

132 FERC ¶ 61,079
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Cargill Power Markets, LLC, Complainant,

Docket No. EL10-61-000

v.

Public Service Company of New Mexico, Respondent.

ORDER GRANTING COMPLAINT AND
ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued July 29, 2010)

1. On April 20, 2010, pursuant to section 206 of the Federal Power Act (FPA),¹ Cargill Power Markets, LLC (Cargill) filed a complaint in the above-captioned proceeding against Public Service Company of New Mexico (PNM), asserting that PNM improperly processed its transmission service queue and unfairly invalidated a transmission service request by Cargill. As discussed below, we grant the complaint and set the issue of the appropriate remedy for hearing and settlement judge procedures. In addition, we direct PNM to revise its Open Access Transmission Tariff (OATT) to specify all transmission services the company provides and to detail the procedures PNM follows when processing transmission service requests.

I. Background

2. On February 21, 2008, Cargill submitted a transmission service request to PNM requesting 125 MW of point-to-point transmission service on the Blackwater–Four Corners transmission path for a five-year period starting on June 1, 2011 at 00:00:00 and stopping on June 1, 2016 at 00:00:00. PNM acted on this request by posting, on its Open Access Same-Time Information System (OASIS), a reply invalidating the request for

¹ 16 U.S.C. § 824e (2006).

having an “invalid start and stop time frame” because the request did not start and stop on January 1 at 00:00:00.

3. Also on February 21, 2008, and roughly five minutes after PNM invalidated the Cargill request, Powerex Corporation (Powerex) submitted a competing request over the same Blackwater–Four Corners transmission path for 150 MW of point-to-point transmission service for a five-year period starting on January 1, 2012 at 00:00:00 and stopping on January 1, 2017 at 00:00:00. PNM acted on this request by posting an OASIS reply validating the request, thereby affording Powerex the first queue position for the Blackwater–Four Corners transmission path.

4. On February 26, 2008, Cargill submitted a second 125 MW request over the Blackwater–Four Corners transmission path for a five-year period, with a start date of January 1, 2012 at 00:00:00 and a stop date of January 1, 2017 at 00:00:00. PNM validated this request, thereby affording Cargill the second position in the queue, behind the Powerex request.

5. On March 11, 2008, Cargill sent PNM a letter stating that PNM acted improperly when it invalidated Cargill’s February 21, 2008 transmission service request. Cargill states that its letter also objected to the fact that PNM had validated a transmission service request by High Lonesome Mesa, LLC (High Lonesome)² over a separate path, the Willard–Four Corners transmission path, even though High Lonesome’s request (like the invalidated Cargill request) started and stopped on a date/time other than January 1 at 00:00:00.

6. On May 5, 2009, as amended on May 12, 2009, PNM submitted a long-term firm point-to-point transmission service agreement with High Lonesome in Docket No. ER09-1097-000.³ Cargill filed a protest in that proceeding, arguing that PNM acted improperly when it accepted a request by High Lonesome for transmission service over the Willard–Four Corners transmission path that did not start on January 1 at 00:00:00.⁴ Cargill argued that it was unfair for PNM to validate the High Lonesome request that started and

² Two transmission service requests were submitted for the same project. The requests were originally submitted by Foresight Energy Company (Foresight) and later acquired by (and assigned to) High Lonesome. For purposes of this order, we will refer to the Foresight transmission service requests as the High Lonesome request.

³ Two service agreements were filed. The first agreement reassigned the transmission service from Foresight to High Lonesome, pursuant to section 23 of PNM’s OATT. The second agreement was between PNM and High Lonesome.

⁴ Cargill’s protest also referenced several other requests that PNM validated even though they did not start and stop on January 1 at 00:00:00.

stopped on a date/time other than January 1 at 00:00:00, and invalidate Cargill's requests for service that similarly started on a date/time other than January 1 at 00:00:00.

