140 FERC ¶ 61,005
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.

TGP Granada, LLC and
Roosevelt Wind Ranch, LLC

Docket No. EL12-42-000

v.

Public Service Company of New Mexico
Tortoise Capital Resources Corp.

TGP Granada, LLC and
Roosevelt Wind Ranch, LLC

Docket No. EL12-43-000

ORDER ON COMPLAINT AND PETITION FOR DECLARATORY ORDER

(Issued July 5, 2012)

1. On March 2, 2012, pursuant to section 206 of the Federal Power Act (FPA),[1] TGP Granada, LLC (TGP Granada) and Roosevelt Wind Ranch, LLC (Roosevelt)[2] (collectively, TGP) filed a complaint (Complaint) against Public Service Company of New Mexico (PNM) and Tortoise Capital Resources Corp. (Tortoise). The Complaint requests that the Commission direct PNM and Tortoise to identify the party responsible for providing long-term transmission service over the Tortoise-owned portion of the Eastern Interconnection Project (EIP) beyond April 1, 2015. TGP also filed a petition for declaratory order (Petition) requesting that the Commission confirm that section 23.2 of PNM's open access transmission tariff (OATT or Tariff) permits TGP to change the point of receipt of a transmission service agreement TGP currently holds in PNM's transmission service queue. Alternatively, TGP seeks a waiver of the PNM OATT to the extent necessary to allow TGP to change the point of receipt of the transmission service

[1] 16 U.S.C. § 824e (2006).

[2] TGP Granada and Roosevelt are wholly-owned, indirect subsidiaries of Terra-Gen Power, LLC.

agreement without losing its service priority (Waiver Request). In this order, we will grant TGP's Complaint and deny both TGP's Petition and Waiver Request, as discussed below.[3]

I. Background

2. The proceeding involves the EIP, which consists of approximately 216 miles of 345 kV transmission lines and associated facilities and connects the Blackwater Switchyard and the Bernalillo-Algodones Switchyard in New Mexico.[4] The EIP runs westward toward load in California, and there are no transmission lines that branch off of its internal portions. Thus, TGP contends that the EIP acts as a radial line between the two switchyards.[5]

3. Since 1985, PNM has operated 100 percent of the EIP and treated 100 percent of these facilities as part of its integrated transmission system, while various institutional investors have held ownership title to the EIP through sale-leaseback arrangements.[6] Currently, Tortoise owns 40 percent of the EIP, and leases this capacity (Leased Capacity) to PNM pursuant to a long-term leveraged lease agreement (Lease) that expires on April 1, 2015.[7] Since 2003, PNM has owned the remaining 60 percent ownership of the EIP's capacity.[8] PNM administers 100 percent of the EIP's capacity—the 40 percent it leases and the 60 percent it owns—pursuant to its OATT. According to the Lease, PNM cannot enter into wheeling agreements, power sales contracts, utility agreements, or grants for the Leased Capacity beyond the Lease's expiration date of April 1, 2015.[9]

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[3] In this order, we will refer to TGP's Complaint, Petition, and Waiver Request as the TGP Filing.

[4] The EIP interconnects with the Southwest Power Pool and the Western Electric Coordinating Council grids and is rated at an estimated capacity of 1000 MW. *See* TGP Filing at 8.

[5] TGP Filing at 4.

[6] PNM Answer at 4; *Pub. Serv. Co. of New Mexico*, 29 FERC ¶ 61,387 (1984).

[7] Tortoise acquired this 40 percent interest in the EIP from Phillip Morris Capital Corporation in June 2011. Previously, Phillip Morris Capital Corporation held a lease with PNM for the Leased Capacity that also expired on April 1, 2015.

[8] The Commission approved PNM's purchase of 60 percent of the EIP's capacity on February 24, 2003. *See Pub. Serv. Co. of New Mexico*, 102 FERC ¶ 62,122 (2003).

[9] PNM Answer at 5-6 (citing Attachment A, Lease § 12 and Attachment B, Operating Agreement § 11).

Thus, PNM only offers long-term transmission service beyond April 1, 2015, on the EIP capacity it owns, and PNM does not offer long-term transmission service over the Leased Capacity past this date.

4. Roosevelt explains that it is in the process of developing a 300 MW wind project in Roosevelt County, New Mexico (Roosevelt Project). Roosevelt plans to interconnect the Roosevelt Project to the EIP at PNM's Blackwater Substation and deliver power through the Four Corners Switchyard for purposes of delivery to the California market or other Western states. In order to obtain transmission service, TGP asserts that it plans to use a transmission service request it acquired when purchasing the assets of an unsuccessful wind project in Guadalupe, New Mexico (Granada Project), from Eurus Granada, LLC (Eurus) on October 1, 2010, by changing the original transmission service request's point of receipt from PNM's Guadalupe substation to Blackwater, which is 90 miles east of Guadalupe.[10] The original transmission service request, which Eurus submitted to PNM on November 6, 2007, reserves 300 MW of service with a point of receipt at Guadalupe, and a point of delivery of Four Corners, and currently holds the highest priority in PNM's transmission service queue.[11] Since the purchase, TGP has confirmed its service reservation and accepted a transmission service agreement with PNM for 300 MW of firm point-to-point transmission service for approximately a 47 year duration, from Guadalupe to Four Corners;[12] however, in order to use the transmission service agreement for the Roosevelt Project, TGP seeks to change the original point of receipt from Guadalupe to the beginning of the line at Blackwater.

