

123 FERC ¶ 61,033
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Public Service Company of New Mexico
EnergyCo Marketing and Trading, LLC

Docket Nos. ER96-1551-019
ER01-615-015
ER07-965-001

ORDER ON NOTICE OF CHANGE IN STATUS
AND TARIFF REVISIONS

(Issued April 17, 2008)

1. In this order, we accept the notice of change in status jointly filed by Public Service Company of New Mexico (PNM) and EnergyCo Marketing and Trading, LLC (EnergyCo)¹ (collectively, Applicants) that reflects a departure from the characteristics that the Commission relied upon in granting Applicants market-based rate authority.² For the reasons discussed below, we accept, effective October 27, 2007, Applicants' proposal to extend previously-approved cost-based rate mitigation in PNM's balancing authority area to all sales during the Summer, Fall and Winter seasons, and to continue current cost-based rate mitigation in the El Paso Electric Company (El Paso) balancing authority area during periods of binding transmission constraints or transmission outages in compliance with a previous Commission order.³ We also accept effective, September 18, 2007, the proposed revisions to Applicants' market-based rate tariffs in compliance with Order No. 697.⁴

¹ EnergyCo is an affiliate of PNM and does not own or control any generating capacity.

² See *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

³ *Public Service Company of New Mexico*, 116 FERC ¶ 61,236 (2006) (Mitigation Order).

⁴ See *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 72 Fed. Reg. 39,904 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252, *clarified*, 121 FERC ¶ 61,260 (2007).

Background

2. On October 26, 2007, as amended on March 20, 2008, Applicants submitted for filing a change in status report that notified the Commission that PNM had acquired the rights to an additional 190 MW of generation. This generation came from three separate sources: a right to purchase up to 40 MW of power located in the PNM balancing authority area from Pyramid Unit 4 owned by Tri-State Generation and Transmission Association, Inc. (Tri-State) under a long-term agreement effective June 1, 2007; the purchase of 50 MW of unit-contingent power located in the Tucson Electric Power Company balancing authority area from Springerville Unit 3 owned by Tri-State under a long-term agreement effective June 1, 2007; and the test firing of an upgrade to a steam turbine at PNM's Afton Generating Station located in the PNM balancing authority area that will add 100 MW of generating capacity to the facility. Applicants also notify the Commission that on February 1, 2007, the PNM balancing authority area and the Public Service Company of Colorado balancing authority area became directly interconnected for the first time. Applicants submitted indicative screens for the PNM balancing authority area, the El Paso balancing authority area, and the remaining first-tier balancing authority areas.⁵

3. Applicants' analysis of the PNM balancing authority area recognizes that they fail the market share screen, so Applicants propose to extend existing mitigation to include all sales in PNM's balancing authority area during the Summer, Fall and Winter seasons, regardless of whether there are transmission constraints, as well as sales in the Spring season when PNM's transmission system is constrained at a delivery point in the constrained area.⁶ For the El Paso balancing authority area, Applicants submitted two analyses, the Base Case and the Current Transmission Utilization Analysis, both of which are based on 2006 data. Based on those studies, Applicants propose to keep mitigation at the current level in the El Paso balancing authority area, as discussed below. In the remaining first-tier markets, Applicants submit studies that they claim show that they pass both the market share and pivotal supplier screens in those markets.

⁵ The remaining first-tier balancing authority areas analyzed are Arizona Public Service, Salt River Project, Western Area Power Administration (WAPA) Lower Colorado, WAPA Colorado Missouri, Tucson Electric Power, Public Service Colorado, and Southwestern Public Service.

⁶ The Commission previously approved price cap mitigation measures that apply when there is a binding transmission constraint into southern New Mexico. *See* Mitigation Order, 116 FERC ¶ 61,236 at P 16.

4. Applicants also submitted proposed tariff revisions that included certain standard provisions in compliance with Order No. 697.⁷

Notice of Filing and Responsive Pleading

5. Notice of Applicants' October 26, 2007 filing was published in the *Federal Register*, 72 Fed. Reg. 64,207 (2007), with interventions and protests due on or before November 16, 2007. None was filed. Notice of Applicants' March 20, 2008 filing was published in the *Federal Register*, 73 Fed. Reg. 16,665 (2008), with interventions and protests due on or before April 10, 2008. None was filed.

Discussion

Horizontal Market Power

6. Applicants filed updated horizontal market power analyses for the PNM balancing authority area and their first-tier balancing authority areas to reflect PNM's acquisition of an additional 190 MW of generation. In order to assess horizontal market power, the Applicants prepared both the pivotal supplier and the wholesale market share screen analyses for these areas.

7. Applicants' market power analysis of PNM's balancing authority area is based on 2006 data that takes into account the additional generation acquired in 2007. Based on that data, Applicants conclude that they fail the market share screen in the Summer, Fall and Winter seasons and pass in the Spring season. Applicants also pass the pivotal supplier screen in all seasons.

