

142 FERC ¶ 61,030  
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.

Public Service Company of New Mexico

Docket No. ER13-390-000

ORDER ON PROPOSED TARIFF REVISIONS

(Issued January 15, 2013)

1. On November 16, 2012,<sup>1</sup> pursuant to section 205 of the Federal Power Act (FPA), the Public Service Company of New Mexico (PNM) filed an executed Asset Purchase Agreement (Purchase Agreement) with the U.S. Bank National Association and Tortoise Capital Resources Corporation (Tortoise) and associated tariff revisions<sup>2</sup> to comply with the directives of Commission orders issued on July 5, 2012, and November 5, 2012.<sup>3</sup> In this order, we accept PNM's tariff revisions and the transmission service-related provisions of the Purchase Agreement to be effective January 16, 2013, subject to the outcome of the proceeding in Docket No. EC13-39-000.<sup>4</sup> We also direct PNM to submit a compliance filing to file the relevant provisions of the Purchase Agreement in eTariff, as discussed below.

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<sup>1</sup> Although PNM's transmittal letter is dated November 14, 2012, the Commission notes that the filing was not submitted until after 5:00 pm on November 15, 2012. Therefore, the date that PNM submitted the filing is November 16, 2012.

<sup>2</sup> PNM's filing of the Purchase Agreement and tariff revisions will be referred to as the November 16 Filing for the purposes of this order.

<sup>3</sup> *TGP Granada, LLC et al. v. Pub. Serv. Co. of New Mexico et al.*, 140 FERC ¶ 61,005 (2012) (July 5 Order); *TGP Granada, LLC et al. v. Pub. Serv. Co. of New Mexico et al.*, 141 FERC ¶ 61,094 (2012) (November 5 Order).

<sup>4</sup> On November 14, 2012, PNM filed an application for approval of acquisition of jurisdictional facilities, including the transmission service-related provisions of the Purchase Agreement, pursuant to section 203 of the FPA in Docket No. EC13-39-000.

## **I. Background**

2. This proceeding involves the Eastern Interconnection Project (EIP), which consists of 216 miles of 345 kV transmission lines and associated facilities, rated at a capacity of 1000 MW, that connect the Blackwater Substation and the Bernalillo-Algodones Switchyard in New Mexico.<sup>5</sup> PNM currently owns 60 percent of the EIP's capacity and Tortoise, an institutional investor, owns 40 percent of the EIP's capacity (Leased Capacity), which Tortoise leases to PNM pursuant to a lease agreement (Lease) that expires on April 1, 2015.<sup>6</sup> PNM operates 100 percent of the EIP's capacity pursuant to its open access transmission tariff (OATT); however, due to contractual provisions in the Lease, PNM does not currently offer transmission service over the Leased Capacity beyond the Lease's expiration date.

3. On March 2, 2012, pursuant to section 206 of the FPA,<sup>7</sup> TGP Granada, LLC (TGP Granada) and Roosevelt Wind Ranch, LLC (Roosevelt)<sup>8</sup> (collectively, TGP) filed a complaint (Complaint) against PNM and Tortoise requesting that the Commission direct PNM and Tortoise to identify the party responsible for providing long-term transmission service over the Leased Capacity beyond the Lease's expiration date.<sup>9</sup>

4. In the July 5 Order, the Commission, among other things, granted TGP's Complaint and directed PNM, in consultation with Tortoise, to report back to the Commission within 30 days of the date of the July 5 Order on which entity would be responsible for offering transmission service over the Leased Capacity beyond April 1, 2015.<sup>10</sup>

5. On August 6, 2012, PNM submitted an informational filing stating that it had been unable to reach an agreement with Tortoise to purchase the Leased Capacity and

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<sup>5</sup> The background of this proceeding has previously been discussed in the July 5 Order. Thus, only the relevant background details are described briefly here.

<sup>6</sup> Tortoise acquired this 40 percent interest in the EIP from Phillip Morris Capital Corporation (Phillip Morris) in June 2011. Previously, Phillip Morris held a lease with PNM for the Leased Capacity that also expired on April 1, 2015.

