

143 FERC ¶ 61,226
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Tri-State Generation and Transmission Association, Inc. Docket No. EL13-53-000

v.

Public Service Company of New Mexico

ORDER DENYING COMPLAINT AND DISMISSING MOTION FOR
CONSOLIDATION

(Issued June 10, 2013)

1. On March 13, 2013, Tri-State Generation and Transmission Association, Inc. (Tri-State) filed a Complaint against Public Service Company of New Mexico (PNM) pursuant to section 206 of the Federal Power Act (FPA) alleging that PNM's current rates are unjust and unreasonable.¹ Tri-State also requested that the Commission consolidate this proceeding with PNM's ongoing Formula Rate Proceeding.² In this order, we deny Tri-State's Complaint and dismiss its Motion for Consolidation, as discussed below.

I. Background

2. On December 31, 2012 and January 2, 2013, PNM filed revisions to its Open Access Transmission Tariff (OATT), Electric Coordination Tariff (Coordination Tariff), and two pre-OATT bilateral contracts (Bilateral Contracts) in order to replace a stated rate with a cost-based formula rate (Formula Rate Filing). On March 1, 2013, the Commission issued an order rejecting in part and conditionally accepting in part and suspending PNM's proposed tariff revisions for five months, to become effective August 2, 2013, subject to refund. Further, the Commission established hearing and settlement judge procedures and consolidated the three proceedings for purposes of

¹ 16 U.S.C. § 824e (2006).

² See Docket Nos. ER13-685-000, ER13-685-001, ER13-687-000, and ER13-690-000 (Formula Rate Proceeding).

hearing and settlement judge procedures.³ Specifically, the Commission directed PNM to submit a compliance filing to remove an acquisition adjustment for its interest in the Eastern Interconnection Project and to revise its proposed formula rate to reflect a return on equity (ROE) based on the median instead of the midpoint. In addition, the Commission denied Tri-State's request to initiate a section 206 investigation and advised Tri-State that, if it had a concern with PNM's existing rates, this was beyond the scope of PNM's filing.⁴ On April 1, 2013, PNM submitted a compliance filing removing the acquisition adjustment and using the median to establish its ROE.⁵ PNM and Navopache Electric Cooperative, Inc. (Navopache) filed requests for rehearing of the March Order.

3. During the five-month suspension period, PNM's rates were to remain at the current level, which were established when the Commission, on January 2, 2013, approved an uncontested Settlement Agreement among PNM and the active intervenors⁶ that PNM filed with the Commission on July 3, 2012.⁷ The settlement resolved issues about the proper level of PNM's power losses that were set for hearing in 2011.⁸ As explained in the presiding judge's certification, the Settlement Agreement, among other things, established an Annual Transmission Revenue Requirement (ATRR) for PNM of \$79.5 million.⁹

II. Complaint

4. Tri-State argues that, in light of the Commission's directive to remove the acquisition adjustment and to recalculate the ROE based on the median, PNM's currently-effective ATRR and resulting Network Integration Transmission Service (NITS) and point-to-point (PTP) transmission service rates under PNM's OATT are no longer just and reasonable. Tri-State argues that the Commission should therefore direct PNM to reduce its currently-allowed transmission revenues by the amount that

³ *Pub. Serv. Co. of N.M.*, 142 FERC ¶ 61,168 (2013) (March Order).

⁴ *Id.* P 22.

⁵ PNM Compliance Filing, Docket No. ER13-690-002 (filed April 1, 2013).

⁶ Active Intervenors refers to: El Paso Electric Company (El Paso); the Incorporated County of Los Alamos, New Mexico (Los Alamos); the Navajo Tribal Utility Association; Navopache; Tri-State; and the Western Area Power Administration (Western).

⁷ *Pub. Serv. Co. of N.M.*, 142 FERC ¶ 61,004 (2013).

⁸ *Pub. Serv. Co. of N.M.*, 135 FERC ¶ 61,196 (2011).

