

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, Linda Breathitt,
and Nora Mead Brownell.

Nevada Power Company and
Sierra Pacific Power Company

v.

EL02-26-000, EL02-28-000,
EL02-33-000, and EL02-38-000

Duke Energy Trading and Marketing, L.L.C.
Enron Power Marketing, Inc.
El Paso Merchant Energy
American Electric Power Services Corp.

Nevada Power Company

v.

EL02-29-000, EL02-30-000, EL02-31-
000, EL02-32-000, EL02-34-000, and
EL02-39-000

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

Southern California Water Company

v.

EL02-43-000

Mirant Americas Energy Marketing, L.P.

Public Utility District No. 1
Snohomish County, Washington

v.

EL02-56-000

Morgan Stanley Capital Group, Inc.

(Consolidated)

ORDER SETTING COMPLAINTS FOR HEARING,
ESTABLISHING HEARING PROCEDURES, AND CONSOLIDATING PROCEEDINGS

(Issued April 11, 2002)

This order addresses complaints filed by Nevada Power Company (Nevada Power) and Sierra Pacific Power Company (Sierra Pacific), Southern California Water Company (SCWC), and Public Utility District No. 1 Snohomish County, Washington (PUD). These complaints allege that dysfunctions in the California electricity spot markets caused long-term contracts negotiated in the bilateral markets in California, Washington and Nevada to be unjust and unreasonable, and seek the extraordinary remedy of contract modification. To ensure that the complainants have a full and fair opportunity to present their cases and that the Commission, in turn, has a complete record on which to base its ultimate decision, we are setting these complaints for an evidentiary hearing. During this hearing, the complainants will bear the burden of proving that modification of contracts is justified. This burden is a heavy one and one that the evidence contained in the complaints taken alone does not yet meet. Moreover, we will direct the parties to comply with contractually required mediation, and we strongly urge the parties to make every effort to settle their disputes during that mediation.

I. Description of Complaints and Responsive Pleadings

The complainants make many of the same arguments, and the respondents make many of the same counter-arguments in their various pleadings. An overview of their main points is provided below.

A. Nevada Companies' Complaints

Nevada Power and Sierra Pacific (collectively, Nevada Companies) filed separate complaints against the following ten entities: Duke Energy Trading and Marketing, L.L.C. (Duke), Morgan Stanley Capital Group Inc. (Morgan Stanley), Calpine Energy Services, L.P. (Calpine), Mirant Americas Energy Marketing, L.P. (Mirant), Reliant Energy Services ,

Inc. (Reliant), El Paso Merchant Energy, L.P. (El Paso), BP Energy Company (BP), American Electric Power Service Corporation (AEP), Enron Power Marketing Inc. (Enron), and (Allegheny Energy Supply Company, L.L.C. (Allegheny). These complaints seek to modify 201 contracts¹ for supply of 25-100 MW blocks of power for forward periods. These contracts were entered into in 2000-2001. Some of the contracts have concluded and others are yet to become effective and will continue through year 2006. Nevada Companies indicate that they are seeking relief for contracts that have not yet gone to delivery. The contract prices range from a low of \$33 to a high of \$290.

In their complaints, Nevada Companies argue that the market-based prices they were charged are the product of markets found by the Commission to be dysfunctional and non-competitive and therefore are unjust and unreasonable. Consequently, they request that the Commission set the contract prices at the current market prices for the delivery of power at the locations and for the periods at issue. In the alternative, they suggest that the Commission should, at the very least, set the matter for hearing.

1. Responsive Pleadings

Respondents argue that the complaints must be dismissed because they fail to make the requisite showing pursuant to the Mobile-Sierra doctrine that the existing contracts' rates adversely affect the public interest.² Respondents cite to section 6.1 of the Western Systems Power Pool (WSPP) Agreement in support. Section 6.1 of the WSPP Agreement states: "Nothing contained herein shall be construed as affecting in any way the rights of the Parties to jointly make application to FERC for a change in the rates and charges, classification, service, terms, or conditions affecting WSPP transactions under Section 205 of the Federal Power Act and pursuant to FERC rules and regulations promulgated thereunder."

