

144 FERC ¶ 61,069
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinohoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.:

City of Boulder, Colorado

Docket No. EL13-67-000

ORDER DENYING PETITION FOR DECLARATORY ORDER WITHOUT
PREJUDICE

(Issued July 29, 2013)

1. On May 17, 2013, the City of Boulder, Colorado (Boulder) filed a petition for declaratory order requesting a decision confirming that in accordance with the Commission's stranded cost regulations,¹ upon becoming a retail-turned-wholesale customer, Boulder will have no stranded cost obligation for the portion of its wholesale power requirements that Boulder purchases from its former retail supplier, Public Service Company of Colorado (PSCo). Boulder seeks clarification that the Commission's ruling in *City of South Daytona, Florida*² should apply to Boulder on a proportional basis if it chooses to form a municipal utility.

2. In this order, we deny Boulder's petition without prejudice, finding that the Commission does not have before it sufficient facts to address the issue presented.

¹ See 18 C.F.R. § 35.26 (2012); *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

² 137 FERC ¶ 61,183 (2011) (*City of South Daytona*) (finding that the Commission's stranded cost regulations do not apply to a retail-turned-wholesale municipal utility that intends to continue receiving its power supply from its former retail supplier rather than from a new power supplier).

I. Background and Petition for Declaratory Order

3. Boulder states that in May 2002, the Boulder City Council passed a resolution that directed the city manager to develop a plan to identify and implement local actions that would reduce, in a cost effective manner, Boulder's contribution to global greenhouse gas emissions seven percent below their estimated 1990 level.³ Boulder asserts that meeting the goals set forth in this resolution proved difficult, and therefore, Boulder began to explore ways not only to reduce energy consumption across the City, but also to shift away from reliance on fuels for the City's electricity needs that cause greenhouse gases.

4. Boulder states that it has been exploring the possibility of forming a municipal utility in order to increase the amount of renewable resources in its fuel mix, rather than continuing to receive its service from PSCo.⁴ After a series of high level studies analyzing the feasibility of municipalizing, Boulder's citizens voted in November 2011 to change the City Charter to authorize the City Council to establish a municipal electric utility, provided that certain conditions (concerning legal, rate, reliability and resource mix issues) are met.⁵ Since then, Boulder states that the City has taken steps to develop a municipalization plan and has expended resources in further planning how it will meet consumers' electricity needs in the future.

5. Boulder petitions the Commission for a declaratory order interpreting the Commission's stranded cost regulations to confirm that, upon becoming a retail-turned-wholesale customer, Boulder will have no stranded cost obligation for the portion of its wholesale power requirements that Boulder purchases from its former retail supplier, PSCo.⁶ Boulder states that the Commission ruled in *City of South Daytona* that when a retail-turned-wholesale customer continues to purchase all of its requirements from its former retail supplier, none of the supplier's investment in its generation assets will be stranded for purposes of Order Nos. 888 and 888-A and the Commission's stranded cost regulations. As a result, the retail-turned-wholesale customer has no stranded cost obligation.⁷ Boulder seeks clarification from the Commission that the ruling in *City of*

³ Boulder Petition at 8-9.

⁴ *Id.* at 9-10.

⁵ *Id.* at 10-11.

⁶ *Id.* at 1.

⁷ *Id.* at 2 (citing *City of South Daytona*, 137 FERC ¶ 61,183 at P 42).

South Daytona would apply in its case, even if Boulder purchases less than 100 percent of its requirements from PSCo.⁸

6. Boulder states that during a transition period, it would purchase from PSCo an amount of electric capacity and associated energy that would otherwise be stranded by Boulder's departure, while purchasing its remaining requirements from generators using renewable resources.⁹ Boulder argues that, based on the Commission's ruling in *City of South Daytona*, a retail-turned-wholesale customer that purchases a portion of its requirements will have no stranded cost obligation for the portion of power it continues to purchase from its historical power supplier. Boulder maintains that it would not be a departing customer of PSCo and would not be using PSCo's transmission service to receive power from another wholesale power supplier as to that portion of Boulder's requirements. Accordingly, Boulder argues that there will be no stranded cost obligation for the portion of its power supply requirements that Boulder continues to purchase from PSCo.¹⁰

7. Boulder also requests expedited treatment of its petition in order to coordinate its planning and decision-making with the PSCo Electric Resource Plan currently pending before the Colorado Public Utilities Commission (Colorado Commission). In addition, Boulder states that the City Council of Boulder is expected to vote on August 6, 2013 on whether to continue moving forward with Boulder's municipalization efforts, and prior Commission action will allow the City Council to provide prompt notice to PSCo should the city choose to municipalize.¹¹

8. Boulder has also submitted a petition pursuant to 18 C.F.R. § 381.108(b) (2012) for waiver of the filing fee with respect to its request for declaratory relief.