II. Notice, Interventions, and Responsive Pleadings

5. Notice of TGP's Filing was published in the *Federal Register*, 77 Fed. Reg. 14,514 (2012), with interventions or comments due on or before April 2, 2012.

6. Timely motions to intervene were filed by: Navopache Electric Cooperative, Inc.; Powerex Corp.; and Tres Amigas LLC. Timely motions to intervene and protests were filed by: Iberdrola Renewables, LLC (Iberdrola) and Cargill Power Markets, LLC (Cargill). A timely motion to intervene and comments were filed by Airstream Energy, LLC (Airstream Energy). Answers to TGP's Filing were submitted by PNM and Tortoise. Answers to the answers were filed by TGP, Iberdrola, Cargill, and PNM.

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[10] TGP Filing at 6, 16.

[11] *Id.* at 6, 37.

[12] *Id.* at 19; Cargill April 2, 2012 Protest at Attachment A, PNM Queue.

III. Discussion

A. Procedural Matters

7. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[13] the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure,[14] prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept the answers to answers filed by TGP, Iberdrola, and Cargill because they have provided information that assisted us in our decision-making process.

B. Complaint

1. TGP Filing

8. TGP requests that the Commission direct PNM and Tortoise to identify the party that will immediately assume the obligation for making the Leased Capacity available to transmission customers for use on a long-term basis beginning April 1, 2015. TGP does not take a position on which party should become responsible for offering this transmission service, but argues that PNM and Tortoise's withholding of the Leased Capacity violates the Commission's open access requirements and has resulted in undue discrimination and preference.

9. On November 6, 2007, Eurus submitted a request to PNM for 300 MW of firm point-to-point transmission service from Guadalupe to Four Corners. PNM responded in a letter dated December 10, 2009, stating that it could accommodate 25 MW of Eurus's request for 300 MW of transmission service but not the remaining 275 MW because of the "ownership issue" regarding the EIP.[15] In order to provide Eurus with the additional 275 MW of transmission service it requested, PNM explained that PNM would need to exercise the early buy-out option of its Lease, and would require a firm commitment from Eurus to purchase the remaining 40 percent of the EIP's capacity. Otherwise, PNM stated that Eurus would need to fund and construct parallel 345 kV transmission lines. As noted above, TGP subsequently purchased the assets of Eurus's unsuccessful Granada Project, including the relevant transmission service request.

10. TGP argues that requiring transmission customers to fund PNM's early buy-out option or to construct alternate transmission lines instead of making the Leased Capacity

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[13] 18 C.F.R. § 385.214 (2011).

[14] 18 C.F.R. § 385.213(a)(2) (2011).

[15] TGP Filing at Attachment C, Ex. 1 (PNM's December 10, 2009 letter to Eurus).

available for long-term transmission service violates Order No. 888[16] and artificially constrains the generation market for developers seeking to use that capacity. Therefore, TGP contends that PNM, as the public utility that controls and operates 100 percent of the EIP, is responsible for providing open access to the line's entire capacity, pursuant to its Commission-jurisdictional OATT and consistent with the Commission's regulations.[17]

11. If PNM cannot provide long-term transmission service over the Leased Capacity due to provisions in the Lease, TGP argues that Tortoise, as the owner of this capacity, is responsible for offering such service.[18] In this situation, TGP argues that Tortoise, by default, would become a public utility under the FPA and would need to file an OATT with the Commission, under which it would provide long-term transmission service consistent with Order No. 888.

12. TGP notes that refusal by PNM and Tortoise to process transmission service requests for the Leased Capacity beyond April 1, 2015, has resulted in undue discrimination and preference against certain transmission customers. TGP explains that it has paid PNM $1,416,000 in non-refundable annual reservation fees to postpone service for its 300 MW transmission service agreement.[19] While it has made payments to defer service, TGP argues that other transmission customers in PNM's queue have been able to retain their service priority free of cost because PNM and Tortoise will not effectuate transmission service agreements beyond the expiration of the Lease. TGP contends that it is unduly discriminatory and preferential for PNM and Tortoise to require

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[16] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

[17] TGP Filing at 25 n.51 (citing 18 C.F.R. § 35.28 (2011)).

[18] *Id.* at 25.

