

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

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| Aquila, Inc. | Docket Nos. ER03-1079-002 ER03-1079-003 |
| Aquila Long Term, Inc. | ER02-47-003 |
| Aquila Merchant Services, Inc. | ER95-216-021 ER95-216-022 ER95-216-023 |
| Aquila Piatt County L.L.C. | ER03-725-003 |
| MEP Clarksdale Power, LLC | ER02-309-003 |
| MEP Flora Power, LLC | ER02-1016-001 |
| MEP Investments, LLC | ER99-2322-001 ER99-2322-002 ER99-2322-003 |
| MEP Pleasant Hill Operating, LLC | ER01-905-001 ER01-905-002 ER01-905-003 |
| Pleasant Hill Marketing, LLC | ER00-1851-001 ER00-1851-002 ER00-1851-003 |
| Aquila, Inc., Aquila Long Term, Inc., Aquila Merchant Services, Inc., Aquila Piatt County L.L.C., MEP Clarksdale Power, LLC, MEP Flora Power, LLC, MEP Investments, LLC, MEP Pleasant Hill Operating, LLC, and Pleasant Hill Marketing, LLC | EL05-83-000 |

ORDER ON UPDATED MARKET POWER ANALYSIS,
INSTITUTING SECTION 206 PROCEEDING AND
ESTABLISHING REFUND EFFECTIVE DATE

(Issued April 14, 2005)

1. On December 21, 2004, Aquila, Inc., and its affiliates, Aquila Long Term, Inc. (Aquila Long Term), Aquila Merchant Services, Inc. (AMS), Aquila Piatt County L.L.C. (Piatt County), MEP Clarksdale Power, LLC (Clarksdale), MEP Flora Power, LLC (Flora), MEP Investments, LLC (MEP Investments), MEP Pleasant Hill Operating, LLC (MEP Operating), and Pleasant Hill Marketing, LLC (Pleasant Hill) (collectively, Aquila), submitted for filing an updated market power analysis in compliance with the Commission's order issued on May 13, 2004.¹ The May 13 Order addressed the procedures for implementing the generation market power analysis announced on April 14, 2004 and clarified on July 8, 2004.² Aquila also filed market-based rate tariff revisions to incorporate the Commission's market behavior rules.³
2. The filing indicates that Aquila passes the pivotal supplier screen in all control areas considered, but fails the wholesale market share screen for each of the four seasons

¹ *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004) (May 13 Order). We note that the May 13 Order incorrectly listed ER94-216-001 instead of ER95-216-021 as the docket number for AMS. Aquila states that while Aquila Long Term, Clarksdale, Flora, and Piatt County were not listed in the May 13 Order, Aquila included them in order to synchronize the dates required for the submittal of their corporate family's updated market power analysis.

² *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

³ *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003), *order on reh'g*, 107 FERC ¶ 61,175 (2004). In its December 21, 2004 filing, Aquila submitted tariff revisions incorporating the Commission's market behavior rules for Aquila, Inc., AMS, Flora, MEP Investments, MEP Operating and Pleasant Hill. The Commission has previously accepted the market behavior rules for Aquila Long Term, Clarksdale and Piatt County. *See Acadia Power Partners, LLC*, Docket No. ER03-1372-001, *et al.* (March 29, 2004) (unpublished letter order).

in the following Aquila control areas: Missouri Public Service (Missouri) and West Plains Energy Kansas (Kansas).⁴

3. As the Commission stated in the April 14 Order, where an applicant is found to have failed either generation market power screen, such failure provides the basis for instituting a proceeding under section 206 of the Federal Power Act (FPA)⁵ and establishes a rebuttable presumption of market power in the section 206 proceeding. Accordingly, as discussed below, in this order, the Commission institutes a proceeding pursuant to section 206 of the FPA to determine whether Aquila may continue to charge market-based rates and establishes a refund effective date pursuant to the provisions of section 206. The instant section 206 proceeding, as well as any resulting mitigation or refunds, is limited to the Missouri and Kansas control areas because the filing indicates that these are the geographic markets for which Aquila fails the wholesale market share screen.

4. In addition, Aquila states that it passes the pivotal supplier screen and the wholesale market share screen in each of the directly interconnected first-tier control areas examined. However, as discussed below, the Commission is unable to conclude that Aquila satisfies the Commission's generation market power standard for market-based rate authority in the directly interconnected first-tier control areas. Accordingly, in this order, the Commission directs Aquila to make a compliance filing within 30 days of the date of this order to revise its generation market power analysis for its first-tier control areas.

5. This order, including the refund effective date, will protect customers from excessive rates and charges that may result from the exercise of market power.

