

144 FERC ¶ 61,198
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Puget Sound Energy, Inc.

Docket Nos. ER13-1146-001
ER13-1193-001

ORDER GRANTING IN PART AND DENYING IN PART REQUESTS FOR
CLARIFICATION

(Issued September 12, 2013)

1. In this order, we grant in part and deny in part requests for clarification filed by Puget Sound Energy, Inc. (Puget) and Powerex Corporation (Powerex) of an order issued on May 20, 2013, accepting for filing four non-conforming service agreements for conditional firm point-to-point transmission service (Service Agreements) between Puget and Morgan Stanley Capital Group, Inc. (Morgan Stanley).¹ We clarify that a last-in, first-out curtailment methodology among similarly-situated conditional firm customers and similarly-situated non-firm customers is discriminatory and is not an acceptable curtailment practice. We also clarify that, while curtailment of similarly-situated conditional firm and similarly-situated non-firm customers on a *pro rata* basis is an acceptable, non-discriminatory curtailment approach, we will permit a transmission provider to propose and justify another curtailment approach for the Commission to consider on a case-by-case basis.

Background

2. On March 21, 2013 (in Docket No. ER13-1146-000) and March 29, 2013 (in Docket No. ER13-1193-000), Puget submitted for filing the Service Agreements referenced above. The Service Agreements include a conditional curtailment option, because transmission capacity on the path over which Morgan Stanley requested service is fully subscribed from June to September each year, due to an existing, long-term seasonal exchange agreement. In the May 20 Order, the Commission found that Puget's approach

¹ *Puget Sound Energy, Inc.*, 143 FERC ¶ 61,157, at P 36 (2013) (May 20 Order).

to curtailing conditional firm service was inconsistent with the requirement that curtailment must be done on a “non-discriminatory basis.”² Therefore, the Commission found that Puget’s business practice of last-in, first-out curtailment is not an appropriate curtailment scheme for conditional firm service and that all conditional firm transmission service must be curtailed *pro rata* with other transmission service within the same curtailment priority during the conditional period.

3. Puget and Powerex both seek guidance on the scope of this finding. On June 10, 2013, Puget filed a request for clarification asking the Commission to clarify whether it intended its ruling on *pro rata* curtailment to be a broad statement on the appropriate curtailment priority scheme for all firm and non-firm classes of customers, or whether the Commission intended that the ruling apply only to the subset of customers subject to conditional curtailment.³ Puget notes that it can accommodate any curtailment priority scheme the Commission decides on, but explains that many utilities in the West have traditionally operated using a last-in, first-out curtailment approach for non-firm service, and that requiring all transmission providers to apply a *pro rata* curtailment methodology to all non-firm customers would result in a significant disruption throughout the Western Interconnection. Puget also points out that implementing a *pro rata* approach to curtailment impacts all non-firm customers and is thus more complex than the last-in, first-out approach, which affects fewer customers and transactions.⁴

4. On June 19, 2013, Powerex filed a request for clarification asking the Commission to clarify that the May 20 Order only applies to those service agreements executed after the issuance of the May 20 Order. In support, Powerex explains that, when it decided to execute two transmission service agreements with Puget for conditional firm service, it relied on representations by Puget that the last-in, first-out curtailment methodology would apply.⁵ Powerex further states that it followed the Commission’s previous guidance that transmission customers should engage with transmission providers if they are uncertain about the rules governing a particular service when it made efforts to determine Puget’s method of curtailing conditional firm service.⁶ Next, Powerex claims that, as this is the first time the Commission has specified the curtailment priority of conditional firm service, the Commission should apply its new policy only to contracts

² *Id.* PP 34, 36.

³ Puget Request for Clarification at 1.

⁴ *Id.* at 5.

⁵ Powerex Request for Clarification at 3.

⁶ *Id.* at 5.

executed after the May 20 Order.⁷ Finally, Powerex asks the Commission to clarify: (1) whether last-in, first-out curtailment can ever be considered non-discriminatory; (2) if so, under what circumstances; and (3) if not, how the Commission intends to enforce its determination with respect to other transmission providers that currently use a last-in, first-out curtailment methodology.⁸

5. On July 3, 2013, Morgan Stanley filed a response to Powerex's request for clarification asking the Commission to reject Powerex's request for clarification. Morgan Stanley argues that the May 20 Order became effective when it was issued, and notes that Commission orders are effective when issued unless stayed.⁹ Morgan Stanley also contends that granting Powerex's request to have the May 20 Order only apply to those service agreements executed after the issuance of the May 20 Order would subject Morgan Stanley's conditional firm service to ongoing discriminatory curtailment, which the Commission sought to remedy in the May 20 Order. Morgan Stanley argues that, where the Commission finds that a transmission provider's interpretation of its business practices conflicts with the statutory requirement to ensure non-discriminatory service, the Commission is obligated to correct that interpretation.¹⁰ Lastly, Morgan Stanley asserts that the Commission's finding in the May 20 Order is not a departure from Commission policy, as Powerex suggests; instead, Morgan Stanley contends that the May 20 Order clarified the existing non-discrimination requirement of Order No. 888. Thus, Morgan Stanley argues that Powerex's arguments do not satisfy the Commission's test for prospective application of a rule.¹¹

Discussion

6. In the May 20 Order, the Commission found that, if Puget curtails on a last-in, first-out basis, Puget will effectively subject Morgan Stanley to curtailment at a priority level

⁷ Powerex states that the Commission applies a test in such circumstances to determine whether a rule announced in an agency proceeding should be given a retroactive effect. Powerex asserts that the application of this test confirms that the new curtailment policy should be applied to contracts executed after May 20, 2013, as otherwise Powerex would suffer harm from relying on Puget's last-in, first-out curtailment policy. *Id.* at n.17.

