

143 FERC ¶ 61,227
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.

Public Service Company of New Mexico

Docket Nos. ER13-685-002
ER13-687-001
ER13-690-001

ORDER ON REHEARING

(Issued June 10, 2013)

1. In an order issued in this proceeding on March 1, 2013,¹ the Commission rejected in part and conditionally accepted in part and suspended Public Service Company of New Mexico's (PNM) proposed revisions to its open access transmission tariff (OATT), Electric Coordination Tariff (Coordination Tariff), and two pre-OATT bilateral contracts (Bilateral Contracts), to become effective on August 2, 2013, subject to refund. Further, the Commission established hearing and settlement judge procedures and consolidated the three proceedings for purposes of hearing and settlement judge procedures. In this order, we grant Navopache Electric Cooperative's (Navopache) request for rehearing and deny PNM's request for rehearing.

I. Background

2. On December 31, 2012 and January 2, 2013, PNM submitted for filing, pursuant to section 205 of the Federal Power Act (FPA),² revisions to its OATT, Coordination Tariff, and two Bilateral Contracts in order to switch from stated to formula rates for

¹ *Public Serv. Co. of New Mexico*, 142 FERC ¶ 61,168 (2013) (March Order).

² 16 U.S.C. § 824d (2006).

transmission services.³ PNM's proposed formula rate included traditional cost of service components such as rate base, operating expenses, revenue credits, and a return on equity. PNM proposed to update the formula rate annually based on the prior year's FERC Form No. 1 data and transmission projects that would be scheduled to go into service that calendar year. PNM proposed to include in its formula rate an acquisition adjustment in connection with its purchase of ownership interest in the Eastern Interconnection Project transmission facilities in order to terminate a lease on the facilities. PNM also proposed a return on common equity (ROE) of 10.81 percent, which PNM stated was based on the midpoint of the range of reasonableness produced by applying the Commission's Discounted Cash Flow (DCF) analysis to a proxy group of electric utilities with comparable risk and credit metrics.⁴

3. PNM's formula rate included Implementation Protocols which provide for an annual update process, true-up calculation, and process through which interested parties can request further information about certain aspects of the inputs in the formula. PNM's Implementation Protocols also provide timelines for such parties to challenge PNM's calculations and for PNM to respond to any such challenges.

4. In the March Order, the Commission conditionally accepted in part PNM's proposed formula rate and suspended it for five months, to become effective on August 2, 2013, subject to refund. The Commission also established hearing and settlement judge procedures. Notably, the Commission rejected PNM's proposal to include the acquisition adjustment for the Eastern Interconnection Project transmission facilities and directed PNM to submit a compliance filing to revise its formula rate to remove the acquisition adjustment.⁵ The Commission also rejected PNM's proposal to use the midpoint rather than the median to establish its base ROE, and directed PNM to submit a compliance filing to revise its formula rate to reflect an ROE based on the median of its DCF analysis.⁶

³ PNM provides transmission service pursuant to the Bilateral Contracts for El Paso Electric Company and Western Area Power Administration under FERC Rate Schedule No. 9 and FERC Rate Schedule No. 86, respectively.

⁴ March Order, 142 FERC ¶ 61,168 at P 12.

⁵ *Id.* P 27.

⁶ *Id.* P 28.

II. Rehearing Requests

5. On March 29, 2013, Navopache filed a request for rehearing of the March Order, arguing that the Commission erred by not directing PNM to remove from its proposed Implementation Protocols the unilaterally-imposed deadline restricting corrections of past formula rate errors to 24 months. Navopache contends that Commission policy has consistently found that an error in the application of a formula rate is a violation of the filed rate doctrine and is correctable irrespective of how much time has elapsed.⁷

6. On April 1, 2013, PNM filed a request for rehearing of the March Order, arguing that the Commission erred by directing PNM to use the median rather than the midpoint of the proxy group range of reasonableness produced through the DCF analysis to establish its proposed base ROE. PNM states that the testimony of Robert B. Hevert included with its filing provided extensive evidence supporting PNM's selection of the midpoint as reasonably reflecting the business and financial risks faced by PNM in the wholesale electric market. PNM argues that the Commission provided no support or rationale for its directive to use the median in the March Order, instead treating its directive as merely a preference for the median, despite PNM's evidence supporting the use of the midpoint as just and reasonable.⁸ Thus, PNM argues that the Commission's determination failed to apply reasoned decision-making and is arbitrary and capricious.⁹

7. PNM contends that use of the median would reduce PNM's ROE from 10.81 percent to 8.67 percent, which would not reflect PNM's true cost of capital as required by the well-established precedent in *Hope* and *Bluefield*.¹⁰ PNM states that the Commission's determination appears to be driven by a misplaced focus on finding the "most accurate measure of central tendency" for data, which yields a result that is inconsistent with the reality of PNM's risk profile, capital investment, and cost of capital, contrary to the principles established by *Hope* and *Bluefield*.¹¹ PNM argues that the DCF model results may be inaccurate or skewed when equity prices or measures of long-term

⁷ Navopache Rehearing Request at 3.

⁸ PNM Rehearing Request at 7.

⁹ *Id.* at 8.

¹⁰ *Id.* at 5, citing *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) (*Hope*); *Bluefield Water Works and Improvement Co. v. Public Service Commission of the State of West Virginia*, 262 U.S. 679 (1923) (*Bluefield*).

¹¹ *Id.* at 9.

growth are affected by changing market conditions and, thus, the most appropriate methodology for determining the required ROE within the range of analytical results may change over time.

