

135 FERC ¶ 61,259
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Cargill Power Markets, LLC

Docket No. EL10-61-000

v.

Public Service Company of New Mexico

ORDER CONDITIONALLY APPROVING CONTESTED SETTLEMENT

(Issued December 30, 2011)

1. On January 13, 2010, Public Service Company of New Mexico (PNM)¹ and Cargill Power Markets, LLC (Cargill)² submitted a contested settlement agreement (Settlement)³ to resolve the issues of harm and remedy in a complaint proceeding.⁴ Based on the Settlement and the record in this proceeding, the Commission finds the Settlement, as conditioned, to be just and reasonable, and that it resolves the issues of harm and remedy for certain transmission service requested by Cargill on PNM's

¹ PNM, a New Mexico corporation and a wholly-owned public utility operating subsidiary of PNM Resources, is engaged in the generation, transmission, and sale of electricity at wholesale in the western United States.

² Cargill is a power marketer with a market-based rate wholesale power sales tariff on file with the Commission. It owns no generating or transmission facilities and receives transmission service under the PNM Open Access Transmission Tariff (OATT).

³ The Settlement was filed pursuant to Rule 602 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602 (2011).

⁴ The two settling parties intend the Settlement to resolve all issues between them without the need for an evidentiary hearing or further proceedings, except for the issues raised in their requests for rehearing of the Commission's July 29, 2010 order, *Cargill Power Mkts., LLC v. Pub. Serv. Co. of New Mexico*, 132 FERC ¶ 61,079 (2010) (July 29 Order) (granting complaint and setting issue of remedy for hearing and settlement judge procedures). Commission action on the requests for rehearing is pending.

transmission system. Accordingly, the Commission conditionally approves the Settlement, as discussed below.

I. Background

2. On April 21, 2010, Cargill filed a complaint (Complaint) that PNM had violated its OATT and improperly denied Cargill's valid request for transmission service on the Blackwater-Four Corners transmission path (Blackwater Path). While the July 29 Order details the background to this Complaint,⁵ essentially, three critical events that occurred on February 21, 2008 gave rise to the Complaint. First, Cargill submitted a transmission service request for 125 MW of firm, point-to-point capacity, which PNM invalidated because the requested transmission service started and stopped on a date other than January 1. Five minutes later, Powerex Corp. (Powerex)⁶ submitted three competing transmission service requests over the Blackwater Path, each for 50 MW, which did start and stop on January 1. PNM validated Powerex's competing transmission requests, and as a result, Powerex was awarded priority over Cargill in the Blackwater Path queue. On February 26, 2008, Cargill resubmitted its transmission service request for 125 MW (Cargill February 26 transmission request), using the Blackwater Path and the same start and stop dates as Powerex's February 21, 2008 transmission requests. PNM queued this transmission request behind the earlier Powerex February 21, 2008 transmission requests. Consequently Cargill filed the Complaint.

3. In the July 29 Order, the Commission granted Cargill's Complaint. Invoking the filed rate doctrine, the Commission found that PNM had improperly invalidated Cargill's February 21 transmission request, which Cargill had submitted in accordance with the PNM OATT on file with the Commission.⁷ The Commission directed PNM to provide appropriate relief to Cargill to remedy the harm caused by the misprocessed service request, but found that Cargill had not demonstrated that its proposed remedy of reprocessing of the PNM transmission queue was just and reasonable.⁸ Noting that there may be other opportunities to remedy Cargill's misprocessed request for transmission on the Blackwater Path, but more information was necessary, the Commission set the issue

⁵ See also *Cargill Power Mkts., LLC v. Publ Serv. Co. of New Mexico*, 134 FERC ¶ 63,015 (2010).

⁶ Powerex, a marketing subsidiary of the Canadian British Columbia Hydro and Power Authority, acquires and sells wholesale power in the United States under a market-based rate wholesale power sales tariff on file with the Commission.

⁷ July 29 Order, 132 FERC ¶ 61,079 at P 22-23.

⁸ *Id.* P 24.

of appropriate remedy for hearing.⁹ The Commission also encouraged the parties to settle their dispute.¹⁰ On January 13, 2011, Cargill and PNM, the settling parties, jointly filed the Settlement.