[19] *Id.* at 26 (citing PNM OATT § 17.7 "[t]he Transmission Customer can obtain, subject to availability, up to five (5) one-year extensions for the commencement of service. The Transmission Customer may postpone service by paying a non-refundable annual reservation fee equal to one-month's charge for Firm Transmission Service for each year or fraction thereof within 15 days of notifying the Transmission Provider it intends to extend the commencement of service.").

it to make significant financial payments to suspend service under its transmission service agreement while allowing other transmission customers to escape financial responsibility for maintaining their queue positions simply because PNM and Tortoise will not provide open access to the Leased Capacity. TGP also claims that PNM and Tortoise's withholding of this capacity results in an economic loss and adversely affects generation developers and their customers who would benefit from using the EIP's full capacity in the long term.[20]

13. Last, TGP asserts that PNM should recognize that the transmission service request it submitted on July 15, 2011 should have a queue position associated with the date that TGP first requested transmission service over the Leased Capacity.[21] TGP explains that one of its affiliates submitted a good-faith transmission service request to Phillip Morris Capital Corporation on December 31, 2009, for 301.3 MW of transmission service with Blackwater as the point of receipt.[22] TGP explains that Phillip Morris Capital Corporation responded by claiming that it could not take action on the transmission service request due to the covenant of quiet enjoyment in its lease with PNM that prevented it from interfering with PNM's use or possession of the Leased Capacity.[23] Regardless of whether PNM or Tortoise is ultimately responsible for providing open access to the Leased Capacity, TGP argues that PNM and Tortoise should revise the queue position of the July 15, 2011 transmission service request to match the queue position that should have been issued on December 31, 2009, as TGP and its affiliate made both requests for the same amount of capacity and for the same point of receipt in good faith. By changing the queue position to match what TGP would have received in December 31, 2009, TGP could use this transmission service request to interconnect the Roosevelt Project at Blackwater.

2. Comments and Answers

14. PNM asserts that the Lease prohibits it from assigning, transferring, encumbering, or subleasing the Leased Capacity beyond the expiration of the Lease without prior written consent from Tortoise. When the Lease expires, PNM states that it will continue to operate, service, and maintain the EIP pursuant to an Operating Agreement with

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[20] *Id.* at 27.

[21] *Id.* at 28.

[22] At the time of the request, Phillip Morris Capital Corporation owned the Leased Capacity and leased it to PNM pursuant to a long-term leveraged lease that expired on April 1, 2015.

[23] TGP Filing at 15 n.27, 28.

Tortoise, but it still cannot enter into a transmission service agreement beyond April 1, 2015, for the Leased Capacity. PNM asserts that it has until April 1, 2013, to choose to invoke one of the end-of-lease options under the Lease and has already engaged in discussions with Tortoise regarding arrangements for the Leased Capacity.[24] In light of the Complaint, on July 3, 2012, PNM made an informational filing stating that it would not invoke any of the end-of-lease options.

15. Tortoise affirms PNM's statement that the Lease prevents PNM from encumbering the Leased Capacity beyond April 1, 2015. In addition, Tortoise claims that the Lease prohibits itself from interfering with PNM's use of the EIP, including the Leased Capacity, before the Lease's expiration date. As a non-operating, passive interest owner of this capacity, Tortoise strongly disagrees with TGP's assertion that the Commission could assert its jurisdiction over Tortoise.[25] Tortoise warns that such action would contradict long-standing Commission precedent and threaten the viability of leveraged lease arrangements as an investment vehicle for energy infrastructure facilities. In order to resolve this issue, Tortoise supports a potential decision by PNM to invoke one of its end-of-lease options as a positive development.

16. Cargill supports the Complaint, agreeing that PNM and Tortoise have improperly withheld valuable transmission capacity on the EIP. Cargill explains that the four transmission service requests it submitted to PNM between February 2008 and January 2009 remain inactive due to PNM's refusal to provide long-term service over the Leased Capacity beyond April 1, 2015. By withholding the Leased Capacity from long-term service, Cargill argues that PNM has violated its obligations under the FPA and the Commission's open access requirements. Further, Cargill agrees with TGP that the Commission should not allow PNM and Tortoise to evade open access requirements by alleging that there is ambiguity regarding their obligations in the Lease.[26]

17. Cargill adds that in directing PNM and Tortoise to identify the party that will make the Leased Capacity available, the Commission should also clarify that PNM and Tortoise must allocate the associated capacity based on the date that each transmission service request was submitted to PNM, Tortoise, and/or Phillip Morris Capital Corporation.[27] Cargill explains that regardless of whether the Commission considers TGP's December 31, 2009 transmission service request a good-faith request, Cargill

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[24] PNM Answer at 13-14.

[25] Tortoise Protest at 3.

[26] Cargill April 2, 2012 Protest at 8.

