

144 FERC ¶ 61,185
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.

Powerex Corp. Docket No. ER08-1525-001

NorthWestern Corporation Docket Nos. ER08-1528-001
ER08-1528-002

ORDER ON REHEARING AND COMPLIANCE FILING

(Issued September 4, 2013)

1. In this order, the Commission dismisses as moot a request for rehearing of the Commission's November 14, 2008 order,¹ in which the Commission accepted an agreement between Powerex Corp. (Powerex) and NorthWestern Corporation (NorthWestern) (Applicants), conditioned on NorthWestern revising a provision in the agreement concerning the standard of review for changes to the agreement. The Commission also dismisses as moot NorthWestern's December 15, 2008 filing submitted in compliance with the November 14, 2008 Order.

I. Background

2. On September 12, 2008, Powerex and NorthWestern filed an executed agreement, pursuant to which Powerex would supply Regulating Reserve Service to NorthWestern at market-based rates commencing January 1, 2009.² In addition, NorthWestern would return Balancing Energy to Powerex. NorthWestern would financially settle the net energy that results from its purchases of Regulating Reserve Services and its sales of Balancing Energy. In the November 14, 2008 Order, the Commission explained that the agreement would be for a term of approximately two years ending on January 6, 2011

¹ *Powerex Corp.*, 125 FERC ¶ 61,179 (2008) (November 14, 2008 Order).

² Section 1.32 of the agreement defines Regulating Reserve Service as "the making available of capacity and energy in order to instantaneously respond to moment-by-moment changes in load plus firm transmission on the transmission path needed to connect load with the Regulating Reserve resource."

and, although Powerex is not obligated to provide service beyond January 6, 2011, the agreement provides that the parties may mutually agree to an extension not to exceed January 31, 2012.³

3. In the November 14, 2008 Order, the Commission accepted the agreement conditioned on NorthWestern revising the standard of review with respect to third parties. The Commission explained that, as filed on September 12, 2008, the agreement, at section 2.2, provides that absent the agreement of the Parties to a proposed change, “the standard of review for changes to this Agreement whether proposed by a Party, a third-party or FERC acting *sua sponte*, shall be the ‘public interest’ standard of review.”⁴ The Commission directed NorthWestern to revise the standard of review applicable to third parties consistent with the Commission’s decision in *Duke Energy Carolinas*,⁵ wherein the Commission noted that, to the extent contracting parties filed provisions that sought to impose a “public interest” standard of review on non-contracting third parties, the Commission would find acceptable a substitute provision that imposes on non-contracting third parties “the most stringent standard permissible under applicable law.”

II. Request for Rehearing and Compliance Filing

4. On November 25, 2008, Powerex and NorthWestern filed a request for rehearing of the November 14, 2008 Order. They assert that the standard of review provision in the agreement is consistent with the Supreme Court’s decision in *Morgan Stanley*⁶ and that the agreement must be evaluated under the public interest standard as framed by the Supreme Court in *Morgan Stanley*. They contend that the agreement as filed applies the correct standard of review to third party challenges and therefore no amendment to the agreement is required. They represent that the agreement is a freely negotiated bilateral wholesale energy sales agreement. They request that the Commission grant rehearing and accept the agreement without condition on grounds that, under *Morgan Stanley*, the Mobile-Sierra “public interest” standard properly applies both to party and non-party challenges to the agreement. In the alternative, in the event the Commission does not grant the requested rehearing, they ask the Commission to clarify that, the “most stringent

³ November 14, 2008 Order, 125 FERC ¶ 61,179 at P 11.

⁴ *Id.* P 10.

⁵ *Id.* P 24 (citing *Duke Energy Carolinas, LLC*, 123 FERC ¶ 61,201, at P 10 & n.10 (2008) (*Duke Energy Carolinas*)).

⁶ *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1 of Snohomish County, Washington*, 554 U.S. 527, 545 (2008) (*Morgan Stanley*)).

standard permissible under applicable law” as applied to the agreement is the public interest standard as set out in *Morgan Stanley*.

5. On December 15, 2008, NorthWestern submitted a compliance filing revising the agreement as directed by the Commission in the November 14, 2008 Order. The revised agreement, as filed December 15, 2008, provides that the standard of review for changes to the agreement proposed by a third party shall be the most stringent standard permissible under applicable law. However, NorthWestern stated that it was submitting the compliance filing subject to the outcome of the Commission’s ruling on the request for rehearing.

III. Discussion

6. As noted above, the agreement was entered into for a term of approximately two years ending on January 6, 2011. The agreement allowed for the parties to agree to an extension, but not to exceed January 31, 2012. Accordingly, in light of the termination of the agreement, we will dismiss as moot both the request for rehearing and the compliance filing.

The Commission orders:

(A) Applicants’ request for rehearing is dismissed as moot, as discussed in the body of this order.

(B) NorthWestern’s compliance filing is dismissed as moot, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.