miles of mains connected at 22 gate stations to the pipeline transmission systems of ANR Pipeline Company, Guardian Pipeline, L.L.C., Natural Gas Pipeline Company of America, Northern Natural Gas Company, and Great Lakes Transmission Company. In addition, Wisconsin Electric has a liquefied natural gas storage plant with a send-out capability of 70,000 dekatherms per day.

Applicants state that Wisconsin Electric operates two district steam systems that supply steam for space heating and process uses. These systems are located in Milwaukee and in Wauwatosa, Wisconsin and are subject to regulation by the Public Service Commission of Wisconsin ("PSCW").

Applicants state that Wisconsin Gas, a Wisconsin limited liability company, is a wholly owned, direct gas public utility subsidiary of Wisconsin Energy authorized to provide retail gas distribution service in designated territories of Wisconsin and

transports customer owned gas. Applicants state that Wisconsin Gas also provides water utility service to customers in the suburban Milwaukee area and is subject to the regulation of the PSCW as to retail gas and water rates, standards of service, issuance of long-term securities, construction of certain new facilities, transactions with affiliates, billing practices and various other matters. For the year ended December 31, 2004, Wisconsin Gas had operating revenues of \$730.9 million and as of December 31, 2004, Wisconsin Gas had total assets of approximately \$1.450 billion.

Applicants state that Edison Sault is a wholly owned, direct electric public utility subsidiary of Wisconsin Energy. Edison Sault is authorized to provide retail electric service in certain territories in Michigan and is subject to the regulation of the Michigan Public Service Commission as to various matters associated with retail electric service in Michigan. Applicants state that Edison Sault generates, distributes and sells electric energy in a territory of approximately 2,000 square miles with a population of approximately 55,000 in the eastern upper peninsula of Michigan and also provides wholesale electric service under contract with one rural cooperative. On a consolidated basis, as of and for the year ended December 31, 2004, Edison Sault had total assets of approximately \$80.7 million and operating revenues of approximately \$43.6 million.

ATC is a Wisconsin limited liability company organized in response to Wisconsin legislation as a single-purpose transmission company to assume ownership and operation of the transmission facilities that had previously belonged to Wisconsin Electric, Edison Sault and several other Wisconsin electric utility companies. Applicants state that in return for the transfer of the transmission facilities, Wisconsin Electric and Edison Sault each acquired membership interests in ATC and Wisconsin Electric acquired shares in

ATC Management, a Wisconsin corporation organized to provide management services to ATC. As of December 31, 2004, Wisconsin Energy owned, through Wisconsin Electric and Edison Sault, 37.8 percent of ATC, and through Wisconsin Electric, 37.8 percent of ATC Management.

C. W.E. Power, LLC

W.E. Power, a Wisconsin limited liability company, is a wholly owned, direct intermediate holding company subsidiary of Wisconsin Energy. Applicants state that W.E. Power was formed in 2001 to design, construct, own, finance and lease to Wisconsin Electric 2,320 megawatts of new generating capacity in Wisconsin, including the generating and transmission facilities discussed below. Applicants state that W.E. Power does not and will not own any facilities directly. W.E. Power directly owns a 100 percent interest in Project Company. Applicants state that W.E. Power had consolidated total assets of \$464.8 million as of December 31, 2004, and consolidated total operating revenues of \$11.5 million for the year ended December 31, 2004, all of which were derived from operations in Wisconsin.

D. Project Company

Applicants state that Project Company, a Wisconsin limited liability company, was formed specifically to develop, construct and own a 100 percent interest in the Port Washington Units. In addition, Project Company will develop, construct and own a 100 percent interest in certain transmission facilities necessary to interconnect the Port Washington Units with the ATC transmission grid. Applicants state that Project Company had total assets of \$318.3 as of December 31, 2004, and total operating revenues of \$0 for the year ended December 31, 2004.

### III. Proposed Transaction

Applicants state that Project Company will develop and construct the Port Washington Units and the associated transmission facilities necessary to interconnect the units with the ATC transmission grid. Upon completion of construction and the satisfaction of certain conditions precedent, including the successful testing of the units, Project Company will lease the Port Washington Units to Wisconsin Electric under the terms of 25-year facility leases, one for each unit ("Facility Leases"), and certain other related contractual arrangements ("Lease Transaction").

