UNITED STATES OF AMERICA 105 FERC ¶ 61,084
FEDERAL ENERGY REGULATORY COMMISSION

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

Aquila, Inc. Docket No. ER03-1271-000

ORDER ACCEPTING AND SUSPENDING PROPOSED GENERATOR BALANCING TARIFF AND SERVICE AGREEMENT AND ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued October 22, 2003)

1. In this order, we accept Aquila, Inc.'s (Aquila) filing, suspend it, make it effective subject to refund, and set it for hearing and settlement judge procedures. This order benefits customers by providing a forum where issues surrounding Aquila's Generator Balancing Tariff and Service Agreement can be addressed to assure that the proposed tariff is just and reasonable.

BACKGROUND

2. On August 29, 2003, Aquila filed a tariff for Generator Balancing Service (GBS Tariff) and associated pro forma Service Agreement (GBS Agreement). Pursuant to the GBS Tariff, Aquila will offer generator balancing service to entities which own, control or schedule the output of independent generating facilities interconnected with Aquila's transmission system. This service will account for unintentional differences between the scheduled generation and the actual generation associated with each independent generation facility.[1] Aquila requests an effective date of November 1, 2003.

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[1]Aquila proposes, as part of its filing, to apply the Hub Daily Index to compute rates for its generator balancing services, but without showing that this index meets the Commission's minimum standards for energy price indices. The Commission issued a policy statement on price indices on July 24, 2003. See Natural Gas and Electric Price Indices, 104 FERC ¶ 61,121 (2003) (Policy Statement). The Commission required that any prospective use of any index in a jurisdictional tariff meet the criteria set forth in the Policy Statement, and reflect adequate liquidity at the referenced location to be reliable.

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3. Notice of Aquila's filing was published in the Federal Register, 68 Fed. Reg. 54,219 (2003), with comments, protests, and interventions due on or before September 19, 2003.

4. On September 25, 2003, Calpine Central, L.P. (Calpine) filed a motion to intervene out of time and protest, arguing that the GBS Tariff and the GBS Agreement should be suspended for five months, as they are unjust, unreasonable and discriminatory against independent generation on the Aquila system. On October 10, 2003, Aquila filed an answer to Calpine's protest.

DISCUSSION

A. Procedural Matters

5. We will grant Calpine's late-filed motion to intervene, given the early stage of the proceeding, its interest in the proceeding, and the absence of any undue prejudice or delay.[2]

6. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2003), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept Aquila's answer and will, therefore, reject it.

B. Calpine's Protest

7. Calpine objects to the rates and the non-rate terms and conditions contained in the proposed tariff, and alleges that Aquila makes no showing of comparability between the proposed GBS Tariff and the charges on its own generating units on its own system. Calpine states that the rates provided for in the GBS Tariff and the GBS Agreement are not cost justified, and the GBS Tariff and GBS Agreement "contain modest data or methodology to support such rates."[3] Calpine claims that the rates and cost computations

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As the Commission stated in the Policy Statement, all prospective users, which would include Aquila, must follow the Policy Statement. Aquila has not, to date, justified that the Hub Daily Index it proposes to use in its GBS Agreement meets the minimum standards presented in the Policy Statement for energy price indices.

[2] See 18 C.F.R. § 385.214 (2003).

[3] See Protest at 3.

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in Article IV of the GBS Agreement could be read to include costs for capacity as though firm service were being taken, although Aquila does not guarantee that it will provide uninterrupted supply to balance scheduled and actual generation. According to Calpine, Aquila's GBS Tariff also proposes rates for Deficit Energy outside the generator balancing bandwidth which Calpine characterizes as "punitive."

8. Further, Calpine alleges that Aquila has not justified the applicability of the Hub Daily Index to generator balancing services on its system, and has provided no cost justification for the $750 per month implementation fee included in the GBS Agreement.

9. Finally, Calpine asserts that Aquila cannot rely on the Commission's orders approving settlements in the Southern Company Services, Inc. (Southern)[4] and Entergy Services, Inc. (Entergy)[5] cases as authority for these GBS Tariff and GBS Agreement provisions.

C. Suspension, Hearing and Settlement Judge Procedures

10. The issues raised in Calpine's protest (such as the comparability of Aquila's proposed rates for deficit and surplus energy, and the cost support for the proposed rates) present issues that are best addressed in the hearing ordered below.[6]

11. Based on the Commission's preliminary review, the GBS Tariff and GBS Agreement have not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Accordingly, we will accept Aquila's filing, suspend it for a nominal period, make it effective November 1, 2003, subject to refund, and set it for hearing and settlement judge procedures.

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[4] Southern Company Services, Inc., 93 FERC ¶ 61,204 (2000).

[5] Entergy Services, Inc., 102 FERC ¶ 61,104 (2003).

[6] Aquila claims that the rates for its generator balancing service are similar to those offered by Southern under its Commission-accepted GBS tariff. See Southern Company Services, Inc., 93 FERC ¶ 63, 009 (2000) (certification of uncontested settlement). However, Aquila cannot rely on the Commission's orders approving uncontested settlements to support its GBS Tariff filing. E.g., Florida Power Corporation, 70 FERC ¶ 61,321 at 61,980 (1995).

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12. In order to provide the parties an opportunity to resolve these matters among themselves, we will hold the hearing in abeyance and direct settlement judge procedures, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.[7] If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding, otherwise, the Chief Judge will select a judge for this purpose.[8] The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) Aquila's Tariff for Generator Balancing Service and associated pro forma Service Agreement are accepted for filing and suspended, to be effective November 1, 2003, subject to refund, as discussed in the body of this order.

(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 I), a public hearing shall be held concerning Aquila's filing. As discussed in the body of this order, we will hold the hearing in abeyance to give the parties time to conduct settlement judge negotiations.

(C) Pursuant to Rule 603 of the Commission's Rule of Practice and Procedure, 18 C.F.R. ' 385.603 (2001), the Chief Administrative Law Judge is hereby authorized to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge in writing or by telephone within five (5) days

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[7] 18 C.F.R. ' 385.603 (2003).

[8] If the parties decide to request a specific judge, the must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of the date of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience. (www.ferc.gov, click on "Legal Matters" and then on "Office of Administrative Law Judges").

of the date of this order.

(D) Within sixty (60) days of the date of this order, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If the settlement judge procedures fail, and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall convene a conference in this proceeding to be held within approximately fifteen (15) days of the date the Chief Judge designates the presiding judge, in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, NE, 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 (except motions to dismiss), as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.