⁹ *See Pub. Serv. Co. of N.M.*, 140 FERC ¶ 63,008, at P 20 (2012).

corresponds to the rate modification ordered by the March Order. Specifically, Tri-State explains that PNM proposed an ATRR for 2011 of approximately \$80.4 million in its Formula Rate Filing; however, when adjusted to remove the acquisition adjustment and to use a median-based ROE, Tri-State asserts that the resulting ATRR, based on the ATRR PNM submitted in the Formula Rate Filing, is \$73.2 million (an amount \$7.2 million lower than its proposed ATRR of \$80.4 million). Therefore, Tri-State argues that the Commission should direct PNM to reduce its currently effective ATRR of \$79.5 million, which was established by the Settlement Agreement, to no higher than \$73.2 million.¹⁰

5. Additionally, Tri-State requests that the Commission initiate an investigation under section 206 of the FPA regarding the justness and reasonableness of the transmission rates currently charged under PNM's effective tariff, arguing that PNM's transmission customers should pay lower transmission rates until the formula rates now suspended for five months and set for hearing are implemented. In addition, Tri-State's Complaint requests that the Commission establish a refund effective on the date it filed the Complaint, i.e. March 13, 2013.

6. Finally, Tri-State requests that the Commission consolidate the Complaint proceeding with the Formula Rate Proceeding, in which the Commission set the proposed formula rate for hearing and settlement judge procedures.¹¹ Tri-State argues that these dockets present common issues of law and fact because the Complaint stems from the differential between PNM's currently effective transmission rates and the rates proposed in the Formula Rate Filing, which the Commission found in the March Order may be unjust and unreasonable. Tri-State adds that consolidation would promote administrative efficiency, preserve Commission and party resources, and prevent an inconsistent outcome between the Complaint and the Formula Rate Proceeding.¹²

III. Notice and Responsive Pleadings

7. Notice of the Complaint was published in the *Federal Register*, 78 Fed. Reg. 17,652 (2013), with PNM's answer, interventions, and protests due on or before April 2, 2013. Timely motions to intervene were filed by Aragonne Wind LLC, El Paso, and Western. Timely motions to intervene and comments were filed by Los Alamos and Navopache. On April 2, 2013, PNM timely filed its answer. On April 17, 2013, Tri-State filed an answer to PNM's answer.

¹⁰ Complaint at 7.

¹¹ *Id.* at 8.

¹² *Id.* at 9.

8. Los Alamos and Navopoche agree with Tri-State that, in light of the Commission's findings in the March Order, PNM's currently effective transmission rates are unjust and unreasonable and should be lowered to \$73.2 million, to match the rate level in the formula rate-based ATRR proposed by PNM in the Formula Rate Proceeding, as adjusted to include the modifications directed by the March Order.¹³ Los Alamos and Navopoche also support Tri-State's request that the Commission set the Complaint for hearing and settlement judge procedures, establish a refund effective date as of the date of the Complaint, and grant Tri-State's Motion for Consolidation of the Complaint with PNM's ongoing transmission rate proceeding.¹⁴

A. PNM Answer

9. PNM argues that the Commission should dismiss Tri-State's Complaint because it fails to meet the *Mobile-Sierra*¹⁵ public interest standard applicable to party challenges and is erroneously premised on a comparison between the ATRR established in the Settlement Agreement and an ATRR (derived from PNM's 2011 FERC Form No. 1 data) that will never become effective.¹⁶ PNM also requests that, if the Commission dismisses the Complaint, it should also deny both Tri-State's request for a hearing and its Motion for Consolidation of the Complaint with the ongoing Formula Rate Proceeding.

