

128 FERC ¶ 61,017
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Public Service Company of New Mexico

Docket Nos. ER09-1097-000
ER09-1097-001

ORDER ACCEPTING TRANSMISSION SERVICE AGREEMENTS

(Issued July 9, 2009)

1. On May 5, 2009, as amended on May 12, 2009,¹ Public Service Company of New Mexico (PNM) submitted a long-term firm point-to-point transmission service agreement with Foresight Energy Company (Foresight) and High Lonesome Mesa, LLC (High Lonesome) (Service Agreement),² which includes immediate reassignment of the transmission service agreement from Foresight to High Lonesome, pursuant to PNM's Open Access Transmission Tariff (OATT). As a result of the reassignment, PNM also submitted a transmission service agreement between PNM and High Lonesome (Revised Service Agreement).³ As discussed below, the Commission accepts the Service Agreements for filing, effective May 1, 2009 and June 1, 2009, as requested.

¹ PNM revised its initial filing to correct inaccurate references to a party.

² PNM designated this agreement Public Service Company of New Mexico FERC Electric Tariff Second Revised Volume No. 6, Service Agreement No. 334.

³ PNM designated this agreement Public Service Company of New Mexico FERC Electric Tariff Second Revised Volume No. 6, First Revised Service Agreement No. 334. Except for the party names and the provisions of each agreement discussing the reassignment of Foresight's rights, duties, and obligations to High Lonesome, the agreements are essentially the same. For the purposes of this order we will refer to both agreements collectively as the "Service Agreements."

I. Background

2. On April 13, 2006, Foresight, on behalf of High Lonesome, submitted a Large Generator Interconnection service request to PNM to interconnect a 100 MW wind generation facility to be located five miles south of the Willard 115 kV Switching Station⁴ (Willard Station) near Willard, New Mexico. PNM determined that the interconnection of the wind generation facility would best be facilitated by a new interconnection point created at Willard Station.

3. On July 6, 2007 and August 3, 2007, Foresight submitted two separate transmission service requests, totaling 100 MW, to deliver the output from the new wind generation facility from a new Point of Receipt at Willard Station to the 345 kV Four Corners Switchyard. The transmission service requests initially were for 90 MW beginning November 30, 2008 and running to December 31, 2027, and 10 MW from December 1, 2008 through January 1, 2029. Prior to the commencement dates, High Lonesome and Foresight delayed the operation date, and PNM subsequently deferred commencement to June 1, 2009, to coincide more closely with potential testing of the wind generation facility. High Lonesome has since requested that the 10 MW of transmission service begin on May 1, 2009, to provide the required transmission capacity for construction and testing of the wind generation facility.

4. On August 8, 2008, PNM and High Lonesome filed a Large Generator Interconnection Agreement.⁵ The Large Generator Interconnection Agreement provides for a five phase series of network upgrades required to reinforce the PNM transmission system and the Willard Station facilities.

II. PNM's Filing

5. PNM states that based on the time needed to complete the network upgrades required to facilitate the full 100 MW of transmission capacity, PNM and High Lonesome have agreed to two periods of transmission service. The first period will run from May 1, 2009 (for 10 MW of transmission capacity) and June 1, 2009 (for 90 MW of transmission capacity) and will continue until the required network upgrades and a true-up of the total cost is completed and agreed to by both parties. Upon completion of the

⁴ The Willard Station is owned by Tri-State Generation and Transmission Association, Inc., and PNM has certain rights to this facility.

⁵ The Large Generator Interconnection Agreement was accepted for filing on November 3, 2008. *See Public Serv. Co. of New Mexico*, Docket No. ER08-1517-000 (Nov. 3, 2008) (unpublished letter order).

network upgrades and true-up, the second period will begin and run through the end of the Revised Service Agreement. In addition, PNM states that the parties have also agreed that High Lonesome will advance the necessary funding for interconnection, and PNM will refund those construction advances in the form of transmission service credits beginning in period 2 until the construction advances have been fully amortized.

6. During the first period PNM will provide a combination of Partial Interim Firm Point-to-Point Transmission Service of 37 MW and Conditional Firm Transmission Service of 63 MW, at PNM's Schedule 7 OATT rate (\$2.07 per kW-month) for long term firm point-to-point transmission service.

7. According to PNM, due to the costs of the network upgrades, the cost of providing the transmission service exceeds PNM's long-term firm point-to-point transmission service rate. As a result, PNM and High Lonesome have agreed to an incremental rate for period 2 based on "higher of" pricing, pursuant to the Commission's Transmission Pricing Policy Statement.⁶ PNM states that the incremental rate is based on the construction cost estimates included in the Large Generator Interconnection Agreement.