II. Notice of Filings and Responsive Pleadings

9. Notice of Boulder's petition was published in the Federal Register, 78 *Fed. Reg.* 63,196 (2013), with comments due on or before June 17, 2013. PSCo filed a timely motion to intervene and answer. The Edison Electric Institute (EEI) filed a timely motion to intervene and comments. American Public Power Association (APPA) filed a timely motion to intervene in support of the petition. The Colorado Commission filed a notice

⁸ *Id.* at 1.

⁹ *Id.* at 2.

¹⁰ *Id.* at 17.

¹¹ *Id.* at 4.

of intervention and answer. The Colorado Office of Consumer Counsel filed a timely motion to intervene.

10. On June 28, 2013, Boulder filed a motion for leave to respond and response. On July 2, 2013, PSCo filed an answer in response to Boulder's motion for leave to respond. On July 3, 2013, the Colorado Commission also filed an answer in response to Boulder's motion for leave to respond.

11. PSCo argues in its answer that the Commission should find that while a partial requirements contract can potentially mitigate stranded costs, the amount of such mitigation is a factual issue that would necessarily turn on the specific terms of any contract that is ultimately negotiated.¹² PSCo states that there are two elements of a negotiated partial requirements contract that are important for determining the amount of stranded cost obligation mitigation that would occur.

12. PSCo maintains that the first is the length of the partial requirements contract. PSCo states that a partial requirements contract would have to cover the same period as the period for which PSCo had a reasonable expectation of continued service in order to provide complete stranded cost mitigation for the portion of Boulder's load supplied by that contract. PSCo states that a contract term of a lesser period would mitigate costs only for that period.¹³ PSCo states that Commission precedent supports the proposition that a utility's long-term planning obligation gives rise to a long-term reasonable expectation period.¹⁴ PSCo notes that in *City of South Daytona*, the Commission granted the petition on the basis of the customer's commitment that it would purchase requirements service from the utility for the full reasonable expectation period, and Boulder has not made a similar commitment in this case.¹⁵

13. PSCo states that the second important element of a negotiated partial requirements contract involves the quantity of service that Boulder would continue to purchase under the contract. PSCo claims that the exact amount of energy Boulder would purchase is unclear, although, according to PSCo, Boulder appears to desire an arrangement whereby it purchases intermittent renewable resources in the market and obligates PSCo to cover

¹² PSCo June 14, 2013 Answer at 2.

¹³ *Id.*

¹⁴ *Id.* at 11 (citing *City of Las Cruces, New Mexico v. El Paso Electric Co.*, Opinion No. 438, 87 FERC ¶ 61,201 (1999) and *City of Alma, Michigan*, Opinion No. 452, 96 FERC ¶ 61,163 (2001)).

¹⁵ *Id.* at 13.

any portion of Boulder's load that is not served by those resources.¹⁶ PSCo maintains that under this type of arrangement, some of the key factors that must be known for purposes of stranded cost mitigation would include an estimate of the total amount of power that intermittent resources will supply, as well as the particular hours and months in which such power is supplied. For instance, PSCo notes that purchases from intermittent resources may occur primarily in off-peak hours when market prices are lowest, requiring PSCo to supply Boulder during peak months and hours.¹⁷ PSCo states that because Order No. 888 requires that the Competitive Market Value Estimate be calculated for both the "capacity and associated energy" that is released when the customer departs, the stranded cost calculation will need to take into account the hours in which intermittent resources may be displacing PSCo's sales.¹⁸

14. PSCo argues that given the uncertainty surrounding these matters, the Commission should hold that while a partial requirements agreement can mitigate stranded cost liability, the amount of that mitigation is a factual issue that can be determined only after the terms of the partial requirements contract have been negotiated.¹⁹ EEI advances similar arguments, stating key factors such as the reasonable expectation period, the partial requirements contract's duration, and the comparability and amount of power to be purchased under the contract must be considered before determining the amount of stranded costs to be recovered.²⁰

15. The Colorado Commission asserts there are numerous unknown facts and variables associated with Boulder's plan, particularly with respect to any potential future contract requirements service Boulder would take from PSCo.²¹ The Colorado Commission states that the Commission should make a limited finding that Boulder's stranded cost obligation may be reduced by some amount as a result of continuing to purchase some of its power needs from PSCo. The Colorado Commission also requests the Commission make clear that any findings made in this proceeding do not prejudice the

¹⁶ *Id.* at 3.