[27] *Id.* at 9.

holds four transmission service requests that predate TGP's and, thus, warrant priority in PNM's service queue. Cargill argues that it should not lose its queue priority because of the failure of PNM, Tortoise, and Phillip Morris Capital Corporation to establish proper open access procedures for the Leased Capacity. Therefore, Cargill asserts that the Commission should ensure that PNM and Tortoise allocate the available Leased Capacity based on the Commission's long-standing first-in-time principles, regardless of whether the associated transmission service requests were originally submitted to PNM, Tortoise, or Phillip Morris Capital Corporation.

18. In response to these pleadings, TGP asserts that no party disputes the fact that all of the capacity on the EIP, including the Leased Capacity, is subject to the Commission's open access requirements. TGP contends that the Commission should still require PNM and Tortoise to resolve this issue expeditiously to avoid further unnecessary and costly delay. In the event that PNM chooses not to invoke one of its end-of-lease options, TGP contends that the Commission should ensure that Tortoise makes the 400 MW of capacity it owns available immediately. TGP notes the Commission typically deems the owner of transmission facilities in sale-leaseback transactions as non-jurisdictional; however, TGP argues that the Lease differs from traditional sale-leaseback transactions because Tortoise, as the owner of the facilities, retains control of the Leased Capacity upon the Lease's expiration date. Thus, if PNM does not invoke one of the end-of-lease options, TGP asserts that PNM will no longer retain operational control of the Leased Capacity, leaving Tortoise as the *de facto* transmission provider for its portion of the EIP.[28]

3. Commission Determination

19. We grant the relief requested by TGP regarding Tortoise's capacity on the EIP beyond April 1, 2015. As we have explained, transmission providers are required under the Commission's open access policies to provide for open, transparent, and non-discriminatory access to their transmission systems.[29] We agree with TGP that not to require PNM or Tortoise to provide open access would enable market participants to circumvent the Commission's open access requirements through the use of lease agreements. Sale-leaseback agreements should facilitate investment in transmission

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[28] TGP April 16, 2012 Answer at 6-7.

[29] Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,926 (App. D, *pro forma* OATT), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30.176 ("The non-discriminatory services required by Order No. 888, known as open access services, are reflected in a *pro forma* open access tariff contained in the Rule."). As TGP notes, no party disputes the fact that all of the capacity on the EIP, including the Leased Capacity, is subject to the Commission's open access requirements. *See also SunZia Transmission, LLC*, 131 FERC ¶ 61,162, at P 36 (2010).

facilities, and not be used as a means for transmission providers and owners to evade the Commission's regulations. Thus, we find that ambiguity or uncertainty regarding the ownership and operation of the transmission facilities upon the expiration of the Lease does not justify PNM and Tortoise's failure to comply with open access requirements. Accordingly, we find that TGP has met its section 206 burden of proof and shown that the refusal by PNM and Tortoise to provide transmission service over the Leased Capacity beyond April 1, 2015 is unjust and unreasonable.[30] We find that TGP's requested relief is just and reasonable, and we direct PNM, in consultation with Tortoise, the counterparty to the Lease, to determine which entity will be responsible for offering transmission service over the Leased Capacity, as discussed below.[31]

20. While we grant the requested relief, we find that the Lease does not clearly delineate which party should provide open access to the Leased Capacity for service beyond April 1, 2015. We direct PNM, in consultation with Tortoise, to resolve this issue and report back to the Commission within 30 days of the date of this order regarding which party will offer long-term transmission service over the Leased Capacity. We find that this 30-day period should provide PNM and Tortoise with time to continue negotiations regarding the Leased Capacity and PNM's end-of-lease options, in order that the parties will reach a mutually agreeable solution in a timely manner.[32] However, we do note that whichever party ultimately becomes responsible for making the Leased Capacity available beyond the Lease's expiration date must do so in a just, reasonable, and not unduly discriminatory manner, consistent with the Commission's regulations.[33]

21. While we grant the relief requested in TGP's Complaint by directing PNM, in consultation with Tortoise, to determine which entity will be responsible for offering

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[30] 16 U.S.C. § 824e(b) (2006) (stating that in any proceeding under this section, "the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant.").

[31] *Blumenthal v. FERC*, 552 F.3d 875, 881 (D.C. Cir. 2009) ("Additionally, as the advocate of a change in practice, Connecticut was required to prove that its proposed changes are just and reasonable.").

[32] Additionally, we remind the parties that the Commission's Dispute Resolution Service (DRS) is available for the purpose of exploring the alternative dispute resolution process and/or to facilitate agreement on the matters at issue. DRS can be reached at 1-877-337-2237.