8. PNM states that upon the completion of the network upgrades, which are anticipated to be completed by December 2010, PNM will true-up the costs of the upgrades to reflect the actual costs of the interconnection and will update the values in the cost of service rate charged in period 2.⁷ PNM states that the rate will be a levelized monthly firm point-to-point transmission service rate based on an agreed cost of service model reflecting the incremental cost of the required network upgrades of approximately \$32 million.⁸ Upon completion of the true-up, PNM will file an amended service

⁶ *Inquiry Concerning the Commission's Pricing Policy for Transmission Services Provided by Public Utilities Under the Federal Power Act*, FERC Stats. & Regs. ¶ 31,005 (1994).

⁷ The true-up will also include additional operation and maintenance expenses that will be created by the interconnection, such as higher property taxes and property insurance costs due to the increased plan value of the upgrades, and any actions taken by Congress, the Internal Revenue Service, or the State of New Mexico regarding tax depreciation rates, corporate income tax rates, or any similar tax actions that apply to the upgrades.

⁸ Specifically, the cost of service model will reflect that (1) the initial funding of the network upgrades will be provided by High Lonesome; (2) the financing High Lonesome provided will decrease as the cash advances provided are refunded to High Lonesome; (3) as the balance of High Lonesome's cash advances decreases, PNM capital will be used to finance the upgrades; (4) in order for High Lonesome to receive the

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agreement reflecting the actual transmission service rate for period 2.⁹ Additionally, as stated above, PNM will refund the cost of the interconnection in the form of transmission credits until the construction advances are fully amortized. PNM states that it will compensate High Lonesome for the unamortized construction balance, and according to PNM, High Lonesome will be reimbursed in approximately nine years. After that, High Lonesome will begin to make monthly payments to PNM for transmission service based on the levelized transmission service rate established in the final true-up.

9. PNM also states that it will not include the costs of the network upgrades associated with High Lonesome's wind generation interconnection in its FERC jurisdictional rate base or in its New Mexico jurisdictional rate base; therefore, the upgrades will not be included in its rolled-in rate. PNM requests waiver of the notice requirement to allow 10 MW of service to commence May 1, 2009, and the remaining 90 MW of service to commence June 1, 2009.

III. Notices of Filing and Responsive Pleading

10. Notices of PNM's filing were published in the *Federal Register*, 74 Fed. Reg. 23,689 and 74 Fed. Reg. 27,134 (2009), with interventions and protests due on or before May 26, 2009 and June 2, 2009, respectively. Cargill Power Markets, LLC (Cargill) filed a timely motion to intervene and protest. On June 10, 2009, PNM and High Lonesome filed answers to Cargill's protest. On June 19, 2009, Arizona Public Service Company (APS) filed a motion to intervene out-of-time and comments.¹⁰ On June 23, 2009, Cargill filed an answer to PNM's and High Lonesome's answers, on June 29, 2009 PNM

benefit of accelerated tax depreciation, the investment will create a tax-book timing difference that is reflected as a reduction to the "rate base" consisting of net book value of the network upgrades; and (5) pursuant to the Commission's direction in Order No. 890, *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008) *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), High Lonesome's incremental investment in network upgrades will be recovered over the period of the transmission service agreement.

⁹ Based on the current cost estimates, the parties anticipate that the period 2 rate will be approximately \$2.96 per kW-month.

¹⁰ In its comments, APS supports acceptance of the Service Agreements as requested by PNM.

filed an answer to Cargill's answer, and on July 1, 2009 High Lonesome filed an answer to Cargill's answer.

IV. Discussion

A. Procedural Matters

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2008), the Commission will grant APS's late-filed motion to intervene given its interest in the proceeding, the early stage of this particular proceeding, and the absence of undue prejudice or delay. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept PNM's and High Lonesome's June 10, 2009 answers and Cargill's June 23, 2009 answer because they have provided information that assisted us in our decision-making process. We are not persuaded to accept PNM's June 29, 2009 answer or High Lonesome's July 1, 2009 answer and will, therefore, reject them.

B. Protest and Reply Comments

12. In its protest, Cargill contends that PNM violated the requirements of its OATT, business practices, and the Federal Power Act (FPA) by granting Foresight's transmission service request while rejecting a transmission service request submitted by Cargill. Cargill requests that the Commission reject PNM's filing and direct PNM to reprocess its queue in conformity with its OATT and business practices.

