

135 FERC ¶ 61,137
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.

Promoting a Competitive Market for Capacity
Reassignment

Docket No. RM10-22-001

ORDER NO. 739-A

ORDER ON REHEARING AND CLARIFICATION

(Issued May 19, 2011)

1. On September 20, 2010, the Federal Energy Regulatory Commission (Commission) issued a Final Rule in this proceeding that revised the *pro forma* open access transmission tariff (OATT) to lift the price cap for sales of reassigned electric transmission capacity beyond the end of a two-year study period.¹ This action was intended to facilitate the development of a market for electric transmission capacity reassignments as a competitive alternative to primary transmission capacity. Powerex Corp. (Powerex) and Portland General Electric Co. (PGE) filed requests for clarification or, in the alternative rehearing. They request that the Commission clarify, or find on rehearing, that certain rate schedules, approved by the Commission in separate proceedings, that have allowed Powerex, PGE, and other transmission customers within Bonneville Power Administration's (Bonneville) service area to make reassignments of electric transmission capacity via bilateral sales at negotiated rates remain operative. In addition, Powerex seeks clarification on how opportunity costs should be calculated under the price cap provisions of Bonneville's OATT. In this order, we deny the requests for rehearing and clarification.

¹ *Promoting a Competitive Market for Capacity Reassignment*, Order No. 739, 132 FERC ¶ 61,238 (2010).

I. Background

2. To foster the development of a more robust secondary market for transmission capacity, the Commission, in Order No. 890, concluded that it was appropriate to lift the price cap for all transmission customers reassigning transmission capacity.² The Commission stated that this would allow transmission capacity to be allocated to those entities that value it most, thereby sending more accurate price signals to identify the appropriate location for construction of new transmission facilities to reduce congestion.³ The Commission also found that market forces, combined with the requirements of the *pro forma* OATT as modified in Order No. 890, would limit the ability of resellers, including affiliates of the transmission provider, to exert market power.

3. The Commission directed staff to closely monitor the reassignment-related data submitted by transmission providers in their quarterly reports to identify any problems in the development of the secondary market for transmission capacity and, in particular, the potential exercise of market power.⁴ The Commission also directed staff to prepare, within six months of receipt of two years of quarterly reports, a report summarizing its findings.⁵ In addition, the Commission encouraged market participants to provide feedback regarding the development of the secondary electric transmission capacity market and, in particular, to contact the Commission's Enforcement Hotline if concerns arise.

4. In Order No. 890-A, the Commission affirmed its decision to remove the price cap on reassignments of electric transmission capacity but granted rehearing to limit the period during which reassignments may occur above the cap.⁶ The period was limited so

² *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, at P 808 (2007), *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).

³ Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 808.

⁴ *Id.* P 820.

⁵ *Id.*

⁶ Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 388, 390.

that the Commission could review the Staff Report to see if changes were needed based on the actual operation of the reassignment program. Accordingly, the Commission amended section 23.1 of the *pro forma* OATT to reinstate the price cap as of October 1, 2010.⁷ Commission staff published its report on the two-year study period on April 15, 2010.⁸

5. Based on its experience regulating capacity reassignment markets and the two-year study, the Commission issued Order No. 739, which lifted the price cap for all electric transmission customers reassigning transmission capacity beyond October 1, 2010. To implement this reform, the Commission revised section 23 of the *pro forma* OATT and directed transmission providers to file conforming changes within 30 days from publication of the Final Rule in the *Federal Register*. The Commission also denied a request from Bonneville for a blanket waiver for non-jurisdictional entities that are unable to satisfy reciprocity conditions with regard to the reassignment of transmission capacity.

6. In its comments to the notice of proposed rulemaking, Powerex expressed concern that Bonneville would reinstate the price cap as of October 1, 2010 and asked the Commission to clarify that Powerex's stand-alone rate schedule (used for capacity reassignment) would remain effective beyond October 1, 2010 and to provide guidance on how to calculate the price cap based on the assignor's opportunity costs capped at the cost of expansion. In the Final Rule, the Commission found Powerex's concern to be premature since Bonneville had not made a final decision about re-instating the price cap as of October 1, 2010. The Commission noted that, when Bonneville submitted its tariff revisions pursuant to Order No. 890, it declined to adopt certain *pro forma* provisions related to the reassignment of transmission capacity and several transmission customers, within Bonneville, including Powerex, filed stand-alone rate schedules allowing them to sell transmission capacity above the price cap.⁹ The Commission indicated that these

⁷ *Id.* P 390.

⁸ FERC Staff, *Staff Finding on Capacity Reassignment* (2010), available at <http://www.ferc.gov> (Staff Report).

