

139 FERC ¶ 61,226
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

Powerex Corp.

Docket No. EL12-21-001

v.

United States Department of Energy, Western Area
Power Administration – Sierra Nevada Region

ORDER DENYING REHEARING

(Issued June 21, 2012)

1. In this order, we deny Powerex Corp.'s (Powerex) request for rehearing of an order issued on March 15, 2012 that denied a complaint, filed by Powerex against the Western Area Power Administration – Sierra Nevada Region (Western), alleging that Western unlawfully and preferentially awarded transmission service to Morgan Stanley Capital Group Inc. (Morgan Stanley).¹

I. Background

2. Western is a federal power marketing administration that operates transmission facilities in 15 western and central states. Western is not a public utility subject to sections 205 and 206 of the Federal Power Act (FPA).² Western is, however, a transmitting utility subject to sections 210 through 213 of the FPA.³ In addition, Western operates under a reciprocity open access transmission tariff (OATT or Tariff) on file with

¹ *Powerex Corp. v. United States Dep't. of Energy, Western Area Power Admin. – Sierra Nevada Region*, 138 FERC ¶ 61,188 (2012) (March 15 Order).

² 16 U.S.C. §§ 824d, 824e (2006).

³ 16 U.S.C. §§ 824j, 824k, 824l (2006).

the Commission.⁴ In order to maintain reciprocity after the Commission issued Order No. 890,⁵ Western revised its tariff to incorporate, among other things, the requirement to offer conditional firm transmission service, a modified version of long-term firm service with varying curtailment priorities, when it cannot accommodate a request for long-term firm service.⁶

3. On December 30, 2011, Powerex filed a complaint with the Commission alleging that Western unlawfully and preferentially awarded to Morgan Stanley long-term firm point-to-point transmission service on the California-Oregon Transmission Project (COTP), a 500 kV transmission line. Powerex alleged that Western's grant of 50 MW of long-term firm capacity on the COTP violated the Commission's open access same-time information system (OASIS) requirements, various provisions of Western's Commission-accepted reciprocity OATT, and certain provisions of Western's business practices governing its operations on OASIS.⁷

4. Powerex complained that Western had not publicly posted available transfer capacity to satisfy the award to Morgan Stanley. Further, Powerex asserted that Western had failed, until shortly before awarding the capacity to Morgan Stanley, to re-enable the OASIS function for requesting long-term firm point-to-point transmission service on its OASIS, a function that Western had disabled when it stopped offering such service on the COTP as an active product in 2007. Powerex alleged that Western's actions resulted in non-comparable treatment of similarly-situated transmission customers and undue discrimination in violation of the FPA.⁸

5. To remedy the alleged violations, Powerex requested the Commission to direct Western to vacate its award of capacity to Morgan Stanley and create a fresh queue with appropriate notice to all potential customers. Powerex also requested the Commission to direct Western to undertake a number of actions to remedy the alleged transparency

⁴ *Western Area Power Admin.*, 133 FERC ¶ 61,193 (2010).

⁵ *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) (Order No. 890).

⁶ Western OATT, § 15.4.

⁷ March 15 Order, 138 FERC ¶ 61,188 at P 1.

⁸ *Id.* P 5.

issues surrounding the availability of long-term firm point-to-point transmission service on the COTP.⁹

6. In their answers, Western and Morgan Stanley pointed out that Morgan Stanley's request had been submitted via fax on January 3, 2011, pursuant to section 17.1 of Western's OATT, and was not the result of off-the-record negotiations, as Powerex had alleged. Further, Western and Morgan Stanley clarified that the award was for conditional firm transmission service on the COTP, not for long-term firm service.¹⁰ Western also averred that it has no long-term firm capacity on the COTP available to third parties due to prior commitments for the capacity under existing contracts and statutory allotments for use by the Department of Energy.¹¹