II. The Settlement

4. The settling parties state that the Settlement resolves all issues in the proceeding without the need for an evidentiary hearing, except for the issues raised and the relief requested in Cargill's and PNM's pending requests for rehearing of the July 29 Order,¹¹ on which they explicitly seek a Commission determination.¹² Settlement paragraph 12 states that the Settlement must be approved in its entirety or with modifications acceptable to all Parties, defined, in Settlement paragraph 1, as Cargill and PNM.

5. Settlement paragraph 13 provides that PNM shall place the Cargill February 21, 2008 transmission request back into the transmission service queue with priority established by the originally queued date of February 21, 2008. Settlement paragraph 13 also provides that the Cargill February 26, 2008 transmission request shall remain in the PNM transmission service queue, unaffected by the Settlement, and that the Cargill February 26, 2008 transmission request does not replace, supersede or otherwise affect the processing of the Cargill February 21, 2008 transmission request.

⁹ *Id.*

¹⁰ *Id.* P 25.

¹¹ On rehearing of the July 29 Order, Cargill claims, among other things, that the Commission erred by: (1) not responding to Cargill's evidence that PNM violated its OATT by accepting High Lonesome Mesa, LLC's transmission service requests; (2) not imposing sanctions or providing remedies for acceptance of those transmission service requests; (3) not offering redress to Cargill for the injury suffered from PNM's failure to invalidate the High Lonesome transmission service requests; and (4) not requiring PNM to reprocess its transmission queue in accordance with its OATT and North American Energy Standards Board (NAESB) business practices. In its February 14, 2011 reply comments, PNM withdrew its first claim of error concerning the Commission's finding that PNM unreasonably denied the Cargill February 21 transmission request. PNM's remaining rehearing request is whether the Commission erred by requiring PNM to specify in its OATT the types of NAESB transmission products it offers. PNM's August 30, 2010 Rehearing Request, Docket No. EL10-61-001, at 5. *See infra* P 26.

¹² *See* January 13, 2011 Settlement Transmittal Letter at 1; Explanatory Statement at 1; Settlement at paragraph 11.

6. In Settlement paragraph 14, PNM agrees to make a one-time \$200,000 cash settlement payment to Cargill within five days of a final Commission order approving the Settlement in its entirety or with conditions acceptable to the parties. A final Commission order is defined as the date on which all requests for rehearing or appeal of the Commission order approving the Settlement are denied, or, in the absence of such requests, the date on which the right to apply for rehearing or appeal expires.

7. Settlement Paragraph 15 states that the Settlement is not contingent on the relief that may be granted by the Commission with respect to Cargill's and PNM's rehearing requests nor does it address or resolve the issues raised in each rehearing request, most notably that PNM improperly accepted invalid transmission service requests submitted by other customers, and the appropriate treatment of those transmission service requests, and a November 4, 2008 request by Cargill for transmission service using the Willard to Four Corners transmission path. The paragraph states that the Settlement does not address Cargill's request that PNM reprocess its transmission queue or PNM's assertion that it has properly processed its transmission queue, and also that the Settlement is not contingent on relief that the Commission may grant in response to Cargill's and PNM's rehearing requests, which are not withdrawn.

8. Settlement Paragraph 19 provides that the Settlement discussions are privileged and confidential and shall be without prejudice to the position of any Party or participant in this proceeding or any other proceeding, except as necessary to enforce the Settlement's terms. Settlement Paragraph 20 provides that any modification to the Settlement be reviewed under the *Mobile-Sierra*¹³ public interest standard.

9. Settlement Paragraph 25 states that the effective date of the Settlement shall be the date established by the Commission in acting on the Settlement. It provides that, if the Commission should by order condition its approval of the Settlement or seek to require modification in a material manner, any Party may notify the other Parties within five business days of the issuance of such order that it does not agree to the condition. The Parties will meet within ten business days after such notification to negotiate in good faith the means by which to restore the economic balance of the Settlement, as executed by the Parties. If such an agreement cannot be reached, the Settlement shall be of no force and effect, and Cargill shall file a motion requesting that the Commission grant the relief requested in the Complaint.

¹³ See *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Mobile-Siera*).