⁹ Order No. 739, 132 FERC ¶ 61,238 at P 38 (citing *Portland General Electric Co.*, Docket No. ER09-93-000 (Dec. 3, 2008) (unpublished letter order); *Idaho Power Co.*, Docket No. ER09-524-000 (Mar. 5, 2009) (unpublished letter order); *Puget Sound Energy, Inc.*, Docket No. ER09-528-000 (Mar. 5, 2009) (unpublished letter order); *Avista Corp.*, ER09-729-000 (May 12, 2009) (unpublished letter order); *PacifiCorp*, Docket No.

(continued...)

customers could submit any necessary revisions to their rate schedules before October 1, 2010 and request waiver of the prior notice requirement, if they find such action to be necessary and appropriate.

II. Discussion

A. Requests for Clarification or, in the Alternative, Rehearing

7. Powerex and PGE state that because Bonneville has indicated that it will reinstate the price cap on its system as of October 1, 2010, Powerex's concerns related to that re-imposition are no longer premature. They also state that Bonneville has declined to adopt the *pro forma* tariff language that would cause it to act as an intermediary or party in its customers' reassignments. Powerex and PGE ask the Commission to clarify that under these circumstances the stand-alone rate schedules permitting capacity reassignments at negotiated rates within non-jurisdictional transmission providers (such as Bonneville) remain operative.

8. Powerex states that for non-jurisdictional transmission providers that have adopted the Commission's *pro forma* OATT provisions to facilitate transmission assignments, but have not removed the price cap for reassignments, transmission customers appear to be required to follow the non-jurisdictional transmission provider's OATT provisions for reassignments. For those non-jurisdictional transmission providers that have not adopted the price reforms of Order No. 739, the price paid for reassigned capacity is set at the higher of several factors, one of which is the customer's opportunity cost capped at the transmission provider's cost of expansion. Accordingly, Powerex asks the Commission to provide guidance regarding the calculation of opportunity cost where transmission customers that may continue to be subject to price caps should evaluate or demonstrate such opportunity costs. If the Commission does not provide the requested clarification, Powerex and PGE request rehearing.

9. Powerex and PGE explain that, on September 21, 2010, Bonneville sent an email to its transmission customers stating that it would reinstate the price cap on reassignments of transmission capacity beginning October 1, 2010. PGE also points out that Bonneville posted a revision to its business practices governing the resale transmission service to reinstate the price cap. Moreover, Powerex states that Bonneville has still declined to adopt the Order No. 890 *pro forma* tariff language requiring it to act as a financial

intermediary for capacity reassignments. PGE contends that, to the extent transmission customers on Bonneville's system are uncertain as to the prices at which they may reassign transmission capacity, this lack of clarity will inhibit reassignments and undermine the development of robust secondary markets. PGE further contends that the Commission's goals are only likely to be achieved, particularly in the Pacific Northwest, if entities holding rights to capacity on Bonneville's transmission system can reassign those rights at market-based rates.

B. Answers

10. In an answer filed on September 30, 2010, Bonneville asks the Commission to deny Powerex's request that Powerex's stand-alone rate schedule permitting capacity reassignments at negotiated rates remain effective. Bonneville contends that to allow Powerex to continue using its stand-alone rate schedule would be inconsistent with Bonneville's tariff, which re-imposed the price cap as of October 1, 2010. Bonneville explains that it is a non-jurisdictional transmission provider, not subject to the Commission's jurisdiction under sections 205 and 206 of the Federal Power Act and, as such, the Commission cannot authorize a public utility (such as Powerex) to act inconsistently with Bonneville's tariff. Moreover, Bonneville contends that the authority of its customers to resell transmission capacity at negotiated rates under stand-alone rate schedules was only necessary on Bonneville's system to accommodate the two-year study by Commission staff. Bonneville contends that reinstating the price cap for reassignments of transmission on the Bonneville system will not hinder the development of a robust resale market.

11. Bonneville states that it has been working to resolve its customers' concerns and, on September 28, 2010, posted proposed revisions to its Resale of Transmission Service business practice that would allow transmission customers to resell transmission capacity pursuant to Section 23.1(iii) above the rate at which customers purchased that capacity and above the maximum rate that Bonneville has on file. Bonneville explains that, under the proposed revisions, Bonneville would assume that, unless there is evidence to the contrary, capacity reassignments at a price above Bonneville's rate would fall within Section 23.1(iii), which sets the resale value as the reseller's opportunity cost capped at the transmission provider's cost of expansion. On November 5, 2010, Bonneville filed an answer to PGE's request for clarification in which Bonneville summarized its response to Powerex.

12. In its answer, Powerex contends that Bonneville's business practices have no bearing on the applicability of Powerex's existing rate schedule for certain transmission reassignments. Powerex explains that the reason Powerex and other transmission customers required independent market-based rate authority for capacity reassignments

on certain non-jurisdictional transmission systems was not due to Order No. 890's removal of the price cap, but rather because certain transmission providers had not chosen to adopt the Order No. 890 *pro forma* tariff provisions requiring them to act as financial intermediaries for reassignments on their systems. Powerex further explains that, in such cases, jurisdictional transmission customers seeking to reassign capacity must engage in bilaterally-negotiated transactions with their counterparty-assignees. Powerex contends that, because Bonneville continues not to act as an intermediary for transmission reassignments, Powerex's independent market-based rate schedule for reassignments remains fully necessary and operative.