13. Cargill states that the North American Energy Standards Board (NAESB) OASIS Business Practices define three types of yearly transmission products.¹¹ According to

¹¹ The NAESB OASIS Business Practices (WEQ-001) provides as follows:

2.1.5. FIXED YEARLY — Service starts at 00:00 on the first date of a calendar year and ends at 24:00 on the last date of the same calendar year (same as 00:00 of the first date of the next consecutive year).

2.1.9. SLIDING YEARLY — Service starts at 00:00 of any date and stops at 00:00 on the same date of the following year. If there is no corresponding date in the following year, the service stops at 24:00 on the last day of the same month in the following year. For example SLIDING

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Cargill, on February 21, 2008, it submitted a valid extended yearly transmission service request for 125 MW of transmission capacity, which PNM rejected because the service request did not have a start and stop date of January 1, 00:00:00. However, Cargill states, PNM accepted the transmission service request underlying the Service Agreements, which also did not have a January 1, 00:00:00 start and stop date. Cargill alleges that PNM has also accepted similar requests by PNM's wholesale power marketing function and other customers. Accordingly, Cargill contends that PNM acted in an unduly preferential and discriminatory manner in processing transmission service, and as a consequence, managing its queue. Cargill requests that the Commission reject the Service Agreements and, in accordance with Commission precedent, direct PNM to reprocess its queue to conform to its OATT and business practices.¹²

14. In addition, Cargill states that the Commission should exercise its discretion and initiate, on its own motion, an FPA section 206 investigation of PNM's transmission processing practices.

15. PNM and High Lonesome argue that Cargill's protest is not about the issue before the Commission—i.e., whether the Service Agreements are just and reasonable—but about an unrelated Cargill transmission service request. PNM and High Lonesome state that the service request that Cargill references in its protest is for service over a different path than the service to be provided under the Service Agreements at issue in this proceeding. According to PNM, Cargill's February 2008 transmission service request was for service from Blackwater to Four Corners, not from Willard Station to Four Corners, which is the path over which service will be provided to High Lonesome under the Service Agreements. PNM states that on November 4, 2008, Cargill submitted a transmission service request for 100 MW of firm point-to-point transmission service to begin January 1, 2011, from Albuquerque to Four Corners 345 kV Switchyard and requesting a new path from Willard to Four Corners, with a source to be identified in its written application. PNM states that it did not have the full 100 MW available, but did ultimately grant Cargill 37 MW of firm point-to-point transmission service from Willard

YEARLY service starting on February 29 would stop on February 28 of the following year.

2.1.13. EXTENDED YEARLY — Service starts at 00:00 of any date and stops at 00:00 more than one year later, but must be requested in increments of full years.

¹² Cargill Protest at 11 (citing *Tenaska Pwr. Services Co., et al. v. Midwest Indep. Transmission Oper., Inc.*, 106 FERC ¶ 61,230, order on reh'g, 107 FERC ¶ 61,308 (2004); *Wisconsin Pub. Pwr. Inc. SYSTEM v. Wisconsin Pub. Serv. Corp.*, 83 FERC ¶ 61,198, at 61,860 (1998)).

Station to Four Corners and that it offered Cargill a Study Agreement for the remaining 63 MW of transmission service, which Cargill declined. PNM and High Lonesome state that Cargill cannot claim that it was harmed by the acceptance of High Lonesome's transmission service request because Cargill did not request transmission service over the Willard Station to Four Corners path until 16 months after High Lonesome's transmission service request.

16. PNM also contends that Cargill cannot claim it was harmed by PNM's acceptance of the High Lonesome transmission service because Cargill's and High Lonesome's requests are not "competing." PNM states that the Commission has previously recognized that service requests are competing if there is an inability to accommodate both.¹³ PNM states that even had Cargill submitted a proper request for service from Blackwater to Four Corners at the time of High Lonesome's request, its request would not have been granted as there was no available transfer capability on the Blackwater to Four Corners path due to the need to reserve the capacity for an expiring existing contract which would have a right of first refusal. Thus, PNM argues, its acceptance of the High Lonesome transmission service request did not cause Cargill's Blackwater to Four Corners transmission service request to be denied.