III. Comments on the Settlement

10. On February 2, 2011, Initial Comments supporting the Settlement were filed by Trial Staff and Cargill. Powerex filed Initial Comments opposing the Settlement. On February 14, 2010, Reply Comments were filed by Trial Staff, Cargill, PNM, and Powerex, whose filing included a motion to strike portions of Cargill's Initial Comments. On February 23, 2010, Powerex filed a motion for leave to respond to Cargill's Reply Comments and its response (Powerex Response). On March 8, 2010, Cargill filed an answer, requesting denial of Powerex's motion and response (Cargill Answer).¹⁴

A. Initial Comments

1. Comments Supporting the Settlement

11. Trial Staff states that the Settlement results in a remedy that is fair and equitable under the circumstances. Trial Staff observes that, while Powerex was granted the first queue position for the Blackwater Path, in 2008, service was not to begin until January 1, 2012, and no contracts were entered into that would be adversely affected by the reprocessing of the transmission queue. Thus, Trial Staff concludes, the most appropriate remedy is the Settlement's (limited) reprocessing of the queue to put the parties back in the position they would have been but for PNM's improper invalidation of the Cargill February 21 transmission request.¹⁵

12. Cargill emphasizes that Powerex "did not provide any evidence demonstrating that it would be harmed in any way by the Settlement or that there is any genuine issue of material fact with respect to the Settlement."¹⁶

2. Powerex's Comments Opposing the Settlement

13. Powerex states that it is harmed by the Settlement, which places Cargill into PNM's transmission queue ahead of Powerex some three years after Powerex gained queue priority. It contends that the settling parties made no meaningful effort to address this harm to Powerex when resolving Cargill's Complaint. It asks the Commission to

¹⁴ On February, 15, 2011, the Settlement Judge reported to the Commission that Powerex has contested the Settlement and identified the matters at issue. *Cargill Power Mkts., LLC v. Pub. Serv. Co. of New Mexico*, 134 FERC ¶ 63,015 (2010). On February 16, 2011, the Chief Administrative Law Judge terminated the settlement judge procedures.

¹⁵ Trial Staff February 2, 2011 Initial Comments at 7.

¹⁶ Cargill February 2, 2011 Initial Comments (Cargill Initial Comments) at 2.

reject the Settlement and to remand the matter to the Settlement Judge for further settlement discussions, stating that a negotiated resolution remains possible prior to utilizing Commission and party resources in an evidentiary hearing. Alternatively, or in conjunction, Powerex asks the Commission to act on the pending rehearing requests.

14. In support, Powerex points out that, under Rule 602(h)(1)(i) of the Commission's Rules of Practice and Procedure,¹⁷ when an offer of settlement is contested, the Commission may decide the merits of the contested settlement if the record contains substantial evidence upon which to base a reasoned decision or the Commission determines there is no genuine issue of material fact. Powerex argues that the Settlement fails to meet both of these requirements.

15. Powerex asserts that there is a lack of substantial evidence to support the Settlement because the July 29 Order found Cargill's request, that the Commission require PNM to reprocess the queue, to be unsupported by the record, and because Cargill has not provided any additional evidence that reinstatement of its transmission service request more than two years after rejection would produce a just and reasonable result. According to Powerex, the loss of primary queue position for its February 21 transmission requests would cause Powerex to lose the value of future transactions through no fault of its own. Powerex argues that without significant upgrades PNM does not have sufficient transmission capacity on the Blackwater Path, so only the transmission service request that is first in the queue will receive any significant transmission capacity.

16. Powerex asserts that the Settlement does not resolve genuine issues of material fact. Powerex complains that, although the Commission directed the settling parties, in an evidentiary hearing, to address the harm caused by the misprocessed transmission service request and the appropriate relief to remedy this harm, the Settlement does neither. Powerex states that the Settlement lacks evidence that reinstatement of the Cargill February 21, 2008 transmission request into top queue position more than two years after PNM rejected it is just and reasonable and not unduly discriminatory. Additionally, Powerex states that the Settlement fails to resolve the issue of the proper remedial relief, which would include the cognizable harm to Powerex. Powerex asserts that by adopting Cargill's initially requested remedy, the settling parties have simply followed the path of least resistance.

17. Moreover, Powerex points out that the Settlement leaves open the disputed, dispositive issues contained in the two rehearing requests. Because Commission action on rehearing has the potential of being inconsistent with the terms of the Settlement, Powerex asks the Commission to consider ruling on the rehearing requests first.

¹⁷ 18 C.F.R. § 385.602 (h)(1)(i) (2011).

18. Powerex also points to the Commission's four approaches, set forth in *Trailblazer Pipeline Co.*,¹⁸ for assessing whether it can approve a contested settlement over a non-settling party's objections, and argues that the Settlement satisfies none of these approaches.

