

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION  
102 FERC ¶ 61,111

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

Aquila, Inc.

v.

Docket No. EL03-33-000

Public Service Company of  
Colorado

Intermountain Rural Electric  
Association

v.

Docket No. EL02-25-000

Public Service Company of  
Colorado

Holy Cross Energy and  
Yampa Valley Electric Association

v.

Docket No. EL02-76-000

Public Service Company of  
Colorado

ORDER SETTING COMPLAINT FOR HEARING  
AND CONSOLIDATING PROCEEDINGS

(Issued January 31, 2003)

1. This order addresses a complaint filed by Aquila, Inc. (Aquila) against Public Service Company of Colorado (PS Colorado). The complaint alleges that PS Colorado has been improperly collecting certain costs through the Fuel Cost Adjustment clause (FAC). The complaint further alleges that certain FAC surcharges imposed by PS

Colorado are unjust and unreasonable. This order sets the complaint for investigation and hearing, and consolidates the complaint with the complaints in Docket Nos. EL02-25-000, et al.<sup>1</sup> This action will ensure that Aquila and PS Colorado have an opportunity to present their cases and that the Commission, in turn, has a complete record on which to base its ultimate decision.

### **Description of Complaint and Responsive Pleadings**

2. Since 1992, Aquila has purchased power and associated energy from PS Colorado under a power purchase agreement, which includes the FAC provision at issue here.

3. On December 18, 2002, Aquila filed its complaint. Aquila alleges that PS Colorado has been collecting costs through its FAC that are ineligible for such treatment. Aquila further alleges that it is unjust and unreasonable for PS Colorado to collect surcharges to recover costs that PS Colorado had neglected to include in its prior bills. Aquila seeks refund of all improperly billed amounts since 1992, with interest.<sup>2</sup>

4. Aquila adds that the facts of its complaint are substantially similar to those issues raised in complaints by Intermountain Rural Electric Association (Intermountain), Holy Cross Energy (Holy Cross), and Yampa Valley Electric Association (Yampa Valley) in Docket Nos. EL02-25-000 and EL02-76-000, respectively.<sup>3</sup> Aquila thus requests that its complaint be consolidated with the complaints in Docket No. EL02-25-000, et al.

5. On January 8, 2003, PS Colorado filed an answer to Aquila's complaint. PS Colorado states that Aquila has offered no independent evidence to justify the

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<sup>1</sup>See Intermountain Rural Electric Association v. Public Service Company of Colorado, 99 FERC ¶ 61,279 (2002)(June 2002 Order).

<sup>2</sup>Aquila represents that a refund effective date is not necessary. Rather, its requested remedy would require PS Colorado to return any overcharges, not as section 206 refunds, but as necessary to correct deviations from the filed rate, arguing that PS Colorado has not complied with its filed rate.

<sup>3</sup>Intermountain's complaint in Docket No. EL02-25-000 was filed with the Commission on November 23, 2001. The complaint filed by Holy Cross and Yampa Valley in Docket No. EL02-76-000 was filed with the Commission on April 17, 2002. In the June 2002 Order, the complaints were set for hearing and consolidated. Aquila was granted intervenor status in that proceeding by the presiding administrative law judge on December 17, 2002.

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Commission's setting of Aquila's complaint for hearing and investigation. PS Colorado explains that Aquila has simply restated the claims of other complainants (*i.e.*, Intermountain, Holy Cross and Yampa Valley) in their consolidated proceeding. Furthermore, with respect to the surcharge. PS Colorado asserts that Aquila has failed to provide any evidence showing that PS Colorado's recent adjustments to its FAC were improper.

6. PS Colorado further contends that, if the Commission grants Aquila's complaint, the hearing and investigation should be limited to the 2000-2001 period, because Aquila has failed to demonstrate that the FAC calculations for periods prior to the year 2000 were erroneous.

7. On January 15, 2003, Aquila filed a response to PS Colorado's answer.

### **Notices of Filing, Interventions, and Protests**

8. Notice of Aquila's complaint was published in the Federal Register, 67 Fed. Reg. 78,798 (2002), with protests or interventions due on or before January 8, 2003.