7. On July 9, 2009, the Commission issued an order in Docket No. ER09-1097-000 that accepted for filing the transmission service agreement between PNM and High Lonesome.⁵ The Commission found that Cargill was not harmed because High Lonesome's service request and Cargill's were not competing requests for the same capacity.⁶ In addition, the Commission declared that the proper forum for Cargill to raise its concerns related to rejected service requests and alleged queue violations would be in a proceeding under section 206 of the FPA.⁷ While the Commission found that Cargill had not presented sufficient evidence in that proceeding to warrant the Commission *sua sponte* launching an investigation into undue discrimination, the Commission noted that Cargill could "file and support a section 206 complaint if it believes such a filing is warranted."⁸ There were no requests for rehearing of the July 2009 Order.

8. On April 20, 2010, Cargill filed its complaint in the instant proceeding, raising the same issues with the Commission that it raised in its protest in Docket No. ER09-1097-000 and in its March 11, 2008 letter to PNM.

II. Notices of Filing and Responsive Pleading

9. Notice of Cargill's complaint was published in the *Federal Register*, 75 Fed. Reg. 22,772 (2010), with interventions and protests due on or before May 10, 2010.

10. On May 7, 2010, PNM filed an answer to the complaint. Timely motions to intervene were filed by Western Water and Power Production Limited, LLC (Western) (with comments), Eurus Energy America Corporation (Eurus) (with comments), Powerex (with comments), High Lonesome (with comments and motion for summary disposition), Arizona Public Service Company (APS) (with comments), and New Mexico Renewable Energy Transmission Authority (RETA). On May 12, 2010, RETA filed a request for expedited decision and comments. On May 24, 2010, Cargill filed an answer. On June 4, 2010, PNM and High Lonesome each filed answers to Cargill. On June 21, 2010, Cargill filed an additional answer.

⁵ *Public Service Co. of New Mexico*, 128 FERC ¶ 61,017 (2009) (July 2009 Order).

⁶ *Id.* P 23.

⁷ *Id.* P 24.

⁸ *Id.*

III. Discussion

A. Procedural Matters

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We will accept RETA's late-filed comments, given its interest in the proceeding, the early stage of the proceeding, and the absence of any undue prejudice or delay. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers to answers filed by Cargill, PNM and High Lonesome and will, therefore, reject them.

B. Cargill's Complaint and Responsive Pleadings

12. In its complaint, Cargill alleges that PNM improperly validated invalid transmission service requests and invalidated a valid Cargill transmission service request, which resulted in Cargill's revised request having a lower position in the queue than it would have had if its original request had been validated. Cargill argues that in so doing, PNM processed its transmission service queue in a way that violates the requirements of PNM's OATT, the North American Energy Standards Board's (NAESB) business practices incorporated by reference in PNM's OATT, the Commission's regulations, and the non-discrimination requirements of the FPA. Specifically, Cargill's complaint renews the argument raised in Docket No. ER09-1097-000 that the NAESB OASIS Business Practices incorporated by reference in Attachment P of PNM's OATT define three types of yearly transmission products (i.e., fixed yearly, sliding yearly, and extended yearly) and only one of these three products (fixed yearly) requires a request to start and stop on January 1 at 00:00:00.⁹ At the time that Cargill submitted its February

⁹ Standard WEQ-001 of the NAESB OASIS Business Practices provides as follows:

2.1.5. FIXED YEARLY — Service starts at 00:00 on the first date of a calendar year and ends at 24:00 on the last date of the same calendar year (same as 00:00 of the first date of the next consecutive year).

2.1.9. SLIDING YEARLY — Service starts at 00:00 of any date and stops at 00:00 on the same date of the following year. If there is no corresponding date in the following year, the service stops at 24:00 on the last day of the same month in the following year. For example, SLIDING YEARLY service starting on February 29 would stop on February 28 of the following year.

(continued)

21, 2008 transmission service request, Cargill was under the impression that PNM was offering all three services. Thus, Cargill argues that it was improper for PNM to invalidate Cargill's request on the basis that the request did not start and stop on January 1 at 00:00:00, which would only be necessary for a request for fixed yearly service. Because the sliding service Cargill requested was part of the NAESB standards incorporated by reference in Attachment P to PNM's OATT, Cargill insists that PNM violated its OATT, NAESB standards and the FPA by denying Cargill's request.