10. PNM explains that, based on the terms of the Settlement Agreement, parties to that settlement who challenge the terms of the settlement are bound by the *Mobile-Sierra* public interest standard of review when requesting changes to the settlement or changes to the tariff provisions implementing the settlement. Specifically, PNM states that section 6.8 of the Settlement Agreement requires the application of the *Mobile-Sierra* public interest standard to any proposed change to the Settlement Agreement. PNM argues that Tri-State has not alleged, let alone demonstrated, that its complaint meets any of these requirements. PNM asserts that Tri-State, as a party to the Settlement Agreement, voluntarily agreed to pay its current rates and, further, that the period for which Tri-State seeks rate relief will last only five months.¹⁷ Therefore, PNM argues that it is impossible to imagine any way in which Tri-State's Complaint could demonstrate

¹³ Los Alamos Comments at 3; Navopoche Comments at 2.

¹⁴ Los Alamos Comments at 3; Navopoche Comments at 3.

¹⁵ PNM Answer at 1, citing *United Gas Pipe Line Co. v. Mobile Gas Services Corp.*, 350 U.S. 332 (1956) (*Mobile*); *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Sierra*) (collectively, *Mobile-Sierra*).

¹⁶ *Id.* at 1-2.

¹⁷ *Id.* at 9.

that the public will be “severely harmed” as required for relief under the *Mobile-Sierra* public interest standard. Moreover, PNM contends that the Commission has rejected the application of the just and reasonable standard to a challenge of provisions contained in an agreement subject to the *Mobile-Sierra* standard, even if the rates under the contract subsequently become unjust and unreasonable or were unjust and unreasonable at the time they entered into the contract.¹⁸ For these reasons, PNM argues that the Commission should dismiss Tri-State’s Complaint as deficient.

11. In addition, PNM claims that Tri-State’s reliance on the adjustments directed in the March Order is also in error. PNM explains that, in addition to the acquisition and ROE adjustments, the Commission directed PNM to recalculate its rates using its 2012 Form No. 1 data and projections for transmission projects to be placed in service during calendar year 2013 for filing by May 1, 2013. PNM argues that, based on this directive, the March Order obviated the possibility that the rates proposed in the Formula Rate Filing would ever be used to derive the actual rates charged to its customers.¹⁹ Further, PNM explains that there is no way to lower the ATRR and resulting transmission rates established by the Settlement Agreement because, given that those rates were agreed to on a black box basis, the components used to derive those rates are unknown. Thus, PNM contends that Tri-State has no factual basis on which to claim any financial harm to itself or its ratepayers that rises to the level needed to satisfy the *Mobile-Sierra* public interest standard.²⁰

12. In addition, PNM requests that the Commission dismiss Tri-State’s request to set the Complaint for hearing. PNM asserts that Tri-State has failed to proffer evidence to support its claim that there are material facts in dispute regarding the rates established by the Settlement Agreement, let alone proffer sufficient evidence to substantiate any such claim. Thus, PNM contends that the Commission can resolve the complaint based on the written record without initiating a hearing process, particularly since Tri-State has failed to meet the applicable *Mobile-Sierra* public interest standard.²¹

13. Lastly, PNM requests that the Commission also dismiss Tri-State’s request to consolidate the Complaint with the ongoing Formula Rate Proceeding, because it would not facilitate the disposition of common issues of law and fact, promote administrative efficiency, preserve Commission and party resources, or prevent inconsistent outcomes.²²

¹⁸ *Id.* at 10.

¹⁹ *Id.* at 11.

²⁰ *Id.* at 12.

²¹ *Id.* at 13.

²² *Id.*

PNM argues that the March Order specifically states that any concern with PNM's current rates is beyond the scope of the Formula Rate Proceeding.²³ Moreover, PNM contends that the two proceedings are fundamentally different, as the complaint proceeding concerns PNM's current rates, which were achieved through a black box settlement, while PNM's proposal to change its current stated rate structure to a formula rate construct, at issue in the Formula Rate Proceeding, has yet to be settled or fully litigated. PNM also argues that the two proceedings concern two different rate periods and, thus, require separate proceedings and, inevitably, different outcomes.²⁴ Therefore, PNM requests that, even if the Commission grants Tri-State's Complaint, the Commission should deny Tri-State's requests for a hearing and for consolidation of any proceeding on Tri-State's Complaint with the ongoing Formula Rate Proceeding.