8. Applicants' existing market-based rate tariffs provide that "[s]ervice under this Tariff shall not be provided during certain periods in which PNM's transmission system is constrained. During times of such transmission constraints [seller] shall not provide service under this Tariff for delivery to all delivery points within or through the constrained area."⁸ The tariffs also provide that, "when there exists a binding transmission constraint into southern New Mexico (SNM Binding Constraint Condition), the total price charged for a sale under this Tariff with a duration of less than one year (Capped Sale) shall not exceed 110 percent of the incremental cost of the incremental

⁷ In Order No. 697, the Commission stated that entities with market-based rate tariffs on file must amend their tariffs to include certain *pro forma* language with, among other things, their next change in status filing. *See* Order No. 697, FERC Stats. & Regs. ¶31,252 at P 924.

⁸ PNM FERC Electric Tariff, First Rev. Vol. No. 3, Third Revised Sheet No. 1; EnergyCo FERC Electric Tariff, Original Vol. No. 1, Original Sheet No. 3.

resource dispatched by [seller] during the period of the Capped Sale.”⁹ The Commission previously found that this mitigation “alleviates our concern . . . regarding market conditions in the El Paso [balancing authority] area during times of binding transmission constraints or other transmission outages.”¹⁰

9. As a result of their market share screen failures, Applicants propose to amend their market-based rate tariffs to impose a similar cost-based price cap in the PNM balancing authority area on the rates that may be charged for sales of less than a year during the Summer, Fall and Winter seasons, regardless of whether any transmission constraints exist. In addition, Applicants propose to extend these same mitigation measures to Spring sales at any constrained point on PNM’s transmission system.¹¹

10. For the El Paso balancing authority area, Applicants performed two sets of the indicative screens: a set entitled “Base Case” and a set entitled “Current Transmission Utilization Analysis.”¹² Under the Base Case, which accounts for the new generation acquired in 2007, Applicants fail the market share screen in the Winter and Summer seasons, with market shares of 22.8 percent and 31.9 percent, respectively. Applicants assert that based on the Current Transmission Utilization Analysis, they pass the screen in the Spring and Fall seasons with market shares of 15.7 percent and 17.3 percent, respectively. To arrive at the Current Transmission Utilization Analysis, Applicants adjusted the Base Case analysis to reflect two changes in transmission that occurred

⁹ PNM FERC Electric Tariff, First Rev. Vol. No. 3, First Revised Sheet No. 6; EnergyCo FERC Electric Tariff, Original Vol. No. 1, Original Sheet No. 3-4. The tariffs state that “a SNM Binding Constraint Condition shall mean times when the aggregate firm transmission rights of parties to the New Mexico Transmission Operating Procedures (NMTOP) over WECC [Western Electricity Coordinating Council] Path 47 are reduced below the levels specified in NMTOP Sections 1.6 and 1.7 . . . : (a) because of a forced or maintenance outage to a southern New Mexico transmission system line or piece of equipment by operation of NMTOP Section 11; (b) because of a forced or maintenance outage of a northern New Mexico transmission system line or piece of equipment by operation of NMTOP Section 13; or (c) by operation of NMTOP Section 10.” *Id.*

¹⁰ Mitigation Order, 116 FERC ¶ 61,236 at P 16.

¹¹ Applicants’ existing market-based rate tariffs state that the tariffs do not extend to sales in a constrained area of the PNM system during the period of a constraint.

¹² Note that while Applicants have submitted two sets of studies for the El Paso balancing authority area and only one set in all other areas, they include the described 190 MW of generation in each market for all studies they provide, including PNM and all first-tier markets.

in 2007. The first change is a 100 MW power swap between El Paso and Phelps Dodge Energy Services, effective June 15, 2006,¹³ which Applicants claim has had the effect of reducing the transmission capacity potentially available to first-tier suppliers into the El Paso balancing authority area and ultimately reducing imported power in each season by a range of 25 MW to 8 MW. The second change is the termination of a contract under which PNM reserved 67 MW of transmission into the El Paso balancing authority area, which Applicants claim freed up transmission capacity to be used by others, and ultimately reduced long-term firm purchases from 67 MW to 0 MW. Under the Current Transmission Utilization Analysis, Applicants pass the market share screen in all seasons with market shares ranging from 2.4 to 8.9 percent. Applicants pass the pivotal supplier screen in all seasons under both the Base Case and Current Transmission Utilization Analysis.

11. As noted above, Applicants have Commission-approved mitigation in place in the El Paso balancing authority area that caps prices during times of a “Southern New Mexico Binding Transmission Constraint” over WECC Path 47, as defined further in Applicants’ market-based rate tariffs. This mitigation was the result of a section 206 proceeding investigating PNM’s potential to exercise market power in the El Paso balancing authority area.¹⁴ Applicants propose to retain this mitigation.

