

101 FERC ¶ 61, 331
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Aquila, Inc.

Docket Nos. ER02-2170-000
ER02-2170-001

ORDER ACCEPTING FOR FILING AND SUSPENDING POWER SALES AND
PURCHASE AGREEMENT, ESTABLISHING HEARING PROCEDURES, AND
PROVIDING GUIDANCE ON AFFILIATE SALES POLICY

(Issued December 20, 2002)

1. In this order, we will accept, suspend, make effective subject to refund, and set for hearing, Aquila Inc.'s (Aquila) executed Master Power Sales and Purchase Agreement (Agreement) for the sale of electric energy to its affiliated power marketer, Aquila Merchant Services (AMS). This order establishes an evidentiary hearing to determine whether the price charged by Aquila for the affiliate sale to AMS under the Agreement addresses the Commission's affiliate abuse concerns; *i.e.*, was not below the relevant market price. This order benefits customers because it provides guidance on the Commission's affiliate sales policy and ensures that customers are protected from affiliate abuse.

Background

2. On June 26, 2002, Aquila filed the Agreement with the Commission for the sale of up to 70 MWh per hour of electric energy from Aquila to its affiliated power marketer, AMS, for the period June 28, 2002 through August 31, 2002.¹ The Agreement established the sale price as the highest of: (1) \$32.00 per MWh; (2) 110 percent of the seller's incremental cost; (3) the seller's highest hourly priced sale during the hour; or (4) an hourly price tied to the "Into Cinergy" trading hub prices for that day, as published by

¹Aquila stated that it filed the Agreement with the Commission because it involves a sale of electric energy from Aquila to an affiliated power marketer.

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Megawatt Daily.² According to Aquila, this would ensure that the sale price under the Agreement would not be too low and could not result in harm to Aquila's captive ratepayers. Aquila requested an effective date of June 28, 2002.

3. On August 23, 2002, Commission staff issued a deficiency letter requesting that Aquila: (1) provide cost support for the \$32.00 per MWh rate; (2) explain why "Into Cinergy" as published by Megawatt Daily is an appropriate index; and (3) further explain the 70 percent and 130 percent multiplier. The deficiency letter also required that the Agreement be filed as a stand-alone rate schedule.

4. During the period June 28, 2002 through August 31, 2002, Aquila went forward with the affiliate sale to AMS pursuant to the Agreement.

5. On October 22, 2002, Aquila filed its response to the deficiency letter. It explains that the \$32.00 per MWh rate was a negotiated rate floor to be utilized only during an hour when the "Into Cinergy" price, 110 percent of Aquila's incremental cost and the price in the highest priced Aquila off-system sale were all below \$32.00 in a given hour. Aquila also claims that "Into Cinergy" is the appropriate index for the Aquila system because it represents the closest liquid trading point to the market in Missouri. According to Aquila, the only other alternative, the "Into Entergy" trading hub, is not liquid and there are frequent transmission constraints between Entergy and Missouri which cause a separation of market prices. In addition, Aquila explains that the 70 percent and 130 percent multipliers were developed as a proxy for converting the average 16-hour "Into Cinergy" trading hub market price into useful hourly prices.³ Further, Aquila states that in every one of the 36 hours of the Agreement under which energy was

²Aquila stated that the sale price would be no lower than 70 percent of the "Into Cinergy" index for hours between 6:00 a.m. and noon and between 8:00 p.m. and 10:00 p.m.; and 130 percent of the "Into Cinergy" index for hours between noon and 8:00 p.m. See June 26 Transmittal at 2.

³Aquila states that the 70 percent multiplier discounts the 16-hour "Into Cinergy" Hub price for the morning and evening hours when the typical hourly market is lower than the 16-hour average while the 130 percent multiplier applies a premium for the peak hours when the hourly market is above the average. It asserts that while it did not use a study to determine the 70 percent and 130 percent multipliers, it determined that these numbers were conservative based on the actual hourly prices in the market. See October 22 Transmittal at 3.

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purchased, the sales price was higher than the relevant adjusted "Into Cinergy" price.⁴ Aquila also designates the Agreement as Aquila's FERC Rate Schedule No. 120.

Notice of Filing

6. Notice of Aquila's June 26, 2002 filing was published in the Federal Register, 67 Fed. Reg. 45,716 (2002), with comments, interventions or protests due on or before July 17, 2002. None was filed. Notice of Aquila's October 22, 2002 filing was published in the Federal Register, 67 Fed. Reg. 67,165 (2002), with comments, interventions or protests due on or before November 12, 2002. None was filed.

Discussion

7. A traditional public utility with market-based rate authority is prohibited from making sales to an affiliate absent prior approval from the Commission in a separate filing under section 205 of the Federal Power Act (FPA).⁵ The Commission requires that this prohibition be included in the utility's market-based rate tariff unless the Commission has otherwise authorized the utility to transact with its affiliates.⁶

8. The Commission has also stated that affiliate abuse takes place when a traditional public utility and its affiliated power marketer transact in ways that result in a transfer of benefits from the traditional public utility (and its captive customers) to the affiliated power marketer (and its shareholders).⁷ Because sales of power between an affiliated power marketer and an affiliated public utility are not at arms-length and present the situations in which affiliate abuse may be the most prevalent, the Commission requires that no sale of power occur unless the Commission approves the transaction in a separate

⁴Aquila states that energy was scheduled during only five percent of the hours when the Agreement was operative, which it claims demonstrates that the pricing was not favorable to the purchaser. See October 22 Transmittal at 4. Aquila attaches an after-the-fact analysis of the hourly energy prices for the "Into Cinergy" hub as reported in Megawatt Daily for the 16-hour period of 6:00 a.m. through 10:00 p.m. for June, July and August 2002. See Attachment A, October 22 Transmittal.