B. Tri-State Answer

14. Tri-State clarifies that its Complaint does not challenge the Settlement Agreement but, instead, disputes the current ATRR under PNM's OATT on a prospective basis. Therefore, Tri-State asserts that the *Mobile-Sierra* public interest standard does not apply to its challenge of PNM's currently effective rate. Tri-State argues that, contrary to PNM's assertions, the Commission has commenced complaint proceedings under similar circumstances relying upon the just and reasonable standard of review. Tri-State explains that the Commission instituted a section 206 proceeding in *Public Service Company of Colorado*, without applying the *Mobile-Sierra* public interest standard of review, because the complainants raised issues of material fact and sought to preserve their rights and ability to obtain a refund for a period that went beyond the scope of the relief at issue in hearing and settlement proceedings.²⁵ Tri-State argues that this same approach should be followed here and the Commission should deny PNM's request to evaluate its complaint under the *Mobile-Sierra* public interest standard.

15. Tri-State maintains that its Complaint does, in fact, demonstrate that PNM's currently effective rates are unjust and unreasonable in light of PNM's Formula Rate Filing and the Commission's March Order. Tri-State claims that, even though PNM will submit revised rates on May 1, 2013, PNM's original submission of these rates for filing demonstrates that PNM finds them to be just and reasonable, regardless of whether they become effective as proposed. Tri-State maintains that the March Order demonstrates

²³ See PNM Answer at 14.

²⁴ *Id.* at 15.

²⁵ Tri-State Answer at 4-5 & n.9 (citing *Pub. Serv. Co. of Colo.*, 141 FERC ¶ 61,019 (2012)).

that PNM's currently effective rates, without the Commission's directed modifications, are unjust and unreasonable and must be reduced to no higher than \$73.2 million.²⁶

16. Tri-State also counters PNM's request that the Commission deny both Tri-State's requests for hearing and consolidation of the complaint proceeding with the ongoing Formula Rate Proceeding. Tri-State asserts that, to the extent that PNM's rehearing request alleges that the March Order presents material issues of fact, the Commission should consolidate the complaint with the settlement judge and hearing procedures already established for the Formula Rate Proceeding. Tri-State disagrees with PNM's contention that the two proceedings do not share common issues of law and fact. In this regard, Tri-State cites *Public Service Company of Colorado*, where the Commission permitted the consolidation of an investigation into the company's existing rates with the contemporaneous formula rate proceeding based on the common nexus of issues between the two proceedings.²⁷ Similarly, Tri-State argues that its Complaint and PNM's Formula Rate Proceeding share a common nexus of issues and should, therefore, be consolidated. Tri-State reiterates that the consolidation of the two proceedings would promote administrative efficiency, conserve staff and Commission resources, and ensure consistent results across both proceedings.

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.

18. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2012), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept Tri-State's answer because it has assisted us in our decision-making process.

B. Commission Determinations

19. We will deny Tri-State's Complaint and dismiss its Motion for Consolidation. We find that Tri-State has failed to meet the requirement to quantify the financial impact or burden of its Complaint under Rule 206(b)(4) of the Commission's Rules of Practice and

²⁶ Tri-State Answer at 5.

²⁷ *Id.* at 7.

Procedure.²⁸ Further, we will dismiss Tri-State's request that we consolidate the Complaint with PNM's ongoing Formula Rate Proceeding, as discussed below.

