

135 FERC ¶ 61,012  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
John R. Norris, and Cheryl A. LaFleur.

Public Service Company of Colorado

Docket No. ER11-2853-000

ORDER CONDITIONALLY ACCEPTING AND SUSPENDING RATES AND  
ESTABLISHING HEARING AND SETTLEMENT PROCEDURES

(Issued April 8, 2011)

1. On February 8, 2011, Public Service Company of Colorado (PSCo) filed a new full-requirements tariff (PSCo Tariff) with the Commission, under section 205 of the Federal Power Act (FPA), for its seven wholesale customers (Wholesale Customers).<sup>1</sup> The PSCo Tariff proposes a formula rate, along with certain terms and conditions applicable to these customers. In this order, we conditionally accept the tariff for filing, suspend it for five months, and establish hearing and settlement judge procedures.

**I. Background and Contents of PSCo Filing**

2. PSCo states that it is a wholly-owned subsidiary of Xcel Energy Inc. (Xcel), which provides electric energy to approximately 1.4 million retail customers and the Wholesale Customers.<sup>2</sup> PSCo states that it anticipates a 2011 peak load of approximately 6,522 MW. Its forecasted 2011 peak demand for the Wholesale Customers is approximately 895 MW. PSCo owns approximately 5,500 MW of generation and about 3,500 MW of capacity acquired through long-term power purchase agreements. PSCo also owns and operates approximately 90,000 miles of transmission and distribution lines. PSCo indicates that there are four primary reasons for filing the new PSCo Tariff: (1) the establishment of new rates to recover significant increases in costs to provide power sales requirements service to the Wholesale Customers; (2) the recovery of wholesale costs

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<sup>1</sup> 16 U.S.C. § 824d (2006).

<sup>2</sup> The Wholesale Customers are Black Hills/Colorado Electric Utility Company, LP, the City of Burlington, Colorado, the Town of Center, Colorado, Grand Valley Rural Power Lines, Inc., Holy Cross Electric Association, Inc., Intermountain Rural Electric Association, and Yampa Valley Electric Association, Inc.

associated with the State of Colorado's 2010 Clean Air Clean Jobs Act (Colorado Act); which requires PSCo to apply promptly to the Commission for recovery of the wholesale share of the costs PSCo will incur to implement PSCo's Colorado Act compliance plan; (3) litigation costs related to the Colorado Act, the Small Business Job Creation and Access to Capital Act of 2010<sup>3</sup> and the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010;<sup>4</sup> and (4) the need to convert PSCo's Wholesale Customers from cost-based production stated rates to cost-based production formula rates.<sup>5</sup>

**A. Significant Cost Increases**

3. Of the four primary reasons provided by PSCo as the impetus for the instant filing, PSCo's proposed recovery of approximately \$739 million from the Wholesale Customers for a recent acquisition represents the most substantial increase in costs. Specifically, PSCo states that at the end of 2010, it purchased two gas-fired generation stations from Calpine Corporation (Calpine) to carry out the Colorado Act's implementation plan, as discussed below.<sup>6</sup> Previously, PSCo had purchased the entire output of these generators through long-term power purchase agreements. The costs associated with these generation stations were not reflected in PSCo's 2010 rate case test year or in the current rates of the Wholesale Customers. Additionally, PSCo adds that various smaller capital projects are in progress, and that the company's operations and maintenance expenses have increased.<sup>7</sup>

**B. Colorado Clean Air Clean Jobs Act**

4. PSCo explains that the Colorado Act<sup>8</sup> requires all rate-regulated Colorado utilities that own or operate coal-fired electric generating plants in Colorado to submit an emissions-reduction plan. PSCo states that it owns and operates substantial coal-fired

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<sup>3</sup> Pub. L. No. 111-240, 124 Stat. 2504 (2010).

<sup>4</sup> Pub. L. No. 111-312, 124 Stat. 3296 (2010).

<sup>5</sup> PSCo Filing Letter at 3.

<sup>6</sup> *Public Service Company of Colorado*, 132 FERC ¶ 62,032 (2010) (Acquisition Order).

<sup>7</sup> PSCo Filing Letter at 4.