[33] 18 C.F.R. § 35.28 (2011).

transmission service over the Leased Capacity, we will not require PNM to assign TGP a queue position of December 31, 2009, as TGP requests. The record is unclear as to TGP's service requests, and in light of the issues to be resolved by the parties pursuant to this order, we will not grant this request for relief. We note that the Commission's regulations and PNM's Tariff require that reservation priority for long-term point-to-point transmission service "be available on a first-come, first-served basis, i.e., in the chronological sequence in which each transmission customer has reserved service."[34]

C. Petition for Declaratory Order

1. TGP Filing

22. TGP requests that the Commission confirm that section 23.2 of the PNM Tariff allows the permitted assignee of a transmission service agreement to change the point of receipt associated with that transmission service agreement without losing its transmission service priority, provided the change will not impair the operation and reliability of PNM's generation, transmission or distribution systems.[35] Specifically, TGP seeks a Commission determination confirming that it can change the point of receipt in the transmission service agreement it acquired by purchasing the Granada Project from Eurus in order to interconnect the Roosevelt Project to the EIP. By changing the point of receipt in the transmission service agreement from Guadalupe to Blackwater, TGP will maintain the first position in PNM's transmission service queue.

23. Sections 22.2, 23.1 and 23.2 of PNM's Tariff are identical to the Commission's *pro forma* tariff. In relevant part, section 22.2 provides that:

> Any request by a Transmission Customer to modify Receipt and Delivery points on a firm basis shall be treated as a new service request in accordance with Section 17 hereof….

24. Section 23.1 provides, in relevant part, that:

> If the Assignee requests a change in service, the reservation priority of service will be determined by the Transmission Provider pursuant to Section 13.2.[36]

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[34] Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,515-16 (App. B, *pro forma* OATT § 13.2); PNM OATT, § 13.2(i) (Reservation Priority).

[35] TGP Filing at 3.

[36] Section 13.2(i) states, "Long-Term Firm Point-To-Point Transmission Service shall be available on a first-come, first-served basis i.e., in the chronological sequence in

(continued…)

25. And section 23.2 provides, in relevant part, that:

> If the Assignee requests a change in the Point(s) of Receipt or Point(s) of Delivery, or a change in any other specifications set forth in the original Service Agreement, the Transmission Provider will consent to such change subject to the provisions of the Tariff, provided that the change will not impair the operation and reliability of the Transmission Provider's generation, transmission, or distribution systems.

26. TGP states that section 23.2 of PNM's Tariff allows the assignee of a transmission service agreement to change the receipt and delivery points set forth in the original transmission service agreement, so long as the change does not impair the operation and reliability of PNM's system. TGP contends that this section of PNM's Tariff, which allows for changes in receipt and delivery points, applies specifically to transmission customers that do not yet take transmission service from PNM. TGP explains that section 22.2 of PNM's Tariff, which states that PNM will treat changes in receipt and delivery points as new service requests, only applies to transmission customers that already take transmission service from PNM.[37] Therefore, TGP argues that section 22.2 of PNM's Tariff does not apply to its request to change the original point of receipt to Blackwater because it is not an active transmission customer of PNM at this time.

27. TGP asserts that the most reasonable interpretation of section 23.2 permits a transmission service agreement assignee to change its point of receipt without losing its queue position. TGP cites Commission precedent to demonstrate that, "like a contract, a tariff must be interpreted to give meaning to all provisions of the tariff,"[38] and it asserts that if section 22.2 of PNM's Tariff applies to assignees of a transmission service agreement, then there is no need for the separate language in section 23.2. Further, TGP argues that if an assignee of a transmission service agreement were required to relinquish its queue position in order to change a receipt or delivery point, there would be no reason for a customer to purchase a transmission service agreement that would require a change of receipt or delivery points. TGP concludes that requiring a transmission service agreement assignee to relinquish its queue position if it seeks to change the receipt or

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which each Transmission Customer has reserved service." PNM OATT, § 13.2(i).

[37] *Id.* at 32-33.

[38] *Id.* at 33 (citing *Cent. Maine Power Co.*, 128 FERC ¶ 61,143, at P 31 & n.29 (2009)).

delivery points would impede the Commission's goal of fostering a robust secondary market for the sale of transmission rights.[39]

2. Comments

28. PNM asserts that it has no recollection of advising TGP to purchase the Granada Project and its assets or confirming that TGP could modify the original transmission service request's point of receipt from Guadalupe to Blackwater without changing its position in the service queue.[40] Instead, PNM explains that it told TGP that the queue position of the original transmission service agreement would only remain unaffected until TGP executed a transmission service agreement with Blackwater as the point of receipt; thus, TGP's queue position would change once the new point of receipt became official. PNM asserts that while section 23.2 of its Tariff permits the modification of receipt and delivery points, such changes remain subject to other provisions of its Tariff, including section 22.2, which clearly indicates that modification to a receipt or delivery point constitutes a new service request. PNM explains that the transmission customer seeking to modify a point of receipt of an existing transmission service request will only retain its queue position while the new request is pending. Moreover, PNM argues that section 22.2 of its Tariff applies to all of its transmission customers, both existing customers and the assignees of transmission rights. PNM asserts that these provisions are consistent with the Commission's *pro forma* OATT and Order Nos. 890 and 890-A.[41]

29. Cargill requests that the Commission deny the Petition, arguing that TGP's interpretation of PNM's Tariff is incorrect. Cargill asserts that section 23.1 of PNM's OATT clearly states that the assignee of transmission rights can only retain its queue position if it does not change the receipt and delivery points of the original request. Cargill also states that the next Tariff section, section 23.2, clarifies that receipt and delivery point changes are subject to the provisions of PNM's entire Tariff.[42] Cargill argues that this language indicates that section 23.2 of PNM's Tariff is governed by

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[39] *Id.* at 34.

