

141 FERC ¶ 61,141
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Cargill Power Markets, LLC

Docket No. EL10-61-001

v.

Public Service Company of New Mexico

ORDER DENYING REHEARING

(Issued November 20, 2012)

1. On August 30, 2010, Cargill Power Markets, LLC (Cargill)¹ and Public Service Company of New Mexico (PNM)² each requested rehearing of the Commission's July 29, 2010 order in this proceeding.³ For the reasons discussed below, we deny rehearing.

I. Background

2. The July 29 Order details the background to Cargill's April 21, 2010 complaint that PNM violated its Open Access Transmission Tariff (OATT) to Cargill's detriment (Complaint).⁴ To summarize briefly, Cargill complained that PNM had improperly invalidated Cargill's February 21, 2008 request (Cargill February 21 Request) for

¹ 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 OATT.

² 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.

³ *Cargill Power Mkts., LLC v. Pub. Serv. Co. of New Mexico*, 132 FERC ¶ 61,079 (2010) (July 29 Order).

⁴ *See also Cargill Power Mkts., LLC v. Pub. Serv. Co. of New Mexico*, 134 FERC ¶ 63,015 (2010) (Settlement Judge Report).

transmission service on the Blackwater-Four Corners transmission path (Blackwater Path). Cargill pointed out, in contrast, that PNM had validated similar requests from other customers, including High Lonesome Mesa, LLC (High Lonesome),⁵ using the Willard-Four Corners transmission path (Willard Path). As relief, Cargill requested a general reprocessing of PNM's transmission service queue and/or its generator interconnection queue.

A. Blackwater Path Service

3. The Cargill February 21 Request, made via PNM's Open Access Same-Time Information System, was for 125 MW of firm point-to-point transmission capacity on the Blackwater Path, to start June 1, 2011, and to stop by June 1, 2016. PNM invalidated this transmission service request because it started and stopped on a date other than January 1. Five minutes later, Powerex Corp. (Powerex)⁶ submitted three requests for transmission service on the Blackwater Path, each request for 50 MW, for a period of five years, to start and stop on January 1 (Powerex February 21 Requests). PNM validated these Powerex requests. On February 26, 2008, Cargill submitted a new transmission service request for 125 MW, using the Blackwater Path and the same start and stop dates as the Powerex February 21 Requests (Cargill February 26 Request). PNM validated this Cargill February 26 Request, placing it in second position in the queue, behind the Powerex February 21 Requests.

B. Willard Path Service

4. On November 4, 2008, Cargill submitted a transmission service request on the Willard Path for 100 MW of firm point-to-point transmission capacity to start on January 1, 2011, and to stop by January 1, 2016 (Cargill November 2008 Request). PNM could not accommodate Cargill's request for a full 100 MW because High Lonesome had previously (in July and August 2007) submitted two related transmission service requests totaling 100 MW (H-L 100 MW Requests) that had queue priority over the Willard Path's capacity. One High Lonesome request, submitted on July 7, 2007, ran from

⁵ High Lonesome, a windpower developer, is the successor-in-interest to Foresight Energy Company (Foresight) in the High Lonesome Wind Ranch project.

⁶ Powerex, the 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.

May 1, 2009 through December 31, 2027 and the other, submitted on August 3, 2007, ran from June 1, 2009 to January 1, 2029.⁷

5. On May 5, 2009, PNM filed a long-term firm point-to-point transmission service agreement with High Lonesome (High Lonesome Agreement) that corresponded to the H-L 100 MW Requests. Cargill protested and asked the Commission to reject the High Lonesome Agreement, arguing that PNM had improperly validated the underlying H-L 100 MW Requests, which did not start and stop on the same day. Cargill also asked the Commission to reinstate the Cargill February 21 Request for service on the Blackwater Path.⁸