13. Cargill also renews its argument that PNM provided an undue preference to those customers whose transmission requests were validated and placed in the queue even though those requests, like Cargill's, failed to start and stop on January 1 at 00:00:00.¹⁰ Cargill argues that PNM cannot arbitrarily validate some requests and invalidate other requests based on purported business practices that are not set forth in the OATT.

14. Cargill therefore asks the Commission to take the following actions: (1) find that PNM has processed its interconnection and transmission services queues in a manner that is unjust and unreasonable, unduly discriminatory and preferential, and in violation of section 206 of the FPA; (2) direct PNM to reprocess its transmission queue in accordance with its OATT and the NAESB business practice standards and reinstate Cargill's Blackwater-Four Corners transmission service request; (3) institute a formal FPA section 206 investigation of PNM's interconnection and transmission queue processing practices; and (4) grant any further relief as necessary to protect Cargill's interest.

15. PNM replies that its invalidation of Cargill's request was proper because at the time of Cargill's February 21, 2008 Blackwater-Four Corners' request, except for two categories of transmission service requests, rollover of grandfathered agreements and generation interconnection-related transmission service, the only type of point-to-point transmission service requests PNM validated were requests that started and stopped on January 1 at 00:00:00.

16. As to Cargill's contention that PNM unduly favored High Lonesome and other customers identified in Cargill's complaint by validating their transmission service

2.1.13. EXTENDED YEARLY — Service starts at 00:00 of any date and stops at 00:00 more than one year later, but must be requested in increments of full years.

¹⁰ Cargill refers to several transmission requests that PNM validated even though those request did not start and stop on January 1 at 00:00:00. Those requests were submitted by PNM's wholesale power marketing function, El Paso Electric, Eurus, and Farmington Electric Utility System.

requests, even though they did not start and stop on January 1 at 00:00:00, PNM states that its practice was to validate requests that do not start and stop on January 1 in only two circumstances:¹¹ (1) to coincide with the in-service date of a new transmission interconnection; or (2) when a customer has rollover rights pursuant to section 2.2 of PNM's OATT and the expiring contract ends on a date other than January 1. PNM argues that, in accordance with this practice, it validated High Lonesome's request to begin service on a date other than January 1 and invalidated Cargill's request to begin service on a date other than January 1. Similarly, PNM argues that it validated, in accordance with the circumstances described above, the other requests Cargill alleges were preferential and should have been invalidated.¹² PNM also argues that the Commission should reject Cargill's complaint because it constitutes a collateral attack on the July 2009 Order.

17. Powerex supports PNM's contention that at the time of Cargill's request, PNM did not offer the type of transmission product that Cargill was seeking, and argues that Cargill's request was properly invalidated because it did not correctly fill in the fields for this product in its OASIS submittal. High Lonesome argues against any suggestion that the agreement accepted for filing in the July 2009 Order be abrogated. It contends that the Commission should summarily reject Cargill's complaint as an unwarranted collateral attack on the July 2009 Order. Notwithstanding, High Lonesome argues that the transmission path at issue in Cargill's complaint (the Blackwater-Four Corners transmission path) is not the same as the path handling High Lonesome's transmission request (the Willard-Four Corners transmission path) and thus no reprocessing of the Willard-Four Corners transmission path is warranted, even if Cargill's complaint is granted.

¹¹ PNM states that, beginning on March 14, 2008, it began offering a new transmission service, Yearly Firm Sliding. According to the OASIS posting, "[t]his type of service can be requested to start on the 1st of any month at 00:00 MST for 12 consecutive months, ending on the 1st at 00:00 MST." Thus, if Cargill or any other customer were to request long-term transmission service from PNM after that date, such a request would no longer be deemed invalid on the basis that the request did not start and stop on January 1 at 00:00:00. The request, however, would have to meet the requirements for a valid request for Yearly Firm Sliding transmission service. The availability of this service is posted on PNM's OASIS website.