B. Reply Comments

1. Reply Comments in Support of the Settlement

19. Trial Staff, Cargill, and PNM contend that there are no genuine issues of material fact and that there is substantial record evidence upon which to make a reasoned decision on the issues Powerex raises. Trial Staff states that the Commission declines to reprocess transmission queues only when doing so would undermine confidence in market stability or the party involved would suffer financial harm by retroactive reordering of the queue, which is not the case here.¹⁹

20. Trial Staff argues that Powerex's claims of alleged harm are too speculative because Powerex failed to present evidence that it has entered into binding commitments for the Blackwater Path's capacity. Nor has Powerex attempted to quantify or estimate the alleged resultant financial harm.

21. Similarly, Cargill contends that Powerex's claims of harm are irrelevant because they do not fall within the scope of the issues set for hearing. Furthermore, Cargill argues that the Powerex February 21, 2008 transmission requests have been pending in the PNM queue in "study" mode and Powerex has not presented evidence that it has entered into binding commitments for this capacity or attempted to quantify or estimate its alleged

¹⁸ 85 FERC ¶ 61,345 (1998), *order on reh'g*, 87 FERC ¶ 61,110, *reh'g denied*, 88 FERC ¶ 61,168 (1999) (*Trailblazer*). These approaches are the following: (1) the Commission may make a decision on the merits of each contested issue; (2) the Commission may determine that the settlement provides an overall just and reasonable result, even if some individual aspects of the settlement may be problematic, and the finding of just and reasonable includes a finding that the contesting party would be in no worse position under the terms of the settlement than if the case were litigated; (3) the Commission may determine that the benefits of the settlement outweigh the nature of the objections, and the contesting parties' interests are too attenuated; or (4) the Commission may determine that the contesting parties can be severed from the settlement.

¹⁹ Trial Staff February 14, 2011 Reply Comments (Trial Staff Reply Comments) at 7 (citing *Pan-Alberta Gas (U.S.) v. Pacific Gas and Elec. Co.*, 72 FERC ¶ 61,092 (1995); *PPL EnergyPlus, LLC v. New York Independent Sys. Operator, Inc.*, 115 FERC ¶ 61,383 (2008)).

resultant financial harm. As a result, Cargill contends that the harm alleged by Powerex is too speculative to create a genuine issue of material fact.

22. Trial Staff contends that the Settlement resolves the issues set for hearing, i.e., the harm caused by the misprocessed transmission service request and the appropriate relief to remedy this harm. Trial Staff states that the Commission intended Cargill to receive appropriate relief for the harm caused by the misprocessed queue, and cites in support the July 29 Order: “In granting the complaint, the Commission also finds that PNM should provide appropriate relief to Cargill to remedy the harm caused by the misprocessed transmission service request.”²⁰ Trial Staff states that the Settlement merely puts Cargill in the position in which it would have been, but for the improperly invalidated Cargill February 21 transmission request. Citing *Tenaska Power Services Co. v. Midwest Independent Transmission System Operator, Inc.*,²¹ Trial Staff argues that Powerex should not be allowed to retain transmission capacity rights that it should not have received in the first place and for which there is no demonstrable harm arising from the reassignment.²²

23. Trial Staff contends that, because Powerex failed to show detrimental reliance on its priority in the PNM transmission queue and nothing in the record shows that Powerex will be harmed by reprocessing the queue, as the Settlement provides, the Commission may approve the contested Settlement under either the first or the second *Trailblazer* approach. The Commission may find that the Settlement is just and reasonable and not unduly discriminatory or preferential. It may also find that acceptance of the Settlement would put Powerex in no worse position than if it had litigated the case.

24. Similarly, Cargill asserts that the Commission may approve the Settlement under the second *Trailblazer* approach because the Settlement, as a whole, is just and reasonable, and Powerex has presented no evidence that it would be in a better position if the matter were fully litigated. By contrast, absent approval of the Settlement, Cargill argues that litigation would ensue, resulting in significant costs, delay, and legal uncertainty for all parties to this proceeding.

25. PNM argues that the Commission can approve the Settlement under *Trailblazer's* second approach, which involves a balancing of the benefits of the settlement against the

²⁰ Trial Staff Reply Comments at 8 (quoting July 29 Order, 132 FERC ¶ 61,079 at P 24).

²¹ 106 FERC ¶ 61,230 at P 53, *reh'g denied*, 107 FERC ¶ 61,308 (2004) (*Tenaska*)).