Duke, Mirant, Reliant, and El Paso state that in accordance with Commission precedent, the fact that a contract is no longer, or no longer appears to be, as economically attractive to one party as before is not sufficient to render the contract contrary to the public interest. In fact, they allege that the public interest would be adversely affected by reformation of the contracts and would, for example, discourage forward contracting, undermine the central purpose of the Commission's mitigation scheme for Western

¹Not all of these contracts may be potentially subject to refund. For a detailed list of contracts being addressed in this order, see Appendix A.

² United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956) (Mobile); FPC v. Sierra Pacific Power, 350 U.S. 348 (1956) (Sierra).

markets, which was to reduce excessive reliance on the spot markets, and result in the filing of a great number of ripple claims.³

In response, Nevada Companies argue that the respondents' claim that the complaints here are barred by the Mobile-Sierra doctrine is without merit. They state that the Mobile-Sierra doctrine applies only to fixed-rate, long-term contracts that have been filed with and accepted by the Commission. Nevada Companies argue that the respondents mistakenly believe that the relevant contract for the purpose of the Mobile-Sierra doctrine is the WSPP Agreement, while the transactions in question are governed by Confirmation Agreements, for which the WSPP Agreement provides only some general terms and conditions. The complainants further contend that the relevant Confirmation Agreements are not subject to the Mobile-Sierra doctrine for a number of reasons. First, these contracts have not been filed, nor are required to be filed with the Commission. Second, the Confirmation Agreements are also not long-term contracts under Commission precedent, which defines a long-term contract as having a duration longer than one year. Third, in accordance with Order No. 888-A,⁴ the Mobile-Sierra doctrine does not extend to situations where, as here, parties have entered into a series of contracts in a dysfunctional market. In the alternative, the complainants argue that even if the Mobile-Sierra doctrine does apply, the Commission's reformation of the contracts would advance the public interest.

In addition, Allegheny challenges the complainants' contention that it is contractually responsible under the three contracts identified in the complaint. According to Allegheny, these contracts were with Merrill Lynch Capital Services, Inc., while Allegheny served as a scheduling agent under these contracts.

³ AEP informs the Commission that it also entered into 2,000 forward contracts during the time period relevant to Nevada Companies' complaints. See Motion to Strike or, in the Alternative, Motion for Leave to File Answer and Answer of AEP, Docket No. EL02-38-000, at 6 (February 27, 2002).

⁴ 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, 61 Fed. Reg. 21,540, at 31,664-65 (1996), FERC Stats. & Regs. ¶ 31,036 (1996), order on reh'g, Order No. 888-A, 62 Fed. Reg. 12,274 (1997), FERC Stats. & Regs. ¶ 31,048 (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, remanded in part on other grounds sub nom. Transmission Access Policy Study Group, *et al. v. FERC*, 225 F. 3d 667 (D.C. Cir.2000), aff'd, *New York v. FERC*, 122 S.Ct. 1012 (2002).

Duke, Enron, Morgan Stanley, Calpine, Reliant, El Paso, BP, and AEP challenge the complainants' assertion that the Commission found the forward market to be dysfunctional as inaccurate, since forward contracts were not subjected to price mitigation. In addition, Allegheny argues that Nevada Power's contracts are priced substantially below the Commission-determined market-clearing price at the time the contracts were made. Nevada Companies counter that the Commission did not hold in prior orders that the forward contract prices at issue here are just and reasonable. On the contrary, the Commission's December 15, 2000 order⁵ established a benchmark to be used in complaint cases involving forward contracts.

Enron, Morgan Stanley, Mirant, Reliant, El Paso, BP, and AEP also argue that the complaints should be dismissed for failure to mediate, as required by the WSPP Agreement.⁶

Mirant and Reliant also argue that Nevada Companies' complaints are premature because the power delivery under the contracts it entered into with Mirant and Reliant does not commence until later. AEP contends that Nevada Companies' complaint is in fact seeking retroactive relief because prospective relief, as Nevada Companies characterize their request, would apply only to future transactions - not to contracts that have already been executed and relied upon by the respondents and other sellers in the west. In response, Nevada Companies state that the actual time at which power is delivered is irrelevant to what prices would be competitive for such contracts and that they are asking the Commission to reform power sales contracts that are scheduled to be performed in the future, not to refund money it paid for power in the past..

