UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Aquila, Inc.	Docket Nos.	ER03-1079-004 ER03-1079-005
Aquila Long Term, Inc.		ER02-47-004 ER02-47-005
Aquila Merchant Services, Inc.		ER95-216-024 ER95-216-025
Aquila Piatt County L.L.C.		ER03-725-004 ER03-725-005
MEP Clarksdale Power, LLC		ER02-309-004 ER02-309-005
MEP Flora Power, LLC		ER02-1016-002 ER02-1016-003
MEP Investments, LLC		ER99-2322-004 ER99-2322-005
MEP Pleasant Hill Operating, LLC		ER01-905-004 ER01-905-005
Pleasant Hill Marketing, LLC		ER00-1851-004 ER00-1851-005
Aquila, Inc., Aquila Long Term, Inc., Aquila Merchant Services, Inc., Aquila Piatt County L.L.C., MEP Clarksdale Power, LLC, MEP Flora Power, LLC, MEP Investments, LLC, MEP Pleasant Hill Operating, LLC, and Pleasant Hill Marketing, LLC		EL05-83-000

ORDER ON PROPOSED MITIGATION MEASURES AND COMPLIANCE FILINGS

(Issued September 19, 2005)

1. On June 13, 2005, Aquila, Inc.[1] filed a proposal providing for cost-based rates applicable to sales of electric power at wholesale for transactions sinking in two Aquila control areas, namely, Missouri Public Service (Missouri) and West Plains Energy Kansas (Kansas), in order to mitigate the presumption of market power in those control areas. In this order, the Commission conditionally accepts Aquila's cost-based rate proposal for filing, to become effective June 27, 2005, as requested, subject to Commission acceptance of the compliance filing directed herein.

2. Also in this order, the Commission accepts: (1) data Aquila submitted to support the simultaneous transmission import capability study, which Aquila relied on for its market power analysis; and (2) revisions to eight of the Aquila affiliates' market-based rate tariffs to incorporate the Commission's change in status reporting requirement.

Background

3. On May 13, 2005 and June 13, 2005, Aquila submitted two separate compliance filings in response to the Commission's April 14, 2005 Order[2] on Aquila's updated market power analysis, which Aquila submitted in compliance with the Commission's order issued on May 13, 2004.[3]

4. Aquila's generation market power analysis indicated that, among other things, Aquila passed the pivotal supplier screen in all control areas considered, but failed the wholesale market share screen for each of the four seasons in the Missouri and Kansas control areas. As the Commission stated in the April 14 Order, where an applicant is found to have failed either generation market power screen, such failure provides the basis for instituting a proceeding pursuant to section 206 of the Federal Power Act (FPA)[4] and establishes a rebuttable presumption of market power in the section 206

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[1] Aquila, Inc. submitted this filing on behalf of itself and its affiliates, which include the following: Aquila Long Term, Inc., Aquila Merchant Services, Inc., Aquila Piatt County L.L.C., MEP Clarksdale Power, LLC, MEP Flora Power, LLC, MEP Investments, LLC, MEP Pleasant Hill Operating, LLC, and Pleasant Hill Marketing, LLC (collectively, Aquila).

[2] *Aquila, Inc.*, 111 FERC ¶ 61,030 (2005).

[3] *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004) (May 13 Order). The May 13 Order addressed the procedures for implementing the generation market power analysis announced on April 14, 2004 and clarified on July 8, 2004. *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

[4] 16 U.S.C. § 824e (2000).

proceeding.[5] Accordingly, because Aquila's filing indicated that it failed the wholesale market share screen, the Commission instituted a section 206 proceeding to investigate generation market power in the Missouri and Kansas control areas.[6] The Commission also established a refund effective date pursuant to the provisions of section 206.

