

134 FERC ¶ 61,071  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Marc Spitzer, John R. Norris,  
and Cheryl A. LaFleur.

Nevada Power Company and  
Sierra Pacific Power Company

v.

Docket Nos. EL02-28-010  
EL02-33-008

Enron Power Marketing, Inc.  
El Paso Merchant Energy

Nevada Power Company

v.

Docket Nos. EL02-29-007  
EL02-30-007  
EL02-31-007  
EL02-32-007  
EL02-39-007

Morgan Stanley Capital Group  
Calpine Energy Services  
Mirant Americas Energy Marketing,  
L.P.  
Reliant Energy Services  
Allegheny Energy Supply Company,  
L.L.C.

(Consolidated)

ORDER APPROVING UNCONTESTED SETTLEMENT

(Issued January 31, 2011)

1. In this order, the Commission approves an uncontested settlement filed on December 1, 2010 between NV Energy, Inc. (NV Energy), formerly Nevada Power Company (NPC), the Office of the Nevada Attorney General, Bureau of Consumer Protection (Nev-BCP), Merrill Lynch Capital Services, Inc. (ML), and

Allegheny Energy Supply Company, LLC (Allegheny) (collectively, the Parties).<sup>1</sup> The Parties submitted an Explanatory Statement, and a Joint Offer of Settlement and Settlement Agreement (Settlement) that resolves all the issues in the above-captioned proceedings concerning Allegheny's forward sales contracts originally executed by ML with NPC, between December 4, 2000 and February 7, 2001, at bilaterally negotiated rates.

## **I. Background**

2. The background of this long and complex proceeding has been previously described at length.<sup>2</sup> Thus, only the relevant background details are described briefly here.

3. Between December 2001 and February 2002, complaints were filed at the Commission by buyers seeking to abrogate or reform contracts they signed during the Western energy crisis. NV Energy was among the parties that filed a complaint to modify its contracts. The complaints argued that the Commission had already determined that the dysfunctional California Independent System Operator Corporation and California Power Exchange spot markets had produced unjust and unreasonable spot prices, the dysfunctional spot markets had tainted the long-term markets and, therefore, the long-term contracts signed during the period of market dysfunction should be found unjust and unreasonable. Nev-BCP and the Public Utilities Commission of Nevada intervened in this proceeding.

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<sup>1</sup> The Commission notes that all other parties included in the Commission's December 18, 2008 Order on Remand, *Nevada Power Co. v. Enron Power Mktg., Inc.*, 125 FERC ¶ 61,312, at P 5-13 (2008), have resolved their disputes in this matter. *See* NV Energy December 9, 2008 Answer ("The complaints brought by NV Energy that remain include those against American Electric Power Services Corp. ("AEP"), BP Energy Company ("BP") and Allegheny Supply Company, LLC ("Allegheny") in Docket Nos. EL02-38 (AEP), EL02-34 (BP) and EL02-29 (Allegheny)"). Settlement Agreements in BP and AEP were accepted on August 25, 2009 and December 23, 2009, respectively. *See Nevada Power Co. v. BP Energy Co.*, 128 FERC ¶ 61,185 (2009); *Nevada Power Co. and Sierra Pacific Power Co. v. Amer. Elect. Power Serv. Corp.*, 129 FERC ¶ 61,266 (2009). Golden State Water Co. (formerly, Southern California Water Company) withdrew its complaint in Docket No. EL02-43-000 on May 5, 2009. Public Utility District No. 1 of Snohomish County, Washington withdrew its complaint in Docket No. EL02-56-000 on December 15, 2010. Accordingly, all of the above-captioned dockets are terminated.

<sup>2</sup> *Nevada Power Co.*, 125 FERC ¶ 61,312 at P 5-13.