2. Comments

Electric Power Supply Association (EPSA) and Mirant argue that the Commission has already rejected the remedy sought by Nevada Companies when it denied requests "to extend price mitigation measures to forward contracts." EPSA, Mirant, and Dynegy Power Marketing, Inc. (Dynegy) point out that the Commission strongly urged parties in

⁵ San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services, 93 FERC ¶ 61,294, 61,994-95 (2000), reh'g denied, 97 FERC ¶ 61,275, at 62,229 (2001) (setting a benchmark at \$74/MWh).

⁶ They cite to Section 34.1 of the WSPP Agreement, which provides that before "binding dispute resolution or any other form of litigation may proceed, any dispute between the Parties to a transaction under [the WSPP Agreement] first shall be referred to nonbinding mediation."

California and elsewhere in the West to enter into longer-term contracts, in order to manage the risks inherent in any spot market.

The Nevada Attorney General, Bureau of Consumer Protection (Nevada BCP), Public Utilities Commission of Nevada (Nevada PUC), and PUD support the complaints. Nevada BCP argues that the finding that the prices in the Nevada Companies' forward contracts are unjust and unreasonable is supported by the fact that there is a critical interdependence between spot markets (which have been found by the Commission to be dysfunctional) and forward contract prices throughout the West. The Nevada PUC and PUD further state that if the contracts are not modified, Nevada ratepayers will continue to be treated differently than California ratepayers, whose utilities relied on spot markets prior to the Commission-ordered price mitigation. According to Nevada PUC, such a disparate, adverse impact on ratepayers in Nevada is contrary to the FPA, which prohibits unjust, unreasonable, unduly discriminatory and preferential rates and practices. PUD also argues that because the Commission encouraged forward contracting, it would be unfair and a poor public policy for the Commission to now deny relief from unjust and unreasonable rates to those parties that reduced their reliance on the spot market and moved more of their load under long-term contracts to alleviate the electricity crisis in the West.

B. SCWC's Complaint

SCWC asks the Commission to declare its five-year long-term contracts with Mirant for 15 MW at \$95 per MWh unjust and unreasonable. The contracts were entered into in March 2001 during the California energy crisis, when, SCWC alleges, it had no ability to make purchases from other sellers at a lower price. SCWC concludes that the rates in its contracts with Mirant are not the product of a competitive market and thus are unlawful. It believes that it has satisfied the requirements of a prima facie case under section 206 of the FPA by showing that the contract rate is more than 28 percent higher than the Commission-proposed benchmark. SCWC also argues that the contract rates in question resulted from exercise of market power by Mirant in a substantially flawed market. For this reason, SCWC continues, the burden to prove that the contract rate is just and reasonable should shift to Mirant.

In its answer, Mirant asserts that the Mobile-Sierra doctrine applies because the WSP Agreement governing the transaction at issue prohibits a party from making a unilateral application to the Commission for a change in rates and charges, and SCWC has not met its burden under that doctrine. Mirant further states that at the time of execution of its contracts, the contract price was beneficial to SCWC as spot prices were over \$200 per MWh; however, it later became uneconomic. It concludes that in accordance with Commission precedent, the fact that a contract is no longer, or no longer appears to be, as

economically attractive to one party as before is not sufficient to render the contract contrary to the public interest.

Mirant also challenges SCWC's claim that the contract rate, being the product of a non-competitive market, is unjust and unreasonable. According to Mirant, the Commission, in its prior orders, made it clear that the spot markets were the only markets in which the Commission determined that rates may be unjust and unreasonable. Mirant also rejects SCWC's argument that Mirant has the burden to show that the contract rate is just and reasonable. Mirant claims that its rate was found just and reasonable when the Commission accepted its market-based tariff for filing.

SCWC argues that its complaint is not barred by the Mobile-Sierra doctrine because the public interest standard is not applicable to contracts that are, as here, being reviewed by the Commission for the first time. SCWC also argues that the Commission has the authority to apply the just and reasonable standard to the complaints under these extraordinary circumstances in the California markets. In the alternative, SCWC argues that its complaint has satisfied the public interest standard.