⁸ *Id.* at 4.

⁹ Morgan Stanley Response to Powerex at 6.

¹⁰ *Id.* at 9.

¹¹ *Id.* at 11-12.

subordinate to other similarly-situated conditional firm service customers. This would make Morgan Stanley's contracts subordinate to those earlier-entered contracts for the same quality of service with regard to curtailment priority. As a result, the Commission found that Puget's curtailment approach for conditional firm service is inconsistent with the requirement in Order No. 888 that curtailment must be on a "non-discriminatory basis."¹²

7. Puget and Powerex have asked the Commission to clarify whether curtailment on a *pro rata* basis applies only to conditional firm service or whether it also applies to different categories of service. For purposes of curtailment, North American Energy Standards Board (NAESB) business practice standards divide transmission service into eight categories of service (Priority 0 – Priority 7). Of these, Priority 7 is the only firm service category; the remaining categories represent different types of non-firm service. Curtailments start with the lowest curtailment priority (Priority 0 – Next-hour Market Service). If additional curtailments are needed – after all useful curtailments from that curtailment priority are exhausted – transmission service schedules with the next lowest curtailment priority are evaluated for possible curtailments.¹³ This process continues through all the non-firm priority levels. Priority 7, Firm Point-to-Point Transmission Services and Network Integration Transmission Service from Designated Resources, has the highest curtailment priority, with curtailments being implemented only after all possible curtailments from non-firm transmission customers have occurred. The transmission provider must implement curtailments for firm transmission service on a *pro rata* basis.¹⁴ Conditional firm point-to-point transmission service, outside of the conditional period, is subject to *pro rata* curtailment consistent with curtailment of Priority 7, Firm Point-to-Point Transmission Services and Network Integration Transmission Service from Designated Resources. Conditional firm point-to-point transmission service, during the conditional period, has a curtailment priority of Priority

¹² May 20 Order, 143 FERC ¶ 61,157 at P 36 (citing *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, at 30,180 (1997), *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)).

¹³ North American Energy Standards Board Wholesale Electric Quadrant Business Practice Standard 008-2.1.

¹⁴ Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,180.

6, Network Integration Transmission Service, from sources not designated as network resources.

8. Section 14.7 of the *pro forma* Open Access Transmission Tariff (OATT) states that “where required, curtailments or interruptions will be made on a non-discriminatory basis to the transaction(s) that effectively relieve the constraint, however, non-firm point-to-point transmission service shall be subordinate to firm transmission service.” The May 20 Order’s finding that Puget’s last-in, first-out curtailment method was inconsistent with this requirement was based on Order Nos. 888-A and 890, which repeatedly endorse *pro rata* curtailment.¹⁵ In addition, the Commission previously rejected last-in, first-out curtailment for hourly non-firm service because it encouraged customers to arrange service earlier than currently possible in the hourly energy markets, or would otherwise promote hoarding of transmission capacity.¹⁶ The May 20 Order merely clarified existing Commission non-discrimination policy as it relates to this case.

9. We therefore continue to find that curtailment of Morgan Stanley’s requested transmission service during the conditional period, which as discussed above has a curtailment Priority 6, on a last-in, first-out basis is discriminatory. We further clarify that the last-in, first-out methodology is discriminatory, regardless of whether applied to contracts for firm service, conditional firm service, or non-firm service. Otherwise, if two entities signed identical contracts for the same service, the entity that signs first would obtain a higher curtailment priority, even though the contracts were otherwise identical.

10. In reviewing the requests for clarification, we understand that the May 20 Order could be read to not only rule out the use of the last-in, first-out curtailment methodology, but to require the use of a *pro rata* curtailment methodology in all instances. While the *pro rata* curtailment methodology is an acceptable, non-discriminatory curtailment approach, a transmission provider may also propose the use of another curtailment methodology as long as the transmission provider demonstrates that such methodology is non-discriminatory. The Commission will consider such proposals on a case-by-case basis.

¹⁵ See May 20 Order PP 35-36.

¹⁶ *Mid-Continent Area Power Pool*, 85 FERC ¶ 61,352, at 62,355-56 (1998), *reh’g denied*, 94 FERC ¶ 61,222 (2001) (*MAPP*). The Commission also rejected last-in, first-out curtailment in the context of an application for service under FPA sections 210 and 211, 16 U.S.C. §§ 824i, 824j (2006), stating “we will require that *pro rata* curtailment be applied to Aero Energy rather than last-in, first-out because that is what comparability of service requires.” *Aero Energy, LLC*, 118 FERC ¶ 61,204 (2009).

11. Finally, we reject Powerex's argument that, because it relied on Puget's representations regarding its last-in, first-out curtailment methodology to make its business decisions, service under existing service agreements should continue to be curtailed using a last-in, first-out approach, while service under new agreements would be curtailed *pro rata*. Powerex apparently based its decisions on a discriminatory practice that was not consistent with Commission requirements. Powerex's assertion that it would be aggrieved by the immediate application of *pro rata* curtailment for conditional firm service does not justify permitting the continuation of a practice that would unfairly disadvantage other similarly-situated customers. Likewise, we find that Powerex's contention that the effects of the May 20 Order should apply only to those service agreements executed after the issuance of the order is without merit. As discussed above, the Commission's policy with respect to nondiscriminatory curtailment of transmission is longstanding. Thus, Powerex's contention that this policy should only be applied prospectively, is without merit. Applying that existing policy only to service agreements executed after the issuance of the May 20 Order would allow discriminatory curtailments to continue to take place.

The Commission orders:

The requests for clarification by Puget and by Powerex are hereby granted in part and denied in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.