7. The Commission denied the complaint, finding no evidence in the record of preferential treatment or undue discrimination by Western. Further, the Commission found that Morgan Stanley and Western had followed the procedures in Western's reciprocity OATT and corresponding business practice manuals. The Commission also found that Morgan Stanley's submission of an application for long-term firm service via fax was a valid submission under Western's currently-effective OATT. Specifically, the Commission noted that section 17.1 of Western's OATT, which has been part of Western's OATT since its inception and remains part of Western's OATT, provides for the submission of applications by fax.¹² Finally, the Commission found that Western complied with all other relevant provisions of its OATT and business practices.¹³ The Commission noted that "Powerex had numerous opportunities to seek clarification of the process for obtaining conditional firm service after the Commission's acceptance of Western's Order No. 890 reciprocity OATT and Western's implementation of its conditional firm transmission service business practices."¹⁴

8. On April 17, 2012, Powerex requested rehearing of the March 15 Order.

⁹ *Id.* PP 15, 16.

¹⁰ *Id.* PP 19-20, 29.

¹¹ *Id.* P 27.

¹² *Id.* P 34.

¹³ *Id.* PP 35, 36.

¹⁴ *Id.* P 41.

II. Request for Rehearing

9. Powerex explains that it does not challenge the Commission's finding in the March 15, 2012 Order of no preferential treatment or undue discrimination by Western. Rather, Powerex expresses concern that "the Commission's March 15 Order may establish a precedent that undermines the fundamental principles of transparency that the Commission established to limit the potential for undue discrimination and preferential treatment by transmission providers."¹⁵ Further, Powerex posits that the March 15 Order may be interpreted as giving transmission providers discretion to turn off established OASIS queues in favor of fax requests, without providing notice to customers.¹⁶ Powerex also asserts that the March 15 Order could be read as sanctioning transmission providers selectively managing their transmission queues without providing public notice to all customers. Powerex states that it requests rehearing in view of these potential interpretations.¹⁷

10. Specifically, Powerex argues that the Commission erred by not acknowledging that faxed transmission requests are appropriate only in two limited circumstances: (1) prior to implementation of the transmission provider's OASIS; and (2) where an established OASIS malfunctions.¹⁸ Thus, Powerex contends that, because neither of these exceptions was present in this case, the Commission arbitrarily and capriciously contravened and established precedent by finding that Morgan Stanley's fax transmission was valid.¹⁹

11. Powerex continues to insist that Western's actions in accepting Morgan Stanley's request were inconsistent with the Commission's OASIS regulations and Western's business practices, arguing that these requirements preclude Western from having the discretion to accept a fax submission.²⁰ Powerex contends that the undisputed facts in

¹⁵ Powerex April 17, 2012 Rehearing Request at 3 (Powerex Rehearing Request).

¹⁶ *Id.* at 3-4.

¹⁷ *Id.* at 5-6.

¹⁸ *Id.* at 7 (citing Western OATT, § 17.1).

¹⁹ *Id.* at 7-10.

²⁰ *Id.* at 10-11 (citing 18 C.F.R. § 37.6(e)(1)(i) (2011) ("[a]ll requests for transmission and ancillary service offered by [t]ransmission [p]rovider ... must be made on the OASIS and posted prior to the [t]ransmission [p]rovider responding to the request ..."); Western Operations Business Practice BP-009 § 19.3 (requiring that all requests for long-term firm transmission service be made through Western's OASIS)).

this case establish that Western and Morgan Stanley did not adhere to these requirements. Powerex argues that by finding that the Morgan Stanley request was validly submitted and that Western acted in accordance with its OATT, the March 15 Order is inconsistent with section 37.6(e)(1)(i) of the Commission's regulations and, therefore, cannot be upheld. Further, Powerex asserts that the Commission failed to address Powerex's allegation that the May 6, 2011 posting to Western's long-term transmission queue bears no resemblance to the Morgan Stanley request.²¹