4. The Commission held a hearing on the complaints to address “whether the dysfunctional California spot markets adversely affected the long-term bilateral markets, and, if so, whether modification of any individual contract at issue [was] warranted.”<sup>3</sup> The hearing also addressed whether the *Mobile-Sierra* public interest standard of review or the ordinary just-and-reasonable standard of review should be applied.<sup>4</sup> Finally, the Commission instructed the administrative law judge (ALJ) who presided over the hearing to consider the “totality of purchases and sales and the conditions present at the time the contract was entered into.”<sup>5</sup>

5. On December 19, 2002, the ALJ issued an initial decision dismissing the consolidated complaints.<sup>6</sup> The ALJ concluded that the *Mobile-Sierra* “public interest” standard of review applied to the contracts at issue and that NPC (as well as the other complainants) had failed to meet the burden of proof under that standard to justify contract modification under Federal Power Act section 206.<sup>7</sup> The ALJ also determined that Allegheny, not ML, was the real party in interest.<sup>8</sup>

6. On June 26, 2003, the Commission affirmed the ALJ’s initial decision denying the complaints, finding, in addition, that Allegheny’s real party in interest issue was moot in light of the decision not to modify the contracts.<sup>9</sup> On November 10, 2003, the Commission denied requests for rehearing and affirmed its order on the initial decision.<sup>10</sup>

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<sup>3</sup> *Nevada Power Co. v. Duke Energy Trading and Mktg., L.L.C.*, 99 FERC ¶ 61,047, at 61,191 (2002) (*Nevada Power*).

<sup>4</sup> See *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *F.P.C. v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Mobile-Sierra*).

<sup>5</sup> *Nevada Power*, 99 FERC ¶ 61,047 at 61,191.

<sup>6</sup> *Nevada Power Co. v. Enron Power Mktg., Inc.*, 101 FERC ¶ 63,031 (2002).

<sup>7</sup> *Id.* P 257.

<sup>8</sup> *Id.* P 242.

<sup>9</sup> *Nevada Power Co. v. Enron Power Mktg., Inc.*, 103 FERC ¶ 61,353 (2003).

<sup>10</sup> *Nevada Power Co. v. Enron Power Mktg., Inc.*, 105 FERC ¶ 61,185 (2003).

7. On appeal, the Ninth Circuit Court of Appeals remanded the case to the Commission, stating that it found flaws in the Commission's analysis.<sup>11</sup> On review of the Ninth Circuit's decision, the United States Supreme Court rejected several aspects of the Ninth Circuit's interpretation of the operation of the *Mobile-Sierra* presumption.<sup>12</sup> Therefore, the Court remanded the matters to the Commission to "amplify or clarify" its findings on two points. First, the Court stated that the Commission's analysis should not be limited to whether consumers' rates increased immediately upon the relevant contracts going into effect, but rather should determine whether the contracts at issue imposed an excessive burden "down the line," relative to the rates consumers could have obtained (but for the contracts) after elimination of the dysfunctional spot market.<sup>13</sup> Second, the Court found that it was unclear from the Commission's orders whether the Commission found the evidence inadequate to support the claim that individual sellers' alleged unlawful activities affected the contracts at issue here.<sup>14</sup>

8. On December 18, 2008, the Commission issued its order on remand, which established a paper hearing and allowed the record to be reopened so that parties could submit specified information that would enable the Commission to address the issues remanded by the Court.<sup>15</sup> The paper hearing was held in abeyance to allow parties to engage in settlement discussions.<sup>16</sup>

9. On December 1, 2010, the Parties submitted the Settlement as a "black box" settlement. They noted that the Settlement was a result of informal

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<sup>11</sup> *Pub. Util. Dist. No. 1 of Snohomish County v. FERC*, 471 F.3d 1053, 1085-97 (9th Cir. 2006).

<sup>12</sup> *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1 of Snohomish County*, 554 U.S. 527, 545-551 (2008) (*Morgan Stanley*). On November 3, 2008, the Ninth Circuit issued an order vacating its prior decision in the case and remanding the matter to the Commission for further proceedings consistent with the Court's *Morgan Stanley* opinion. *Pub. Util. Dist. No. 1 of Snohomish County v. FERC*, 547 F.3d 1081 (9th Cir. 2008).

<sup>13</sup> *Morgan Stanley*, 554 U.S. at 552-55.

<sup>14</sup> *Id.*

<sup>15</sup> *Nevada Power Co.*, 125 FERC ¶ 61,312 at P 29-32.

