

145 FERC ¶ 61,106
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.

Aragonne Wind, LLC

Docket No. ER13-1954-000

ORDER GRANTING WAIVER REQUEST

(November 6, 2013)

1. On July 10, 2013, Aragonne Wind, LLC (Aragonne) filed with the Commission a request for waiver of the one-year notice requirement to roll over long-term firm point-to-point transmission service under section 2.2 of the Public Service Company of New Mexico's (PNM) Open Access Transmission Tariff (OATT).¹ In this order, we grant Aragonne's waiver request, as discussed below.

I. Background

2. On December 19, 2007, Aragonne entered into a transmission service agreement (TSA) with PNM for a six-year term from January 1, 2008, to January 1, 2014. Under the TSA, Aragonne transmits 90 MW of firm point-to-point transmission service from the 345 kV Guadalupe Switching Station in the PNM Control Area to the 345 kV Switchyard

¹ Request of Aragonne Wind, LLC for Waiver of One-Year Notice Requirement to Roll Over Transmission Service Agreement with Public Service Company of New Mexico, Docket No. ER13-1954-000 (July 10, 2013) (Aragonne Waiver Request). On September 10, 2013, Aragonne filed a clarification of its waiver request, notifying the Commission that it has entered into an agreement to secure 75 MW of the 90 MW of long-term firm point-to-point capacity. Aragonne Wind, LLC Clarification of Request for Waiver, Docket No. ER13-1954-000 (Sept. 10, 2013) (Aragonne Clarification).

at Four Corners in the Arizona Public Service Company (APS) Control Area.² Aragonne uses this transmission service to sell the output of its 90 MW wind energy generating facility in Guadalupe, New Mexico, pursuant to its long-term power purchase agreement (PPA) with APS.³

3. At the time Aragonne and PNM executed the TSA, PNM's OATT required that transmission customers provide notice of their intent to roll over service within 60 days of the expiration of the existing service agreement.⁴ The TSA provides that rollover "shall be subject to any renewal rights available and exercised under the then-effective [OATT]." PNM subsequently revised its OATT to implement a one-year notice period to comply with the requirements of Order No. 890.⁵ Specifically, section 2.2 of PNM's currently effective OATT states that the one-year notice requirement applies to service agreements entered into prior to July 17, 2008, with five years or more left in their terms, which includes Aragonne's TSA.

II. Aragonne's Filing

4. Aragonne states that, due to administrative oversight, it failed to meet the one-year notice requirement to roll over its TSA and, therefore, requests waiver of section 2.2 of PNM's OATT. Aragonne explains that it failed to update its "tickler" system to reflect the new January 1, 2013 renewal deadline and, thus, failed to notify PNM of its intent to renew service until the following business day. Aragonne explains that it received notification from PNM on January 2, 2013, that it had missed the deadline to roll over

² Aragonne Waiver Request at 2.

³ *Id.* at 4.

⁴ *Id.* at 2.

⁵ *Id.* (citing *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 (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)).

service and quickly attempted to correct the error that same day but PNM rejected its request as untimely pursuant to section 2.2 of PNM's OATT.⁶

5. Aragonne asserts that its request for waiver of section 2.2 of PNM's OATT satisfies the Commission's four criteria for granting waiver. First, Aragonne states that it acted in good faith because its failure to meet PNM's OATT deadline was inadvertent and because it attempted to remedy its mistake the next day after the notice deadline.⁷ Second, Aragonne maintains that its waiver request is of limited scope because it is a one-time waiver of a deadline that it missed by one business day.⁸ Third, Aragonne asserts that its waiver request resolves a concrete problem by permitting it to meet its obligation to supply wind energy to APS under its existing PPA.⁹ Last, Aragonne argues that its request for waiver will not harm third parties because PNM's other transmission customers with pending transmission service requests in PNM's queue will be in the position they would have been in had Aragonne submitted its renewal request on time. Further, Aragonne notes that 300 MW of transmission capacity was recently released over the identical path, which will be available to PNM's other transmission customers.¹⁰

6. In support of its waiver request, Aragonne points to a recent order in which the Commission granted Southeastern Power Administration's (SEPA) similar request for waiver of the analogous rollover provision in PJM Interconnection, L.L.C.'s (PJM) OATT for similar reasons.¹¹

⁶ *Id.* at 2-3.

⁷ Aragonne states that its operating company, Infigen Energy US, operates 18 other wind farms and that its 90 MW wind farm in Guadalupe, New Mexico, is the operating company's only wind farm with a TSA. Therefore, Aragonne contends that it is reasonable that it was not aware of the revised deadline in PNM's OATT. *Id.* at 3.

⁸ *Id.* at 3-4.

⁹ Aragonne states that APS uses this energy to meet its renewable portfolio requirement. *Id.* at 4.

¹⁰ *Id.*

¹¹ *Southeastern Power Admin.*, 143 FERC ¶ 61,210, at P 7 (2013) (*SEPA*) (finding that SEPA's request to waive PJM's one-year notice requirement to renew a service

III. Notice of Filings and Responsive Pleadings

7. Notice of Aragonne's filing was published in the *Federal Register*, 78 Fed. Reg. 43,194 (2013), with interventions and protests due on or before July 31, 2013. PNM submitted a motion to intervene on July 24, 2013. Cargill Power Markets, LLC (Cargill) submitted a motion to intervene and protest on July 31, 2013. APS submitted an untimely motion to intervene on August 19, 2013.