¹⁷ *Id.* at 16.

¹⁸ *Id.*

¹⁹ *Id.* at 3.

²⁰ EEI Comments at 3.

²¹ Colorado Commission June 17, 2013 Answer at 3.

application of any element of the Commission's Order No. 888 stranded cost formula to Boulder.²²

16. The Colorado Commission also argues that Boulder's circumstances are different than those in *City of South Daytona* because in that case, all customers were to continue purchasing all their needed power from their traditional supplier and would not use FERC-mandated open access to reach any new wholesale power supplier.²³ Further, the Colorado Commission states that in *City of South Daytona*, the city was willing to enter into a full requirements contract for 10 years, which was also the same period of time the utility claimed was its reasonable expectation period under Order No. 888's stranded cost formula.²⁴ In contrast, in this proceeding, there is an unidentified amount of retail customer load that plans to remain on PSCo's system for an unidentified, perhaps open-ended, period of time.²⁵

17. APPA states that it strongly supports Boulder's petition and urges the Commission to confirm that, upon becoming a retail-turned-wholesale customer, Boulder will have no stranded cost obligation to PSCo under the Commission's regulations for the portion of its wholesale power requirements that Boulder purchases from PSCo rather than a new supplier.²⁶

18. Boulder argues in its answer that the intervenors' comments rely on the premise that Boulder will be using PSCo's transmission facilities to obtain power from third parties, and in the case described in its petition, Boulder would not be using transmission service under PSCo's OATT to reach another power supplier.²⁷ Boulder asserts that stranded costs arise only if the new utility uses the former provider's transmission facilities to purchase wholesale electricity from a third party.²⁸ Boulder states that it would not be considered a departing generation customer for the portion of its wholesale

²² *Id.* at 4.

²³ *Id.* at 9-10.

²⁴ *Id.* at 10.

²⁵ *Id.*

²⁶ APPA Motion at 3.

²⁷ Boulder June 28, 2013 Answer at 2, 5.

²⁸ *Id.* at 5-6.

requirements that it continued to purchase from PSCo, and no costs PSCo incurred to provide that portion of Boulder's requirements would be stranded.²⁹

19. Boulder also requests clarification in its answer that the provisions of the Commission's stranded cost regulations that apply to a new partial wholesale requirements contract will apply to Boulder if it municipalizes and contracts with PSCo for partial wholesale requirements service. Boulder maintains that these provisions: (1) prohibit PSCo from recovering stranded costs associated with such a contract in any transmission rates; (2) limit PSCo to recovery of stranded costs associated with the contract in accordance with its terms, in energy rates, if the contract contains an exit fee or other explicit stranded cost provision; and (3) preclude the application of the stranded cost formula for purposes of determining the amount of any such stranded costs.³⁰ Boulder maintains that its prospective partial wholesale requirements contract with PSCo would be a "new wholesale requirements contract" for purposes of the Commission's stranded cost rule.³¹ It concludes that because the Commission's stranded cost regulations do not allow public utilities to recover stranded costs for a new partial requirements contract except pursuant to an explicit contract provision, the Commission's stranded cost formula would be inapplicable, absent an exit fee or other explicit stranded cost provision negotiated by Boulder and PSCo in the new agreement.³²

20. Boulder maintains that as a result, the argument that a requirements service arrangement must extend for PSCo's full reasonable expectation period does not apply here.³³ Boulder acknowledges that this is without prejudice to the question of what stranded cost obligation Boulder would have for the portion of its wholesale requirements that it would obtain from third parties reached through open access transmission service provided by PSCo, but Boulder states that this issue is not the subject of its petition.³⁴

21. Boulder also states that it agrees with PSCo that the determination of Competitive Market Value Estimate in the stranded cost calculation formula under the stranded cost rule must be based on the market value of a product equivalent to the power sales that

²⁹ *Id.* at 5.

³⁰ *Id.* at 3 (citing 18 C.F.R. § 35.26(c)(1)(ii)-(iii) and § 35.26(c)(2) (2012)).

³¹ *Id.* at 7.

³² *Id.*

³³ *Id.* at 8.

³⁴ *Id.* at 9.

have been displaced by a retail-turned-wholesale customer's access to other providers.³⁵ Boulder asserts that confirmation of this principle by the Commission would provide useful clarity for purposes of future stranded cost negotiations between Boulder and PSCo.