<sup>8</sup> PSCo states that the Colorado Act is a statute enacted by the Colorado General Assembly in 2010 to proactively address anticipated federal action to reduce carbon emission and regional haze, among other things.

plants and is significantly affected by the Colorado Act. PSCo's recently-approved emissions-reduction plan requires PSCo to retire early, retrofit, or change the fuel for a number of PSCo coal-fired plants by the end of 2017.<sup>9</sup>

5. According to PSCo, in accordance with the Colorado Act, the Colorado Public Utilities Commission (Colorado PUC) has assigned part of the costs of PSCo's emissions-reduction plan to its Wholesale Customers. PSCo states that the Colorado Act also requires PSCo to promptly apply to the Commission for recovery of such costs. If the Commission denies the inclusion of such costs in PSCo's wholesale rates, PSCo "might recover any disallowed costs from its retail jurisdiction but only if the utility had made its application to FERC 'within six months after the [Colorado PUC's] final order assigning a portion of the plan's costs to the public utility's wholesale customers.'"<sup>10</sup> Thus, PSCo requests a determination from the Commission that it is just and reasonable for the Wholesale Customers to pay their proportionate share of the Colorado Act costs as they are incurred in the initial year of the rate formula, 2011, and thereafter. Notwithstanding the Colorado Act, PSCo adds that both the Small Business Job Creation and Access to Capital Act of 2010 and the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 authorize additional depreciation for plants placed in service at particular times and therefore will affect PSCo's tax depreciation expenses and accumulated deferred income taxes in PSCo's Formula Rate Year 2011 and for several years thereafter.<sup>11</sup>

### C. Formula Rates

6. PSCo states that it has elected to convert its stated rate for requirements service to Wholesale Customers to a formula rate. PSCo contends that formula rates generally provide greater transparency and assure that rates are more closely tied to actual costs than stated rates. PSCo also argues that it will be able to achieve cost recovery more quickly without the expenses required to conduct regular section 205 rate cases.<sup>12</sup>

7. PSCo argues further that formula rates will benefit the Wholesale Customers, whose rates will be trued up annually when forecasted costs are compared to actual costs. Because a true-up is not a feature of stated rates, PSCo asserts that customers with stated rates may therefore be undercharged or overcharged in any given rate year, with their

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<sup>9</sup> PSCo Filing Letter at 4.

<sup>10</sup> *Id.* at 4-5.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 6.

remedy limited to a complaint under section 206 of the FPA at the Commission. Finally, PSCo argues that combining the existing individual agreements of the Wholesale Customers into one tariff will increase administrative convenience for it and the Commission.<sup>13</sup>

8. To further support its proposed conversion, PSCo states that it models its proposed formula rate template on the implementation procedures of its affiliate, Southwestern Public Service Company, and that the Commission has accepted such rates for filing in several dockets.<sup>14</sup> PSCo then describes its proposed formula as consistent with earlier Commission orders containing fixed values for the rate of return on equity, costs of post-employment benefits other than pensions, and Commission-approved depreciation rates used to determine annual depreciation expenses, among other things.

9. PSCo states that it will populate its formula rate template with fully forecasted data based on an annual budget and reminds the Commission that its proposed formula rates are subject to annual true-up.<sup>15</sup> PSCo lists a number of unpredictable factors that can affect final costs: construction delays, inaccurate sales forecasting, and legislative changes, but observes that formula rates allow customers, through the true-up process, to pay only for costs actually incurred.<sup>16</sup>

10. PSCo proposes a rate of return on equity (ROE) of 10.9 percent. PSCo's witness explains that this rate of return is below the midpoint and above the median indicated by the discounted cash flow method analyzing the proxy group that the company used. PSCo also notes that any ROE cannot be changed without a separate FPA section 205 or 206 proceeding.<sup>17</sup>

11. PSCo states that it makes sales from generating resources on its system to various third parties, as well as to its affiliate Southwestern Public Service Company. PSCo proposes to share the proportionate wholesale share of margins from these sales, which it refers to as "Gen Book" sales, with the Wholesale Customers on a 50/50 basis through a single once-a-year bill credit.<sup>18</sup>

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 7.

<sup>15</sup> *Id.* at 8-9.

<sup>16</sup> *Id.* at 9.

<sup>17</sup> *Id.* at 13.

<sup>18</sup> *Id.* at 12.

12. Finally, PSCo seeks a nominal suspension of its proposed rates, with an effective date of April 10, 2011. PSCo states that Commission precedent establishes that a nominal suspension period is justified in cases where no more than ten percent of the proposed rate increase appears to be excessive.<sup>19</sup>

## **II. Notice of Filing and Responsive Pleadings**

13. Notice of PSCo's filing was published in the *Federal Register*<sup>20</sup> with interventions, comments, and protests due on or before March 1, 2011. Black Hills/Colorado Electric Utility Company, LP filed a motion to intervene. Intermountain Rural Electric Association (Intermountain) and Cooperative Customers protested and filed comments.<sup>21</sup> On March 16, 2011, PSCo filed an answer. On March 17, 2011, PSCo filed a revised answer to correct a formatting problem and one typographical error. On March 25, 2011, Intermountain and Cooperative Customers filed answers to PSCo's answer. On March 31, 2011, PSCo filed an answer to Intermountain and Cooperative Customers' answers to PSCo's answers.

