

137 FERC ¶ 61,192
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Public Service Company of New Mexico

Docket Nos. ER12-72-000

ER11-4534-000

(Consolidated)

ORDER ACCEPTING AND SUSPENDING PROPOSED RATES,
ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES,
AND CONSOLIDATING PROCEEDINGS

(Issued December 12, 2011)

1. On October 13, 2011, Public Service Company of New Mexico (PNM) filed with the Commission an unexecuted network integration transmission service agreement and network operating agreement (together, Revised Unexecuted Agreements) between PNM and Navopache Electric Cooperative, Inc. (Navopache). As discussed below, we will accept the filing, suspend it for a five-month period, to be effective April 14, 2012, subject to refund, set all issues raised by the filing for hearing and settlement judge procedures, and consolidate this filing with the ongoing proceeding in Docket No. ER11-4534-000.

I. Background

2. PNM is a New Mexico corporation owning or leasing approximately 3,170 circuit miles of electric transmission lines.¹ PNM provides transmission services to Navopache, a non-profit electric cooperative. PNM explains that while Navopache's electric system is not physically interconnected with PNM transmission lines, or contiguous to PNM's service territory or the "core" of the PNM balancing authority, Navopache's electric system, via telemetry, is part of the PNM balancing authority.²

¹ PNM Filing Letter at 2.

² *Id.*

II. PNM's Filing

3. PNM states that the Revised Unexecuted Agreements are revised versions of the original and first revised network integration transmission service agreement and network operating agreement (together, Existing Agreements) initially filed with the Commission in 2000, and amended in 2005.³ In its filing, PNM seeks to revise the Existing Agreements a second time. PNM states that the Revised Unexecuted Agreements, along with PNM's open access transmission tariff (OATT) will establish the terms and conditions under which PNM will provide and Navopache will receive and purchase network integration transmission service from PNM. Specifically, PNM states that the Revised Unexecuted Agreements "seek to streamline and update the prior agreements," and in the case of the network integration transmission system agreement, "allow the agreement to be more closely aligned to PNM's *pro forma* [network integration transmission services agreement] contained in PNM's OATT."⁴ Also, PNM notes that the network operating agreement is being modified to remove outdated language.

4. According to PNM, it is filing the Revised Unexecuted Agreements in unexecuted form because the parties could not agree to the revised terms of the Revised Unexecuted Agreements. Also, PNM states that the Revised Unexecuted Agreements are related to an unexecuted amended power sales agreement between PNM and Navopache, which is currently in settlement and hearing proceedings before the Commission.⁵

5. PNM requests waiver of the Commission's prior notice requirement to permit the Revised Unexecuted Agreements to go into effect as of November 14, 2011, the same effective date requested for the power sales agreement in Docket No. ER11-4534-000.⁶

III. Notice of Filing and Responsive Pleadings

6. Notice of PNM's filing was published in the *Federal Register*, 76 Fed. Reg. 65,713 (2011), with interventions and protests due on or before November 3, 2011. Navopache filed a timely motion for summary disposition and protest. On November 18,

³ *Id.*

⁴ *Id.* at 5.

⁵ On November 14, 2011, in Docket No. ER11-4534-000, the Commission accepted PNM's unexecuted amended power sales agreement between itself and Navopache, suspend it for a five-month period, to be effective April 14, 2012, subject to refund, and established hearing and settlement judge procedures. *Pub. Serv. Co. of New Mexico*, 137 FERC ¶ 61,119 (2011).

⁶ PNM Filing Letter at 5.

2011, PNM filed a motion for leave to answer and answer. On November 28, 2011, Navopache filed a motion for leave to answer and answer.

IV. Discussion

A. Procedural Issues

7. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), Navopache's timely, unopposed motion to intervene serves to make it a party to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We are not persuaded to accept PNM or Navopache's answers, and will, therefore, reject them.

B. Navopache's Protest

8. Navopache asserts that, in early 2010, PNM contacted Navopache with regard to revising the parties' Existing Agreements. Navopache argues that while it negotiated with PNM in good faith, the parties were unable to reach an agreement.⁷ On June 24, 2010, Navopache states that PNM submitted an informational report to the Commission regarding the negotiations for revising such agreements.⁸ In late 2010, according to Navopache, PNM informed Navopache that it was ending such negotiations.⁹ Navopache states that it did not learn of PNM's intention to file the Revised Unexecuted Agreements in unexecuted form until it received PNM's filing in Docket No. ER11-4534-000.

9. Navopache first urges the Commission to summarily dismiss the instant filing pursuant to Rule 217 of the Commission's Rules of Practice and Procedure.¹⁰ In support of its request, Navopache argues that the Existing Agreements allow only mutual written amendments and that Navopache agrees to none of PNM's proposed amendments. As a result, Navopache contends that PNM's proposed amendments to the Existing Agreements are not in the public interest and should be rejected by the Commission because they violate the terms of such agreements and, under the *Mobile-Sierra* doctrine,

⁷ Navopache Protest at 5.