²² Trial Staff Reply Comments at 7 (citing *Tenaska*, 106 FERC ¶ 61,230 at P 53).

cost and potential effect of continued litigation.²³ PNM states that litigation of the Cargill February 21 transmission request would be protracted and would consume time and resources of all the parties and the Commission. Additionally, PNM anticipates that the outcome would be the same result as the Settlement, i.e., reinstating the Cargill February 21 transmission request. Thus, the benefits of the Settlement outweigh any objections to the Settlement.²⁴

26. PNM also clarifies its pending rehearing request. By agreeing, in the Settlement, to reinstatement of the Cargill February 21, 2008 transmission request, PNM no longer seeks rehearing as to this issue. However, all other issues in the PNM rehearing request remain.²⁵

2. Powerex's Motion to Strike and Reply Comments

27. In its Reply Comments, Powerex first moves the Commission to strike the portion of the Cargill Reply Comments stating that “during the course of settlement negotiations,” Powerex did not provide evidence that the Settlement would harm it or that there is any genuine issue of material fact with regard to the Settlement.²⁶ In support, Powerex cites Rule 602(e) of the Commission's Rules of Practice and Procedure,²⁷ which makes a participant's comments on an offer of settlement inadmissible in evidence against the participant's objection, and which also makes the parties' discussion not subject to discovery or admissible as evidence.

28. Next, Powerex contends that it will suffer harm if it loses its queue priority position for 150 MW on the Blackwater Path because entities seeking business opportunities have contacted it and it has reached “a deal” for 50 MW, in a letter of intent executed “approximately three months ago.”²⁸ Powerex continues that Cargill has provided no details of the harm it claims to have suffered as a result of PNM's queue

²³ *Trailblazer*, 87 FERC at 61,439.

²⁴ PNM February 14, 2011 Reply Comments (PNM Reply Comments) at 5-7.

²⁵ PNM Reply Comments at 7.

²⁶ Powerex Reply Comments at 2 (citing Cargill Initial Comments at 2).

²⁷ *Id.* at 3 (citing 18 C.F.R. § 385.602(e) (2011)).

²⁸ *Id.* at 5 (citing February 2, 2011 affidavit of Michael McWilliams, Director of Transmission, Powerex Corp., at ¶¶ 17-21, included in Powerex Initial Comments). Because the Powerex Reply Comments were filed on February 14, 2011, “approximately three months ago” would be mid-November 2010.

processing beyond rough estimates of potential value. Powerex again urges the Commission to order further settlement discussions.

IV. Discussion

A. Procedural Matters

29. Rule 602(f)(2) of the Commission's Rule of Practice and Procedure, 18 C.F.R. § 385.602(f)(2)(2011), permits initial and reply comments, but does not contemplate subsequent comments. 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 an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the February 23, 2011 Powerex Response or the March 8, 2011 Cargill Answer, and will therefore reject them.

30. In light of the Commission's policy of protecting the confidentiality of settlement negotiations and promotion of settlements,²⁹ we grant Powerex's motion to strike the following: "CPM wishes to emphasize that, during the course of settlement negotiations, the one party did not provide any evidence demonstrating that it would be harmed in any way by the Settlement or that there is any genuine issue of material fact with respect to the Settlement."³⁰

B. Commission Determination

31. The Commission conditionally approves the contested Settlement as just and reasonable, based on the substantial record evidence in this proceeding, as discussed below.³¹ As a remedy to PNM's improper invalidation of the Cargill February 21, 2008 transmission request, the Settlement places the transmission request into PNM's service queue as if it had not been improperly invalidated, and awards Cargill \$200,000. PNM and Cargill state that the Settlement resolves all issues between them regarding the

²⁹ See generally 18 C.F.R. § 602 (2011).

³⁰ Cargill Initial Comments at 2.

³¹ PNM stated in its reply comments that it no longer seeks rehearing on the issue of whether it unreasonably denied the Cargill February 21, 2008 transmission request, thus removing any challenge to the validity of this transmission request. The Commission is acting on the Settlement prior to addressing the rehearing requests in light of the January 1, 2012 start date for the disputed Transmission Service Agreement. Settlement paragraph 15 makes the settling parties' obligations not contingent on the Commission's actions on rehearing.