5. For the Missouri and Kansas control areas, Aquila was directed to: (1) file a Delivered Price Test analysis; (2) file a mitigation proposal tailored to its particular circumstances that would eliminate the ability to exercise market power; or (3) inform the Commission that it would adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates.[7]

6. In addition to addressing Aquila's failure of the wholesale market share screen, the Commission directed Aquila to: (1) file data to support its simultaneous transmission import capability study for its first-tier control areas; and (2) revise its market-based rate tariffs to incorporate the change in status reporting requirement adopted in Order No. 652.[8]

<u>May 13, 2005 Compliance Filing</u>

7. Aquila's May 13, 2005 compliance filing included data and work papers to support the simultaneous transmission import capability study prepared by the Southwest Power Pool (SPP) which was relied upon in the generation market power analysis for the directly interconnected first-tier control areas to Aquila. Aquila's May 13, 2005 compliance filing also included revisions to its market-based rate tariffs to incorporate the change in status reporting requirement.

<u>June 13, 2005 Compliance Filing</u>

8. In Aquila's June 13, 2005 compliance filing, Aquila informs the Commission that it will adopt the default cost-based rates and files revisions to its market-based rate tariff to incorporate cost-based rates with respect to sales that sink within the Missouri and Kansas control areas. In submitting its cost-based rate filing, Aquila states that it does not concede that it has market power, or that it has exercised market power, in those areas.

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[5] April 14 Order, 107 FERC ¶ 61,018 at P 201.

[6] *Aquila, Inc.*, 111 FERC ¶ 61,030 (2005).

[7] April 14 Order, 107 FERC ¶ 61,018 at P 201, 207-09.

[8] *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

9. Aquila further states that it will continue to use its market-based rate tariff to arrange capacity and energy sales transactions with entities that service load outside the Kansas and Missouri control areas.

10. Aquila proposes to cap its rates in the Kansas and Missouri control areas at a level equal to the incremental costs of making such sales plus 10 percent. Aquila's proposed tariff revision defines incremental cost for energy generated by Aquila to be the actual out-of-pocket cost of supplying the energy; for energy purchased from a third party, the amount paid by Aquila for such energy, plus the cost of any third party transmission charges and losses and any applicable taxes borne by Aquila.

Notice of Filing and Responsive Pleadings

11. Notice of Aquila's May 13 compliance filing was published in the *Federal Register*, 70 Fed. Reg. 30,431 (2005), with comments, interventions, and protests due on or before June 3, 2005. None was filed.

12. Notice of Aquila's June 13 compliance filing was published in the *Federal Register*, 70 Fed. Reg. 36,932 (2005), with comments, interventions, and protests due on or before July 5, 2005. Kansas Municipal Utilities, Kansas Municipal Energy Agency, and Kansas Power Pool (collectively, Kansas Intervenors) filed a motion to intervene and protest. Aquila filed an answer to the protest on July 20, 2005.

13. Kansas Intervenors protest Aquila's June 13 filing to the extent that it fails to adopt the Commission's default cost-based rates for sales greater than one week but less than one year, and for sales greater than one year. Kansas Intervenors state that Aquila's filing purports to adopt the Commission's default cost-based rates, but in actuality it adopts only a portion of the default cost-based rates. Kansas Intervenors argue that the Commission should direct Aquila to adopt the default cost-based rates in their entirety or, alternatively, direct Aquila to work with affected parties to develop an appropriately tailored mitigation plan.

14. In response to the Kansas Intervenors' concerns regarding sales of power of more than one week and less than one year, Aquila states that it will hold such sales to the same standard as sales of one week or less. Aquila further states that although its tariff language does not directly correspond to the Commission's proposed default rate for sales of more than one week and less than one year, Aquila nevertheless believes that the tariff revision it submitted for this period, providing for a cost-based rate cap at Aquila's incremental cost plus 10 percent, is just and reasonable for Aquila and should be approved without hearing.

15. In its answer to the protest, Aquila states that it commits to separately file with the Commission any long-term, cost-based sales arrangement with a customer seeking capacity and energy within the Kansas and Missouri control areas. Aquila states that it, therefore, complies with the default rate requirements for sales of one year or longer.