Background

6. On May 24, 2002, AMS, MEP Investments, Pleasant Hill, and MEP Operating filed an updated market power analysis employing a Supply Margin Assessment. On August 8, 2002, AMS, MEP Investments, Pleasant Hill, and MEP Operating amended that filing. On February 6, 2004, Aquila, Inc., filed an updated market power analysis employing a Supply Margin Assessment.

7. In the April 14 Order, as clarified by the July 8 Order, the Commission adopted two indicative screens for assessing generation market power: a pivotal supplier screen

⁴ Aquila's analysis shows market shares as high as 37.9 percent and 31.5 percent, respectively.

⁵ 16 U.S.C. § 824e (2000).

and a wholesale market share screen. The Commission stated that passage of both screens establishes a rebuttable presumption that the applicant does not possess generation market power, while failure of either screen creates a rebuttable presumption that the applicant has generation market power. The Commission further stated that applicants and intervenors may, however, rebut the presumption established by the results of the initial screens by submitting a Delivered Price Test. Alternatively, an applicant may accept the presumption of market power or forego the generation market power analysis altogether and go directly to mitigation.⁶ The May 13 Order directed Aquila to file within 225 days of the issuance of that order revised generation market power analyses based on the two indicative screens.⁷

8. On December 21, 2004, Aquila filed an updated market power analysis, amending its earlier analyses, listed above, in compliance with the Commission's May 13 Order. Aquila also filed revised tariff sheets to the market-based rate tariffs of Aquila, Inc., AMS, Flora, MEP Investments, MEP Operating and Pleasant Hill to include the Commission's market behavior rules.

Description of Aquila's December Filing

9. In its filing, Aquila submitted the results of the two generation market power screens for its control areas, Missouri and Kansas, and its six directly interconnected first-tier control areas, as well as for the Public Service Company of Colorado (Colorado) control area. As required in the May 13 Order, Aquila also provided updated information on the other three parts of the Commission's four-part analysis. Aquila states it continues to be unable to exercise transmission market power, erect barriers to entry, or engage in affiliate abuse or reciprocal dealing.

10. Aquila states that it passes the pivotal supplier screen in the Aquila control areas (Missouri and Kansas) and in each directly interconnected control area as well as in the Colorado control area. Aquila further states that it passes the wholesale market share screen in the Colorado control area and each directly interconnected control area to Missouri and Kansas but fails the wholesale market share screen in the Missouri and Kansas control areas. Aquila states that it relied upon the results of a simultaneous transmission import capability study conducted by the Southwest Power Pool (SPP) for purposes of determining import capability in the screens.

⁶ In addition, as the Commission stated in the April 14 Order, the applicant or intervenors may present evidence such as historical sales data to support whether the applicant does or does not possess market power. *See* April 14 Order, 107 FERC ¶ 61,018 at P 37.

⁷ *See* May 13 Order at Ordering Paragraph (A).

11. Aquila argues that, despite the screen failures, Aquila does not have market power because the screen does not provide full credit for its native load obligations.

Notice of Filing

12. Notice of the May 24, 2002 filing of an updated market power analysis was published in the *Federal Register*, 67 Fed. Reg. 39,707 (2002), with interventions or protests due on or before June 14, 2002. None was filed.

13. Notice of the August 30, 2002 amendment was published in the *Federal Register*, 67 Fed. Reg. 58,417 (2002), with interventions or protests due on or before September 20, 2002. None was filed.

14. Notice of the February 6, 2004 filing of an updated market power analysis was published in the *Federal Register*, 69 Fed. Reg. 7,922 (2004), with interventions or protests due on or before February 27, 2004. None was filed.

15. Notice of the December 21, 2004 filing of Aquila's revised updated market power analysis was published in the *Federal Register*, 70 Fed. Reg. 805 (2005), with interventions or protests due on or before January 11, 2005. None was filed.

Discussion

Market-Based Rate Authorization

16. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. The Commission also considers whether there is evidence of affiliate abuse or reciprocal dealing.⁸

Generation Market Power

17. Aquila states that Aquila's share of uncommitted capacity in the Missouri and Kansas control areas exceeds 20 percent for each of the four seasons during the relevant time period. Consequently, Aquila fails the wholesale market share screen in those control areas.

18. As outlined in the April 14 Order, Aquila's failure of the wholesale market share screen provides the basis for the Commission to institute the instant section 206

⁸ See, e.g., *Progress Power Marketing, Inc.*, 76 FERC ¶ 61,155 at 61,919 (1996); *Northwest Power Marketing Co., L.L.C.*, 75 FERC ¶ 61,281 at 61,899 (1996); accord *Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223 at 62,062-63 (1994).

proceeding, which is limited to the Missouri and Kansas control areas, to determine whether Aquila may continue to charge market-based rates and establishes a rebuttable presumption of market power. This order establishes a refund effective date in order to put in place the necessary procedural framework to promptly impose an effective remedy, in case the Commission determines that such a remedy is required. Our decision to establish a refund effective date does not constitute a determination that refunds will be ordered.