20. We disagree with Tri-State's contention that the Commission's findings regarding the components PNM used to derive its proposed formula rate demonstrate that the settlement-based rates PNM currently charges are unjust and unreasonable. PNM's proposed formula rate consists of numerous cost-of-service components that are updated each year based on PNM's costs and revenues. PNM's current stated rate, however, like other black box settlement-based rates, does not set forth any cost-of-service elements or explain how the stated rates were derived.²⁹ Moreover, the parties' Settlement Agreement and the Commission's approval of the Settlement Agreement were based on the bottom line stated rate and not on any agreed-upon rate treatment for a particular expense or revenue item. The fact that the settlement rates are higher than the adjusted formula rates set for hearing does not, by itself, demonstrate that the settlement rates may fall outside of the zone of reasonableness and, thus, may be unjust and unreasonable. Therefore, we find that the March Order's determinations regarding the specific cost components of PNM's proposed formula rate do not, without more, invalidate the justness and reasonableness of PNM's current rates.

21. The Commission has found in other proceedings concerning black box settlements that it would be impossible to determine which cost components are included in current rates and which were excluded.³⁰ Without knowledge of or access to this cost and revenue information, the Commission cannot quantify the financial impact that cost elements, including the acquisition adjustment or ROE, may have had on PNM's current rates. Nor does the Complaint identify any specific quantifiable financial impact on Tri-State. Thus, we find that Tri-State's comparison of the settlement-based ATRR to the ATRR that Tri-State alleges will result from the March Order's directives does not constitute "a good faith effort to quantify the financial impact or burden (if any) created

²⁸ 18 C.F.R. § 385.206(b)(4) (2012). In the background of this order, we explain that PNM's answer to the Complaint argues that the Complaint should be denied because, among other reasons, it fails to meet the *Mobile-Sierra* public interest standard applicable to party challenges. In turn, Tri-State presents its arguments as to why, in its view, the just and reasonable standard applies here. Because we find that Tri-State has not met its burden under Rule 206(b)(4) we need not reach the issue of whether the *Mobile-Sierra* public interest standard applies here, as Tri-State has not established an adequate basis for its Complaint even under the just and reasonable standard.

²⁹ Section 6.4 of the Settlement Agreement states that its contents are "privileged and shall not be admissible in evidence or made a part of the record in any proceeding."

³⁰ See *El Paso Natural Gas Co.*, 132 FERC ¶ 61,139, at PP 81-82 (2010) (citing *United Gas Pipe Line Co.*, 56 FERC ¶ 61,214, at 61,855 n.7 (1991)).

for the complainant as a result of the action or inaction” as required by the Commission’s regulations.³¹ We agree with PNM that Tri-State’s Complaint amounts to a mere allegation of disputed facts that, consistent with Commission precedent, is “insufficient to mandate a hearing.”³² Without a demonstration that PNM’s current rates are unjust and unreasonable, including adequate evidence and a clear demonstration of the rates’ financial impact, we find that there are no issues of material fact that necessitate a formal trial-type evidentiary hearing. Thus, we dismiss Tri-State’s Complaint because the Complaint is both procedurally deficient and fails to present a genuine issue of material fact to warrant setting the Complaint for hearing.

22. We will also dismiss Tri-State’s Motion for Consolidation. In light of our decision in this order to deny the Complaint, we find Tri-State’s request that the Commission set the Complaint for hearing and consolidate it with the Formula Rate Proceeding to be moot and, as such, we will dismiss it.

23. Moreover, in contrast to the facts in *Public Service Company of Colorado*,³³ which we determined involved a common nexus of issues, in the instant case no such nexus exists because the instant case involves the justness and reasonableness of PNM’s existing stated rates and the proceeding in the Formula Rate Proceeding involves PNM’s proposed formula rates.

The Commission orders:

Tri-State’s Complaint and its Motion for Consolidation are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

³¹ Rule 206 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.206(b)(4) (2012).

³² PNM Answer at 13 (citing *Pioneer Transmission LLC*, 130 FERC ¶ 61,044, at P 35 (2010)).

³³ *See supra* n.25.