6. On July 9, 2009, the Commission denied Cargill's protest and accepted the High Lonesome Agreement.⁹ The Commission found that the H-L 100 MW Requests on the Willard Path and the Cargill February 21 Request on the Blackwater Path did not compete for the same transmission capacity. The Commission also determined that the High Lonesome transmission service request was not related to the rejection of the Cargill February 21 Request. Moreover, because Cargill had not submitted the Cargill November 2008 Request for transmission service on the Willard Path until some 16 months after High Lonesome had submitted the H-L 100 MW Requests (in July and August 2007), the Commission concluded that Cargill was not harmed by PNM's validation of the H-L 100 MW Requests.¹⁰ Concerning the Blackwater Path and Cargill's dissatisfaction with PNM's invalidation of the Cargill February 21 Request, the Commission determined that Cargill had presented insufficient evidence to warrant the Commission's instituting, on its own motion, a proceeding under section 206 of the Federal Power Act (FPA)¹¹ to investigate alleged PNM queue violations. The

⁷ High Lonesome submitted two transmission service requests totaling 100 MW based on the time needed to complete separate phases of High Lonesome's network upgrades. On July 9, 2009, the Commission accepted the two transmission service agreements between PNM and High Lonesome that corresponded to the two transmission service requests. *Pub. Serv. Co. of New Mexico*, 128 FERC ¶ 61,017 (2009) (High Lonesome Order).

⁸ Cargill May 26, 2009 Motion to Intervene and Protest, Docket Nos. ER09-1097-000 and ER09-1097-001, at 8-12.

⁹ High Lonesome Order, 128 FERC ¶ 61,017 at PP 22-23.

¹⁰ *Id.* P 23.

¹¹ *See* 16 U.S.C. § 824e(a) (2006).

Commission added that Cargill could file a section 206 complaint if it considered such a filing to be warranted.¹² Cargill filed the instant Complaint on April 21, 2010, initiating this proceeding.

C. July 29 Order

7. In the July 29 Order, the Commission granted the core of Cargill's Complaint. It found that PNM had improperly invalidated the Cargill February 21 Request that complied with section 17 of the PNM OATT. The Commission found that PNM's OATT did not state accurately what services PNM offered, and that Attachment P of PNM's OATT explicitly incorporated by reference all of the North American Energy Standards Board's business practices (NAESB Practices). The Commission stated that customers, such as Cargill, could reasonably conclude that PNM offered all the types of point-to-point transmission services described in the NAESB Practices, including service that did not start and stop on January 1 (also called sliding service). The Commission directed PNM to file revisions to its OATT to specify all transmission services that the company intended to provide and the procedures it intended to follow when processing transmission service requests.¹³

8. The Commission also held that PNM could not rely on practices that it had not filed with the Commission. Therefore, the Commission concluded that PNM had improperly invalidated the Cargill February 21 Request.¹⁴ Accordingly, the Commission determined that PNM should provide appropriate relief to Cargill to remedy the harm caused by the improperly processed transmission queue. The Commission did not, however, order PNM to reprocess its transmission queue because it determined that there may be other ways to remedy the harm Cargill suffered from PNM's improper invalidation of the Cargill February 21 Request. To that end, the Commission ordered a trial-type evidentiary hearing to explore the issues of harm and remedy, preceded by settlement judge procedures.¹⁵ On January 12, 2011, PNM and Cargill filed a settlement (Settlement).

¹² July 29 Order, 132 FERC ¶ 61,079 at PP 23-24.

¹³ *Id.* at Ordering Paragraph (B).

¹⁴ *Id.* PP 12, 22-23.

¹⁵ *Id.* PP 24-25.

D. The Settlement

9. The Settlement provides for PNM to place the Cargill February 21 Request back into the PNM transmission service queue with priority established by the original request date of February 21, 2008. The Settlement states explicitly that it neither addresses nor resolves the issues raised in the pending rehearing requests. On February 15, 2011, the Settlement Judge reported to the Commission that the Settlement was contested.¹⁶ On December 30, 2011, the Commission conditionally approved the contested Settlement.¹⁷

II. Rehearing Requests and Subsequent Filings

10. On August 30, 2010, PNM and Cargill each filed a request for rehearing of the July 29 Order. On September 14, 2010, High Lonesome and Eurus Energy North America Corporation (EURUS) each filed a motion for leave to answer Cargill's rehearing request and an answer.