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

15. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits an answer to a protest and answers to answers unless otherwise ordered by the decisional authority. We are not persuaded to accept PSCo or Intermountain and Cooperative Customers' answers and will, therefore, reject them.

### **A. Intermountain and Cooperative Customers' Protests**

16. Intermountain and Cooperative Customers object to several aspects of PSCo's proposal. First, they argue that PSCo's proposed tariff has not been shown to be just and reasonable, and request that the Commission impose the maximum five-month suspension and establish hearing procedures to review PSCo's proposed tariff. Cooperative Customers request that the Commission summarily dispose of PSCo's ROE and revenue sharing proposals and set the remaining components of PSCo's formula rate for hearing.

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<sup>19</sup> *Id.* at 14 (citing *West Texas Utilities Co.*, 18 FERC ¶ 16,189 (1982) (*West Texas*)).

<sup>20</sup> 76 Fed. Reg. 9007 (2011).

<sup>21</sup> Cooperative Customers are Grand Valley Rural Power Lines, Inc., Holy Cross Electric Association, Inc., and Yampa Valley Electric Association, Inc.

17. Intermountain and Cooperative Customers raise numerous concerns related to PSCo's acquisition of the Blue Spruce and Rocky Mountain gas-fired generators from Calpine and the inclusion of acquisition-related costs in PSCo's ratebase. Cooperative Customers contend that, before PSCo is permitted to pass through any of the costs associated with the acquisition, it should have to demonstrate why the purchase was prudent in the first instance. Both Intermountain and Cooperative Customers also raise concerns that PSCo is attempting to include an undisclosed acquisition premium for the Calpine facilities in the current filing—a rate incentive that they contend PSCo has failed to demonstrate as appropriate or consistent with Commission policy. They also take issue with PSCo's proposal to amortize certain incremental costs associated with the Calpine transaction, arguing that PSCo has failed to justify the reasonableness of their inclusion.

18. Cooperative Customers argue that customers must be held harmless from the effects of the Calpine transaction. They assert that PSCo's proposal to convert its service to a formula rate just a few months after the Commission approved the acquisition of the Blue Spruce and Rocky Mountain facilities is PSCo's attempt to get reimbursed for increased acquisition costs from its Wholesale Customers. Cooperative Customers contend that PSCo's proposal is contrary to Commission policy and PSCo's own assurances during the section 203 proceeding that the purchase would “have no adverse effect on long-term requirements customers.”<sup>22</sup>

19. Intermountain and Cooperative Customers take issue with various elements of PSCo's base ROE methodology. In particular, they object to PSCo's proxy group selection, including its decision to eliminate three companies with low-end ROEs more than 100 basis points above the cost of debt and its failure to eliminate PPL Corporation from the proxy group despite its major acquisition activity during the six-month dividend yield data period. Protestors also oppose PSCo's use of the Capital Asset Pricing Model and Expected Earnings approaches and its reliance on the midpoint of its proxy group to justify its requested ROE. Cooperative Customers provide testimony arguing that the appropriate ROE for PSCo is 9.97 percent.<sup>23</sup> They contend that PSCo's requested ROE of 10.9 percent is unsupported and would yield substantially excessive revenues by approximately 14.9 to 19.6 percent.

20. Intermountain and Cooperative Customers raise questions about PSCo's projected depreciation and amortization expenses. They point to PSCo's references to “Company

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<sup>22</sup> Cooperative Customers Protest at 9 (citing PSCo's Joint Application under section 203 of the Federal Power Act for Disposition of Jurisdictional Facilities, Docket No. EC10-71 at 11).

<sup>23</sup> *Id.*, Exhibit CC-1 at 7.

Records” as the source of depreciation estimates for PSCo’s steam, hydro, and “other” functions. Cooperative Customers are concerned that permitting PSCo to generally reference “Company Records” and nothing more leaves PSCo with the ability to modify its depreciation expense inputs and methodologies without Commission review. Intermountain and Cooperative Customers also contend that there are many inconsistencies between PSCo’s requested depreciation expense cost recovery and PSCo’s workpapers. For example, Intermountain states that PSCo’s workpapers show only \$72,884,100 in steam production plant, which is \$40,684,189 less than the \$113,568,289 PSCo claims.<sup>24</sup>

