

135 FERC ¶ 61,230  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
John R. Norris, and Cheryl A. LaFleur.

Public Service Company of New Mexico

Docket No. EC05-29-002

ORDER APPROVING REQUEST TO REMOVE  
INDEPENDENT MARKET MONITOR AND  
SEMI-ANNUAL PLANNING REPORT REQUIREMENT

(Issued June 16 2011)

1. On July 12, 2010, Public Service Company of New Mexico (PNM) submitted a request under section 203(b) of the Federal Power Act (FPA)<sup>1</sup> for an order modifying the terms of the order issued in this proceeding that authorized a disposition of jurisdictional facilities associated with a sale of securities from SW Acquisition, L.P. (SW Acquisition) to PNM Resources, Inc. (PNM Resources).<sup>2</sup> Specifically, PNM seeks to remove (1) the market monitoring plan with an independent market monitor (Market Monitor), and (2) the requirement to submit semi-annual reports on progress on a consolidated transmission plan for the Southwest. As discussed below, we will grant PNM's request.

**I. Background**

**A. PNM and Affiliates**

2. PNM is a wholly-owned, public utility operating company subsidiary of PNM Resources. PNM is engaged in the generation, transmission, and sale of electricity at wholesale and retail. PNM holds the rights to approximately 2,730 megawatts (MW) of generating capacity. Also, PNM owns or leases approximately 3,170 circuit miles of electric transmission lines and provides open-access service pursuant to its open access transmission tariff (OATT).

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<sup>1</sup> 16 U.S.C. § 824b(b) (2006).

<sup>2</sup> *PNM Resources, Inc.*, 110 FERC ¶ 61,204 (2005) (2005 Authorization Order).

3. PNM Resources, a public utility holding company, does not directly own or operate any facilities subject to the Commission's jurisdiction and does not own any significant assets other than the stock of its subsidiaries. In addition to PNM, PNM Resources is the corporate parent of Texas-New Mexico Power Company (TNMP). TNMP provides electric service to customers within the Electric Reliability Council of Texas and does not own or control any generating facilities subject to the Commission's jurisdiction.<sup>3</sup>

**B. 2005 Authorization Order**

4. In the 2005 Authorization Order, the Commission granted a joint application filed by PNM Resources, SW Acquisition, TNP Enterprises, Inc. (TNP Enterprises) and TNMP (applicants) pursuant to section 203 of the FPA.<sup>4</sup> Applicants requested Commission approval for a disposition of jurisdictional facilities by means of the sale of all the outstanding shares of TNP Enterprises by SW Acquisition to PNM Resources (Transaction).

5. The Commission reviewed the Transaction under the Merger Policy Statement<sup>5</sup> and found that the Transaction would not have an adverse effect on competition, rates or regulation, and that it was consistent with the public interest.<sup>6</sup> Specifically, the Commission found that the Transaction would not increase market concentration or eliminate a competitor because TNMP does not own or control any generation resources. Therefore, the Commission concluded that the Transaction would not harm competition by any horizontal consolidation of generation resources.<sup>7</sup> With respect to vertical competition, the Commission found that the Transaction would not result in a vertically

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<sup>3</sup> On January 1, 2007, TNMP's New Mexico utility system assets and operations were consolidated into those of PNM. *PNM Resources, Inc.*, 117 FERC ¶ 62,053 (2006).

<sup>4</sup> 16 U.S.C. § 824b.

<sup>5</sup> See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, 61 Fed. Reg. 68,595, (Dec. 30, 1996), FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement); see also *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, 65 Fed. Reg. 70,983 (Nov. 28, 2000), FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001) (Merger Filing Requirements).

<sup>6</sup> 2005 Authorization Order, 110 FERC ¶ 61,204 at P 1.

<sup>7</sup> *Id.* P 23.

integrated utility increasing its control of electric generation capacity in any relevant market.<sup>8</sup>

6. In support of their Transaction, applicants stated that they would continue to promote the development of regional wholesale markets in the Southwest. To this end, applicants stated that they would work to expand regional transmission planning efforts and promote the development of a single, consolidated transmission plan for the Southwest. The Commission accepted this commitment and ordered the applicants to submit a single consolidated transmission plan for the Southwest and, in the interim, until such a plan is completed, the Commission directed applicants to inform the Commission on a semi-annual basis the progress in developing the plan (Semi-Annual Planning Report).