19. The Commission's decision to institute the instant section 206 proceeding does not constitute a definitive finding by the Commission that Aquila has market power in the Missouri and Kansas control areas. As discussed in the April 14 and July 8 Orders, the screens are conservatively designed to identify the subset of applicants who require closer scrutiny. Accordingly, Aquila will have 60 days from the date of issuance of this order finding a screen failure to: (1) file a Delivered Price Test analysis; (2) file a mitigation proposal tailored to its particular circumstances that would eliminate the ability to exercise market power; or (3) inform the Commission that it will adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates.⁹ In addition, as the Commission stated in the April 14 Order, the applicant or intervenors may present evidence such as historical sales data to support whether Aquila does or does not possess market power.¹⁰

20. In cases where, as here, the Commission institutes a section 206 proceeding on its own motion, section 206(b) requires that the Commission establish a refund effective date that is no earlier than 60 days after publication of notice of the initiation of the Commission's proceeding in the *Federal Register*, and no later than five months subsequent to the expiration of the 60-day period. In order to give maximum protection to customers, and consistent with Commission precedent,¹¹ the Commission will establish a refund effective date at the earliest date allowed. This date will be 60 days from the date on which notice of the initiation of the proceeding in Docket No. EL05-83-000 is published in the *Federal Register*. In addition, section 206 requires that, if no final decision has been rendered by that date, the Commission must provide its estimate as to when it reasonably expects to make such a decision. Given the times for filing identified in this order, and the nature and complexity of the matters to be resolved, the Commission estimates that it will be able to reach a final decision by August 31, 2005.

⁹ April 14 Order, 107 FERC ¶ 61,018 at P 201, 207-209.

¹⁰ *Id.* at P 37.

¹¹ *See, e.g., Canal Electric Company*, 46 FERC ¶ 61,153, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

21. The filing indicates that Aquila passes the pivotal supplier screen and the wholesale market share screen in the Colorado control area. Aquila states that while it owns generation and serves retail customers in the Colorado control area, it is not required to perform screens for the control areas directly interconnected to Colorado. The Commission notes that, consistent with the April 14 Order, Aquila is not required to perform the screens for control areas first-tier to Colorado since Aquila's generation located in that control area is interconnected to a non-affiliate owned transmission system.¹² The Commission has reviewed Aquila's generation market power screens for the Colorado control area and has determined that Aquila passes the screens in that control area. Accordingly, the Commission finds that Aquila satisfies the Commission's generation market power standard in the Colorado control area.

22. The filing indicates that Aquila passes the pivotal supplier screen and the wholesale market share screen in each of the directly interconnected first-tier control areas examined. However, the Commission is unable to find here that Aquila satisfies the Commission's generation market power standard for market-based rate authority in the first-tier control areas of Aquila without a compliance filing, as discussed below.

23. Regarding import capability, as noted above, Aquila states that it utilized the results of a simultaneous transmission import capability study conducted by SPP for the control areas in the region. However, the Commission requires further information in order to make a determination regarding the adequacy of Aquila's transmission import capability study for its first-tier control areas. Aquila did not file supporting documents for its transmission import capability study, simply stating the import capability numbers for each control area. While Aquila states that the study it relied upon has been used by other applicants, that does not obviate the need for Aquila to provide sufficient information for the Commission to make a determination that the study was performed properly for Aquila's first-tier markets. Therefore, Aquila is directed to file data to support its simultaneous transmission import capability study, consistent with the requirements set forth in Appendix E of the April 14 Order, for its first-tier control areas, within 30 days of the date of this order. The Commission finds that Aquila conditionally satisfies the generation market power standard with respect to all areas not subject to the instant 206 proceeding, pending acceptance of the compliance filing directed above.

Transmission Market Power

24. When a transmission-owning public utility seeks market-based rate authority, the Commission has required the public utility to have an open access transmission tariff (OATT) on file before granting such authorization. Aquila states that it has an OATT on

¹² April 14 Order, 107 FERC ¶ 61,018 at footnote 64.

file with the Commission.¹³ Further, no intervenor has raised transmission market power concerns. The Commission finds that Aquila satisfies the Commission's transmission market power standard for the grant of market-based rate authority.