[40] PNM Answer at 7.

[41] *Id.* at 10 (citing *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, at 698, 708 (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, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009)).

[42] Cargill April 2, 2012 Protest at 12.

section 22.2, which provides that any request by a transmission customer to modify its receipt and delivery points constitutes a new request for service. Cargill refutes TGP's claim that this section only applies to existing transmission customers, asserting that the tariff language applies to "any request." Nevertheless, Cargill contends that section 22.2 definitively applies to TGP because it has already confirmed capacity reservations with PNM and executed a transmission service agreement.[43]

30. Cargill claims that allowing TGP to change its point of receipt and maintain its queue position would disrupt the processing of pending service requests in PNM's queue and create substantial uncertainty for those customers. In addition, Cargill argues that the Commission's acceptance of TGP's Petition would have far-reaching ramifications, as sections 22.2 and 23.2 of PNM's Tariff are consistent with the Commission's *pro forma* OATT.[44] Therefore, Cargill asserts that the Commission should deny TGP's Petition and clarify that any modification to the point of receipt of TGP's transmission service agreement will be treated as a new request for service, consistent with PNM's Tariff.

3. Commission Determination

31. We deny TGP's Petition. PNM's Tariff, which is based on the Commission's *pro forma* OATT, treats a request to change the receipt or delivery points associated with a transmission service agreement as a new service request. PNM's Tariff provides that new transmission service requests are processed pursuant to first-in-time principles.[45] Contrary to TGP's assertions, the plain language of both sections 22.2 and 23.1 provides that a change in receipt or delivery points of a transmission service agreement constitutes a new service request. In effect, under section 23.2, the assignee of the transmission service agreement becomes the transmission customer, which is then subject to section 22.2 of PNM's Tariff, if the assignee elects to change the service specifications on a firm basis. This finding is consistent with section 23.1 of PNM's Tariff, which specifically states that when an assignee of a transmission service agreement requests a change in transmission service, including a modified receipt or delivery point, PNM will determine the transmission service agreement priority under first-in-time principles. Moreover, we note that section 23.2 of PNM's Tariff includes the language "subject to the provisions of the Tariff." We find that this additional language confirms that section 23.2 must be read in conjunction with sections 22 and 23.1 of PNM's Tariff.

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[43] *Id.* at 13-14.

[44] *Id.* at 15.

[45] PNM OATT, § 13.2(i) (Reservation Priority).

32. In response to TGP's question whether different rules apply to a change in point of receipt of a transmission service request versus a transmission service agreement, we clarify that under PNM's Tariff, any change in receipt or delivery point is processed under first-in-time principles, regardless of whether the transaction involves a transmission service request, a transmission service agreement, an assignee, or an existing customer. Therefore, we find that any departure from these principles would be contrary to the Commission's general policy that public utility transmission providers treat similarly-situated transmission customers in a non-discriminatory manner.[46] We also note that this determination is consistent with Commission guidance regarding both redirects and transmission capacity reassignments.[47]

D. Request for Waiver

1. TGP Filing

33. If the Commission does not grant its Petition, TGP asks that the Commission grant its alternative request for waiver of sections 22.2 and 23.2 of PNM's Tariff. According to TGP, granting the Waiver Request will allow it to change the point of receipt of its transmission service agreement so that Roosevelt can use it for the Roosevelt Project without losing the original transmission service agreement's transmission service priority. TGP argues that it meets the criteria that the Commission uses when considering waiver requests: (i) a concrete problem needs to be remedied; (ii) the entity seeking the waiver acted in good faith; (iii) the waiver is of a limited scope; and (iv) the waiver will not have undesirable consequences, such as harming third parties.[48]

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[46] *Midwest Indep. Transmission Sys. Operator, Inc.*, 131 FERC ¶ 61,273, at P 16 (2010) ("[T]he purpose of an open access transmission tariff . . . is to make transmission service available to all transmission customers in a non-discriminatory manner.").

[47] *Standards for Business Practices and Communication Protocols for Public Utilities*, FERC Stats. & Regs. ¶ 32,582, at P 29 (2005) ("Under section 22.2 of the *pro forma* tariff, a request for a redirect is to be treated as a new request for service."); Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 1285 ("The Commission concludes it would be inappropriate, and contrary to the *pro forma* OATT, to grant redirects special queue treatment."); *Revised Public Utility Filing Requirements for Electric Quarterly Reports*, 124 FERC ¶ 61,244, at P 4 (2008) ("Sales by transmission providers of reassigned transmission capacity must be made in accordance with the terms and conditions of the transmission provider's Open Access Transmission Tariff…").