7. In addition, applicants proposed a market monitoring plan that provided for a Market Monitor to monitor PNM's and TNMP's post-merger generation dispatch and the operation of their transmission system. Applicants stated that the Market Monitor would: (1) identify market events and/or rules that would result in significant increases in wholesale prices or the foreclosure of competition by rival suppliers; (2) report any anticompetitive conduct; (3) respond to requests from the Commission for data and analysis; (4) provide quarterly reports to the Commission; and (5) respond to complaints from customers and competitors.<sup>9</sup> Applicants also noted that the Market Monitor will review and report on system transfer capability and available transfer capability. The Commission accepted applicants' commitment to implement the market monitoring plan and directed the Market Monitor to monitor the use of the PNM's and TNMP's transmission systems for underuse and to review the applicants' report to the Commission on system usage. The Commission also directed the Market Monitor to report on PNM's commitment to participate in regional transmission planning groups and report on the effectiveness of these groups in achieving transmission expansion.

## **II. PNM's Instant Filing**

8. According to PNM, the 2005 Authorization Order did not condition Commission approval of the Transaction on the existence of the Market Monitor or on the requirement to file the Semi-Annual Planning Reports. Thus, PNM states that, it is not clear whether Commission approval is needed here; however, PNM states that, out of an abundance of caution, it is submitting this request under section 203(b) of the FPA. PNM asserts that circumstances have changed since the 2005 Authorization Order that demonstrate that the Market Monitor and the Semi-Annual Planning Reports are no longer necessary.

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<sup>8</sup> *Id.* P 31.

<sup>9</sup> *Id.* P 35-36.

9. PNM states that there was no finding by the Commission in the 2005 Authorization Order that PNM could exercise vertical market power. At the time, PNM asserts that the applicants “voluntarily modeled their market monitoring plan on those [applications] already accepted by the Commission” to address any potential question of vertical market power.<sup>10</sup> PNM contends that any concerns about potential vertical market power issues can be adequately addressed through other means and requests Commission approval to retire the Market Monitor (i.e., Potomac Economics). For instance, PNM argues that it has an OATT compliant with Order No. 890<sup>11</sup> on file with the Commission that will continue to mitigate any vertical market power stemming from PNM’s ownership and operation of transmission facilities in the Western Interconnection.<sup>12</sup> PNM also notes that the Commission may review PNM’s vertical and horizontal market power through the company’s triennial market power filings and change-in-status filings,<sup>13</sup> in response to complaints, or on the Commission’s own motion.<sup>14</sup> Further, PNM argues that continued reliance on the Market Monitor will cost the company and its ratepayers funds that can be better spent ensuring competition and non-discriminatory access to PNM’s transmission system through the OATT and other compliance efforts.

10. Finally, PNM argues that the Market Monitor in its 18 quarterly reports since the consummation of the Transaction has not reported any evidence of any anti-competitive behavior and has not initiated an investigation into PNM’s market practices. Also, PNM states that it is committed to non-discriminatory operation of its transmission system. Thus, even without a Market Monitor, PNM asserts that it will continue to operate its transmission system in a non-discriminatory fashion consistent with the Commission’s improved open access requirements. Accordingly, PNM states that the removal of the Market Monitor will not harm any of its competitors, and further will provide monetary savings to its ratepayers.

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<sup>10</sup> PNM July 12, 2010 Filing at 8.

<sup>11</sup> *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).

<sup>12</sup> PNM July 12, 2010 Filing at 1, 7.

<sup>13</sup> In PNM’s most recent triennial, PNM has opted not to continue to seek authorization to sell at market-based rates in its own balancing authority area and the El Paso Electric Company’s balancing authority area. *Public Serv. Co. of New Mexico*, Docket No. ER01-615-018 (October 26, 2010) (delegated letter order).

<sup>14</sup> PNM July 12, 2010 Filing at 7.

11. Additionally, PNM argues that there is no longer a need for the Semi-Annual Planning Report because PNM Resources participates in regional planning groups, including the West Connect STP Project Agreement, the Southwest Area Transmission Planning Group, and the Western Electricity Coordinating Council Transmission Expansion Planning Policy Committee, and is involved in regional planning studies.<sup>15</sup> At the time of the 2005 Authorization Order, PNM notes that it did not have a detailed regional planning process in its OATT. However, PNM now has a detailed regional and subregional planning process included in its OATT in Attachment K. Therefore, PNM notes that it will not harm any of PNM's ratepayers or competitors to terminate Semi-Annual Planning Report filings.