12. Powerex asserts that, in order to protect the Commission's long-established precedent regarding the fundamental need for transparency, the Commission should: (1) reaffirm the narrow limits on the use of fax machines for transmission service requests; (2) determine that Western did not comply with the Commission's OASIS regulations and its own business practices, and erred by ignoring the language of its tariff and accepting Morgan Stanley's faxed transmission service request; and (3) direct Western to consistently comply with the Commission's OASIS regulations and the requirements of its tariff and business practices.²²

III. Discussion

13. We will deny Powerex's rehearing request. We disagree with Powerex's assessment of the adverse consequences that may result from possible interpretations of the March 15 Order. We find that nothing in the March 15 Order can be read as paving the way for off-the-record negotiations, undue discrimination, or preferential treatment, and any such possibility is speculative in any event.

14. The determinations in the March 15 Order are highly fact-sensitive and do not create precedent condoning the widespread use of fax submissions as a replacement for OASIS-based transmission service requests. The Commission has, as Powerex correctly notes, placed limitations on the use of fax requests for transmission service.²³ However,

²¹ *Id.* at 10-14.

²² *Id.* at 15-16.

²³ See, e.g., *Powerex Corp. v. US Dep't of Energy—W. Area Power Admin., Rocky Mtn. Region/Western Area Colorado Missouri*, 95 FERC ¶ 61,241, at 61,826-27 (2001); *Open Access Same-Time Information System and Standards of Conduct*, 88 FERC ¶ 61,305 (1999); *order on clarification*, 91 FERC ¶ 61,339, at 62,150 (2000); *Carolina Power & Light Co., et al.*, 85 FERC ¶ 61,145, at 61,579 (1998); *Am. Elec. Power Serv. Corp., et al.*, 81 FERC ¶ 61,332, at 62,517 (1997).

this case involves a novel, and perhaps unanticipated, situation²⁴ and we stand by our prior determination that acceptance of Morgan Stanley's fax request by Western was reasonable under the circumstances and within the bounds of Western's tariff.

15. Moreover, we find that Powerex's general concerns regarding the possible industry perception of the Commission's continuing commitment to open access and transparency are well beyond the scope of this proceeding, which addresses the narrow issue of whether Western engaged in violations that justify vacating its award of transmission capacity to Morgan Stanley. They are, as well, speculative. We continue to find, based on the unique facts and circumstances surrounding the award, as described elsewhere in this order and in the March 15 Order, that such a remedy is unwarranted.

16. In the March 15 Order, moreover, the Commission concluded that, "even if [Western] had posted Morgan Stanley's request on its OASIS immediately upon receipt, on January 3, 2011, thereby providing notice to Powerex that it could submit its own request," any error in administering Western's stated procedures would have been harmless because Morgan Stanley's request still would have taken priority, as first in time, over any subsequent Powerex request.²⁵ On rehearing, Powerex has again not persuaded us that either the timing or content of that posting contributed to any harm that Powerex may have suffered, given that Morgan Stanley's request still would have taken priority.

17. Further, we find it unnecessary to grant rehearing to afford the relief requested by Powerex. It goes without saying that all entities with OATTs on file with the Commission, including those that have filed reciprocity OATTs, are expected to comply with those tariffs and any associated business practices, as well as the Commission's OASIS regulations. By filing a reciprocity OATT, Western committed itself to providing open access to its transmission system in a transparent and non-discriminatory manner. Nothing in the March 15 Order changes those commitments or the Commission's expectations regarding Western's compliance with the terms of its OATT or any other applicable regulations.

²⁴ Western included general provisions for conditional firm transmission service in its Order No. 890 reciprocity OATT and business practices, but does not appear to have contemplated specific policies to address the unique situation on the COTP where Western has no long term firm transmission capacity available for third parties.

²⁵ See March 15 Order, 138 FERC ¶ 61,188 at P 41.

The Commission orders:

Powerex's rehearing request is hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Clark voting present.

(S E A L)

Kimberly D. Bose,
Secretary.