

108 FERC ¶ 61,092
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Public Service Company of New Mexico

Docket Nos. ER04-668-000
ER04-668-001

ORDER ACCEPTING FOR FILING REVISED MARKET-BASED
RATE TARIFF, AS MODIFIED

(Issued July 29, 2004)

Introduction

1. In this order, the Commission accepts for filing, pursuant to section 205 of the Federal Power Act (FPA),¹ revisions to the market-based rate tariff, as modified, filed by Public Service Company of New Mexico (PNM).² The proposed filing, among other things, incorporates the market behavior rules required by the Commission.³ This order benefits customers because it ensures that wholesale markets are competitive and market-based rates remain just and reasonable.

Background

PNM's Proposed Market-Based Rate Tariff

2. On March 24, 2004, as amended on June 8, 2004, PNM filed a revised tariff to comply with the Commission's order regarding the market behavior rules. In addition, the proposed tariff revisions include: (1) clarifying a potential ambiguity in the affiliate sales provision; (2) removing reference to the merger with Western Resources, Inc. (Western Resources) and instead incorporating generic terms under which PNM would

¹ 16 U.S.C. § 824d (2000).

² FERC Electric Tariff, First Revised Volume No. 3, First Revised Sheet Nos. 1-2, 4, and Original Sheet Nos. 10-11. First and Second Revised Sheet Nos. 7-8 are rejected, as discussed below.

³ Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 105 FERC ¶ 61,218 (2003).

interact with a merger partner while the merger is pending; (3) eliminating the requirement to file service agreements made pursuant to the tariff; (4) changing the bank information for service payments; and (5) revising the form of service agreement to include a *Mobile-Sierra* provision.⁴ PNM requests an effective date of December 17, 2003, the date the market behavior rules became effective, for Original Sheet Nos. 10-11, and an effective date of March 25, 2004, for the remainder.

3. On January 24, 2001, the Commission approved PNM's current market-based rate tariff in connection with PNM and Western Resources' notification of change in status to reflect their proposed merger.⁵ This order permitted PNM to make sales to affiliates with no captive customers, subject to certain conditions and limitations.⁶ PNM must receive prior approval from the Commission under section 205 of the FPA for sales to affiliates with a franchised electric service territory.

4. PNM states that it terminated the merger agreement with Western Resources on January 8, 2002. However, PNM proposes to revise the existing section of its tariff referencing the merger with Western Resources to make a generic provision in the event that PNM merges with another public utility. Hence, that public utility and its affiliates would be treated as affiliates of PNM.

5. PNM proposes to eliminate a potential ambiguity in the affiliate sales provision which does not change the underlying intent of the provision (*i.e.*, removing the words "except that," implying that the terms and conditions listed for affiliates without captive customers are an exception to the requirement that PNM first receive approval from the Commission for sales to affiliates with a franchised electric service territory).

⁴ *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Power Co.*, 350 U.S. 348 (1956) (*Mobile-Sierra*).

⁵ *Western Resources, Inc., et al.*, 94 FERC ¶ 61,050 (2001).

⁶ In connection with sales to affiliates without captive customers, (1) the rates for capacity and/or energy will not be lower than the rate that PNM charges non-affiliates; (2) discounted offers to affiliates will be extended simultaneously to non-affiliates through a posting on its internet homepage; and (3) PNM will simultaneously post the price of the affiliate transaction on its internet homepage.

6. PNM proposes to eliminate language in the tariff requiring executed service agreements under the tariff to be filed with the Commission, stating that Order No. 2001 eliminated the requirement.⁷
7. PNM also proposes to change the bank information listed in the tariff to reflect the current information parties should use to make payments for service under the tariff.
8. PNM's revision to the form of service agreement provides that absent the agreement of the parties to a change in the negotiated rate under the agreement, the standard of review will be the *Mobile-Sierra* doctrine for changes to the agreement by parties or the Commission. PNM states that it is implementing language from the Commission's proposed policy statement.⁸
9. In its original filing, PNM's proposed form of service agreement stated that the rate negotiated under the agreement is not subject to change under section 205 or 206 of the FPA. On May 14, 2004, the Director, Divisions of Tariffs and Market-Development-South, acting pursuant to delegated authority, issued a deficiency letter requesting that PNM explain and clarify its proposal, because the statement appeared to explicitly prohibit the challenge of the rate under any circumstances, not just those in the public interest.
10. On June 8, 2004, PNM submitted a response to Commission Staff's deficiency letter amending the filing. PNM stated that its only intention was to bind the parties and the Commission to the public interest standard of review, and accordingly, submitted an amended tariff sheet to clarify that the rate can be changed when the public interest standard has been met. The proposed revision states:

The rate for service that was negotiated and agreed upon between Purchaser and Seller shall remain in effect for the term specified in this Agreement and shall not be subject to change under section 205 or section 206 of the Federal Power Act absent the agreement of all parties to the proposed change, except when the standard of review for changes has been met. The standard of review for changes to this Agreement (including the rate for

⁷ Revised Public Utility Filing Requirements, Order No. 2001, 67 FR31042, FERC Stats. & Regs., Regulations Preambles, ¶ 31,127 (April 25, 2002); *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reconsideration and clarification denied*, Order No. 2001-B, 100 FERC ¶ 61,342 (2002).