Discussion

Procedural Matters

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

17. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385(a)(2) (2005), prohibits an answer to a protest unless otherwise ordered by the decisional authority. The Commission will accept Aquila's answer because it provided information that assisted us in our decision-making process.

Analysis

May 13, 2005 Compliance Filing

18. The Commission concludes that, with the May 13, 2005 compliance filing, which includes data and work papers to support the simultaneous transmission import capability study prepared by SPP, Aquila satisfies the Commission's generation market power standard for market-based rate authority in the directly interconnected first-tier control areas to Missouri and Kansas.

19. Order No. 652 requires that the change in status reporting requirement be incorporated in the market-based rate tariff of each entity authorized to make sales at market-based rates. As noted above, Aquila revised its tariffs to include the change in status reporting requirement. However, the tariff sheets filed for Aquila, Inc. do not include the correct provisions. The sheets filed for the other Aquila affiliates are correct.[9]

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[9] Aquila Long Term, Inc., FERC Electric Tariff, Original Volume No. 1, Original Sheet No. 7; Aquila Merchant Services, Inc., FERC Electric Tariff, Original Volume No. 1, Original Sheet No. 7; Aquila Piatt County, L.L.C., FERC Electric Tariff, Original Volume No. 1, Original Sheet No. 7; MEP Clarksdale Power, LLC, FERC Electric Tariff, Original Volume No. 1, Original Sheet No. 7; MEP Flora Power, LLC, FERC Electric Tariff, Original Volume No. 1, Original Sheet No. 7; MEP Investments, LLC, FERC Electric Tariff, Original Volume No. 1, Original Sheet No. 6; MEP Pleasant Hill Operating, LLC, FERC Electric Tariff, Original Volume No. 1, Original Sheet No. 7; Pleasant Hill Marketing, LLC, FERC Electric Tariff, Original Volume No. 1, Original Sheet No. 6.

Accordingly, Aquila, Inc. is directed, within 30 days of the date of issuance of this order, to revise its market-based rate tariff to incorporate the following provision without variation:

> [insert market-based rate seller name] must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority. A change in status includes, but is not limited to, each of the following: (i) ownership or control of generation or transmission facilities or inputs to electric power production other than fuel supplies, or (ii) affiliation with any entity not disclosed in the application for market-based rate authority that owns or controls generation or transmission facilities or inputs to electric power production, or affiliation with any entity that has a franchised service area. Any change in status must be filed no later than 30 days after the change in status occurs.

June 13, 2005 Compliance Filing

20. As discussed below, the Commission conditionally accepts Aquila's cost-based rate proposal for filing, to become effective June 27, 2005, as requested, subject to Commission acceptance of the compliance filing directed herein.

21. The Commission finds that a number of the issues raised by Kansas Intervenors have been addressed by Aquila in its answer. Specifically, in response to Kansas Intervenors' argument that, although the filing purports to adopt the Commission's default cost-based rates, it fails to do so for sales greater than one year, Aquila commits to separately file with the Commission any long-term power sales agreements sinking in either the Missouri or Kansas control areas. The Commission accepts this commitment and finds that this commitment addresses the Kansas Intervenors' concerns. Consistent with this commitment, we direct Aquila to file any long-term power sales agreements sinking in either the Missouri or Kansas control area with the Commission for review and approval prior to the commencement of service.

22. In response to the Kansas Intervenors' argument that the compliance filing fails to adopt the Commission's default cost-based rates for sales of power greater than one week but less than one year,[10] Aquila proposes that the default cost-based rate applicable to sales of one week or less (incremental costs plus 10 percent) also be applied to sales of power of more than one week but less than one year. Aquila explains that it is not

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[10] The April 14 Order states that the default rate for sales of power of more than one week but less than one year must be priced at an embedded cost "up to" rate reflecting the costs of the unit or units expected to provide the service. April 14 Order, 107 FERC ¶ 61,018 at P 40.

seeking a fixed demand charge of any sort as part of the proposed incremental cost cap, nor is Aquila proposing any other charge on top of the proposed incremental cost cap plus 10 percent. Aquila further notes that the Commission has stated that it will consider case-specific proposals.