Blackwater Path without the need for an evidentiary hearing or further proceedings.³² As explained below, the Commission requires, as a condition for approval of the Settlement, modification of the provisions of paragraph 20 of the Settlement that seek to bind the Commission and non-settling third parties to the *Mobile-Sierra* “public interest” standard of review.

32. The Commission’s order in *Trailblazer* provides guidance regarding the standards and procedures for ruling on contested settlements. Where there is an adequate record, the first approach of *Trailblazer* provides that the Commission may examine the merits of each contested issue.³³ If each of the contesting party’s contentions lacks merit, the Commission can approve the Settlement on that basis.³⁴

33. Here, we disagree with Powerex that the record lacks substantial evidence for our determination, and that material facts are in dispute about the queue priority established in the Settlement. In the July 29 Order, the Commission found that PNM had relied on practices that were not on file with the Commission when it invalidated the Cargill February 21, 2008 transmission request, and that therefore the invalidation was improper.³⁵ In light of that finding, the Commission determined that PNM should provide relief to Cargill, but set the issue of the appropriate remedy for hearing because “Cargill [had] not met its burden under section 206 of the [Federal Power Act (FPA)] of demonstrating that its proposed remedy of reprocessing the transmission queue was just and reasonable and not unduly discriminatory.”³⁶ Although the Commission did not

³² The Settlement does not resolve the issues raised and the relief requested in the pending requests for rehearing of the July 29 Order.

³³ *Trailblazer*, 85 FERC at 62,342. *See also Mobil Oil Corp. v. FPC*, 417 U.S. 283 at 313-14 (1974) (“No one seriously doubts the power – indeed the duty – of the Commission to consider the terms of a proposed settlement, which fails to receive unanimous support as a decision on the merits.”).

³⁴ *Id.* *See also* Rule 602(h)(1)(i) of the Commission’s Rules of Practice and Procedure which provides that the Commission may decide the merits of contested settlement issues if the record contains substantial evidence upon which to base a reasoned decision or the Commission finds that there is no genuine issue of material fact. 18 C.F.R § 385.602(h)(1)(i) (2011).

³⁵ July 29 Order, 132 FERC ¶ 61,079 at P 22. In making this finding, the Commission relied on substantial record evidence that showed exactly when Cargill and Powerex each placed their respective February 21 transmission requests. *Id.* P 2-4.

³⁶ *Id.* P 24.

require reprocessing of the transmission queue, the Commission's ruling did not preclude reinstating the Cargill February 21 transmission request. Indeed, the Commission left open the possibility that reprocessing the queue on the Blackwater Path could be reasonable, when it encouraged the parties to "consider the harm caused by PNM's actions *and whether PNM can reprocess the queue for the Blackwater-Four Corners transmission path to validate Cargill's February 21, 2008 transmission service request, or develop another appropriate solution.*"³⁷

34. No party disputed the fact that the Cargill February 21, 2008 transmission request on the Blackwater Path was made before the Powerex February 21, 2008 transmission requests. The Commission also found in the July 29 Order that the record showed that PNM improperly invalidated Cargill's request. This means that the capacity should have been awarded to Cargill in the first place. Powerex did not seek rehearing of the July 29 Order, nor does it dispute those facts. Furthermore, Section 13.2 of the PNM OATT states, as does the Commission's *pro forma* tariff,³⁸ that reservation priority for long-term firm point to point transmission service "shall be available on a first-come, first-served basis, *i.e.*, in the chronological sequence in which each Transmission Customer has reserved service."³⁹ Based on these facts and circumstances, and the fact that Powerex has not shown that it will be materially harmed as a result of reinstating the Cargill February 21 transmission request, as discussed below, we find just and reasonable the Settlement's corrective measure, to reinstate the Cargill February 21 transmission request, which necessarily means that it has priority over the later Powerex February 21 transmission requests and any later competing transmission requests. Concerning Powerex's loss of primary (top) queue position to Cargill, we find persuasive the holding

³⁷ *Id.* (emphasis added).

³⁸ *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, at 30,515-16, *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).