<sup>7</sup> 16 U.S.C. § 824e (2006).

<sup>8</sup> TGP Granada and Roosevelt are wholly-owned, indirect subsidiaries of Terra-Gen Power, LLC.

<sup>9</sup> TGP also filed a petition for declaratory order or, in the alternative, a request for waiver with the Commission, regarding certain provisions in PNM's OATT.

<sup>10</sup> July 5 Order, 140 FERC ¶ 61,005 at PP 19-20.

requesting an extension of time. In addition, Tortoise filed an informational report requesting that the Commission grant PNM's request for additional time. On August 13, 2012, the Secretary of the Commission granted a 30-day extension of time until September 5, 2012.

6. On September 5, 2012, PNM submitted a second informational filing, stating that it had reached an agreement in principle with Tortoise to purchase the Leased Capacity upon the Lease's expiration date. PNM stated that, prior to the termination of the Lease and upon Commission approval of the Purchase Agreement, it would immediately assume responsibility for offering long-term service over the Leased Capacity and would not implement a separate queue for this capacity. In order to execute the Agreement, PNM requested an additional extension of time.

7. In the November 5 Order, the Commission conditionally accepted PNM's September 5 Filing as complying with the July 5 Order's directive to identify the party responsible for providing long-term transmission service over the Leased Capacity, subject to PNM filing the Purchase Agreement on or before November 14, 2012.<sup>11</sup> The Commission also declined to act on a July 24, 2012 motion for clarification of the July 5 Order filed by TGP, stating that it would be premature to address the merits of the Motion before PNM and Tortoise reached a final resolution.<sup>12</sup> The Commission also declined to direct PNM to address certain issues raised by intervenors regarding its transmission service queue.<sup>13</sup>

## II. PNM's November 16 Filing

8. PNM states that the Purchase Agreement provides for the purchase of the Leased Capacity from Tortoise upon the expiration date of the Lease, i.e. April 1, 2015. Upon consummation of the purchase, which, in part, requires the Commission's separate approval of PNM's application under FPA section 203 in Docket No. EC13-39-000,<sup>14</sup> PNM will own 100 percent of the EIP's capacity. In order to provide transmission service upon the expiration of the Lease, PNM also requests approval of transmission service-related provisions of the Purchase Agreement under section 205 of the FPA. In the November 16 Filing, PNM filed the Purchase Agreement, explaining that Article IV of the Purchase Agreement, along with Exhibit 4.1, constitute agreements relating to the provision of transmission service and, as such, must be filed with and accepted by the

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<sup>11</sup> November 5 Order, 141 FERC ¶ 61,094 at P 11.

<sup>12</sup> *Id.* P 13.

<sup>13</sup> *Id.* P 11.

<sup>14</sup> November 16 Filing at 3 (citing 16 U.S.C. § 824b (2006)).

Commission pursuant to section 205 of the FPA.<sup>15</sup> PNM states that Article IV of the Purchase Agreement provides that PNM will assume sole responsibility for evaluating, granting, or denying post-Lease transmission service requests, and compliance with all relevant laws and regulatory orders related to such activities involving the acquired capacity.<sup>16</sup>

9. PNM explains that as both the owner of 60 percent of the EIP's capacity and lessor of the remaining 40 percent, it has always operated the entire EIP capacity pursuant to its OATT. In purchasing the 400 MW of capacity from Tortoise, PNM states that it will continue to treat all transmission service requests in accordance with the terms and conditions of its OATT and existing transmission and interconnection queues. PNM asserts that it is not willing to purchase the Leased Capacity if it will be required to offer transmission service for the 400 MW under a separate or additional transmission or interconnection service queue.<sup>17</sup> PNM states that operating two service queues would result in considerable additional expenses and administrative burden. As the operator for the EIP, PNM indicates that it has received transmission service requests for the Leased Capacity. PNM asserts that these requests remain in its queue with a service priority based on the Commission's longstanding first-come, first-served policy.<sup>18</sup>