On February 2, 2002, SCWC also filed a motion requesting that the Commission direct Mirant to place funds into an escrow account to cover the refund obligation that will likely result as an outcome of these proceedings. SCWC states that it satisfies the criteria for granting this kind of equitable relief. First, it states that it has demonstrated that it will likely succeed on the merits of its complaint. Second, SCWC contends that because Mirant's investment rating has been downgraded, its potential inability to pay refunds would nullify that Commission's enforcement of the FPA mandate that all rates and charges be just and reasonable.

In response to the motion, Mirant states that there is no legal basis for the relief sought by SCWC because the FPA does not provide for the posting of bond or any other security. In the alternative, Mirant argues that even if the Commission finds that there is a legal basis for considering SCWC's motion, SCWC has failed to meet the criteria for such equitable relief. Mirant also states that SCWC does not even make an attempt to show that it would suffer irreparable harm if its motion is denied. According to Mirant, the only harm SCWC would suffer is monetary loss, which the Commission has not recognized to constitute irreparable harm.

C. PUD's Complaint

PUD's complaint against Morgan Stanley concerns a long-term contract entered into on January 26, 2001. In its complaint, PUD alleges that it was forced to agree to an extremely long contract term and to the imposition of a needlessly expensive and onerous

collateralization requirement⁷ in order to obtain power to serve PUD's consumers. PUD asserts that the contract terms are unjust and unreasonable because the contract was entered into during the period of severe market dysfunctions in late 2000 and early 2001.

1. Responsive Pleadings

On March 4, 2002, Morgan Stanley filed a motion to dismiss PUD's complaint on the ground that the complaint is procedurally defective because, as a result of Morgan Stanley's refusal to participate in informal negotiations with PUD, PUD is now required to use the WSPP Agreement's formal mediation procedures.

Morgan Stanley also filed an answer to PUD's complaint in which it argues that PUD's complaint is barred by the Mobile-Sierra doctrine. Morgan Stanley argues that even if the Commission were to review PUD's complaint under the just and reasonable standard, PUD has failed to meet its burden of proof, since its complaint relies on the unsupported assertion that dysfunctional spot markets in California affected bilateral forward contracts in Washington.

Morgan Stanley further argues that the Commission can find the contract at issue to be unjust and unreasonable only if it determines that Morgan Stanley secured the contract by exercising market power. In Morgan Stanley's opinion, PUD has failed to refute the Commission's finding that Morgan Stanley has no market power. In addition, Morgan Stanley contends that the Commission must examine the surrounding circumstances as they existed when the parties entered into the transaction to determine whether the contract terms are just and reasonable.

In response, PUD argues that its complaint raises issues of material fact and credibility questions that warrant discovery and the establishment of an evidentiary hearing.

PUD disagrees with Morgan Stanley's interpretation of the Mobile-Sierra doctrine. According to PUD, if Morgan Stanley's position on the subject matter were adopted, it would mean that utility monopolists could evade review of their abusive and unjust contracts by the simple expedient of including the Mobile-Sierra clause in their contracts.

PUD further argues that the Mobile-Sierra doctrine does not apply to the circumstances presented here because the original Mobile and Sierra involved the situation

⁷The value of the bond is calculated by computing the value of the MWh over the 8 plus years at 365 days times 24 hours at \$105 per MWh. This amount is then discounted to net present value and then reduced by the current market price of MWh. The current result is a demand by Morgan Stanley for a \$100 million bond.

where a party sought to increase the rate, thereby raising costs to consumers. PUD explains that it is seeking to change terms and conditions of service for the benefit of consumers. It also argues that the Mobile-Sierra doctrine was intended to apply only to contracts that had already been reviewed and approved by the Commission under the just and reasonable standard.

With regard to dispute resolution, PUD states that the plain terms of Exhibit D of the WSPP Agreement clearly establish that it has satisfied the dispute resolution requirement of WSPP Section 34.1. According to PUD, Exhibit D provides that the informal mediation shall be considered to satisfy mediation requirements under Section 34.1 of the WSPP Agreement.

2. Comments

America Public Power Association (APPA) supports PUD's complaint. It states that the Commission cannot rely on market forces to dictate the level of rates charged by Morgan Stanley to PUD in a bilateral contract. APPA argues that the FPA mandates contract modification in the instant case because the structural preconditions for a competitive market were absent at the time the contract between Morgan Stanley and PUD was executed.