¹² PNM also notes that Cargill mistakenly refers to certain requests to designate network resources by its network customers as transmission requests that were validated by PNM. PNM assures that designations of network resources are not requests for point-to-point transmission service.

18. RETA argues that Cargill's complaint jeopardizes the issuance of bonds for the High Lonesome transmission project already approved by the Commission, because it raises the specter of PNM's Willard-Four Corners queue being reprocessed. RETA urges the Commission to reject Cargill's complaint as an unwarranted collateral attack on the July 2009 Order.

19. APS also opposes Cargill's complaint and observes that Cargill delayed nearly ten months after the Commission denied its protest in the July 2009 Order before filing its complaint, and that it would be disruptive to other parties who relied on the July 2009 Order to now reprocess the Willard-Four Corners queue. Eurus likewise argues that any problems that might exist with PNM's Blackwater-Four Corners' request should not lead to a reprocessing of PNM's queue for PNM's Guadalupe-Taiban Mesa-Four Corners transmission path. Western argues that, if true, the allegations raised by Cargill would affect other parties and the Commission should consider these interests when fashioning a remedy.

C. Commission Determination

20. For the reasons explained below, the Commission grants Cargill's complaint, sets the issue of remedy for hearing and settlement judge procedures, and directs PNM to submit a compliance filing within 30 days of issuance of this order revising its OATT to specify all transmission services the company provides and to detail the procedures PNM follows when processing transmission service requests.

21. Because the July 2009 Order expressly declined to reach the merits of Cargill's claims concerning its rejected transmission service requests and alleged PNM queue violations, the Commission has not considered the merits of Cargill's complaint previously and, therefore Cargill is not estopped from raising the issues set forth in its complaint.¹³

22. The Commission finds that PNM improperly invalidated Cargill's February 21, 2008 transmission service request because Cargill submitted its request in accordance with section 17 of PNM's OATT. PNM's OATT in Attachment P explicitly

¹³ July 2009 Order, 128 FERC ¶ 61,017 at P 24. *See, e.g., Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 295 n.7 (D.C. Cir. 2003) (petitioners were not estopped from seeking review of a Commission determination under the Clean Water Act because the prior Commission order had not considered whether the requirements of that provision were satisfied); *Connecticut Light & Power Co. v. FPC*, 557 F.2d 349, 353 (2d Cir. 1977) ("the [collateral estoppel] doctrine is operative only as to facts that were actually litigated and decided").

incorporates by reference all of the NAESB business practice standards.¹⁴ While the Commission does not require transmission providers to adopt each of the flexible services included in the NAESB standards,¹⁵ the Commission does require the OATT to state accurately which services are offered, and PNM's OATT does not specify which services it actually offers. Consequently, it is reasonable for the Commission and customers, such as Cargill, to conclude that on February 21, 2008, when Cargill submitted its Blackwater–Four Corners transmission service request, PNM was offering all the types of point-to-point transmission services described in the NAESB business practice standards incorporated by reference into its OATT, including sliding service. Therefore, PNM acted unreasonably by denying Cargill's sliding service transmission request that complied with PNM's OATT.¹⁶

23. Cargill's predicament is a prime example of why the Commission, consistent with the FPA,¹⁷ requires all practices that significantly affect rates, terms, and conditions of service to be on file with the Commission.¹⁸ Customers need to have proper notice in

¹⁴ NAESB Standards WEQ-001- 2.1.5, 2.1.9, and 2.1.13, which include "fixed," "sliding," and "yearly" service, are incorporated by reference in Attachment P of PNM's OATT.

¹⁵ July 2009 Order, 128 FERC ¶ 61,017 at P 24 (noting that "the NAESB standards do not dictate the particular services a transmission provider must offer under its OATT").

¹⁶ Under the filed rate doctrine, the rate on file with the Commission is the only lawful rate. *Maislin Industries, U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 126-127 (1990); *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915). *See also Town of Norwood v. FERC*, 217 F.3d 24, 28 (1st Cir. 2000) ("The filed rate doctrine . . . revolves around the notion that under statutes like the Federal Power Act, utility filings with the regulatory agency prevail over unfiled contracts and other claims seeking different rates or terms than those reflected in the filings with the agency.").