Other Barriers to Entry

25. Aquila states that it does not have the ability to erect any barriers to entry. Aquila states that it does not have dominant control over generation sites or other scarce inputs into generation. Aquila also states that it is involved in various gas ventures that do not create barriers to entry. The Commission notes that Aquila owns several natural gas intrastate pipelines and local natural gas distribution companies that sell and transport natural gas within its service area. No intervenor has raised concerns regarding barriers to entry. Based on Aquila's representations, the Commission finds that Aquila cannot erect barriers to entry. However, should Aquila or any of its affiliates deny, delay or require unreasonable terms, conditions or rates for natural gas service to a potential electric competitor in bulk power markets, that electric competitor may file a complaint with the Commission that could result in the suspension of Aquila's authority to sell power at market-based rates.¹⁴

Affiliate Abuse

26. Aquila states that it has on file Commission-approved codes of conduct governing its relationship with its affiliates. Aquila further states that no change in circumstances has occurred that would raise affiliate abuse issues. In addition, no intervenor has raised concerns regarding affiliate abuse. Based on these representations, the Commission finds that Aquila satisfies the Commission's concerns with regard to affiliate abuse.

Reporting Requirements

27. Consistent with the procedures the Commission adopted in Order No. 2001, an entity with market-based rates must file electronically with the Commission an Electric Quarterly Report containing: (1) a summary of the contractual terms and conditions in every effective service agreement for market-based power sales; and (2) transaction information for effective short-term (less than one year) and long-term (one year or greater) market-based power sales during the most recent calendar quarter.¹⁵ Electric

¹³ *Appalachian Power Co.*, unpublished letter order dated September 25, 1998, in Docket No. OA97-478-000, *et al.*

¹⁴ *See, e.g., Louisville Gas & Electric Co.*, 62 FERC ¶ 61,016 (1993).

¹⁵ *Revised Public Utility Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31,043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002). Required data sets for
(continued)

Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.¹⁶

28. Aquila must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.¹⁷ Order No. 652 requires that the change in status reporting requirement be incorporated in the market-based rate tariff of each entity authorized to make sales at market-based rates. Accordingly, Aquila is directed, within 30 days of the date of issuance of this order, to revise its market-based rate tariffs to incorporate the following provision:

[market-based rate seller name] must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority. A change in status includes, but is not limited to, each of the following: (i) ownership or control of generation or transmission facilities or inputs to electric power production other than fuel supplies, or (ii) affiliation with any entity not disclosed in the application for market-based rate authority that owns or controls generation or transmission facilities or inputs to electric power production, or affiliation with any entity that has a franchised service area. Any change in status must be filed no later than 30 days after the change in status occurs.

29. Aquila requests that the Commission, on a going forward basis, synchronize the dates on which the updated market power analyses are due for their corporate family to make the process more efficient. The Commission grants this request.

contractual and transaction information are described in Attachments B and C of Order No. 2001. The Electric Quarterly Report must be submitted to the Commission using the EQR Submission System Software, which may be downloaded from the Commission's website at <http://www.ferc.gov/docs-filing/eqr.asp>.

¹⁶ The exact dates for these reports are prescribed in 18 C.F.R. § 35.10b (2004). Failure to file an Electric Quarterly Report (without an appropriate request for extension), or failure to report an agreement in an Electric Quarterly Report may result in forfeiture of market-based rate authority, requiring filing of a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

¹⁷ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175 (2005).

The Commission orders:

(A) Aquila is directed, within 30 days of the date of issuance of this order, to revise its generation market power analysis for its first-tier control areas, as discussed in the body of this order.

(B) Aquila's updated market power analysis for the Colorado control area is hereby accepted for filing.

(C) Aquila's updated market power analysis for all other relevant markets not subject to the section 206 proceeding instituted herein is hereby conditionally accepted for filing, pending Commission acceptance of the compliance filing directed in Ordering Paragraph (A), as discussed in the body of this order.

(D) Aquila's revised tariff sheets incorporating the market behavior rules are hereby accepted for filing, effective December 17, 2003.

(E) Aquila is directed, within 30 days of the date of issuance of this order, to revise its market-based rate tariff to incorporate the change in status reporting requirement adopted in Order No. 652.

(F) 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 by 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), the Commission hereby institutes a proceeding in Docket No. EL05-83-000 concerning the justness and reasonableness of Aquila's market-based rates in the Missouri and Kansas control areas, as discussed in the body of this order.

(G) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of the proceeding under section 206 of the FPA in Docket No. EL05-83-000.

(H) The refund effective date established pursuant to section 206(b) of the FPA will be 60 days following publication in the *Federal Register* of the notice discussed in Ordering Paragraph (G) above.

(I) For the Missouri and Kansas control areas, Aquila is directed, within 60 days from the date of issuance of this order, to: (1) file a Delivered Price Test analysis; (2) file a mitigation proposal tailored to its particular circumstances that would eliminate the

ability to exercise market power; or (3) inform the Commission that it will adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.