III. Discussion**A. Procedural Matters**

11. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure prohibits answers to requests for rehearing.¹⁸ Accordingly, we reject the answers filed by High Lonesome and EURUS.

B. PNM's Rehearing Request**OATT Terms and Remedy Date**

12. PNM contends that the Commission erred when holding that the PNM OATT must specify which NAESB Practices PNM offers. PNM states that, prior to the July 29 Order, the Commission has never required transmission providers to specify in an OATT which NAESB transmission services are offered. Moreover, PNM states, as recognized

¹⁶ Settlement Judge Report, 134 FERC ¶ 63,015 at P 32. Powerex opposed the Settlement because it did not address the harm to Powerex from placing Cargill's transmission request ahead of Powerex's transmission requests in the PNM queue.

¹⁷ *Cargill Power Mkts., LLC v. Pub. Serv. Co. of New Mexico*, 137 FERC ¶ 61,259 (2011) (Settlement Order). The condition concerns the standard for future modification of the Settlement by either the Commission or third parties.

¹⁸ 18 C.F.R. § 385.713(d)(1) (2012).

in the July 29 Order, NAESB standards do not dictate the particular services that the transmission provider must provide under its OATT. Therefore, PNM contends that it is illogical for the Commission and customers to conclude, as stated in the July 29 Order, that PNM was offering all the point-to-point transmission services described in the NAESB Practices, which PNM had incorporated by reference into its OATT. PNM states further that the July 29 Order did not supply a reason for requiring PNM to adopt, in its OATT, the specific NAESB services offered.¹⁹

13. PNM insists that it did not violate its OATT, and that the Commission is requiring PNM to change its OATT without first finding the existing OATT to be unjust and unreasonable. PNM argues further that section 206(a) of the FPA,²⁰ under which Cargill brought its Complaint, permits the Commission to order relief only from the date that it finds an existing rate to be unjust and unreasonable.²¹ Thus, PNM contends that any remedy imposed by the Commission must be prospective only. Additionally, PNM contends that under section 206(b) any refund effective date may be no earlier than the date of the complaint.²²

14. We deny rehearing on both issues. The FPA requires all practices that significantly affect rates, terms and conditions of service to be on file with the Commission.²³ The FPA states:

¹⁹ On October 22, 2010, PNM filed a revised OATT with a new attachment stating all the transmission services that PNM provides. The filing was accepted under delegated authority on July 21, 2011. *Pub. Serv. Co. of New Mexico*, Docket No. ER11-1867-000 (July 21, 2011) (delegated letter order).

²⁰ 16 U.S.C. § 824e(a) (2006).

²¹ PNM August 30, 2010 Request for Rehearing at 8-9 (citing section 206(b) of the FPA, 16 U.S.C. § 824e(b) (2006), which authorizes the Commission to order refunds for amounts paid under a rate that is not just and reasonable, and provides that a refund effective date may be no earlier than the date of the complaint) (PNM Rehearing Request).

²² PNM had also requested rehearing on the issue of whether the Commission erred in finding that PNM incorrectly invalidated the Cargill February 21 Request. PNM withdrew this issue as part of the Settlement. *See* PNM February 14, 2011 Reply Comments at 7.

²³ Additionally, the Commission's regulations require that "[e]very public utility shall file with the Commission . . . full and complete rate schedules . . . clearly and

(continued...)

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing *all* rates and charges for *any* transmission or sale subject to the jurisdiction of the Commission, *and* the classification, practices, and regulations affecting such rates and charges, classifications and services.²⁴

15. The Commission's finding in the July 29 Order is consistent with the FPA and Commission policy. This filing requirement applies to all public utilities to ensure that transmission services are offered on a just and reasonable and not unduly discriminatory basis.²⁵ PNM did not comply with this requirement because its OATT did not identify all the transmission services offered and the rates, terms and conditions under which PNM offers them. Attachment P of the OATT stated that PNM offered the services described in the NAESB Practices (without stating any exceptions), but PNM's actions did not follow this provision of its OATT. Accordingly, the Commission reasonably directed PNM to state which transmission services it offers.