8. On August 15, 2013, Aragonne submitted a motion for leave to answer and answer to Cargill's protest. On August 30, 2013, Cargill submitted a request for leave to reply and reply to Aragonne's answer. On September 10, 2013, Aragonne filed a clarification to its July 10, 2013 waiver request.

9. PNM states that it takes no position on Aragonne's waiver request, noting only that it processed Aragonne's transmission service request in strict adherence with the terms of its OATT.

10. Cargill argues that Aragonne's request for waiver does not satisfy the Commission's criteria for granting waiver of tariff provisions. First, Cargill argues that Aragonne's waiver request does not meet the criterion that the tariff waiver must not have undesirable consequences to third parties.¹² Cargill states that it currently holds five transmission service requests (TSR) totaling 640 MW of long-term firm point-to-point transmission service pending in PNM's queue that require the same capacity that is currently reserved under Aragonne's TSA. As a result, Cargill asserts that it might be harmed if the Commission grants Aragonne's requested waiver because, if Aragonne is permitted to roll over its TSA, there might be insufficient transmission capacity on PNM's system to grant Cargill's TSRs in their entirety without requiring potentially expensive system upgrades.¹³

11. Next, Cargill disputes whether Aragonne submitted its waiver request in good faith. Cargill argues that the one-year requirement is clearly set forth in PNM's OATT

agreement appeared to be the result of administrative error and satisfied the Commission's criteria for granting waiver).

¹² Cargill Protest at 2, 7.

¹³ In support, Cargill submits an affidavit by Riley Rhorer. *Id.*, Exhibit 1.

and incorporated into the TSA, and that “administrative oversight” is not a persuasive reason to grant waiver of a tariff deadline.¹⁴ In its reply, Cargill contends that PNM posted a notice on its Open Access Same-Time Information System (OASIS) notifying Aragonne of its rollover deadline approximately 18 months before Aragonne’s one-year renewal deadline.¹⁵ Cargill also argues that Aragonne’s seven-month delay in submitting its waiver request to the Commission justifies Cargill’s business expectation that it would have access to the transmission capacity at issue and, therefore, would be harmed if the Commission were to grant Aragonne’s request for waiver.¹⁶

12. Cargill disputes Aragonne’s assertion that the requested waiver will address a concrete problem, arguing that Aragonne has failed to explain why it was unable to comply with the one-year notice requirement, which Cargill argues was clearly established by Order No. 890 and adopted in section 2.2 of PNM’s OATT.¹⁷ Instead, Cargill asserts that PNM’s OATT is clear and that Aragonne could have complied with the notice requirement absent its administrative oversight. Cargill adds that the waiver request in *SEPA* is dissimilar from the instant proceeding because *SEPA*’s waiver request was not opposed by any party and, therefore, the Commission was able to find that no third party would be harmed by the requested waiver.¹⁸

13. In its answer to Cargill’s protest, Aragonne argues that there will not be any harm to Cargill, or any other third party, if the Commission grants its request for waiver of section 2.2 of PNM’s OATT. Aragonne asserts that, instead, Cargill only speculates that transmission capacity “may” not be sufficient to accommodate its TSRs without transmission system upgrades if Aragonne is permitted to roll over its TSA.¹⁹ Moreover,

¹⁴ *Id.* at 6 (citing *Seneca Energy II, LLC*, 138 FERC ¶ 61,226, at PP 9-12 (2012); *Illinois Power Co.*, 75 FERC ¶ 61,269, at 61,878 (1996)).

¹⁵ Cargill Reply at 4. The notice Cargill refers to is a June 16, 2011 revision made to the “status comments” of Aragonne’s service reservation in PNM’s OASIS to reflect the one-year deadline for renewal of service. *Id.*, Exhibit A.

¹⁶ *Id.* at 6.

¹⁷ Cargill Protest at 7.

¹⁸ *Id.* at 7-8.

¹⁹ Aragonne Answer at 3-4.

Aragonne contends that granting its request for waiver will put Cargill in the same position it would have been in had Aragonne submitted its renewal request on time. Aragonne argues that, while the sudden availability of the 90 MW of transmission capacity resulting from its administrative oversight will provide a windfall for Cargill, the removal of this windfall does not constitute actual harm to Cargill.²⁰

14. On September 10, 2013, Aragonne filed a clarification of its waiver request, notifying the Commission that it has entered into an agreement to secure 75 MW of long-term firm point-to-point capacity. Accordingly, Aragonne asks the Commission to grant its requested waiver for “up to 90 MW.”²¹

IV. Discussion

A. Procedural Matters

15. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the unopposed, timely motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2013), we will grant APS’s late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

16. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept the answers filed by Cargill and Aragonne because they have provided information that assisted us in our decision-making process.

