

167 FERC ¶ 61,270
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, Richard Glick,
and Bernard L. McNamee.

Public Service Company of Colorado

Docket No. ER19-1721-000

ORDER ACCEPTING MARKET-BASED RATE AGREEMENTS AND GRANTING
REQUEST FOR LIMITED AUTHORIZATION

(Issued June 28, 2019)

1. On April 30, 2019, pursuant to section 205 of the Federal Power Act (FPA)¹ and Part 35 of the Commission's regulations,² Xcel Energy Services, Inc. (XES) filed on behalf of Public Service Company of Colorado (PSCo) a request for: (1) acceptance of two power sales agreements that PSCo proposes to acquire from Twin Eagle Resource Management, LLC (Twin Eagle) as non-conforming market-based rate agreements under PSCo's market-based rate tariff; and (2) limited authorization to sell power at the existing prices of the power sales agreements. As discussed below, we accept the power sales agreements as non-conforming market-based rate agreements, effective July 1, 2019, as requested, and grant the requested limited authorization to make sales at the existing prices of the power sales agreements.

I. Background

A. PSCo

2. XES states that PSCo, a Colorado corporation and a wholly owned utility operating company subsidiary of Xcel Energy Inc., is a vertically integrated electric utility serving portions of Colorado. XES states that PSCo provides cost-based electric utility services to approximately 1.5 million electric retail and wholesale electric customers, and also provides cost-based natural gas retail sales and intrastate natural gas transportation services as a local distribution company to approximately 1.4 million natural gas customers. XES explains that PSCo operates a balancing authority area certified by the North American Electric Reliability Corporation and is a member of the Western Electricity Coordinating Council. XES states that as of December 2018, PSCo

¹ 16 U.S.C. § 824d (2012).

² 18 C.F.R. pt. 35 (2018).

owns or purchases under long-term contracts approximately 10,660 megawatts of generation in the Western Interconnection.

3. XES states that PSCo also owns jurisdictional transmission facilities and provides access to its transmission system under the Xcel Energy Operating Companies Open Access Transmission Tariff. XES further states that PSCo routinely makes purchases in wholesale energy markets for purposes of resale, typically in the Western Interconnection or the Southwest Power Pool region, where PSCo has market-based rate authority.³ XES represents that PSCo does not have market-based rate authority within its balancing authority area, but has market-based rate authority in directly interconnected first-tier balancing authority areas. XES explains that within the PSCo balancing authority area, PSCo sells electric power at cost-based rates.⁴

B. Twin Eagle Power Sales Agreements

4. XES states that on April 5, 2019, Twin Eagle and PSCo entered into a purchase and sale agreement under which PSCo will acquire three jurisdictional wholesale power sales agreements from Twin Eagle and thereafter will become the wholesale provider of service to the load serving entity customers under the agreements. XES states that these power sales agreements were originally executed between Twin Eagle and these customers. XES represents that on April 8, 2019, PSCo and Twin Eagle filed an application under section 203 of the FPA⁵ for authorization to transfer the three power sales agreements from Twin Eagle to PSCo (Proposed Transaction).⁶

5. The power sales agreements to be transferred from Twin Eagle to PSCo are the following:

- a. Partial Requirements Agreement dated as of February 28, 2013, by and among Arkansas River Power Authority (ARPA) and Twin Eagle Resource Management, LLC (Twin Eagle), as amended by that certain First Amendment to Partial Requirements Agreement Dated as of August 13,

³ Application at 3 (citing *Sw. Pub. Serv. Co.*, Docket No. ER12-2696-001 (Dec. 14, 2012) (delegated order)). XES states that PSCo is a Category 2 Seller in the Northwest region and a Category 1 Seller in all other regions. *Id.*

⁴ *Id.*

⁵ 16 U.S.C. § 824b (2012).

⁶ Application at 3-4. Concurrent with the issuance of this order, a letter order is being issued under delegated authority in Docket No. EC19-77-000 authorizing the Proposed Transaction. *See Pub. Serv. Co. of Colo.*, 167 FERC ¶ 62,201 (2019).