16. We also deny PNM's request to make the OATT revisions effective prospectively from the date of the Commission's order. To support its request, PNM relies on the

specifically setting forth all rates and charges . . . [and the] practices, rules and regulations affecting such rates and charges." 18 C.F.R. § 35.1(a) (2012); *see also City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985); *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, at P 989 (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), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

²⁴ 16 U.S.C. § 824d(c) (2006) (emphasis added); *see also* 18 C.F.R. § 35.1(a) (2012).

²⁵ *See Keyspan-Ravenswood, LLC v. FERC*, 474 F.3d 804, 811 (D.C. Cir. 2007) (statutory obligation to file significant changes to rates and "practices" affecting such rates); *see also Towns of Concord, Norwood, and Wellesley, Massachusetts*, 955 F.2d 67, 71 (D.C. Cir. 1992) (filed rate doctrine preserves agency's primary jurisdiction over reasonable rates and ensures that companies charge only those rates of which the agency is cognizant); *AT&T v. Central Office Tel., Inc.* 524 U.S. 214, 221-22 (1998) (requirement to file all charges, classifications, practices, and regulation affecting such charges has goal of preventing unreasonable and discriminatory rate).

FPA's provision for refunds – that is, the return of money collected in excess of a just and reasonable rate. PNM's argument is inapplicable to this situation. PNM did not collect money from Cargill and has nothing to refund. Rather, as the Commission found, PNM's actions violated its OATT; PNM was not acting in accord with the filed rates, terms and conditions, and therefore the Commission's order granting Cargill relief was proper.²⁶ Accordingly, we deny PNM's request to make the revisions effective only prospectively.

C. Cargill's Rehearing Request

1. High Lonesome's Transmission Service

17. Cargill states that, when the Commission accepted the High Lonesome Agreement, in the High Lonesome Order, the Commission expressly declined to reach the merits of Cargill's claims concerning Cargill's rejected transmission service request on the Willard Path (the Cargill November 2008 Request), High Lonesome's two accepted transmission service requests on the Willard Path (the H-L 100 MW Requests), and PNM's alleged queue violations.²⁷ Thus, Cargill contends that its claim for relief against High Lonesome's receipt of transmission service on the Willard Path is not a collateral attack on the High Lonesome Order because those issues were not actually litigated in the High Lonesome proceeding. Therefore, Cargill argues that it is not barred from raising arguments in these instant proceedings to challenge the genesis and validity of the H-L 100 MW Requests underlying the High Lonesome Agreement.²⁸

18. We deny rehearing on this issue. Cargill errs in stating that, in the High Lonesome Order, the Commission did not reach the merits of Cargill's claims concerning the Willard Path and also that closure of the High Lonesome proceeding does not bar Cargill from challenging the Commission's acceptance of the H-L 100 MW Requests. The High Lonesome Order held that Cargill was not harmed by Commission acceptance of High Lonesome's transmission service requests for two reasons. The order found that the Cargill February 21 Request on the Blackwater Path and the H-L 100 MW Requests on

²⁶ The Commission has held repeatedly that it may order relief where a utility has not complied with the rates, terms and conditions of its tariff. *See, e.g., DTE Energy Trading, Inc. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 111 FERC ¶ 61,062, at P 28, *order on reh'g*, 113 FERC ¶ 61,214 (2005), *reh'g denied*, 119 FERC ¶ 61,109 (2007); *Quest Energy, L.L.C. v. Detroit Edison Co.*, 106 FERC ¶ 61,227, at P 21 (2004).

²⁷ *See supra* PP 5-6.