³⁹ Public Service Company of New Mexico, Open Access Transmission Tariff, section 13.2(i), "Reservation Priority."

in *Tenaska* that parties should not be allowed to retain transmission capacity that they should not have received in the first place.⁴⁰

35. Powerex's main contention is that it will be harmed because the Settlement causes Powerex to lose its top position in the Blackwater Path queue. However, subsequent to issuance of the July 29 Order, Powerex had the opportunity to submit for inclusion in the record evidence of the harm it would incur if it were to lose its top priority in the Blackwater Path queue. We find Powerex failed to provide record evidence demonstrating that it would in fact be harmed financially by this loss of queue position. While Powerex claims that it has reached a "deal" for 50 MW of capacity for which it has a "letter-of-intent," it has not filed either this "letter-of-intent" or a contract to support this claim. Secondly, Powerex has not provided supporting documents quantifying its claim of financial harm caused by reinstatement of the Cargill February 21 transmission request. Moreover, Powerex has been on notice that it might lose its primary (top) queue position at least since April 20, 2010, when Cargill filed its Complaint, and with greater certainty upon issuance of the July 29 Order, which found that PNM violated the filed rate doctrine by denying Cargill's valid transmission service request, and directed parties to consider whether PNM can reprocess the queue for the Blackwater Path to validate the Cargill February 21 transmission request. Powerex's claim of harm, based on a recent "deal" it describes as having been executed around November 2010, well after the date of the Commission's July 29, 2010 Order finding that PNM erred in not validating the Cargill February 21 transmission request, is not persuasive.⁴¹

36. In *Trailblazer*, the Commission stated that the second approach to evaluating a contested settlement "involves a balancing of the benefits of the settlement against the cost and potential effect of continued litigation."⁴² Here, the Settlement places Cargill in the position that it would have been in originally if PNM had processed its queue in accordance with its OATT in the first place. In *Tenaska*, the Commission reached this same conclusion when a transmission provider had improperly processed its queue.⁴³

⁴⁰ *Tenaska*, 106 FERC ¶ 61,230 at P 53. While the Commission could have followed *Tenaska* in the July 29 Order, we chose to give the parties an opportunity to first develop the evidence, explore alternative solutions and consider the impact of reprocessing the queue. In this regard, we note that the Commission's authority is at its zenith when fashioning remedies. *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967).

⁴¹ See *supra* note 28.

⁴² *Trailblazer*, 85 FERC at 61,343.

⁴³ *Tenaska Power*, 106 FERC ¶ 61,230 at P53.

Indeed, the Commission required the transmission provider to reprocess the queue, and stated, “parties should not be allowed to retain transmission capacity that they should not have received in the first place.”⁴⁴ We find that requiring a hearing or ordering the continuation of settlement discussions, as requested by Powerex, would create uncertainty regarding the January 1, 2012 inception of service and is unlikely to lead to a different result based on the evidence presented during the course of this proceeding.

37. With respect to the standard for modifications to the Settlement, as noted above, Settlement Paragraph 20 provides that any modification to the Settlement be reviewed under the *Mobile-Sierra* public interest standard.⁴⁵ As a condition for approval of the Settlement, the Commission requires modification of this provision of the Settlement that seeks to bind the Commission and non-settling third parties to the *Mobile-Sierra* “public interest” standard of review.

38. We find that the Settlement does not establish “contract rates.”⁴⁶ In support of this finding, we note that the Settlement stems from a pre-existing Commission proceeding that involves a violation of the PNM OATT, a tariff of general applicability. For this reason, we find that the *Mobile-Sierra* presumption, as defined by the U.S. Supreme Court,⁴⁷ does not apply to the Settlement.

39. As we have stated in several recent orders, in the context of reviewing settlements that do not involve “contract rates,” the Commission has discretion as to whether to approve a request to impose the more rigorous application of the statutory “just and reasonable” standard of review that is often characterized as the *Mobile-Sierra* “public interest” standard of review.⁴⁸ The Commission has also stated in those orders

⁴⁴ *Id.*

⁴⁵ See *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956).

⁴⁶ Cf. *El Paso Elec. Co. and Tucson Elec. Power Co.*, 136 FERC ¶ 61,150, at P 5 (2011); *El Paso Elec. Co.*, 136 FERC ¶ 61,149, at P 6 (2011).

⁴⁷ *Morgan Stanley Capital Grp. v. Public Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 530 (2008); *NRG Power Mktg., LLC v. Maine Pub. Utils. Comm’n*, 130 S.Ct. 693, 700 (2010).