23. As Aquila correctly notes, the Commission allows applicants the option to propose case-specific mitigation.[11] Here, Aquila is proposing a rate for sales of more than one week but less than one year that foregoes full embedded cost recovery for the units that will provide the service. Our preliminary analysis indicates that Aquila's proposal appears to be just and reasonable and has not been shown to be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful.

24. Additionally, Aquila proposes to adopt the default rates for sales of power of one week or less (namely, incremental costs plus 10 percent).

25. We conditionally accept Aquila's cost-based rate proposal for filing, to become effective June 27, 2005, as requested,[12] subject to Commission acceptance of Aquila's compliance filing, to be submitted within 30 days of the date of this order, complying with the following three directives. First, we note that Aquila filed its cost-based rates as revisions to Aquila, Inc.'s market-based rate tariff. However, we believe that such cost-based rates are more appropriately included in a separate tariff. Accordingly, we direct Aquila, Inc. and its affiliates to file, within 30 days of the date of this order, the cost-based rate provisions for sales into the Missouri and Kansas control areas as tariffs separate from their market-based rate tariffs, rather than including cost-based rates in their market-based rate tariffs.

26. Second, we will require cost support for these rates. In particular, Aquila is directed to provide, in their cost-based rate tariffs, the formulas and methodology according to which it intends to calculate incremental costs.[13] Accordingly, we note that we will deny Aquila's request that the Commission waive its cost support filing requirements contained in section 35.13 of the Commission's regulations to the extent that we require the information above.[14]

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[11] April 14 Order, 107 FERC ¶ 61,018 at P 148.

[12] *See Central Hudson Gas & Electric Corp.*, 60 FERC ¶ 61,106, *order on reh'g*, 61 FERC ¶ 61,089 (1992).

[13] April 14 Order, 107 FERC ¶ 61,018 at P 208 & n.203.

[14] 18 C.F.R. § 35.13 (2005).

27. Third, we direct Aquila, Inc. and its affiliates to revise their market-based rate tariffs, within 30 days of the date of this order, to prohibit sales at market-based rates in the Missouri and Kansas control areas.[15]

28. As we stated in the April 14 Order, where, as here, an applicant adopts cost-based rates in order to mitigate the presumption of market power, we will no longer waive our otherwise applicable accounting regulations (*e.g.*, Parts 41, 101, and 141 of the Commission's regulations),[16] and we will not grant blanket approval for issuances of securities or assumptions of liability pursuant to Part 34 of the Commission's regulations for the applicant and its affiliates.[17]

29. Aquila is directed to file an updated market power analysis within three years of the date of this order. The Commission also reserves the right to require such an analysis at any intervening time.

The Commission orders:

(A) Aquila's proposal is conditionally accepted, to be effective on June 27, 2005, subject to Commission acceptance of the compliance filing directed herein, as discussed in the body of the order.

(B) Aquila's compliance filing providing data and work papers submitted to support its simultaneous transmission import capability study is accepted for filing.

(C) Aquila, Inc. and its affiliates are directed, within 30 days of the date of this order, to file cost-based rate tariffs, including the formulas and methodology according to which they intend to calculate incremental costs, as discussed in the body of this order.

(D) Aquila, Inc. and its affiliates are directed, within 30 days of the date of this order, to revise their market-based rate tariffs to prohibit sales at market-based rates in the Missouri and Kansas control areas.

(E) The correctly revised tariff sheets incorporating the change in status reporting requirement adopted in Order No. 652 are hereby accepted for filing, effective March 21, 2005.

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[15] The Commission will terminate the instant 206 proceeding upon finding that Aquila has met the conditions set forth in this order.

[16] April 14 Order, 107 FERC ¶ 61,018 at P 150.

[17] *Id.*

(F) Aquila, Inc. is directed, within 30 days of the date of this order, to revise its market-based rate tariff to incorporate the change in status reporting requirement adopted in Order No. 652.

(G) Aquila's next updated market power analysis is due within three years of the date of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.