17. Additionally, PNM states that although the Commission should reject Cargill's protest as unrelated to the Service Agreements, PNM also wishes to rebut Cargill's claims regarding how PNM processes its transmission queue. PNM asserts that it treats its merchant function and other customers on a comparable basis, that it properly granted Foresight's request for transmission service, and that it consistently followed its sliding year business practice and the NAESB business practices. PNM states that prior to March 2008,¹⁴ it did not accept sliding year transactions because when the Commission instituted the OATT and OASIS in 1996 and 1997, the Commission did not require transmission providers to offer sliding or extended year service. At that time, PNM determined that it could not adequately administer the submission of sliding transmission service requests.¹⁵ PNM acknowledges, however, that there are two exceptions to its pre-

¹³ See PNM Answer at 7 (citing *Tenaska Power Services Company v. Midwest Indep. Transmission Sys. Operator*, 102 FERC ¶ 61,095, at n.11 (2003) *Tenaska power Services Co.*).

¹⁴ PNM notes that in response to Cargill's inquiry regarding sliding service, PNM re-evaluated whether firm sliding service should be offered and decided that there may be a business opportunity in providing a more flexible sliding service transmission product. See PNM Answer at P 17.

¹⁵ PNM Answer at 14 (citing *Open Access Same-Time Information System and*

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March 2008 general rule not to accept sliding service requests. First, PNM states that pursuant to section 2.2 of the PNM OATT, PNM is obligated to roll-over any pre-existing firm transmission service agreements, which may have start/stop dates other than January 1 at 00:00:00. Second, PNM states that pursuant to Order No. 2003,¹⁶ PNM allows sliding transmission service requests by interconnection customers to synchronize the in-service date of the generation facility with the commencement of service date.¹⁷ PNM notes that High Lonesome's service request met these requirements and assures that this method is consistent with its business practices. Furthermore, PNM states that several requests Cargill referred to in its protest, are requests to designate network resources by its network customers, which PNM states are not requests for point-to-point transmission service. PNM states that when it designates a new network resource, it may be required to decrement available transfer capability to reflect the operation of the new network resource. PNM states that in an effort to make it clear to the market that available transfer capability has been decremented, PNM assigns a transmission service request in the process of decrementing the transmission capability. PNM notes that there are no limitations in PNM's OATT regarding when a new network resource can be designated.

18. PNM further argues that it properly followed the NAESB standards, which are standards for service but do not require a particular yearly product to be offered.¹⁸ Furthermore, in response to Cargill's statement that PNM has been unwilling to resolve this matter informally through the Commission's Enforcement Hotline, PNM states that it

Standards of Conduct, Order No. 638, FERC Stats & Regs. ¶ 31,093 (2000)).

¹⁶ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 (2004), *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).

¹⁷ PNM notes that in Order No. 2003-A, the Commission stated that while interconnection and transmission service are separate services, the queues for both services should be closely coordinated. *See* PNM Answer at 15 (citing Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 541).

¹⁸ PNM Answer at 18 (citing North American Energy Standards Board Wholesale Electric Quadrant, Business Practice Standards at P 18 (Oct. 31, 2007)).

was not contacted by the Commission's Enforcement Hotline staff until May 26, 2009, the date of Cargill's protest.

19. PNM also states that because Cargill's protest is unrelated to the Service Agreements, Cargill should have filed its concerns with the Commission in a complaint and that Cargill should not be allowed to assert claims now that Foresight and High Lonesome have invested large amounts of capital. Similarly, High Lonesome contends that Cargill failed to raise its concerns before the Commission in a timely fashion and that while Cargill expressed its concerns to PNM and the New Mexico Renewable Energy Transmission Authority, a state agency that does not have any jurisdiction over PNM's management of its OATT, Cargill waited nearly eight months before bringing its concerns to the Commission.

20. High Lonesome adds that in reliance of the validity of its transmission service requests, it negotiated interconnection and transmission service agreements with PNM and a power purchase agreement with APS, and constructed the wind generation project, which required it to invest large amounts of capital. High Lonesome further argues that if the Commission were to grant Cargill's protest, it would effectively award Cargill the transmission service for which High Lonesome contracted. This would occur because while Cargill's Blackwater to Four Corners transmission service request was submitted in February 2008, in November 2008 Cargill submitted a new service request for transmission capacity from Willard Station to Four Corners, which is the same path as High Lonesome's service request. High Lonesome contends that if the Commission does not deny Cargill's protest APS and its customers will be deprived of a clean, renewable source of electricity, High Lonesome will face financial hardship, and a completed 100 MW wind project will be stranded. Accordingly, High Lonesome requests that the Commission consider the practical consequences and equitable considerations, and deny Cargill's protest.