⁸ Standard of Review for Proposed Changes to Market-Based Rate Contracts for Wholesale Sales of Electric Energy by Public Utilities, FERC Stats. & Regs., Proposed Regulations Preambles (1999-2003), ¶ 32,562 (August 1, 2002) (proposed policy statement).

service hereunder) proposed by a party, a non-party or the Federal Energy Regulatory Commission (FERC) acting *sua sponte* shall be the “public interest” standard of review set forth in [*Mobile-Sierra*].⁹

Notice of Filing and Interventions

11. Notice of PNM’s March 24, 2004, filing was published in the *Federal Register*, 69 Fed. Reg. 18,069 (2004), with comments, protests or motions to intervene due on or before April 14, 2004. A timely motion to intervene was filed by Overton Power District No. 5.

12. Notice of PNM’s June 8, 2004, amendment to its filing was published in the *Federal Register*, 69 Fed. Reg. 34,151 (2004), with comments, protests or motions to intervene due on or before June 29, 2004. None was filed.

Discussion

13. PNM proposes to adopt language providing that unless both parties agree to a proposed change, the standard of review for changes to the rate proposed by either party, or the Commission acting *sua sponte*, shall be the “public interest” standard of review. With the issuance of Order No. 2001, a generic form of service agreement for market-based rates need not be filed with or pre-approved by the Commission.¹⁰ On this basis, the proper place for specifying the standard of review for rate changes is in the individual agreements negotiated by the parties. Accordingly, PNM’s proposed change to the form of market-based service agreement, as reflected on Revised Sheet Nos. 7 and 8, is rejected.

14. PNM proposes to have a generic provision in its tariff regarding the treatment of merger partners that would apply to any merger partner PNM may enter into agreement with in the future. We will grant PNM’s request in this regard. However, our grant does not relieve the applicant of the requirement to have current and complete tariffs on file with the Commission, pursuant to 18 C.F.R. §35.1 (2003).

15. We will accept PNM’s remaining revisions as they are consistent with Commission policy.

16. We grant PNM’s request for an effective date of December 17, 2003, for Original Sheet Nos. 10-11, and March 25, 2004, for the remainder.

⁹ Proposed Second Revised Sheet No. 7.

¹⁰ See Order No. 2001 at P 6, Table 2, and P 20.

The Commission orders:

PNM's revised tariff is hereby accepted for filing, as modified in the body of this order.

By the Commission. Commissioner Brownell dissenting in part with a separate statement attached.

(S E A L)

Linda Mitry,
Acting Secretary.

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FEDERAL ENERGY REGULATORY COMMISSION

Public Service Company of New Mexico

Docket Nos. ER04-668-000
ER04-668-001

(Issued July 29, 2004)

Nora Mead BROWNELL, Commissioner *dissenting in part*:

1. Public Service Company of New Mexico (PNM) has an approved market-based-rate tariff that includes a generic service agreement which is silent as to the standard of review for future changes. This order rejects PNM's proposal to amend that generic service agreement to include an explicit *Mobile-Sierra* provision. I would have accepted the amendment.
2. I have previously stated my opinion that judicial case law calls for the application of the public interest standard in the absence of clear contractual language allowing unilateral contract modification.¹ Therefore, I think PNM's proposed amendment would simply emphasize the standard that already applies. However, not all of my fellow Commissioners have shared my view of contract interpretation, and there has been considerable litigation over this very issue. Given that, PNM's proposal is a laudable attempt to provide greater clarity in the marketplace.
3. Further, I see no unfairness in designating the public interest standard, which binds the seller every bit as much as the buyer, as the starting point in market-based-rate power sales negotiations. Should a potential buyer wish to include the lower just and reasonable standard in a specific contract, it would remain free to negotiate with PNM for such a change to the generic agreement. As PNM has been determined to lack market power, the buyer should be at no disadvantage in those negotiations.

Nora Mead Brownell

¹See, e.g., *Nevada Power Company and Sierra Pacific Power Company v. Enron Power Marketing, Inc., et al.*, 105 FERC ¶61,185 (2003).