⁸ *Pub. Serv. Co. of New Mexico*, Docket No. ER00-2523-000 (filed June 24, 2010).

⁹ Navopache Protest at 5-6.

¹⁰ *Id.* at 7 (citing 18 C.F.R. § 385.217(b) (2011)).

the Commission may only accept changes in contravention of a contract if they are in the public interest.¹¹

10. Navopache also contends that the Commission should reject PNM's filing because PNM's proffered amendments violate New Mexico contract law; specifically, the duty to negotiate in good faith.¹² Navopache asserts that PNM's actions violate the good faith requirement because the unilateral revisions harm Navopache's interests, including financial harm to its customers.¹³

11. Navopache argues that PNM's filing "proposes new, undefined, unsupported, and unjust and unreasonable redispatch charges and system congestion mitigation charges" that conflict with the Existing Agreements, are not justified, and are not specific.¹⁴ Specifically, Navopache contends that the charges are unjust and unreasonable because they create a payment obligation that conflicts with the Existing Agreements.¹⁵ Navopache also argues that PNM's filing is an attempt to re-bundle a power supply agreement with the Revised Unexecuted Agreements, which are transmission service agreements, in violation of Order No. 888.¹⁶

¹¹ *United Gas Pipe Line v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) and *Federal Power Comm'n v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Mobile-Sierra*).

¹² Navopache Protest at 17-18.

¹³ *Id.* at 2-3.

¹⁴ *Id.* at 19-20.

¹⁵ According to Navopache, section 13 of the network integration transmission service agreement provides that "transmission service provided by Navopache does not involve or contribute to congestion of PNM's transmission facilities . . . and that PNM will not assess Navopache a system congestion mitigation charge."

¹⁶ Navopache Protest at 21. *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).

12. Navopache next alleges that PNM has violated the standards of conduct under Order No. 889¹⁷ because the filing in the instant case closely follows the filing in Docket No. ER11-4534-00 in both content and timing. Navopache argues that the circumstances of the two filings show collusion between PNM's merchant and transmission arms.¹⁸ Finally, Navopache argues that PNM's filing should be rejected because it is premature given that the Commission has not ruled on the related power sales agreement at issue in Docket No. ER11-4534-000.¹⁹ To the extent that the Commission does not summarily dismiss PNM's filing, Navopache requests that the Commission suspend the filing and set the issues for hearing.

C. Commission Determinations

13. We decline to summarily dismiss the filing in this docket. PNM's proposal raises issues that cannot be resolved based on the record before us, and are more appropriately addressed in the hearing and settlement judge procedures ordered below.

14. Our preliminary analysis indicates that PNM's filing has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. We will accept PNM's filing, suspend it for five months, to be effective April 14, 2012, subject to refund, and set it for hearing and settlement judge procedures.²⁰

15. In addition, because the issues in this proceeding are closely intertwined with those raised in Docket No. ER11-4534-000, we will consolidate the instant filing with the ongoing proceeding in Docket No. ER11-4534-000 for purposes of hearing and decision as well as settlement judge procedures.²¹

16. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes before hearing

¹⁷ *Open Access Same-Time Information System and Standards of Conduct*, Order No. 889, FERC Stats. & Regs. ¶ 31,035 (1996), *order on reh'g*, Order No. 889-A, FERC Stats & Regs. ¶ 31,049, *reh'g denied*, Order No. 889-B, 81 FERC ¶ 61,253 (1997).

¹⁸ Navopache Protest at 23.

¹⁹ *Id.* at 24-25.

²⁰ We similarly suspended PNM's proposed power sales agreement with Navopache, in Docket No. ER11-4534-000, for five months. *Pub. Serv. Co. of New Mexico*, 137 FERC ¶ 61,119 at P 1, 14.

²¹ *See Missouri River Energy Services*, 124 FERC ¶ 61,309, at P 39 (2008).

procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.²² If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.²³

17. The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) PNM's filing is hereby accepted for filing and suspended for five months, to be effective April 14, 2012, subject to refund and hearing, as discussed in the body of this order and the ordering paragraphs below.

(B) PNM's filing is hereby consolidated with the ongoing proceeding in Docket No. ER11-4534-000 for the purpose of hearing and decision and settlement judge procedures, as discussed in the body of this order.

(C) 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 FPA, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R. Chapter I), a public hearing shall be held concerning the justness and reasonableness of the proposed revisions. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Paragraphs (D) – (F) below.

(D) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2011), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within 15 days of the date of this order. Such settlement judge shall have all the powers and duties enumerated in Rule 603 and

²² 18 C.F.R. § 385.603 (2011).

²³ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge in writing or by telephone within five days of the date of this order.

(E) Within 30 days of the date of this order, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every 60 days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(F) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within 15 days of the date of the presiding judge's designation, convene a prehearing conference in this proceeding in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.