22. In its answer to Boulder's answer, PSCo states that Boulder declines to provide any concrete information regarding the type of partial requirements contract it desires and criticizes PSCo and the Colorado Commission for identifying the contract terms that will be important for purposes of assessing stranded cost mitigation.³⁶ PSCo urges the Commission to reject Boulder's argument that any partial requirements agreement will, by definition, mitigate all of its stranded cost liability for the load served by that contract. PSCo states that because Boulder's petition did not propose a scenario where a partial requirements arrangement would eliminate stranded cost responsibility altogether, the Commission should decline to address any such scenario.³⁷

23. PSCo also maintains that Boulder is incorrect to argue that Order No. 888's treatment of exit fees under new requirements contracts means that Boulder can avoid stranded cost liability for PSCo's past investments by negotiating an exit fee. PSCo states that exit fees are designed to address future stranded costs incurred in serving the customer under the new contract.³⁸ PSCo argues that the issue in this case is not stranded costs associated with a new contract, but rather costs that PSCo has already incurred in serving Boulder.³⁹

24. The Colorado Commission states in its answer to Boulder's answer that Boulder makes overly-broad statements and interpretations that are inconsistent with the text and intent of the Commission's stranded cost rules.⁴⁰ The Colorado Commission reiterates its request that the Commission issue only a narrow ruling that Boulder's stranded costs may be mitigated if some of PSCo's customers remain as power customers of PSCo for some indefinite period of time after Boulder municipalizes.⁴¹

³⁵ *Id.* at 10.

³⁶ PSCo July 2, 2013 Answer at 2.

³⁷ *Id.* at 5.

³⁸ *Id.* at 4.

³⁹ *Id.*

⁴⁰ Colorado Commission July 3, 2013 Answer at 2.

⁴¹ *Id.*

25. The Colorado Commission states that Boulder has confused recovery of stranded costs incurred on behalf of retail customers prior to municipalization with recovery of stranded costs that may be incurred on behalf of those same customers after municipalization resulting from service under a new partial requirements contract.⁴² The Colorado Commission argues that the rules that apply to retail-related stranded costs do not change merely because a former retail customer decides to stay on the former supplier's system as a new wholesale customer. Rather, if a retail customer becomes a wholesale transmission customer of a public utility, and costs become stranded as a result, the utility may seek recovery of such stranded costs through section 205 or 206 of the Federal Power Act.⁴³ The Colorado Commission argues that, contrary to Boulder's assertions, the restrictions contained in the stranded cost rules regarding new requirements service pertain to actual new wholesale requirements service, not to retail service previously provided.⁴⁴

III. Discussion

A. Procedural Matters

26. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

27. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2012), prohibits answers to protests and answers unless otherwise ordered by the decisional authority. We will accept the answers because they have provided information that has assisted us in our decision-making process.

B. Analysis

28. As discussed below, we deny Boulder's petition for declaratory order without prejudice, finding that we have insufficient facts before us to determine that upon becoming a retail-turned-wholesale customer, Boulder will have no stranded cost obligation for the portion of its wholesale power requirements that it purchases from its former retail supplier, PSCo.

29. In Order No. 888, the Commission adopted regulations permitting public utilities to seek recovery of stranded costs associated with providing open access transmission.

⁴² *Id.* at 4-5.

⁴³ *Id.* at 5-6.

⁴⁴ *Id.* at 6.

The Commission limited the opportunity to seek stranded cost recovery primarily to two discrete situations: (1) costs associated with customers under wholesale requirements contracts executed on or before July 11, 1994 that do not contain an exit fee or other explicit stranded cost provision, a situation that is not present in the instant proceeding; and (2) costs associated with retail-turned-wholesale customers, arising through new municipalizations and municipal annexations.⁴⁵

30. The Commission's regulations, promulgated through Order No. 888, provide that:

If a retail customer becomes a legitimate wholesale transmission customer of a public utility or transmitting utility, e.g., through municipalization, and costs are stranded as a result of the retail-turned-wholesale customer's access to wholesale transmission, the utility may seek recovery of such costs through FPA section 205-206 or section 211-212 rates for wholesale transmission services to that customer.⁴⁶

31. The Commission's regulations also state that a public utility seeking to recover stranded costs must make an evidentiary demonstration to show that: (i) it incurred costs to provide service to a wholesale requirements customer or retail customer based on a reasonable expectation that the utility would continue to serve the customer; (ii) the stranded costs are not more than the customer would have contributed to the utility had the customer remained a wholesale requirements customer, or, in the case of a retail-turned-wholesale customer, had the customer remained a retail customer of the utility; and (iii) the stranded costs are derived using the following formula: Stranded Cost Obligation = (Revenue Stream Estimate - Competitive Market Value Estimate) x Length of Obligation (reasonable expectation period).⁴⁷

32. In the present case, the Commission does not have before it sufficient facts and circumstances to make a finding that Boulder will have no stranded cost obligation for the portion of its wholesale power requirements that Boulder purchases from its former retail supplier. For example, the Commission has no facts regarding Boulder's proposed municipalization, such as the length of a prospective partial requirements contract with PSCo and the length of the period for which PSCo had a reasonable expectation of continued service to Boulder. The Commission finds that a determination on Boulder's stranded cost obligation, if any, would be premature and speculative given that Boulder

⁴⁵ Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,348.