21. In its answer, Cargill largely reiterates the arguments it made in its protest adding that PNM was not authorized by its OATT to grant any exceptions to what PNM has identified as a general rule not to accept sliding year requests. Cargill also asserts that because the grant of the High Lonesome transmission service request was invalid, as it did not confirm to PNM's general rule not to accept sliding service requests, the award of transmission capacity to High Lonesome reduced the available capacity that PNM was able to award to Cargill on the Willard to Four Corners path under Cargill's November 2008 transmission service request.

C. Commission Determination

22. For the reasons discussed below, the Commission will accept PNM's proposed Service Agreements, effective May 1, 2009 and June 1, 2009, as requested.

23. We find that the issue in this proceeding is whether the proposed Service Agreements are just and reasonable and therefore should be accepted by the Commission. We also find that Cargill's Blackwater to Four Corners service request and High Lonesome's service request are not competing requests for the same capacity. Service requests are competing requests if there is an inability to accommodate both requests.¹⁹ Here, High Lonesome requested capacity from Willard Station to Four Corners. However, Cargill's Blackwater to Four Corners request sought capacity over a separate and distinct path from that of High Lonesome. Therefore, the High Lonesome service request was not related to the rejection of Cargill's Blackwater to Four Corners service request. In fact, Cargill did not seek capacity over the Willard Station to Four Corners transmission path until 16 months after the High Lonesome request was submitted.²⁰ Thus, High Lonesome's request did not harm Cargill. Accordingly, the Commission denies Cargill's protest.

24. With respect to Cargill's concerns related to the rejected service requests and queue violations, we find that the proper forum for Cargill to raise such claims is a proceeding under section 206 of the FPA. Further, while Cargill has alleged that PNM acted in an unduly preferential and discriminatory manner in granting the High Lonesome transmission service request and service requests submitted by PNM's wholesale marketing function and other customers, the Commission finds that Cargill has not presented sufficient evidence here to warrant the Commission instituting a section 206 proceeding on its own motion.²¹ Furthermore, regarding the concerns raised associated with the NAESB standards, we note that the NAESB standards do not dictate the particular services a transmission provider must offer under its OATT.²² Therefore, the

¹⁹ *Tenaska Power Services Co.*, 102 FERC ¶ 61,095 at n.11.

²⁰ Further, when Cargill submitted its November 2008 request over the Willard Station to Four Corners transmission path and PNM was not able to provide the full requested capacity, PNM properly offered Cargill a Study Agreement for the remaining 63 MW of transmission service, which Cargill declined.

²¹ In Exhibit 2 of its answer, PNM explained each of the service requests referenced by Cargill.

²² Specifically, the NAESB standards provide as follows:

The existence of an attribute value in this table does not imply the services must be offered by a Transmission Provider. Requirements as to which services must be offered are defined by regulation and tariffs. Likewise, absence of a service period value in Table 2.1 does not restrict a Transmission Provider from offering a service. The intent of the table is to establish common terminology associated

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Commission will not institute a section 206 proceeding. However, Cargill may file and support a section 206 complaint if it believes such a filing is warranted.

25. As stated above, we will accept the proposed Service Agreements effective May 1, 2009, and June 1, 2009, as requested.²³ PNM proposes two periods of transmission service. During period 1, PNM will provide 37 MW of Partial Interim Firm Point-to-Point transmission service and 63 MW of Conditional Firm Point-to-Point transmission service at the rate provided in Schedule 7 of the PNM OATT. In addition, PNM proposes to charge a formula rate based on the cost of service for period 2. The period 2 rate is consistent with the Commission's "higher of" pricing, pursuant to the Commission's Transmission Pricing Policy Statement.²⁴ We note that upon completion of the required network upgrades and the final true-up, PNM commits to submit another transmission service agreement reflecting the approved formula rate for period 2.

The Commission orders:

The Service Agreements are hereby accepted, effective May 1, 2009 and June 1, 2009, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

with standard products. North American Energy Standards Board Whole Sale Electric Quadrant, Business Practice Standards at P 18 (Oct. 31, 2007).

²³ See *Central Hudson Gas & Electric Corporation, et al.*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992), and *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, *clarified* 65 FERC ¶ 61,081 (1993).

²⁴ *Inquiry Concerning the Commission's Pricing Policy for Transmission Services Provided by Public Utilities Under the Federal Power Act*, FERC Stats. & Regs. ¶ 31,005 (1994).