²⁸ Cargill August 30, 2010 Request for Rehearing at 11-12 (Cargill Rehearing Request).

the Willard Path were not competing requests for the same capacity, and, significantly, that Cargill did not seek capacity on the Willard Path until 16 months after the H-L 100 MW Requests had been submitted.²⁹ If Cargill thought that the Commission had erred by failing to address Cargill's arguments that the High Lonesome Agreement harmed Cargill's request for Willard Path transmission service, Cargill should have sought rehearing in the High Lonesome proceeding where the Commission held that Cargill had not been harmed by acceptance of the High Lonesome Agreement. Cargill failed to do so. The matter is therefore settled. To raise the issue in this proceeding would be a collateral attack on the High Lonesome Order.³⁰ Accordingly, we deny rehearing.

2. EURUS' Transmission Service Request

19. Cargill contends that the July 29 Order did not even mention Cargill's claim that PNM's acceptance of EURUS's transmission service request harmed Cargill.³¹

20. Cargill does not explain, however, in either its Complaint or its Rehearing Request, why it believes that PNM's acceptance of EURUS's transmission request harmed Cargill. In fact, the Complaint barely mentions EURUS. The first occurrence is in Table 2, where Cargill lists five customers who, between December 1997 and January 2010, made a total of eight transmission requests that, according to Cargill, PNM incorrectly validated.³² Cargill's only other mention of EURUS is the following statement: "In particular, PNM has granted invalid TSRs [Transmission Service Requests] submitted by wholesale power marketing function affiliate, PNM, and from other customers (*i.e.*, FEC [Foresight], HLM [High Lonesome], EPEC [El Paso], FEUS [Farmington], and EURUS)."³³ These brief, passing references to EURUS and other companies fail to meet the requirements of Rule 206 of the Commission's Rules of Practice and Procedure, which requires that a complaint clearly identify the action or

²⁹ High Lonesome Order, 128 FERC ¶ 61,017 at P 23 n.20; *see supra* PP 4-5.

³⁰ *See, e.g., New York Indep. Sys. Operator*, 135 FERC ¶ 61,170, at P 105, *order on reh'g*, 137 FERC ¶ 61,218 (2011); *So. Cal. Edison Co.*, 135 FERC ¶ 61,164, at P 12 (2011).

³¹ Cargill Rehearing Request at 9-11.

³² Complaint at 28 & n.108 (identifying EURUS; the remaining four customers are PNM Marketing, El Paso Electric Company, Farmington Electric Utility System, and Foresight (*i.e.*, High Lonesome)).

³³ *Id.* at 43.

inaction alleged to violate applicable statutory standards or regulatory requirements and include documents that support the complaint.³⁴ They are insufficient to indicate that Cargill intended the Commission to address, in the Complaint proceeding, the harm that EURUS (and the other companies) allegedly caused Cargill. As the Commission has stated, “rather than bald allegations, [complaining parties] must make an adequate proffer of evidence, including pertinent information and analysis to support its claims.”³⁵

21. Moreover, only on rehearing does Cargill contend that its transmission service request and that of EURUS were competing requests.³⁶ Our longstanding policy proscribes the introduction of new evidence or issues at the rehearing stage because parties are unable to challenge them.³⁷ Thus, we reject Cargill’s assertion that the July 29 Order should have addressed Cargill’s claim that it was harmed by PNM’s validation of EURUS’ non-conforming transmission service request. If Cargill had wanted the Commission to address the EURUS transmission service request in these Complaint proceedings, then Cargill should have asserted harm, filed supporting evidence, and requested relief when it filed its Complaint – which it did not do – instead of waiting for rehearing.

3. Reprocessing the PNM Queue

22. In support of its claim that, in the July 29 Order, the Commission should have ordered a general reprocessing of the PNM transmission queue, Cargill cites *Tenaska Power Services*.³⁸ Cargill states that, in *Tenaska*, the Commission found that the

³⁴ See 18 C.F.R. § 385.206(b) (2012).