⁴⁶ 18 C.F.R. § 35.26(c)(1)(vii) (2012).

⁴⁷ 18 C.F.R. § 35.26(c)(2).

and PSCo have neither negotiated the terms of, nor entered into, a power requirements contract detailing key terms of the arrangement.⁴⁸

33. However, we clarify that a retail-turned-wholesale customer need not purchase all of its power supply from its formal retail supplier, as in *City of South Daytona*,⁴⁹ in order to mitigate its stranded cost obligation.⁵⁰ Instead, a departing customer's stranded cost obligation is determined by the application of the formula set forth in the Commission's regulations.⁵¹ Therefore, if Boulder forms a municipal utility that becomes a wholesale partial requirements customer of PSCo, its stranded cost obligation might be reduced based on, among other things, the amount of power it continues to take from PSCo. However, the extent of Boulder's stranded cost obligation would be a fact-specific determination that could only be made when the terms of a future partial requirements contract with PSCo are known.

34. We also note that Boulder appears to suggest in its answer that it would have no stranded cost obligation for a "new wholesale requirements contract" executed after July 11, 1994, or extended or renegotiated to be effective after July 11, 1994. In contrast to Boulder's interpretation, the provisions contained in the stranded cost regulations at

⁴⁸ See, e.g., *Patrick C. Lynch v. ISO New England, Inc.*, 107 FERC ¶ 61,242, at P 14 (2004) (dismissing Rhode Island Attorney General's petition for declaratory order as premature, noting that to grant the petition would inappropriately circumvent established procedures in New England); *Committee of Certain Members of Cajun Electric Power Cooperative, Inc.*, 87 FERC ¶ 61,129, at 61,509 (1999) (declining to issue order declaring that certain elements of a bankruptcy plan of reorganization are contrary to the Federal Power Act, Commission precedent, and Section 32 of the Public Utility Holding Company Act on the grounds that it was not possible to know what action the bankruptcy court would take); *Turlock Irrigation District v. Pacific Gas and Electric Co.*, 64 FERC ¶ 61,183, at 62,544, *Reh'g denied*, 65 FERC ¶ 61,016, at 61,227 (1993) (declining to issue a declaratory order regarding a proposed rate design in the absence of a rate filing); *Camille E. Held*, 57 FERC ¶ 61,080, at 61,293 (1991) (declining to issue a declaratory order because the alleged controversy was purely speculative); *Minnesota Power & Light Co. and Northern States Power Co.*, 43 FERC ¶ 61,104, at 61,343, *reh'g denied*, 43 FERC ¶ 61,502, at 61,241-42 (1988) (denying request for declaratory order on prudence of acquisition as premature until public utility seeks to reflect the transaction in rates).

⁴⁹ *City of South Daytona, Florida*, 137 FERC 61,183 (2011).

⁵⁰ Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,843 and n. 872.

⁵¹ 18 C.F.R. § 35.26(c)(2)(iii).

18 C.F.R. § 35.26(c)(1)(ii)-(iii) (2012) regarding “new wholesale requirements contracts” pertain to new wholesale requirements service, not to the retail service that PSCo previously provided to Boulder. Boulder’s petition pertains explicitly to its potential stranded cost obligation upon becoming a retail-turned-wholesale customer, and that obligation would arise as a result of PSCo’s prior retail service. The regulations regarding “new wholesale requirements contracts” to which Boulder refers are not pertinent to the issue it has presented. Furthermore, we decline to address Boulder’s request for confirmation that Competitive Market Value Estimate must be based on the market value of a product equivalent to the power sales that have been displaced by a retail-turned-wholesale customer’s access to other providers, as such request goes beyond the question presented in its initial petition.

35. Finally, we grant Boulder’s petition for waiver of the filing fee. Section 381.108 of the Commission’s regulations provides that municipalities are exempt from the filing fees required in Part 381. Boulder explains that it is a municipality organized under the laws of Colorado. Boulder is therefore exempt from the filing fee required for a petition for declaratory order.

The Commission orders:

(A) Boulder’s petition for declaratory order is hereby denied without prejudice, as discussed in the body of this order.

(B) Boulder’s petition for the waiver of the filing fee is granted.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.