10. PNM notes that, in its motion for clarification, TGP requests a queue priority for service on the Leased Capacity, based on a transmission service request it submitted to Phillip Morris, Tortoise's predecessor-in-interest, on December 31, 2009. PNM clarifies that it takes no position as to whether the Commission should grant TGP's request and direct it to treat any service requests made to Phillip Morris or Tortoise as valid, other than that it will not operate an additional service queue for the Leased Capacity.<sup>19</sup> If the Commission chooses to direct PNM to accept requests made to Phillip Morris or Tortoise, PNM asks that the Commission ensure that any alternative requests submitted to both PNM and Phillip Morris or Tortoise for the same capacity be treated as one single

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<sup>15</sup> PNM explains that Exhibit 4.1 of the Purchase Agreement is the "Attachment EIP," providing PNM's terms for transmission service during the interim period between PNM's purchase of the Leased Capacity and the consummation of the purchase. The Attachment EIP is also proposed as a tariff revision and is discussed below. *Id.* at 2, 9.

<sup>16</sup> *Id.* at 4.

<sup>17</sup> *Id.* at 5.

<sup>18</sup> *Id.* at 6 (citing PNM Tariff, § 13.2(i)).

<sup>19</sup> *Id.* at 6.

service request for that capacity. PNM asserts that these queue issues constitute legal and policy matters that do not require a hearing or further factual development.<sup>20</sup>

11. PNM states that it will commence offering transmission service over the Leased Capacity once the conditions in the Purchase Agreement are fulfilled, which will likely be upon issuance of favorable Commission orders in this proceeding and in the FPA section 203 proceeding in Docket No. EC13-39-000. PNM contends that the most significant, albeit unlikely, condition under which the parties could terminate the Purchase Agreement would be an order on rehearing, appeal, or remand of an initial Commission order on either the section 203 or section 205 filings that either party believes may materially and adversely affect its ability to consummate the Purchase Agreement.<sup>21</sup> In the event that either of the parties terminates the Purchase Agreement, PNM notes that Tortoise will be responsible for offering transmission service over the Leased Capacity.

12. Regarding the proposed tariff revisions, PNM explains that it is required to notify its transmission customers of the possibility that the Purchase Agreement does not become effective; thus, PNM proposes to add an “Attachment EIP” to its tariff for use in service agreements entered into between the time that the Commission ultimately approves its sections 203 and 205 filings and April 1, 2015.<sup>22</sup> In particular, the Attachment EIP notifies customers that, if PNM does not ultimately acquire the Leased Capacity, customer rates could change. PNM asserts that these provisions balance the risk that the Purchase Agreement may not be consummated with the likelihood that PNM will, in fact, purchase the 400 MW from Tortoise upon the expiration of the Lease. Therefore, PNM argues that the Attachment EIP is just, reasonable, and not unduly discriminatory, and superior to the *pro forma* provisions it supplements due to its non-intrusive nature. PNM requests the Commission explicitly determine that use of the Attachment EIP in connection with the service agreements named in the Attachment EIP, represents a conforming change to such service agreement.<sup>23</sup> PNM states that it will seek Commission approval to remove the Attachment EIP from its tariff once the provision has served its purpose.

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<sup>20</sup> *Id.* at 7.

<sup>21</sup> *Id.* at 8.

<sup>22</sup> During this time, PNM will offer transmission service with an end date beyond April 1, 2015, over the Leased Capacity; however, PNM will not officially own the Leased Capacity until April 1, 2015, assuming that the parties ultimately consummate the Purchase Agreement.

<sup>23</sup> November 16 Filing at 10.

13. Lastly, PNM requests waiver of the Commission's prior notice requirements so that the Purchase Agreement and Attachment EIP will become effective on the date the Commission issues an order accepting the instant filing. PNM states that good cause exists because of the need to provide certainty for customers seeking transmission services over the Leased Capacity.<sup>24</sup>

### **III. Notice of Filing and Responsive Pleadings**

14. Notice of the filing was published in the *Federal Register*, 77 Fed. Reg. 70,427 (2012), with interventions and comments due on or before December 7, 2012. Tortoise and Cargill Power Markets, LLC (Cargill) filed motions to intervene and comments.