Applicants propose to implement the Lease Transaction using a "leased generation" structure specifically authorized under Wisconsin's "Leased Generation Law."<sup>2</sup> Applicants state that this law establishes a new regulatory framework under which nonutility affiliates may develop, construct and own large-scale dedicated generating facilities within the state of Wisconsin and lease those facilities to their regulated, franchised public utility affiliates. The legislative intent behind the Leased Generation Law is to "provide an incentive for utility holding companies to continue to provide generation services for the affiliate utility's native load customers."<sup>3</sup> To that end, Applicants state that the statute specifically permits a public utility company to acquire generating resources by leasing them from an affiliate as an alternative to the public utility company constructing the generating facilities itself. The Leased Generation Law allows a public utility company to build generation indirectly through an affiliate. The

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<sup>2</sup> See 2001 Wis. Legis. Serv. 16, § 3008mc (West) (codified as Wis. Stat. § 196.52(9)(a)(3)(2002)).

<sup>3</sup> See Approval of Affiliated Interest Transactions Between W.E. Power; Wisconsin Elec. Power Co.; and Wisconsin Energy Corp., PSCW Docket Nos. 05-AE-109, 05-CE-117, 137-CE-104, and 6650-CG-211 (December 19, 2002) ("PSCW Order")

Leased Generation Law is limited to leases between a public utility company and an affiliated entity; it does not apply to leases between a public utility company and third parties.

Once the lease provisions become effective, Wisconsin Electric will make fixed monthly lease payments to Project Company for the terms of the Facility Leases. In return, Wisconsin Electric will have the right to possess and operate the Port Washington Units. The Port Washington Units will be integrated with, and operated as part of, Wisconsin Electric's existing regulated generation fleet. Wisconsin Electric will be responsible for all operations, maintenance, and fuel costs for the Port Washington Units.

Applicants state that neither Project Company nor its immediate parent, W.E. Power, will operate or control the Port Washington Units or associated transmission facilities. At the end of the terms of the Facility Leases, Wisconsin Electric may, at its option, renew each Facility Lease for a renewal term determined under the terms of the Facility Lease, buy each Port Washington Unit outright from Project Company or return the units to Project Company in good condition.

When the Port Washington Units become operational, Project Company will be a public utility company under the Act. Wisconsin Energy and W. E. Power request authority to acquire Project Company as a public utility company under sections 9(a) and 10 of the Act. In addition, Wisconsin Energy requests an order affirming that, following the Transaction, it will continue to be exempt under section 3(a)(1) of the Act and W.E. Power will be an exempt intermediate holding company under section 3(a)(1) of the Act. In support of this request, Applicants state that for the year ending December 31, 2004, Wisconsin Energy's total gross operating revenues were \$3,649,500 and of that amount

\$208,600, or 5.72%, of Wisconsin Energy's total gross operating revenue, came from out-of-state sales of energy. In addition, Applicants state that for the year ending December 31, 2003, Wisconsin Energy's total gross operating revenue was \$3,493,800 and of that amount \$195,000, or 5.60%, came from out-of-state sales of energy. Finally, Applicants state that for the year ending December 31, 2002, Wisconsin Energy's total gross operating revenue was \$3,057,400 and of that amount \$166,800, or 5.6%, came from out-of-state sales of energy. Applicants also state that Wisconsin Electric's out of state revenue percentages for 2004, 2003 and 2002 respectively are 5.94%, 5.69% and 5.51%, Wisconsin Gas has no out of state revenue and that ATC's revenues were not a material portion of Wisconsin Energy's operating revenues.<sup>4</sup> As stated above, all sales of energy by utility assets owned indirectly by W.E. Power will be located in the state of Wisconsin.

Wisconsin Energy states that the fees, commissions and expenses to be paid or incurred by Wisconsin Energy directly or indirectly in connection with this Application are estimated to be approximately \$8,000. Wisconsin Energy states that the PSCW has jurisdiction over the Transaction and that approval by the PSCW was granted under the PSCW Order. Wisconsin Energy states that the Federal Energy Regulatory Commission ("FERC") also has jurisdiction over the Transaction and that on October 1, 2003, FERC granted the authority.<sup>5</sup> Wisconsin Energy states that no other state commission and no

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<sup>4</sup> For a discussion of the "materiality" standard in the determination of exemptions under sections 3(a)(1) and 3(a)(2), *see* NIPSCO Industries, HCAR No. 26975 (February 10, 1999).

<sup>5</sup> *See* Wisconsin Energy Corp, 105 FERC ¶ 62,002 (2003).



federal commission, other than the Commission, has jurisdiction over the relief requested in this Application.

Due notice of the filing of this Application, as amended, has been given in the manner prescribed in rule 23 under the Act, and no hearing has been requested of, or ordered by, the Commission. On the basis of the facts in the record, it is found that the applicable standards of the Act and rules under the Act are satisfied, and that no adverse findings are necessary.

IT IS ORDERED, under the applicable provisions of the Act and rules under the Act, that the Application, as amended, be granted and permitted to become effective immediately, subject to the terms and conditions prescribed in rule 24 under the Act.

For the Commission by the Division of Investment Management, pursuant to delegated authority.

Jill M. Peterson  
Assistant Secretary