<sup>16</sup> *Id.* P 33.

settlement discussions and negotiations between the Parties, facilitated by the Commission's Dispute Resolution Service.<sup>17</sup>

## **II. Procedural Matters**

10. The Parties filed the Settlement with the Commission pursuant to Rule 602 of the Commission's Rules of Practice and Procedure.<sup>18</sup> Pursuant to Rule 602(f), initial comments were due on or before December 21, 2010, and reply comments were due on or before January 3, 2011.<sup>19</sup> No comments were filed concerning the Settlement.

## **III. The Terms of the Settlement**

11. The Parties state that the Settlement is a black box settlement. The principal elements of the Settlement are ML's one-time, lump-sum \$1.4 million payment to NV Energy, on behalf of itself and Allegheny, in return for NV Energy's and the Nev-BCP's release of all claims against ML and Allegheny related to certain of Allegheny's forward sales contracts executed with NV Energy between December 4, 2000 and February 7, 2001, at bilaterally negotiated rates and termination of the complaint dockets.<sup>20</sup> The sole obligation of ML, on behalf of itself and Allegheny, pursuant to the Settlement Agreement is to pay the lump sum amount to NV Energy. The Parties agree that NV Energy is solely responsible for any commitments to its ratepayers, the Nev-BCP, the Public Utilities Commission of Nevada, or to other third parties related to the ultimate disposition of the funds paid by ML, on behalf of itself and Allegheny, to NV Energy.<sup>21</sup> The Parties state that they intend the Settlement to be a full and final settlement of the issues in or could have been brought in the proceeding.

12. Under the Settlement, ML, on behalf of itself and Allegheny, agrees to pay NV Energy by check within 30 days of the effective date of the Settlement, and no

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<sup>17</sup> Explanatory Statement at 1-2.

<sup>18</sup> 18 C.F.R. § 385.602 (2010).

<sup>19</sup> *Id.* § 385.602(f).

<sup>20</sup> Explanatory Statement at 6.

<sup>21</sup> *Id.*

interest will accrue on the lump-sum settlement payment if the payment is made on or before the thirtieth day following the effective date of the Settlement.<sup>22</sup>

13. The Settlement becomes effective and binds the Parties on the date the Commission's order accepting or approving the Settlement and terminating the complaint docket becomes final. For the purposes of the Settlement Agreement, the Commission order shall be deemed final as of the date all requests for rehearing of the Commission order accepting or approving the Settlement Agreement and terminating the Complaint docket are denied or, in the absence of such a request for rehearing, the date on which the right to apply for rehearing expires. Within 15 days of the date on which ML, on behalf of itself and Allegheny, has paid the settlement payment to NV Energy, Allegheny shall file in the docket a letter notifying the Commission and all interested parties of the payment. From and after the date on which this notice is filed, Allegheny shall be deemed to be a non-party in the proceeding and any consolidated matters.<sup>23</sup>

14. With respect to future changes to the Settlement itself, page 9 of the Settlement Agreement provides that:

This Settlement Agreement may only be amended by the agreement, in writing, of all the Parties hereto. The standard of review for any modifications to this Settlement Agreement proposed by any Party without the consent of all other Parties after the Settlement is approved by the Commission will be the *Mobile-Sierra* public interest standard. The standard of review for any modifications to the Settlement Agreement proposed by any non-party to the Settlement Agreement, after it is approved by the Commission, including any modifications resulting from the Commission acting *sua sponte*, will be the most stringent standard permitted by law.

#### **IV. Commission Determination**

15. The Settlement appears to be fair and reasonable and in the public interest and is hereby approved. The Commission's approval of this Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

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<sup>22</sup> Settlement Agreement at 5-6.

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

16. Given that the Parties intend this Settlement to be a full and final settlement of the issues in this proceeding, this order terminates Docket No. EL02-39-007.

The Commission orders:

The Settlement is hereby approved, as discussed in the body of this order.

By the Commission. Chairman Wellinghoff and Commissioner Moeller are not participating.

( S E A L )

Kimberly D. Bose,  
Secretary.