⁵16 U.S.C. § 824d (2000).

⁶See, e.g., AES Placerita, Inc. et al., 89 FERC ¶ 61,202 at 61,613 (1999).

⁷See, e.g., Heartland Energy Services Inc., 68 FERC ¶ 61,223 at 62,062 (1994).

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rate filing under section 205.⁸ In evaluating whether to approve a request to sell power to an affiliate where a traditional public utility, such as Aquila, makes sales to an affiliated power marketer, the Commission is concerned that such sales not be made at a rate that is too low (i.e., below market price).⁹

9. In the instant case, Aquila filed under section 205 of the FPA for authority to make sales to its affiliated power marketer pursuant to the terms and conditions of the Agreement. However, Aquila submitted its proposal two days prior to the service commencement date and proceeded to transact under the Agreement without prior Commission approval. As noted, initiating such a sale before receiving our authorization is not consistent with our precedent.

10. Aquila submits that the sale price as established in the Agreement addresses the Commission's affiliate abuse concerns because it sets the sale price at the highest of: (1) \$32.00 per MWh; (2) 110 percent of the seller's incremental cost; (3) the seller's highest hourly priced sale during the hour or; (4) an hourly price tied to the "Into Cinergy" trading hub prices for that day, as published by Megawatt Daily. Although Aquila attempts to demonstrate why the pricing protections proposed in the Agreement would produce a sales price that is not below the market price, the more appropriate question at this point in time, given that the term of the Agreement has concluded, is what harm, if any, captive customers have experienced as a result of the transactions. In particular, the key issue is whether the price actually charged for the sales in question under the Agreement satisfied the Commission's affiliate abuse concerns; i.e., was not below the relevant market price.

⁸See, e.g., Heartland Energy Services, Inc., 68 FERC ¶ 61,223 at 62,064 (1994); Southern Company Services, Inc., 72 FERC ¶ 61,324 at 62,047 (1995); Tucson Electric Power Company, 81 FERC ¶ 61,131 at 61,623 (1997); Central and South West Services, Inc., 82 FERC ¶ 61,001 at 61,003 (1998), reh'g denied, 85 FERC ¶ 61,444 (1998).

⁹See, e.g., Pinnacle West Capital Corp., et al., 91 FERC 61,290 (2000); reh'g denied, 95 FERC ¶ 61,300 (2001). See also Detroit Edison Co., 80 FERC ¶ 61,348 (1997) (Detroit Edison), where the Commission allowed sales by a public utility to its affiliated power marketer subject to the following conditions: (1) the sale must be at a rate that is no lower than the rate it charges non-affiliates; (2) the public utility must make the same offer to unaffiliated entities at the same time through its electronic bulletin board; (3) the public utility must simultaneously post the actual price charged to its affiliate for all transactions. Id. at 62,198.

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11. Because we are unable to resolve this issue based on the record before us, we will require an evidentiary hearing. We encourage the parties to provide a diverse range of evidence for purposes of establishing relevant market prices. This should include benchmark evidence which shows the prices, terms and conditions of sales made by non-affiliated sellers or evidence of the prices that non-affiliated buyers were willing to pay for similar services from Aquila. Accordingly, we will accept the Agreement for filing, suspend it for a nominal period to become effective June 28, 2002, subject to refund, and establish an evidentiary hearing on the pricing issue. If Aquila is found to have transacted at a price below the relevant market price, the Commission will consider, among other remedies, requiring a surcharge up to the market price with interest.¹⁰

12. Finally, we reaffirm that sales of power between a traditional public utility and its affiliates are not permitted without first receiving Commission approval of the transaction under section 205 of the FPA.¹¹

The Commission orders:

(A) The Agreement is hereby accepted for filing and suspended for a nominal period, to become effective June 28, 2002, subject to refund.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly Sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter 1), a public hearing shall be held in Docket No. ER02-2170-001, as discussed in the body of this order.

(C) A Presiding Administrative Law Judge (ALJ), to be designated by the Chief Administrative Law Judge for that purpose, pursuant to 18 C.F.R. § 375.304 (2002), must convene a prehearing conference in this proceeding to be held within approximately fifteen (15) days after issuance of this order, in a hearing or conference room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The Presiding Judge is authorized to establish procedural dates and to rule on all motions

¹⁰We note that we have the statutory authority to order such remedies as we may deem appropriate. 16 U.S.C. § 825h (2000).

¹¹See supra ¶ 7 & 9.

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(except motions to dismiss) as provided for in the Commission's Rules of Practice and Procedure.

(D) The Secretary is hereby directed to publish a copy of this order in the Federal Register.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.