⁴⁸ See, e.g., *Devon Power LLC*, 134 FERC ¶ 61,208 (2011), *order on reh’g*, 137 FERC ¶ 61,073 (2011) (*Devon Power*); see also *Carolina Gas Transmission Corp.*, 136 FERC ¶ 61,014 (2011); *Southern LNG LLC*, 135 FERC ¶ 61,153, at P 24 (2011); *Petal Gas Storage LLC*, 135 FERC ¶ 61,152, at P 17 (2011); *High Island Offshore System, LLC*, 135 FERC ¶ 61,105, at P 24 (2011).

that we will not approve imposition of that more rigorous application of the statutory “just and reasonable” standard of review on future changes to settlements sought by the Commission or non-settling third parties, absent compelling circumstances such as we found to exist in *Devon Power*.⁴⁹ We find that the circumstances surrounding the Settlement do not satisfy that test, and thus we find it unjust and unreasonable to impose the more rigorous application of the statutory “just and reasonable” standard of review in the instant proceeding with respect to future changes to the Settlement sought by the Commission acting *sua sponte* or at the request of a non-settling third party.

40. While we are requiring the Settlement standard of review provisions to be modified as discussed above, the Commission continues to recognize the role of settlements in providing rate certainty. The Commission has discretion to initiate FPA section 206⁵⁰ proceedings, either on its own motion or at the request of others.⁵¹ In deciding whether to exercise that discretion with respect to the instant Settlement or any other settlement, the Commission would take into account the settling parties’ interest in maintaining the Settlement.

41. Accordingly, we find the Settlement, as conditioned, to be just and reasonable and therefore we approve it. Additionally, for the reasons discussed above, we see no benefit to ordering resumption of settlement discussion, as Powerex has requested, and will therefore not require it.

⁴⁹ 134 FERC ¶ 61,208 at P 24-25; 137 FERC ¶ 61,073 at P 37.

⁵⁰ 16 U.S.C. § 824e (2006).

⁵¹ *General Motors Corp v. FERC*, 613 F.2d 939, 944 (D.C. Cir. 1979); *Southern Union Gas Co.*, 840 F.2d 964, 968 (D.C. Cir. 1988); *see also Iroquois Gas Transmission System*, 69 FERC ¶ 61,165, at 61,631 (1994); *JMC Power Projects v. Tennessee Gas Pipeline*, 69 FERC ¶ 61,162 (1994), *reh’g denied*, 70 FERC ¶ 61,168, at 61,528 (1995); *aff’d*, *Ocean States Power v. FERC*, 1996 U.S. App. LEXIS 11096 at *18.

The Commission orders:

The Settlement is hereby conditionally approved, as discussed in the body of this order.

By the Commission. Commissioner Norris is concurring with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Cargill Power Markets, LLC

Docket No. EL10-61-000

v.

Public Service Company of New Mexico

(Issued December 30, 2011)

NORRIS, Commissioner, *concurring*:

I concur in the outcome of this order, which conditionally approves a contested settlement (Settlement) that resolves the issues of harm and remedy for certain transmission service requested by Cargill Power Markets, LLC (Cargill) on Public Service Company of New Mexico's (PNM) transmission system, subject to Cargill and PNM revising the Settlement so as not to impose the "public interest" standard of review on future changes proposed by the Commission and non-settling third parties. I agree that the Settlement does not establish "contract rates", and that as a result, the public interest presumption does not apply.¹ For the reasons I expressed in my partial dissent in *Devon Power LLC*, however, I disagree that the Commission can or should exercise its discretion to extend the public interest standard of review to non-contract rates, terms and conditions.² Therefore, I disagree with the analysis in this order of whether the Commission should permit the application of the public interest standard to future changes to the Settlement sought by the Commission or non-settling third parties.³

For these reasons, I respectfully concur.

John R. Norris, Commissioner

¹ *Cargill Power Markets, LLC v. Public Service Co. of New Mexico*, 137 FERC ¶ 61,259, at P 38 (2011).

² *Devon Power LLC*, 134 FERC ¶ 61,208 (2011), *Norris, dissenting in part*.

³ *Cargill Power Markets*, 137 FERC ¶ 61,259 at P 39. I note that I agree with the statement in this order that the Commission "continues to recognize the role of settlements in providing rate certainty," and that when deciding whether to exercise its discretion to initiate Federal Power Act section 206 proceedings, the Commission "would take into account the parties' interest in maintaining the Settlement." *Id.* P 40; *see also Devon Power LLC, Norris, dissenting in part* at 5-6 (noting the Commission's responsibility to take into account the need for certainty and stability and to respect settlements under the usual "just and reasonable" standard).