[48] TGP Filing at 35 (citing *Hudson Transmission Partners, LLC*, 134 FERC ¶ 61,030, at P 5 (2011); *ISO New England, Inc.*, 117 FERC ¶ 61,171, at P 21 (2006)).

34. TGP argues that it acted in good faith at all times during its discussions with PNM regarding the interconnection of the Roosevelt Project to the EIP. TGP asserts that it would not have purchased the Granada Project had it known that it would not be able to change the point of receipt from Guadalupe to Blackwater for the Roosevelt Project and retain the Granada Project transmission service request's original queue position. Further, TGP contends that PNM knew that TGP would seek to change the transmission service request's point of receipt when it approved the transfer of the transmission service request from Eurus to TGP and recommended that TGP do so.[49] Based on PNM's recommendation, TGP states that it has spent approximately $10 million developing the Roosevelt Project under the assumption that it would change the point of receipt of the Granada Project's former transmission service request to Blackwater. Had TGP known that it would not be able to change the point of receipt without losing the transmission service request's queue position, TGP argues that it would have submitted a transmission service request with the point of receipt as Blackwater for the Roosevelt Project as early as 2009.

35. TGP affirms that its Waiver Request will not adversely affect any other customers in PNM's transmission queue or have any other undesirable consequences. TGP explains that the point of receipt associated with its transmission service agreement is irrelevant both technically and commercially, because the EIP acts as a radial line; and, no matter where the Roosevelt Project connects to the EIP, it will still obligate 300 MW of the line's capacity. In addition, TGP notes that changing the point of receipt of its transmission service agreement will not affect any other customers in PNM's transmission service queue because TGP already retains the highest service priority; thus, none of PNM's customers' queue positions will change.[50] TGP asserts that it has requested that PNM study the change in point of receipt to Blackwater and expects to fund the network upgrades necessary to make this change.

36. Last, TGP explains that granting its Waiver Request will remedy a concrete problem by allowing TGP to move forward with developing the Roosevelt Project, an exceptionally high-quality renewable resource.[51] If the Commission denies the requested waiver, TGP asserts that losing its queue position will significantly and adversely affect the economics of the Roosevelt Project, which TGP states will bring jobs and revenue to rural New Mexico and help California utilities and consumers achieve the state's public policy goals.[52] Alternatively, TGP notes that it could construct an approximately 83-mile

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[49] *Id.* at 36.

[50] *Id.* at 37.

[51] *Id.* at 13.

[52] *Id.* at 38.

generator tie line from the Roosevelt Project to Guadalupe in order to use the existing transmission service agreement; however, TGP estimates the cost of constructing this line to be $700,000 per mile. TGP claims that constructing such a costly generator tie line that serves no engineering, commercial, or reliability purpose simply because of a dispute over PNM's Tariff would be illogical and inefficient.[53]

2. Comments and Answers

37. PNM states that it does not oppose TGP's Waiver Request and takes no position on whether changing the point of receipt from Guadalupe to Blackwater will adversely affect its other transmission queue customers.[54] However, PNM disputes TGP's assertion that it advised TGP to purchase the Granada Project or that it would be able to change the Granada Project transmission service request's point of receipt to Blackwater while retaining the original queue position.[55]

38. Airstream challenges PNM's statements and provides testimony in support of TGP's Waiver Request. Airstream asserts that PNM did encourage Terra-Gen to purchase transmission rights from other developers in order to advance the Roosevelt Project. In addition, Airstream states that PNM's Transmission Operations Department confirmed that Terra-Gen would be able to redirect a point of receipt for point-to-point transmission service without losing its transmission queue priority.[56]

39. Cargill requests that the Commission deny TGP's Waiver Request due to the undesirable consequences granting waiver would have on PNM's transmission customers. Cargill argues that regardless of PNM's communications with TGP, PNM's Tariff clearly states that PNM will treat a change in point of receipt as a new request for service.[57] If the Commission allows TGP to change the point of receipt to Blackwater without losing its priority in PNM's transmission queue, Cargill claims that lower-queued customers will bear additional costs to upgrade the EIP beginning at Blackwater, rather than Guadalupe. According to Cargill, it has a 125 MW transmission service request pending with a point of receipt of Blackwater and a point of delivery of Four Corners in PNM's transmission service queue. Cargill contends that TGP's Waiver Request could

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[53] *Id.* at 23, 29.

[54] PNM Answer at 12.

[55] *Id.* at 6-7.

[56] Airstream Comments at 3.