9. On January 6, 2003, Intermountain filed a motion to intervene supporting consolidation of Aquila's complaint with the proceedings in Docket No. EL02-25-000, et al. On January 8, 2003, Holy Cross and Yampa Valley filed a joint motion to intervene and comments also supporting consolidation of Aquila's complaint.

### **Discussion**

#### **A. Preliminary Matters**

10. Under Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2002), the timely, unopposed motions to intervene serve to make the intervenors parties to this proceeding.

11. Under Rule 213(a) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213 (2002), no answer may be made to an answer unless otherwise ordered by the Commission. We are not persuaded that good cause has been shown that would justify accepting Aquila's response to PS Colorado's answer. We will therefore reject Aquila's response.

**B. Hearing Procedures**

12. The matters raised by Aquila in its complaint, which Aquila indicates are similar to those set for hearing in Docket No. EL02-25-000, et al., are issues of material fact that are best resolved in an evidentiary hearing. Accordingly, consistent with our order in Docket No. EL02-25-000, et al., the Commission will institute an investigation and hearing, under section 206 of the Federal Power Act, into the justness and reasonableness of PS Colorado's FAC charges in Aquila's power purchase agreement. Moreover, because the issues raised by Aquila are similar to those raised by Intermountain and Holy Cross and Yampa Valley, the Commission will consolidate the proceedings for purposes of hearing and decision.

13. In cases where the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b) requires that the Commission establish a refund effective date that is no earlier than 60 days after the filing of the complaint, but no later than five months subsequent to the expiration of the 60-day period. Consistent with our general policy of providing maximum protection to customers,<sup>4</sup> we will set the refund effective date as of the date 60 days after the date of the filing of Aquila's complaint on December 18, 2002, or February 16, 2003.<sup>5</sup>

14. Section 206(b) also requires that, if no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state the best estimate as to when it reasonably expects to make such a decision. Ordinarily, to implement that requirement, we would direct the presiding judge to provide a report to the Commission in advance of

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<sup>4</sup>See e.g., *Seminole Electric Cooperative, Inc. v. Florida Power & Light Company*, 65 FERC ¶ 61,413 at 63,139 (1993); *Canal Electric Company*, 46 FERC ¶ 61,153 at 61,539, reh'g denied, 47 FERC ¶ 61,275 (1989).

<sup>5</sup>While Section 206 requires the Commission to specify a refund effective, the Commission has long recognized that costs recovered through automatic adjustment clauses, such as the FAC at issue here, may be examined even prior to the refund effective date. E.g., *UtiliCorp United, Inc. v. City of Harrisonville, Missouri*, 95 FERC ¶ 61,054 at 61,130 & n.17, order on reh'g, 95 FERC ¶ 61,392 (2001); *Boylston Municipal Light Department, et al. v. Vermont Yankee Nuclear Power Corp.*, 92 FERC ¶ 61,185 at 61,640 & n.10 (2000); *Boston Edison Company*, Opinion No. 376, 61 FERC ¶ 61,026 at 61,145 & n.103 (1992); *Montaup Electric Power Company*, 55 FERC ¶ 61,174 at 61,561 & n.5 (1991).

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the refund effective date. However, here, the Commission is consolidating this proceeding with the proceeding in Docket No. EL02-25-000, et al., for purposes of hearing and decision. As specified in the June 2002 Order, the Commission estimated that in Docket No. EL02-25-000, et al., the presiding judge should be able to render a decision by May 31, 2003, and that the Commission would be able to render its decision by December 31, 2003.<sup>6</sup> Accordingly, we estimate that if the presiding judge is still able to render an initial decision by May 31, 2003, the Commission should be able to issue its decision by December 31, 2003.

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly section 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 I), a public hearing shall be held concerning the complaint in this proceeding.

(B) Aquila's request to consolidate Docket Nos. EL02-25-000, EL02-76-000, and EL03-33-000 is hereby granted.

(C) The presiding judge designated to preside in Docket No. EL02-25-000, et al. shall determine the procedures best suited to accommodate the consolidation of the proceedings.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.

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<sup>6</sup>June 2002 Order at P 30.