### **III. Notice of Filing and Responsive Pleadings**

12. Notice of PNM's filing was published in the *Federal Register*, 75 Fed. Reg. 42,730 (2010), with interventions and protests due on or before August 2, 2010. None were filed.<sup>16</sup>

### **IV. Discussion**

#### **A. Removal of Market Monitor**

13. We will grant PNM's request to remove the Market Monitor. In the 2005 Authorization Order, the Commission accepted PNM's proposed market monitoring plan, which included a provision for a Market Monitor to identify any anticompetitive behavior regarding its operation of its transmission facilities.<sup>17</sup> Since then, as PNM states, the Market Monitor has submitted 18 quarterly reports in which there was no evidence of PNM engaging in anti-competitive behavior or the exercise of vertical market power by withholding or under-reporting transmission capacity. The Market Monitor has not found any evidence of PNM posting lower available transfer capability or total transfer capability on Open Access Same-Time Information System (OASIS) than is actually physically available on transmission paths. Also, the Market Monitor has not initiated an investigation into PNM's market practices.

14. Additionally, since the 2005 Authorization Order, PNM has taken steps to increase transparency of its transmission operations. For instance, through its OASIS, PNM posts

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<sup>15</sup> *Id.* at 2.

<sup>16</sup> On January 7, 2011, the Commission issued an order tolling time for action on PNM's application. *Public Serv. Co. of New Mexico*, 134 FERC ¶ 61,011 (2011).

<sup>17</sup> 2005 Authorization Order, 110 FERC ¶ 61,204 at P 34.

the following: (1) transmission service requests, data supporting the grant or denial of transmission service, and information regarding service granted or denied to affiliates versus non-affiliates; and (2) available transfer capability and total transfer capability.<sup>18</sup> Also, as discussed below, PNM has contributed to transmission development planning in the Southwest and addressed ways to ease congestion in the region.<sup>19</sup>

15. Further, PNM has committed to non-discriminatory operation of its transmission system. PNM also recognizes that it must continue to operate its transmission system in a non-discriminatory fashion consistent with the Commission's improved open access requirements.<sup>20</sup> Any party that believes PNM is not abiding by the terms in its OATT may contact the Commission's enforcement hotline or file a complaint pursuant to section 206 of the FPA.<sup>21</sup>

**B. Removal of Requirement for Semi-Annual Planning Report**

16. We will also grant PNM's request to remove the requirement to file Semi-Annual Planning Reports. We find that PNM's participation in the West Connect STP Project Agreement, the SWAT, and the Western Electricity Coordinating Council Transmission Expansion Planning Policy Committee provides assurances that PNM is involved in the development of a consolidated transmission plan for the Southwest.

17. Additionally, PNM's continued participation in regional planning activities will encourage further development of transmission resources in the Southwest. For example, PNM has participated in the Southwest Area Transmission Planning Group studies

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<sup>18</sup> PNM July 12, 2010 Filing at 8. *See also Public Serv. Co. of New Mexico, OATT, Volume No. 6, Section 49, Attachment C (1.0.0); PNM Resources, Request for filing revisions to Attachment C to conform to the implementation of the NERC MOD reliability standards pursuant to OrderNo. 729, Docket No. ER11-3343-000 (filed April 13, 2011).*

<sup>19</sup> As chair of the Southwest Area Transmission Planning Group (SWAT) subregional committee for New Mexico, PNM actively participates in coordinated transmission development. *PNM Semi-Annual Transmission Report for October 2010 at 3 (October 28, 2010).*

<sup>20</sup> PNM July 12, 2010 Filing at 9.

<sup>21</sup> 16 U.S.C. § 824e.

involving the planned development of the High Plains Express Transmission Line (sponsored by PNM) and the SunZia Transmission Line.<sup>22</sup>

18. The Commission retains its authority under section 203(b) of the FPA to reinstate both the Market Monitor and the Semi-Annual Transmission Planning Report should the Commission find that it is necessary or appropriate.<sup>23</sup>

The Commission orders:

(A) We grant PNM's request to remove the independent market monitor, as discussed in the body of this order.

(B) We grant PNM's request to remove the requirement to file Semi-Annual Planning Reports, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>22</sup> *PNM Resources, Semi-Annual Transmission Planning Report*, Docket No. EC05-29-000 (submitted May 1, 2011). See *SunZia Transmission, LLC*, 135 FERC ¶ 61,169 (2011).

<sup>23</sup> Nothing in this order prejudices the outcome of the Commission audit of PNM in Docket No. FA11-7-000. *Public Service Company of New Mexico*, Docket No. FA11-7-000 (Nov. 2, 2010).