B. Commission Determination

17. We will grant Aragonne’s request for waiver of the one-year notice requirement to roll over long-term firm point-to-point transmission service under section 2.2 of PNM’s OATT. We find that Aragonne’s request for waiver of this provision meets the Commission’s standard for granting waiver. In addition, granting Aragonne’s request for

²⁰ *Id.* at 4.

²¹ Aragonne Clarification at 1-2.

waiver will not, in this instance, undermine the Commission's rationale for establishing the requirement in Order No. 890, as discussed below.

18. The Commission has granted limited waivers of tariff provisions where: (i) the applicant has been unable to comply with the tariff provision at issue in good faith; (ii) the waiver is of limited scope; (iii) a concrete problem will be remedied by granting the requisite waiver; and (iv) the waiver does not have undesirable consequences, such as harming third parties.²² We find that Aragonne's waiver request meets the Commission's criteria for granting limited waiver of tariff provisions. First, Aragonne's failure to comply with the tariff provision at issue was in good faith. Aragonne missed the one-year notice requirement by one day, a Federal holiday, and provided notice of its intent to roll over the TSA the following day, January 2, 2013, and 364 days before the TSA was scheduled to terminate. Furthermore, in this instance, the one-year notice requirement in section 2.2 of PNM's OATT was increased (from a 60-day notice requirement) after Aragonne and PNM executed the TSA in 2007. We also find that the waiver is of limited scope because Aragonne provided the required notice the next day. Thus, we are not granting Aragonne an open-ended waiver, but rather a one-time, limited extension of the deadline as set forth in OATT section 2.2. Additionally, granting Aragonne's waiver request will remedy a concrete problem by permitting Aragonne to meet its obligation to supply wind energy to APS under its existing PPA. Therefore, we find that Aragonne's request for waiver of section 2.2 of PNM's OATT was made in good faith, is of limited scope, and will remedy a concrete problem.

19. We also find that Aragonne's request for waiver will not create undesirable consequences, such as harming third parties. Despite Cargill's argument that if the Commission were to grant Aragonne's waiver request there may be insufficient available transmission capacity on PNM's system to grant Cargill's TSRs in their entirety without potential expensive transmission system upgrades, we do not believe that Cargill's business expectations realistically changed in the one day, a Federal holiday, by which Aragonne missed the renewal deadline. We are persuaded by Aragonne that granting the waiver will leave Cargill no worse off than it was when it submitted the TSRs and that there is no demonstrated harm to third parties.

20. In addition, Aragonne's request for waiver does not undermine the stated purpose of the section 2.2 rollover requirement in PNM's OATT. In Order No. 890, the

²² See, e.g., *SEPA*, 143 FERC ¶ 61,210 at P 7; *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,069, at P 8 (2011).

Commission adopted a five-year minimum contract term (up from a one-year minimum contract term) in order for a customer to be eligible for rollover rights and, in concert, established a one-year notice period (up from a 60-day notice period) to do so. The Commission explained that rollover reform and transmission planning are closely related and that its intent behind reforming its policy on rollover rights was to better align the rights and obligations of the customer with the planning and construction obligations of the transmission provider.²³ Further, the Commission explained that it established the five-year minimum term for rollover rights and the one-year notice requirement for renewing service to encourage longer-term contracting.²⁴ The Commission noted that no single notice period could perfectly balance the circumstances faced by customers in renewing power supply contracts and the interests of transmission providers in attempting to plan their system, but that it would be “reasonable to expect that customers [would] consider renewing such long-term obligations in advance of 60 days prior to the expiration of their current obligation.”²⁵ Finally, the Commission stated that it would not fashion its policy for customers that “wait until the last minute to evaluate whether to extend their long-term contracts.”²⁶

21. We find that Aragonne’s failure to meet the one-year notice deadline by one day does not interfere with the overall purpose and goal of the one-year notice requirement, i.e. to foster long-term planning and longer use of the grid. Delaying notice by one day, a Federal holiday, did not prejudice either PNM’s ability to plan its transmission system over the next 364 days or the opportunity for other customers, such as Cargill, to make informed business decisions.²⁷ Further, Aragonne’s immediate attempt to renew its service shows that, consistent with the Commission’s stated expectation, Aragonne began considering the renewal of its transmission service well before 60 days prior to the expiration of its TSA and did not wait until the last minute to evaluate whether to extend its long-term contract. Thus, Aragonne’s waiver request is consistent with the policy

²³ Order No. 890, FERC Stats. & Regs. ¶ 31,241 at PP 1234, 1265.

²⁴ *Id.* P 1238.

²⁵ *Id.* P 1246.

²⁶ *Id.*

²⁷ We note that PNM took no position on Aragonne’s waiver request in its comments.

underlying section 2.2 of PNM's OATT. For these reasons we find that Aragonne's waiver request satisfies the fourth criterion of the Commission's standard for granting waiver.

22. Accordingly, we will grant Aragonne's request for a limited, one-time waiver of section 2.2 of PNM's OATT in order to allow Aragonne to roll over the amount of firm transmission capacity needed to continue to deliver the output of its generating facility to APS—i.e., up to 90 MW.

The Commission orders:

Aragonne's request for limited waiver of section 2.2 of PNM's OATT is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.