8. PNM asserts that the Commission has recognized that the choice between the midpoint and median measures of a DCF analysis should be made on a case-by-case basis.¹² PNM also argues that the Commission relied on three recent cases to support its assertion that its precedent requires use of the median, but that the Commission regularly accepted use of the midpoint up until 2008.¹³ PNM states that, at minimum, this demonstrates both that the midpoint may be a just and reasonable measure for single utilities and that the justness and reasonableness of any particular method can change over time in response to shifting market conditions. PNM contends that ignoring the facts and circumstances specific to this case prohibits PNM from earning the return on its capital required to assure confidence in its financial soundness and, thus, to attract credit and capital sufficient for it to carry out its duties as a public utility.¹⁴

9. Finally, PNM argues that, since the Commission has historically allowed use of the midpoint for single utilities, and since the Commission did not find that use of the midpoint in this case led to an unjust and unreasonable rate, the Commission has exceeded its authority to review rates under the FPA.¹⁵

10. On April 16, 2013, Navopache and Tri-State Generation and Transmission Association, Inc. (Tri-State) filed answers to PNM's request for rehearing.

III. Discussion

A. Procedural Matters

11. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2012), prohibits an answer to a request for rehearing. Accordingly, we reject the answers filed by Navopache and Tri-State.

¹² PNM Rehearing Request at 10, citing *Midwest Independent Transmission System Operator, Inc.*, 106 FERC ¶ 61,302, at PP 8, 15 (2004).

¹³ PNM Rehearing Request at n.20, citing *Devon Power Co.*, 104 FERC ¶ 61,123, at P 49 (2003) ("The Commission, as a general policy, employs the midpoint of the zone of reasonableness as the appropriate rate of return").

¹⁴ PNM Rehearing Request at 12.

¹⁵ *Id.* at 13-14.

B. PNM's Rehearing Request

12. We will deny PNM's rehearing request. First, as stated in the March Order, the Commission's well-established precedent is that the proper methodology for determining ROE is to calculate ROE using the median of the proxy group.¹⁶ PNM has failed to present any sound reason why the Commission should depart from its established precedent in this case. Instead, PNM's rehearing request merely reiterates arguments that the Commission properly rejected in the March Order.

13. The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) recently upheld the Commission's median-based methodology for measuring the ROE of a single utility with average risk.¹⁷ Specifically, in *SoCal Edison v. FERC*, the D.C. Circuit denied in part Southern California Edison Company's (SoCal Edison) petition for review of the Commission's orders directing SoCal Edison to revise its ROE to reflect the median, not midpoint, of the relevant zone of reasonableness as arbitrary and capricious. In reaching this decision, the D.C. Circuit explained that the Commission had changed its policy on this issue in 2008, had presented a reasoned explanation for the new policy, and has applied the new policy consistently since then. The D.C. Circuit affirmed the Commission's determination regarding SoCal Edison's ROE and found that the Commission did not hold SoCal Edison to a higher standard than the FPA allows in requiring that SoCal Edison, a single utility of average risk, use the median instead of the midpoint.¹⁸ Further, the D.C. Circuit found that the Commission has, in fact, properly identified and provided principle reasons for its decision to use the median for setting the ROE in electric proceedings.¹⁹ The D.C. Circuit also dismissed SoCal Edison's argument that the Commission's use of the midpoint for a group of utilities with diverse risk profiles, such as for the members of a regional transmission organization, disadvantages single electric utilities as not withstanding scrutiny.²⁰ Therefore, consistent with *SoCal Edison v. FERC*, we will deny PNM's request for rehearing and reaffirm our requirement that PNM, a single utility of average risk, calculate its ROE based on the median of the proxy group.

¹⁶ March Order, 142 FERC ¶ 61,168 at P 28.

¹⁷ *Southern Cal. Edison Co. v. FERC* No. 11-1471, -- F.3d --, 2013 WL 1920937 (D.C. Cir. May 10, 2013) (*SoCal Edison v. FERC*).

¹⁸ *Id.*, slip op. at 4.

¹⁹ *Id.* at 6.

²⁰ *Id.* at 9.

C. Navopache's Rehearing Request

14. We find that Navopache's arguments on this issue are well-founded and, therefore, we will grant its request for rehearing. Navopache correctly asserts that the 24-month cutoff date established in PNM's formula rate Implementation Protocols contradicts the Commission's longstanding policy that an error in the application of a formula rate is a violation of the filed-rate doctrine and as such is correctable back to the date of the error, irrespective of elapsed time.²¹ Specifically, Navopache references a previous Commission order in which the Commission directed a utility to remove language from its protocols that would impose time-barred corrections, finding that, "[i]n order for formula rates to work properly, they must allow for after-the-fact corrections and updates."²² Accordingly, we will direct PNM, within 30 days of the date of issuance of this order, to revise the Implementation Protocols of its formula rate to remove the 24-month cut-off for the correction of formula rate errors.

The Commission orders:

(A) PNM's rehearing request is hereby denied, as discussed in the body of this order.

(B) Navopache's rehearing request is hereby granted, as discussed in the body of this order.

²¹ Navopache Rehearing Request at 2-3.

²² *Id.* at n.9, citing *Virginia Elec. and Power Co.*, 123 FERC ¶ 61,098, at P 46 (2008). Navopache also cites *North Carolina Elec. Membership Coop. v. Carolina Power & Light Co.*, 57 FERC ¶ 61,332, at 62,065 (1991), in which the Commission rejected the utility's efforts to limit the period of review to the prior 12 months and stated "[w]hile prompt identification of disputes is certainly a reasonable goal to strive for, the Commission cannot allow utilities to recover excessive rates through automatic adjustment clauses because the customer did not complain in as prompt a manner as the company believes the customer should have." *Id.* at n.12.

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

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.