13. Powerex also contends that Bonneville's proposed business practice would allow customers to sell transmission capacity at rates above Bonneville's maximum tariff rate at a price capped at the customer's opportunity cost. Powerex explains that Bonneville's draft business practice states that Bonneville will assume that, "unless there is evidence to the contrary," resales of transmission at a price above the maximum tariff rate will fall under the "opportunity cost" cap in Section 23.1 of Bonneville's OATT. Powerex contends that the proposed business practice creates more uncertainty because of Bonneville's unbounded discretion to determine whether a customer's market-based reassignment qualifies as being at or below the customer's opportunity cost.

14. If Section 23 of Bonneville's OATT is held to govern the pricing of bilaterally negotiated reassignments, Powerex contends that further specifications must be incorporated into Bonneville's OATT. Powerex states that the Commission has consistently required that "utilities must file 'those practices that affect rates and service significantly, that are reasonably susceptible of specification, and that are not so generally understood in any contractual arrangement as to render recitation superfluous.'"¹⁰ Thus, Powerex contends that, where a utility adopts certain practices that condition or otherwise significantly affect rates on its system, such as Bonneville's business practice, those practices must be set forth in its tariff. Accordingly, Powerex contends that Bonneville should incorporate its business practice into its OATT along with any other provisions that would provide it with sole discretion to determine whether a customer's reassignment price above the maximum tariff rate is acceptable under Section 23.1 of Bonneville's OATT.

¹⁰ Powerex Answer at 8 (citing *KeySpan Ravenswood, LLC v. FERC*, 474 F.3d 804, 811 (D.C. Cir. 2007) (citing *City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985))).

C. Commission Determination

15. The Commission denies the requests for clarification, or in the alternative rehearing, filed by Powerex and PGE. In Order No. 739, the Commission declined to clarify that the existing stand-alone rate schedules that allow reassignments above the price cap would remain operative because those rate schedules were outside the scope of this proceeding and it was unclear at the time whether Bonneville would re-impose the price cap. The Commission suggested that entities could file, in separate proceedings, revised rate schedules allowing them to continue reselling transmission capacity above a price cap if such a price cap were imposed by a non-jurisdictional entity. The Commission stated that these revisions could be filed by October 1, 2010 to allow transmission customers to continue to resell transmission capacity at negotiated rates even if a non-jurisdictional transmission provider re-imposed the price cap.

16. We continue to find that the issues raised with respect to Bonneville are better resolved in specific proceedings rather than as part of a generic rulemaking. In fact, customers have made individualized filings raising these issues. Powerex, Macquarie Energy LLC (Macquarie), and Morgan Stanley Capital Group Inc. (MSCG) filed, in separate proceedings, revised stand-alone rate schedules governing reassignments of transmission capacity on non-jurisdictional systems that remove reference to the October 1, 2010 reinstatement of the price cap. The Commission did not receive any protests to any of these revised rate schedules and accepted all three.¹¹ Like Powerex and others, PGE can file a stand-alone rate schedule governing reassignments of transmission capacity on non-jurisdictional systems to allow assignments over the cap of the non-jurisdictional system. The Commission will evaluate the merits of that filing once made, just as it has for Powerex, Macquarie, and MSCG.

17. Powerex asks for Commission guidance regarding the calculation of opportunity cost where a non-jurisdictional transmission provider declined to lift the price cap on reassignments of transmission capacity beyond October 1, 2010 as directed in Order No. 739. We find Powerex's concern to be beyond the scope of this proceeding. In Order No. 739, the Commission concluded that lifting the price cap on reassignments of transmission capacity would facilitate the development of a market for electric transmission capacity reassignments as a competitive alternative to transmission capacity

¹¹ *Powerex*, Docket No. ER10-3060-000 (Nov. 18, 2010) (unpublished letter order); *Macquarie Energy LLC*, Docket No. ER10-3089-000 (Nov. 19, 2010) (unpublished letter order); *Morgan Stanley Capital Group*, Docket No. ER11-68-000 (Nov. 23, 2010) (unpublished letter order).

acquired directly from the transmission owner. Accordingly, the Commission revised section 23.1 of the *pro forma* OATT and directed all transmission providers to file these changes within 30 days of publication of Order No. 739 in the Federal Register. Issues of reciprocity with non-jurisdictional transmission providers, such as Bonneville, are outside the scope of this proceeding. Moreover, Powerex's request appears moot at this point since, as discussed above, Powerex has an individual rate schedule permitting sales of transmission capacity above the price ceiling.

Commission Orders:

The requests for rehearing and clarification are denied as discussed in the body of the order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.