

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

Docket Nos. ER96-1551-013
ER96-1551-014
ER96-1551-015
ER96-1551-016
ER96-1551-017
ER01-615-009
ER01-615-010
ER01-615-011
ER01-615-012
ER01-615-013
EL05-2-000

ORDER ON COMPLIANCE FILING AND TERMINATING SECTION 206
PROCEEDING

(Issued September 8, 2006)

1. In this order, the Commission accepts, effective March 6, 2005, the proposal filed by Public Service Company of New Mexico (PNM) to adopt cost-based rate mitigation in the El Paso Electric Company (El Paso) control area during periods of binding transmission constraints or transmission outages in compliance with an order issued on April 21, 2006.¹ We also accept, effective June 6, 2005, the proposed amendments to PNM's market-based rate tariff regarding affiliate sales. Accordingly, the Commission terminates the proceeding instituted in Docket No. EL05-2-000 pursuant to section 206 of

¹ *Public Service Company of New Mexico*, 115 FERC ¶ 61,090 (2006) (April 21 Order).

the Federal Power Act (FPA)² that was instituted to investigate generation market power in the El Paso control area.

Background

2. On August 11, 2004, as supplemented on October 7, 2004, and amended on November 19, 2004, PNM submitted for filing an updated generation market power analysis pursuant to the Commission's order issued on May 13, 2004.³ In an order issued on December 20, 2004,⁴ the Commission found that PNM failed the wholesale market share screen for PNM's control area and that the existing mitigation in PNM's market-based rate tariff was insufficient to rebut the presumption of market power established by PNM's failure of the wholesale market share screen. In addition, we were unable to validate the results of PNM's generation market power analysis in the El Paso control area. Consequently, the Commission instituted a section 206 proceeding to investigate generation market power in the PNM and El Paso control areas.

3. Among other things, in the December 20 Order, the Commission directed PNM, for the PNM and El Paso control areas, to either: (1) file a Delivered Price Test (DPT) analysis; (2) file a mitigation proposal tailored to its particular circumstances that would eliminate the ability to exercise market power; or (3) inform the Commission that it would adopt the April 14 Order's⁵ default cost-based rates or propose other cost-based rates and submit cost-support for such rates. The Commission also gave PNM the option to file revised generation market power screens and a simultaneous transmission import capability study for the El Paso control area, which complies with the requirements of Appendix E of the April 14 Order.

4. PNM filed a timely request for rehearing and clarification of the December 20 Order. PNM also submitted a compliance filing in response to the December 20 Order. Among other things, the compliance filing included revised generation market power analyses for the PNM and the El Paso control areas and a new simultaneous import capability study for the El Paso control area. On April 14, 2005, the Commission issued

² 16 U.S.C. § 824e (2000).

³ *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004) (May 13 Order).

⁴ *Public Service Company of New Mexico*, 109 FERC ¶ 61296 (2004), *reh'g denied*, 111 FERC ¶ 61,038 (2005) (December 20 Order).

⁵ *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (2004) (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004).

an order denying rehearing and clarification, rejecting PNM's compliance filing, and directing a further compliance filing.⁶

5. In compliance with the Rehearing Order, PNM submitted a DPT analysis, as amended, for the PNM and El Paso control areas. PNM also proposed certain mitigation measures that would be effective during times of binding transmission constraints⁷ should the Commission conclude that PNM possessed generation market power in the PNM control area and/or the El Paso control area. After reviewing all of the relevant factors, including PNM's proposed mitigation measures during periods of binding constraints and its DPT analysis, the Commission concluded in the April 21 Order that PNM satisfied the Commission's generation market power standard for the grant of market-based rate authority in the PNM control area. Accordingly, the Commission terminated the section 206 proceeding instituted in Docket No. EL05-2-000 with respect to the PNM control area only.

6. However, the Commission also found in the April 21 Order that the DPT analysis submitted by PNM did not adequately address PNM's market power in the El Paso control area during conditions of binding transmission constraints over Path 47 in southern New Mexico and Path 48, to the extent that Path 48 limits imports into the El Paso control area. Therefore, the Commission directed PNM to either: (1) submit a revised DPT analysis that evaluates PNM's potential to exercise market power in the El Paso control area during conditions of binding transmission constraints or other transmission outages over Path 47 and Path 48, to the extent that Path 48 limits imports into the El Paso control area, or (2) propose cost-based mitigation measures similar to those currently in place in the PNM control area during times of binding transmission constraints.

7. The Commission also found in the April 21 Order that PNM's market-based rate tariff did not state that PNM will not make sales to an affiliate with a franchised service territory "without first receiving" Commission authorization of the transaction under

⁶ *Public Service Company of New Mexico*, 111 FERC ¶ 61,038 (2005) (Rehearing Order).

⁷ PNM's market-based rate tariff already contained mitigation measures in the event that transmission constraints on Path 48 prevent customers from importing power from outside the PNM control area. In the December 20 Order and the Rehearing Order, the Commission found that this mitigation was insufficient to rebut the presumption of market power indicated by PNM's updated market power analyses.

section 205 of the FPA.⁸ Accordingly, we directed PNM to make a compliance filing within 30 days to revise its market-based rate tariff to include such language.

8. On May 30, 2006, PNM submitted a filing in compliance with the April 21 Order (May filing) to amend its market-based rate tariff to specify that it will not make sales to an affiliate with a franchised service territory without first receiving Commission authorization of the transaction under section 205 of the FPA. PNM requests a waiver of the Commission's prior notice requirements in order to make the filing effective June 6, 2005, the date Texas-New Mexico Power Company became an affiliate of PNM.