2014, by and among ARPA and Twin Eagle, as further amended by that certain Second Amendment to Partial Requirements Agreement Dated as of November 21, 2017, by and among ARPA and Twin Eagle, and including the Written Waiver by Twin Eagle, of Certain Provisions of Partial Requirements Agreement Dated as of January 25, 2019 (the ARPA Agreement);

- b. Partial Requirements Agreement Executed on August 14, 2014, by and among City of Fountain, Colorado, and Twin Eagle Resource Management, LLC, as amended by that certain First Amendment to the Partial Requirements Agreement Dated as of April 21, 2017, by and among City of Fountain, Colorado, and Twin Eagle (the Fountain Agreement); and
 - c. Partial Requirements Agreement Dated as of September 24, 2015, by and among Big Horn County Electric Cooperative, Inc. and Twin Eagle (the Big Horn Agreement).
6. XES states that each of the three power sales agreements provide for sales to the wholesale customer priced at market-based rates, based upon the rates, terms, and conditions negotiated by Twin Eagle, a public utility with market-based rates, and the respective customers under the agreements.⁷ As the new provider of service, the power sales agreements will require PSCo to deliver energy to: (i) ARPA, which is located in Colorado within the PSCo balancing authority area; (ii) the City of Fountain, which is located in Colorado in the Western Area Power Administration-Colorado Missouri balancing authority area adjacent to the PSCo balancing authority area; and (iii) Big Horn Electric Cooperative, which is located in Montana, outside the PSCo balancing authority area and not located in an adjacent balancing authority area.⁸ XES represents that PSCo will serve the customers under the power sales agreements at the respective agreements' existing rates, terms, and conditions, and that the three wholesale customers consented to the assignment of the power sales agreements to PSCo.

C. Request for Limited Authorization to Charge Existing Rates Under the Power Sales Agreements

7. XES states that PSCo will be delivering power under the power sales agreements to ARPA and City of Fountain, which are located within, or at the border of, PSCo's

⁷ Application at 4.

⁸ XES notes that for the Big Horn Agreement, the customer is located outside of PSCo's balancing authority area, in a location where PSCo has market-based rate authority, and asserts that no separate FPA section 205 authority is needed for PSCo to charge the rates under the Big Horn Agreement. *Id.* at 5.

balancing authority area. PSCo does not have market-based rates within its own balancing authority area. However, XES states that the existing rates under the ARPA and Fountain Agreements, which were negotiated by Twin Eagle, a seller without market power, exceed the ceiling rate under PSCo's cost-based rate tariff, which PSCo uses for wholesale sales within its own balancing authority area. Accordingly, XES requests on behalf of PSCo limited authorization under FPA section 205 to provide service at the existing rates under the ARPA and Fountain Agreements, which would allow PSCo to provide the same service to ARPA and City of Fountain under the same rates, terms, and conditions negotiated by Twin Eagle.⁹ XES argues that although PSCo does not have market-based rate authority within its balancing authority area, the Commission's policy permits this request for limited authorization to make sales at the existing rates, terms, and conditions of the ARPA and Fountain Agreements. XES asserts that in Order No. 697-A, the Commission held that a seller that fails the Commission's market-based rate test for blanket authority "may file with the Commission under FPA section 205, on a case-by-case basis, a request for contract-specific market-based rates based on a demonstration that the seller does not have market power with respect to the specific long-term contract being filed."¹⁰

8. XES argues that it is just and reasonable to allow PSCo to charge the rates under the ARPA and Fountain Agreements. XES maintains that they are long-term power sales agreements that were executed at arm's length between non-affiliates and were the product of extensive negotiations conducted by a non-affiliated seller with market-based rate authority. XES states that the power sales agreements are not the result of market power, and both were negotiated and executed by non-affiliates years before PSCo proposed to acquire them from Twin Eagle. XES explains that the ARPA Agreement was originally executed by Twin Eagle and ARPA on February 28, 2013, for a seven-year term, and was amended in 2014 to extend the term by three years, while the Fountain Agreement was originally executed by Twin Eagle and City of Fountain on August 14, 2014, for a ten-year term, and was amended in 2017 to extend the term by two years. XES maintains that PSCo