21. Intermountain claims that PSCo’s proposal to use an equity percentage of 57.1 percent in its capital structure for calculating its cost of capital for 2011 is unjust and unreasonable. Intermountain argues that because PSCo’s equity percentage is 57.1 percent compared to Xcel’s equity percentage, which was 46 percent as of December 31, 2010, PSCo bears a lower risk than Xcel. Intermountain asserts that it would be unreasonable to develop PSCo’s recommended ROE based on Xcel’s relatively higher risk and then apply it to PSCo’s higher equity percentage. In short, Intermountain argues that PSCo should use both the ROE and the equity ratio of Xcel in determining its cost of capital. Intermountain states that correcting PSCo’s capital structure to use Xcel’s equity percentage instead of PSCo’s equity percentage results in a reduction of PSCo’s revenue requirement of \$36,058,851 for 2011.<sup>25</sup>

22. Cooperative Customers request that the Commission summarily reject PSCo’s proposal for 50/50 margin sharing of off-system third-party sales as contrary to Commission precedent. Cooperative Customers contend that PSCo’s only basis for the 50/50 sharing arrangement is a prior agreement negotiated with the Wholesale Customers, which does not constitute Commission precedent in support of such an arrangement. Furthermore, Cooperative Customers argue that failure to credit wholesale customers with the full benefits of off-system sales results in overcharges to customers who have already paid their share of PSCo’s total production-related costs.<sup>26</sup> Cooperative Customers assert that the Wholesale Customers should be credited 100 percent of the revenues from these Gen Book sales. Cooperative Customers argue that the proposed 50/50 margin sharing would lead to an increase in the production demand rate that would produce excessive revenues to PSCo between 5.5 and 7.1 percent.

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<sup>24</sup> Intermountain Protest at 11.

<sup>25</sup> *Id.* at 5.

<sup>26</sup> Cooperative Customers Protest at 28-29.

23. Cooperative Customers question PSCo's proposal to recover certain costs associated with the Colorado Act. Cooperative Customers state that, though they understand that PSCo has an obligation to comply with the requirements of the Colorado Act, there are important questions and factors to be considered in determining how these costs should be recovered. Cooperative Customers assert that, despite the fact that the Colorado PUC issued an order permitting the allocation of certain costs incurred under the Colorado Act to Wholesale Customers, no state law can displace the Commission's right to set wholesale rates. Furthermore, Cooperative Customers claim that the Colorado Act cannot shield PSCo from its obligation to file a Statement BM detailing its construction program.<sup>27</sup> They request that the Commission set for hearing PSCo's proposal to pass Colorado Act-related costs on to Wholesale Customers through the formula rate.

24. Intermountain and Cooperative Customers raise concerns with numerous other components of PSCo's rate filing, including, but not limited to: bonus depreciation, supporting documentation for 2011 projections related to certain administrative and general expenses and common plant increases, credits for internally funded operating reserve accounts, and adjustments to PSCo's accumulated deferred income tax.

### **III. Commission Determination**

25. The formula rate filed by PSCo and all of the issues raised by Intermountain and Cooperative Customers raise issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing and settlement procedures ordered below.

26. Our preliminary analysis indicates that PSCo's proposed rates have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Additionally, we find that PSCo's proposed formula rate may produce rates that are substantially excessive. In *West Texas*,<sup>28</sup> the Commission explained that when its preliminary examination indicates that the proposed rates may be unjust and unreasonable, and may be substantially excessive, the Commission generally imposes a five-month suspension. Therefore, we will accept PSCo's proposed rates for filing, suspend them for a five-month period, make them effective September 10, 2011, subject to refund, and set this case for hearing and settlement judge procedures.

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<sup>27</sup> *Id.* at 20.

<sup>28</sup> 18 FERC at 61,374.

27. At the hearing we direct the administrative law judge to consider whether PSCo's proposal is consistent with PSCo's representation in the section 203 proceeding that the acquisition at issue in that proceeding would have no adverse effect on the rates of long-term requirements customers, i.e., the Wholesale Customers.<sup>29</sup> We reject protestors' requests for summary disposition of PSCo's proposed ROE and revenue sharing mechanism because we find that these issues would also benefit from the opportunity for discovery presented by formal hearing and settlement procedures.

28. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.<sup>30</sup> If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.<sup>31</sup> The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, 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) PSCo's proposed tariff and rates are hereby accepted for filing and suspended for a five-month period, to become effective September 10, 2011, 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 by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and

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<sup>29</sup> Public Service Company of Colorado, Joint Application for Authorization under Section 203 of the Federal Power Act for Disposition of Jurisdictional Facilities, Docket No. EC10-71-000, at 11-12 (filed May 18, 2010).

<sup>30</sup> 18 C.F.R. § 385.603 (2010).

<sup>31</sup> If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held concerning PSCo's proposed rates. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2010), the Chief Administrative Law Judge is hereby directed 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 within five (5) days of the date of this order.

(D) Within thirty (30) days of the appointment of the settlement judge, 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 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, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a 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 )

Kimberly D. Bose,  
Secretary.