15. Tortoise states that it fully supports the Purchase Agreement and associated tariff revisions. Without the Commission's approval of the November 16 Filing, Tortoise asserts that it would risk being regulated as a jurisdictional transmission owner, even though it is only a passive interest owner of the Leased Capacity.<sup>25</sup> If it were to become a jurisdictional transmission owner, Tortoise argues that significant delays and inefficiencies in offering long-term service over the Leased Capacity would result. Tortoise adds that such action would discourage passive investment in energy infrastructure and increase transmission rates for customers using the EIP.

16. Cargill urges the Commission to accept the Purchase Agreement and Attachment EIP expeditiously in order to allow PNM to provide long-term service over the Leased Capacity as soon as possible. In addition, Cargill requests that the Commission concurrently issue an order rejecting TGP's motion for clarification, in order to provide certainty to PNM and customers.<sup>26</sup> Regarding TGP's December 31, 2009 transmission service request, Cargill holds that it would be inappropriate to incorporate requests made to Phillip Morris or Tortoise into the PNM queue, given that it was generally understood that PNM was the proper recipient of service requests because it operated 100 percent of the EIP's capacity.<sup>27</sup> Cargill argues that, without Commission guidance on TGP's motion concerning its December 31, 2009 transmission service request, it is unclear how PNM can properly allocate available capacity to EIP customers.

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<sup>24</sup> *Id.*

<sup>25</sup> Tortoise December 7, 2012 Comments at 3.

<sup>26</sup> Cargill December 7, 2012 Comments at 6.

<sup>27</sup> *Id.* at 8.

#### IV. Discussion

##### A. Procedural Matters

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

##### B. Commission Determination

18. We accept the uncontested tariff revisions, and the transmission service-related provisions of the Purchase Agreement, effective January 16, 2013, and subject to the outcome of the proceeding in Docket No. EC13-39-000. In accepting PNM's filing, we clarify that PNM should continue to operate the Leased Capacity pursuant to its tariff and administer its transmission service queue on a first-come, first-served basis. Further, we clarify that PNM is to continue to operate its single queue for all capacity on the EIP. There will be no changes to PNM's service queue or its operation, as doing so could interfere with PNM's provision of transmission service. We also accept PNM's commitment to make a filing under section 205 of the FPA to remove the Attachment EIP from its tariff within 30 days of its final purchase of the Leased Capacity on April 1, 2015.

19. In response to requests that the Commission issue an order on TGP's motion for clarification, we will address that motion in the proceeding involving TGP's Complaint in Docket Nos. EL12-42-001 and EL12-43-001 and not in this section 205 proceeding.

20. In accepting PNM's proposed tariff revisions, we find it is unclear whether PNM seeks an effective date on the date the order is issued or the date after the order is issued.<sup>28</sup> Therefore, we deny PNM's request for waiver of the Commission's 60-day prior notice requirements. We find that PNM has not demonstrated good cause for waiver and, further, that in this proceeding, waiver is unnecessary to grant an effective date the day after issuance of this order.<sup>29</sup> Therefore, we accept the November 16 Filing to be effective January 16, 2013, 61 days after the filing date and subject to the outcome of Docket No. EC13-39-000, as discussed above.

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<sup>28</sup> See November 16 Filing at 2 (requesting an effective date the day the order is issued), 10 (requesting an effective date the day after the order is issued).

<sup>29</sup> *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).

21. Finally, we find that PNM filed only the Attachment EIP tariff revisions in eTariff. PNM did not file the transmission service-related provisions of the Purchase Agreement for which it seeks section 205 approval in eTariff. Accordingly, we require PNM to file, within 30 days of the date of this order, the applicable provisions of the Purchase Agreement in eTariff.

The Commission orders:

(A) PNM's tariff revisions and the transmission service-related provisions of the Purchase Agreement are accepted, effective January 16, 2013, subject to the outcome of the proceeding in Docket No. EC13-39-000, as discussed in the body of this order.

(B) PNM is directed to submit a compliance filing within 30 days of the date of this order, as discussed in the body of this order.

(C) PNM's request for waiver of the 60-day prior notice requirement is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.