12. Applicants submitted a study for their remaining first-tier markets demonstrating that Applicants pass all of the screens in those markets. However, the study uses 2004 data. In their March 20, 2008 filing, Applicants informed the Commission that:

[T]hey are not aware of any changes from 2004 to 2007 that would materially alter the results of Dr. Pace’s analyses of these markets. Dr. Pace found that Applicants pass both of the Commission’s indicative screens by wide margins in all of these first-tier markets, [] and Applicants do not believe that the use of 2006 or later data would have any material impact on these results.¹⁵

13. The Commission has reviewed Applicants’ pivotal supplier and wholesale market share screens for these remaining balancing authority areas, and has determined that Applicants pass the screens for those markets. Accordingly, the Commission finds that Applicants satisfy the Commission’s horizontal market power standard for the grant of market-based rate authority in those markets.

¹³ *El Paso Electric Company*, 115 FERC ¶ 61,312 (2006).

¹⁴ *Public Service Company of New Mexico*, 109 FERC ¶ 61,296 (2004), *reh’g denied*, 111 FERC ¶ 61,038 (2005), Mitigation Order, 116 FERC ¶ 61,236.

¹⁵ Applicants’ March 20, 2008 filing at 1-2.

14. Based on the record before us, we find that the proposed mitigation in the PNM balancing authority area, which caps the price at which Applicants can sell power at a rate equal to Applicants' incremental cost plus ten percent, alleviates our market power concerns. However, the Commission has specified that cost-based provisions should not be included in a market-based rate tariff.¹⁶ Therefore, the existing tariff provisions regarding cost-based caps during SNM Binding Constraint Conditions, and the new provisions regarding cost-based caps in the PNM balancing authority area should be removed from Applicants' market-based rate tariffs. Instead, each Applicant should note in the Limitations and Exemptions section of its market-base rate tariff that it is precluded from making such sales at market-based rates, citing the instant order. To the extent that the cost-based caps are not reflected in Applicants' existing cost-based tariffs, Applicants should file to amend their cost-based tariffs to do so.

Vertical Market Power

15. Applicants state that vertical market power is not enhanced or even affected by the changes in status reported in their filing. They state they lack transmission market power because PNM has an open access transmission tariff on file with the Commission.¹⁷ Furthermore, Applicants state that EnergyCo neither owns nor controls any electric transmission facilities. Applicants assert that other than PNM, no affiliate of Applicants owns or controls any electric transmission facilities. Further, we note that no intervenor has raised transmission market power concerns.

16. With regard to other barriers to entry, Applicants state that PNM: owns an intrastate natural gas pipeline over which open access transportation is provided pursuant to New Mexico state law's gas services division; leases natural gas storage at a storage facility in Texas; and controls one unused site for generation capacity development with limited output potential. Applicants state that neither PNM, EnergyCo nor any affiliate owns or controls sources of coal supplies or equipment for the transportation of coal supplies such as barges or rail cars. Applicants cite to the requirement established in Order No. 697 directing sellers to make an affirmative statement that they "have not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market."¹⁸ In this regard, Applicants state that they lack the ability to erect

¹⁶ See *Niagara Mohawk Power Corp.*, 121 FERC ¶ 61,275, at P 21 (2007); *Deseret Generation & Transmission Co-operative, Inc.*, 115 FERC ¶ 61,306, at P 13 (2006), *order on reh'g*, 120 FERC ¶ 61,139 (2007); *Northern States Power Co.*, 83 FERC ¶ 61,293 (1998).

¹⁷ *Public Service Company of New Mexico*, Docket No. ER07-150-000 (December 20, 2006) (unpublished letter order).

¹⁸ Order No. 697, FERC Stats. & Regs. ¶ 31, 252 at P 447.

barriers to entry into markets in which they are located and commit not to do so. No intervenor has raised concerns regarding barriers to entry.

17. Based on Applicants' representations, the Commission finds that Applicants satisfy the Commission's vertical market power standard for the grant of market-based rate authority.

Order No. 697 Tariff Compliance

18. Applicants' October 26, 2007 filing further incorporates changes to their respective market-based rate tariffs to comply with Order No. 697, including tariff revisions that incorporate the tariff provision adopted in Order No. 697 concerning market-based rate sales at the metered boundary. We will accept these revisions to Applicants' market-based rate tariffs as in compliance with Order No. 697, effective September 18, 2007.¹⁹

The Commission orders:

(A) Applicants are directed to revise their market-based rate tariffs, as discussed in the body of this order.

(B) Applicants are direct to make any necessary revisions to their cost-based rate tariffs, as discussed in the body of this order.

(C) Applicants' revised market-based rate tariff sheets filed in compliance with the determinations made by the Commission in Order No. 697, including tariff revisions that incorporate the provision adopted in Order No. 697 concerning market-based rate sales at the metered boundary, are hereby accepted, effective September 18, 2007, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁹ Public Service Company of New Mexico, FERC Electric Tariff, Second Revised Volume No. 3, Original Sheet Nos. 1-10; EnergyCo Marketing and Trading, LLC, FERC Electric Tariff, First Revised Volume No. 1, Original Sheet Nos. 1-5