⁹ *Id.*

¹⁰ *Id.* (citing *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 119 FERC ¶ 61,295, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, 123 FERC ¶ 61,055, at P 281, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, 125 FERC ¶ 61,326 (2008), *order on reh'g*, Order No. 697-C, 127 FERC ¶ 61,284 (2009), *order on reh'g*, Order No. 697-D, 130 FERC ¶ 61,206 (2010), *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 26 (2012)).

was not a party to and did not play any role in drafting or negotiating the ARPA or Fountain Agreements or their subsequent amendments.¹¹

II. Notice of Filing

9. Notice of the Application was published in the *Federal Register*,¹² with interventions and protests due on or before May 21, 2019. None was filed.

III. Discussion

10. At issue here is whether PSCo, which does not have market-based rate authority in its balancing authority area, may sell power to buyers in its balancing authority area under existing long-term power sales agreements that were executed at arm's length between non-affiliates and were the product of negotiations conducted by a non-affiliated seller with market-based rates.

11. In Order No. 697-A, the Commission established a policy with regard to long-term power sales whereby “any seller who fails the Commission’s market-based rate test or surrenders market-based rate authority (referred to herein as ‘mitigated sellers’) may file with the Commission under FPA section 205, on a case-by-case basis, a request for contract-specific market-based rates based on a demonstration that the seller does not have market power with respect to the specific long-term contract being filed.”¹³ We find that XES has demonstrated, consistent with the requirements in Order No. 697-A, that PSCo does not have market power with respect to the ARPA and Fountain Agreements. As noted by XES, the ARPA and Fountain Agreements are long-term power sales agreements that were executed at arm's length between non-affiliates and were the product of negotiations conducted by a non-affiliated seller with market-based rates years before PSCo proposed to acquire the agreements from Twin Eagle. In this case, ARPA and the City of Fountain will continue to receive the power they contracted for at the price they contracted, but from a different seller (PSCo).¹⁴ We therefore grant XES’s request for authorization for PSCo to make power sales pursuant to the ARPA and Fountain Agreements and accept the Agreements.

¹¹ *Id.* at 7.

¹² 84 Fed. Reg. 19,775 (2019).

¹³ Order No. 697-A, 123 FERC ¶ 61,055 at P 281.

¹⁴ *Id.*

12. Finally, we direct PSCo to submit a compliance filing, within 30 days of the date of the consummation of the Proposed Transaction, revising the limitations and exemptions section of PSCo's market-based rate tariff¹⁵ to list the specific, limited authorizations granted herein and to include a citation to this order.¹⁶

The Commission orders:

(A) The ARPA and Fountain Agreements are hereby accepted, effective July 1, 2019, as discussed in the body of this order.

(B) XES's request for authorization for PSCo to make power sales to ARPA pursuant to the ARPA Agreement is hereby granted, effective July 1, 2019, as discussed in the body of this order.

(C) XES's request for authorization for PSCo to make power sales to the City of Fountain pursuant to the Fountain Agreement is hereby granted, effective July 1, 2019, as discussed in the body of this order.

(D) PSCo is hereby directed to submit a compliance filing within 30 days of the date of the consummation of the Proposed Transaction, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁵ Public Service Company of Colorado, FERC FPA Electric Tariff, Production Tariffs, [Tariff, ARPA - Twin Eagle Operating Agreement, 0.0.0](#); [Tariff, City of Fountain - Twin Eagle Operating Agreement, 0.0.0](#).

¹⁶ Order No. 697, 119 FERC ¶ 61,295 at App. C; Order No. 697-A, 123 FERC ¶ 61,055 at P 384.