¹⁷ *E.g.*, 16 U.S.C. § 824d(c) (2006).

¹⁸ The Commission's regulations require that "[e]very public utility shall file with the Commission . . . full and complete rate schedules . . . clearly and 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) (2010). *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).

order to be able to obtain services on a just and reasonable and not-unduly discriminatory basis.¹⁹ The types of transmission services PNM offers and the policies PNM uses to determine queue processing significantly affect rates, terms and conditions of service and, therefore, should be clearly and accurately set forth in PNM's OATT.²⁰ Therefore, while PNM may have adhered to its unwritten policies regarding types of services offered, even if these unpublished rollover and generation interconnection exceptions were reasonable, this still would not overcome the fact that these exceptions, combined with the express language contained in PNM's OATT on file with the Commission, strongly suggest that in fact PNM was offering "sliding service" on February 21, 2008, when Cargill made its request for service. As a result, we grant Cargill's complaint.²¹ Furthermore, because the FPA requires all significant rates, terms and conditions of service to be on file, pursuant to section 206 of the FPA,²² we direct PNM to file tariff revisions within 30 days of the date of this order to specify all transmission services the company provides, and to detail the procedures PNM follows when processing transmission service requests.

24. In granting the complaint, the Commission also finds that PNM should provide appropriate relief to Cargill to remedy the harm caused by the misprocessed transmission service request. However, Cargill has not met its burden under section 206 of the FPA of demonstrating that its proposed remedy of reprocessing the transmission queue is just and reasonable and not unduly discriminatory. Notwithstanding, we find that there may be other opportunities to remedy Cargill's request but more information is necessary. We also find that issues regarding the harm and remedies are more appropriately addressed in a trial-type evidentiary hearing. Therein, we encourage the parties to consider the harm caused by PNM's actions and whether PNM can reprocess the queue for the Blackwater-Four Corners transmission path to validate Cargill's February 21, 2008 transmission service request, or develop another appropriate solution. Moreover, we clarify that the

¹⁹ *AT&T v. Central Office Tel., Inc.*, 524 U.S. 214, 222 (1998) (discussing history and policy objectives of the filed rate doctrine).

²⁰ *Cf. Keyspan-Ravenspoold, LLC v. FERC*, 474 F.3d 804, 811 (D.C. Cir. 2007), *order on remand*, 124 FERC ¶ 61,062 (2008) (matters significantly affecting rates, such as method of translating installed capacity into unforced capacity, must be included in the filed tariff).

²¹ *Town of Norwood v. FERC*, 217 F.3d 24, 28 (1st Cir. 2000) ("The filed rate doctrine . . . revolves around the notion that under statutes like the Federal Power Act, utility filings with the regulatory agency prevail over unfiled contracts and other claims seeking different rates or terms than those reflected in the filings with the agency.").

²² 16 U.S.C. § 824e.

hearing on remedies will only deal with the Blackwater-Four Corners path and will not address (or require) the reprocessing of the Willard-Four Corners transmission path.

25. While we set these matters for trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures begin. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.²³ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise the Chief Judge will select a judge for this purpose.²⁴ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) Cargill's complaint is hereby granted, finding that PNM improperly invalidated Cargill's February 21, 2008 transmission service request, as discussed in this order.

(B) PNM is hereby directed, within 30 days of the date of issuance of this order, to file revisions to its OATT to specify all transmission services the company provides, and to detail the procedures PNM follows when processing transmission service requests, as discussed in this order.

(C) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the FPA, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held in Docket No. EL10-61-000 to determine what an appropriate remedy is regarding Cargill's February 21, 2008 transmission request for the Blackwater-Four Corners transmission

²³ 18 C.F.R. § 385.603 (2010).

²⁴ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge in writing or by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

path. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in this order.

(D) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2010), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(E) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(F) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in this proceeding in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.