³⁵ *Californians for Renewable Energy, Inc. v. Cal. Pub. Util. Comm’n*, 129 FERC ¶ 61,075, at P 13 (2009) *reh’g denied*, 131 FERC ¶ 61,102 (2010) (citing *Ill. Mun. Elec. Agency v. Central Ill. Pub. Serv. Co.*, 76 FERC ¶ 61,084, at 61,482 (1996)).

³⁶ See *supra* P 19.

³⁷ See, e.g., *Startrans 10*, 130 FERC ¶ 61, 209, at P 22, *reh’g denied*, 133 FERC ¶ 61,154 (2010) (new evidence introduced at the rehearing stage is not subject to challenge and is therefore inappropriate); *Tesoro Refining and Marktg. Co. v. Calnev Pipe Line, LLC*, 136 FERC ¶ 61,083, at P 6 (2011) (permitting new issues to be raised on rehearing disrupts the administrative process because it creates a impermissible moving target).

³⁸ *Tenaska Power Services Co.*, 106 FERC ¶ 61,230, at PP 53-54, *reh’g denied*, 107 FERC ¶ 61,308 (2004) (*Tenaska*).

transmission provider's methodology of treating rollover requests was discriminatory, and therefore the Commission directed reprocessing of Tenaska's transmission queue in accordance with the methodology in its Business Practices. Cargill argues that, consistent with this precedent, the Commission should have ordered PNM to reprocess its transmission queue and offer the capacity awarded to customers such as High Lonesome and EURUS to other customers, instead of ordering a hearing on the appropriate relief that PNM was required to make to Cargill.³⁹

23. We deny rehearing on this issue. Cargill exaggerates the breadth of the holding in *Tenaska*, and the factual underpinnings of each of these cases are distinct. In *Tenaska*, the Commission found that the Midwest Independent Transmission System Operator, Inc. (MISO) had improperly handled requests for transmission service that competed with rollover requests, such that various companies were harmed. Thus, based on this demonstration of actual harm, the Commission ordered MISO to reprocess its transmission queue.⁴⁰ In contrast, in this proceeding, Cargill's Complaint did not present evidence of harm that sufficed to necessitate our ordering the reprocessing of PNM's entire transmission queue. In addition, *Tenaska* does not stand for the proposition that transmission queue reprocessing is the sole remedy for improper transmission queue processing. Rather, as stated in the Settlement Order, while the Commission could have followed *Tenaska* and required queue reprocessing, it chose instead to give the parties an opportunity to first develop the evidence, explore alternative solutions, and consider the impact of queue reprocessing.⁴¹ As the Settlement Order noted, the Commission's discretion is at its zenith when fashioning remedies,⁴² and therefore the Commission was not required to mandate reprocessing of the transmission queue. Additionally, we find that Cargill's voluntary settlement with PNM concerning service on the Blackwater Path establishes that Cargill was satisfied with a remedy that does not require broad queue reprocessing.

24. Furthermore, Cargill's request for the reprocessing of PNM's transmission queue was vague and unspecific.⁴³ Cargill did not state whether it requests reprocessing of

³⁹ Cargill Rehearing Request at 13-14.

⁴⁰ *Tenaska*, 106 FERC ¶ 61,230 at P 53.

⁴¹ Settlement Order, 137 FERC ¶ 61,259 at P 33.

⁴² *Id.* P 35 n.40 (citing *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153 (D.C. Cir. 1967)).

⁴³ *See supra* P 20.

PNM's entire transmission queue dating back to December 1, 1997, the earliest date mentioned in Table 2, or a different date. Further, Cargill did not state which companies should have been made aware that their transmission service requests and existing transmission service agreements were possibly insecure. Nor did Cargill provide evidence showing which companies were actually harmed. In addition, Cargill's allegation of general harm to PNM's transmission customers is insufficient to warrant a reprocessing of PNM's entire transmission queue for an indeterminate time period and unspecified transmission paths. Accordingly, we deny rehearing on this issue.

The Commission orders:

The rehearing requests filed by PNM and Cargill are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.