[57] Cargill April 2, 2012 Protest at 16-17.

adversely affect its ability to inject power at Blackwater and/or increase the costs PNM will charge for service.[58]

40. In its answer, TGP maintains that section 23.2 of PNM's Tariff is, at best, ambiguous, and it argues that granting the Waiver Request would be in the interest of equitable considerations.[59] TGP explains that had it not been for this and PNM's recommendations, it would not have purchased the Granada Project and would have submitted a transmission service request with the point of receipt as Blackwater for the Roosevelt Project as early as 2009. TGP also disputes Cargill's statements that changing the point of receipt to Blackwater will harm other transmission customers. TGP claims that Cargill cannot demonstrate that it will actually incur harm from changing the point of receipt and that granting the Waiver Request will not affect Cargill's current rights and obligations for its current PNM queue positions. TGP reaffirms its commitment to studying the point of receipt change and funding the necessary upgrades to accommodate the change, which TGP contends will instead benefit PNM's transmission customers.[60]

3. Commission Determination

41. We will deny TGP's request for waiver of sections 22.2 and 23.2 of PNM's Tariff. The Commission has found good cause to grant waiver where the waiver is of limited scope, where there are no undesirable consequences, or where there are resultant benefits to customers.[61] As discussed below, we do not find that circumstances here justify granting TGP's Waiver Request.

42. We find that TGP has not sufficiently demonstrated that its Waiver Request will not result in undesirable circumstances for third parties. Allowing TGP to retain the queue position associated with the original transmission service request submitted on November 6, 2007, would enable TGP's service request to surpass all of the other transmission customers in PNM's queue that submitted transmission service requests after that date. In a recent Commission proceeding, PNM, Cargill, and Powerex Corp. established that the EIP's Blackwater to Four Corners transmission path has numerous competing transmission service requests, and that priority queue positions are highly

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[58] *Id.* at 17.

[59] TGP April 16, 2012 Answer at 8.

[60] *Id.* at 11.

[61] *Pac. Gas & Elec. Co*., 134 FERC ¶ 61,265, at P 14 (2011).

valuable.[62] Based on the lack of specific information in this record, we cannot find with certainty that granting the requested waiver will not limit the ability of other transmission customers, such as Cargill, to obtain transmission service at Blackwater.

43. Further, we find that TGP's commitment to fund the network upgrades associated with its modified point of receipt is insufficient to support the requested waiver, as all transmission customers are obligated to pay for the upgrades needed to accommodate

their requests for service.[63] Moreover, TGP does not address the fact that maintaining queue priority after modifying the point of receipt of its transmission service agreement may result in additional costs for lower-queued customers, as they could face additional costs for upgrades beginning at Blackwater rather than Guadalupe. Therefore, we find that TGP, as the party requesting waiver, has not met its burden to sufficiently demonstrate that granting waiver will not result in undesirable consequences.

44. We also disagree that TGP has sufficiently demonstrated that its Waiver Request is of limited scope. In Order No. 890, the Commission explained that reassignments of transmission capacity will not be subject to queuing by the transmission provider unless the assignee desires to change the point of receipt or point of delivery.[64] In that circumstance, section 23.2 of the Commission's *pro forma* OATT, which is identical to that of PNM, applies.[65] We find that granting waiver in this instance could set precedent not only for the customers of all transmission providers whose tariffs contain *pro forma* section 23.2, but would explicitly contradict the policy that the Commission set forth in Order No. 890 and increase regulatory uncertainty.[66] If a waiver is granted based on the

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[62] *Cargill Power Markets, LLC v. Pub. Serv. Co. of New Mexico*, 132 FERC ¶ 61,079 (2010), *order on settlement*, 137 FERC ¶ 61,259, at P 15 (2011) ("Powerex argues that without significant upgrades PNM does not have sufficient transmission capacity on the Blackwater Path, so only the transmission service request that is first in the queue will receive any significant transmission capacity").

[63] Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,951 (App. D, *pro forma* OATT § 27); PNM OATT, § 27 (Compensation for New Facilities and Redispatch Costs).

[64] Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 816 n.497 ("To the extent the assignee desires to change its points of receipt or delivery, the limitations set forth in section 23.2 shall apply.").

[65] *Id.* at n.497.

[66] *See, e.g. supra* n.47.

instant record, parties may be reluctant to commit to the transmission service queue out of concern that the Commission may remove any priority afforded by granting a future waiver of the queue requirements at the last minute. Thus, we do not find that the Waiver Request is of limited scope and, particularly given the potential for undesirable consequences to transmission customers seeking transmission service at Blackwater. We also find that TGP has not sufficiently demonstrated that such a departure from Commission policy is warranted. For these reasons, we find that TGP has not demonstrated good cause for the Waiver Request and accordingly deny it.

The Commission orders:

(A) The Commission grants the request for relief in TGP's Complaint, as discussed in the body of this order.

(B) The Commission directs PNM, in consultation with Tortoise, to identify the party that will provide long-term transmission service over Tortoise's EIP capacity within 30 days of the date of this order, as discussed in the body of this order.

(C) The Commission denies TGP's Petition and Waiver Request, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.