EPSA, on the contrary, requests that the Commission dismiss PUD's complaint. EPSA argues that the Commission-imposed mitigation measures, which became effective on June 20, 2001 and are to terminate on September 30, 2002, were implemented on a prospective basis only and were not meant to modify transactions that, as here, were entered into prior to that time.

II. Joint Motion for Expedited Consideration

On March 5, 2002, Mirant, Calpine, Morgan Stanley, El Paso, AEP and Allegheny (collectively, Indicated Sellers) filed a joint motion requesting expedited consideration of Nevada Companies' and SCWC's complaints. The motion requests that the Commission reject or dismiss the complaints by no later than March 29, 2002, in order to forestall the filing of ripple refund complaints.

In the alternative, the Indicated Sellers ask that the Commission establish a refund effective date for all ripple claims involving forward contracts executed between August 2, 2000 and June 20, 2001. Furthermore, the Indicated Sellers request that when setting any

of the complaints for hearing, the Commission provide clear direction as to the scope of such hearings. In particular, the Indicated Sellers suggest that the Commission should clarify: that the public interest standard, not the just and reasonable standard applies to the complaints and define the nature of the public interest showing that must be made; whether relief will be granted in the absence of a showing of market power abuse by the respondent; and whether “market dysfunction” arguments will be entertained, and if so, what would support a finding that forward markets were dysfunctional.

Answers to the Motion

In their answer, Nevada Companies state that although they support the expedited treatment of their complaint proceedings, they object to all other requests made by the Indicated Sellers. Nevada BCP also supports expeditious consideration of the complaints, but believes that the ruling on the merits should be deferred pending completion of settlement discussions and mediation between Nevada Companies and the respondents.

Furthermore, several parties object to the Indicated Sellers' request that the Commission set a refund effective date for all potential ripple claims. They believe that if other parties intend to file section 206 complaints in response to Nevada Companies' complaints, they should be required to take that step before receiving the benefit of a refund effective date. Nevada Companies, SCWC, and Pinnacle West Capital Corporation (Pinnacle) also object to the request to establish a refund effective date as procedurally improper and factually baseless. In contrast, however, the Nevada BCP states that the Commission should expeditiously establish refund effective dates for related ripple claims in order to provide security to all participants during the pendency of settlement negotiations.

III. Procedural Matters

Notice of the Nevada Companies' complaint in Docket No. EL02-26-000 was published in the Federal Register, 66 Fed. Reg. 63,528 (2001), with comments, protests, or interventions due on or before December 20, 2001. Notice of the Nevada Companies' complaint in Docket No. EL02-28-000 was published in the Federal Register, 66 Fed. Reg. 64,031 (2001), with comments, protests, or interventions due on or before December 20, 2001. Notice of the Nevada Power's complaint in Docket No. EL02-29-000 was published in the Federal Register, 66 Fed. Reg. 64,234 (2001), with comments, protests, or interventions due on or before December 24, 2001. Notice of the Nevada Power's complaints in Docket Nos. EL02-30-000, EL02-31-000, and EL02-32-000 was published in the Federal Register, 66 Fed. Reg. 64,235 (2001), with comments, protests, or

interventions due on or before December 24, 2001. Notice of the Nevada Companies' complaint in Docket Nos. EL02-33-000 and Docket No. EL02-34-00 was published in the Federal Register, 66 Fed. Reg. 64,408 (2001), with comments, protests, or interventions due on or before December 26, 2001. Notice of the Nevada Companies' complaint in Docket No. EL02-38-000 was published in the Federal Register, 66 Fed. Reg. 64,409 (2001), with comments, protests, or interventions due on or before December 26, 2001. Notice of the Nevada Power's complaint in Docket No. EL02-39-000 was published in the Federal Register, 66 Fed. Reg. 65,474 (2001), with comments, protests, or interventions due on or before December 27, 2001. Notice of the SCWC's complaint in Docket No. EL02-43-000 was published in the Federal Register, 67 Fed. Reg. 318 (2002), with comments, protests, or interventions due on or before January 10, 2002. Notice of the PUD's complaint in Docket No. EL02-56-000 was published in the Federal Register, 67 Fed. Reg. 7,680 (2002), with comments, protests, or interventions due on or before March 4, 2002.