9. On June 6, 2006, PNM filed a motion requesting: (1) a technical conference to discuss issues related to the possible mitigation of PNM's market-based rates in the El Paso control area and (2) a 30-day extension of time to comply with Ordering Paragraph C of the April 21 Order (directing PNM to either file a revised DPT analysis or propose cost-based mitigation measures for the El Paso control area).

10. On June 9, 2006, the Commission issued a notice (June 9 Notice) granting PNM's motion for a technical conference to discuss mitigation for the El Paso control area and denying PNM's motion for extension of time to comply with the April 21 Order. Commission Staff held the technical conference on June 14, 2006.

11. On June 20, 2006, PNM submitted a filing in compliance with the April 21 Order (June filing) to address the Commission's concerns regarding PNM's market power in the El Paso control area. As discussed below, in its June filing, PNM elects to propose cost-based mitigation measures during times of binding transmission constraints instead of submitting a revised DPT analysis for the El Paso control area. PNM requests that this filing be made effective March 6, 2005, the refund effective date established in the section 206 proceeding instituted in these proceedings in Docket No. EL05-2.

Notice of Filing and Responsive Pleadings

12. Notice of PNM's May filing was published in the *Federal Register*, 71 Fed. Reg. 34,910 (2006), with interventions or protests due on or before June 20, 2006. None was filed.

13. The June 9 Notice was published in the *Federal Register*, 71 Fed. Reg. 34,924 (2006).

⁸ 16 U.S.C. § 824d (2000).

14. Notice of PNM's June filing was published in the *Federal Register*, 71 Fed. Reg. 37,562 (2006), with interventions or protests due on or before July 11, 2006. None was filed.

Discussion

15. In its June filing, PNM proposes to amend its market-based rate tariff to impose a cost-based price cap on the rates that it may charge for sales of less than a year when there are binding transmission constraints or other transmission outages into southern New Mexico (where Path 47 is located). During these periods, PNM proposes to cap the price at which it can sell power at a cost-based rate equal to PNM's system incremental costs, plus 10 percent. The filing also includes the formula under which PNM intends to calculate incremental costs. PNM further proposes that agreements for sales of one year or more in the El Paso control area when there are such binding transmission constraints or transmission outages will be filed individually with the Commission, unless authorized by another PNM tariff.⁹

16. The Commission finds that PNM's June filing alleviates our concern in the April 21 Order regarding market conditions in the El Paso control area during times of binding transmission constraints or other transmission outages. Thus, we accept PNM's filing, effective March 6, 2005.¹⁰

17. With the Commission's acceptance of PNM's proposed mitigation, the Commission terminates PNM's section 206 proceeding for the El Paso control area instituted in Docket No. EL05-2-000.

⁹ PNM proposes to define a binding transmission constraint into southern New Mexico as a time when the aggregate firm transmission rights of parties to the New Mexico Transmission Operating Procedures (NMTOP) over WECC Path 47 are reduced below the levels specified in NMTOP sections 1.6 and 1.7 (as appropriate given the status of El Paso's Phase-Shifting Transformer): (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 to 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, which discusses curtailment of southern New Mexico imports.

¹⁰ FERC Electric Tariff, First Revised Volume No. 3, First Revised Sheet No. 6 (superseding Original Sheet No. 6), Original Sheet No. 6a.

18. We also find that PNM's May and June filings, which amend its market-based rate tariff to specify that it will not make sales to an affiliate with a franchised service territory without first receiving Commission authorization of the transaction under section 205 of the FPA comply with the Commission's directives in the April 21 Order. Thus, we accept PNM's tariff revisions to be effective June 6, 2005, as requested.¹¹

19. To the extent that PNM has made any sales under its market-based rate tariff since the refund effective date¹² of this proceeding in the El Paso control area that were above the rates under the mitigation proposal accepted herein, PNM is directed, within 30 days of the date of issuance of this order, to make refunds, with interest. In addition, we direct PNM to file a refund report within 15 days after making refunds. If no refunds were due, PNM is expected to file with the Commission within 30 days of the date of issuance of this order so stating.

20. PNM is directed to file an updated market power analysis within three years of the date of this order. The Commission also reserves the right to require such an analysis at any intervening time.

The Commission orders:

(A) PNM's revised tariff sheets implementing mitigation in the El Paso control area during times of binding transmission constraints or other transmission outages are accepted, effective March 6, 2005, as discussed in the body of this order.

(B) PNM is hereby ordered to make refunds within 30 days of the date of issuance of this order, with interest, calculated pursuant to 18 C.F.R. § 35.19(2) (2006), and to file a refund report with the Commission within 15 days of the date refunds are made, as discussed in the body of this order. If no refunds are due, PNM is directed to file with the Commission within 30 days of the date of issuance of this order so stating.

(C) PNM's revised tariff sheet amending the affiliate sales prohibition language is hereby accepted, effective June 6, 2005, as discussed in the body of this order.

(D) The section 206 proceeding for the El Paso control area in Docket No. EL05-2-000 is terminated, as discussed in the body of this order.

¹¹ FERC Electric Tariff, First Revised Volume No. 3, Third Revised Sheet No. 1 (superseding Second Revised Sheet No. 1), Original Sheet No. 1A.

¹² The refund effective date in this proceeding is March 6, 2005.

(E) PNM's next updated market power analysis is due within three years of the date of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.