Timely motions to intervene were filed by entities listed in the Appendix B to this order. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2001), the filing of a timely motion to intervene that has not been opposed makes the movant a party to the proceeding. Certain parties filed late motions to intervene in this proceeding. Given the lack of undue prejudice and the parties' interests, we find good cause to grant under Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2001), the unopposed, untimely motions to intervene in this proceeding.

Also, Nevada Companies, Enron, Allegheny, AEP, SCWC, and Mirant filed answers to an answer. We will allow these filings, as the Commission permits parties to respond to answers when doing so, as here, will assist the Commission's understanding of the issues raised.⁸

IV. Discussion

Before turning to the merits of the complaints before us, we want to strongly encourage all parties involved in disputes arising from the California crisis to seriously negotiate settlements. The uncertainty and expense of continued litigation over these

⁸ See, e.g., Atlantic City Electric Co., 90 FERC ¶ 61,268 at 61,898 (2000) and New York Independent System Operator, Inc., 91 FERC ¶ 61,128 (2000).

disputes serves the interests of neither the parties to those disputes nor the public. In the case of the contracts at issue in these proceedings, the WSPP Agreement requires the parties to attempt mediation. Therefore, to the extent parties have not fulfilled this commitment, we direct them to do so.

That being said, in the event that not all of these complaints settle, we are presented with a very serious and difficult decision. The Commission's long-standing policy, consistent with a substantial body of Supreme Court and other judicial precedent, has been to recognize the sanctity of contracts. Rarely has the Commission deviated from that policy, and then only in extreme circumstances, such as the fundamental industry-wide restructuring under Order No. 888 and the reorganization of a bankrupt utility.⁹ Preservation of contracts has, if anything, become even more critical since the policy was first adopted. Competitive power markets simply cannot attract the capital needed to build adequate generating infrastructure without regulatory certainty, including certainty that the Commission will not modify market-based contracts unless there are extraordinary circumstances.

As discussed below, the Commission has determined that, based on the unusual circumstances presented, it is appropriate to set the contracts listed in Appendix A for hearing. As an initial matter, in these dockets, parties have argued extensively over whether the complainants should be bound to a Mobile-Sierra "public interest" burden of proof or a "just and reasonable" burden of proof to support reformation of the contracts. For all but one of the contracts identified by the complainants, Section 6.1 of the umbrella WSPP Agreement appears to be the only specific contractual provision, which may affect parties' rights to make changes to contracts entered into under the WSPP Agreement; however, this provision addresses sellers' FPA section 205 rights, not buyers' FPA section 206 rights, to modify rates affecting WSPP transactions.¹⁰ One of the contracts at issue contains a separate provision, not contained in the umbrella WSPP Agreement, which addresses both FPA section 205 rights and FPA section 206 rights.¹¹ We do not believe that we have a

⁹See Order No. 888 *supra* note 5, at 31,664-65; and Northeast Util. Serv. Co., 66 FERC ¶ 61,332, *reh'g denied*, 68 FERC ¶ 61,041 (1994).

¹⁰ Section 6.1 of the umbrella WSPP Agreement in relevant part states: "...Nothing contained herein shall be construed as affecting in any way the right of the Parties to jointly make application to FERC for a change in the rates and charges, classification, service, terms, or conditions affecting WSPP transactions under Section 205 of the Federal Power Act and pursuant to FERC rules and regulations promulgated thereunder."

¹¹ Section 39B added to the umbrella WSPP Agreement by PUD and Morgan

sufficient record to address the Mobile-Sierra issue definitively and, accordingly, we will set for hearing the issue of whether the complainants must bear the burden of showing that a challenged contract is contrary to the public interest, or whether they will bear the burden of showing that the contract is not just and reasonable. However, it is our view that even under a "just and reasonable" burden of proof standard, parties who seek to overturn contracts into which they voluntarily entered will bear a heavy burden. In the evidence presented thus far, the complainants have failed to show that the dysfunctional California Independent System Operator (ISO) and Power Exchange (PX) spot markets had an adverse effect on the long-term, bilateral markets in California, Nevada and Washington. To meet any burden of proof to reform these market-based contracts, complainants will need to demonstrate that there was such an adverse effect and, if there was, that the effect was of a magnitude warranting modification of contracts entered into in the bilateral markets. Given the importance of these questions, we have decided it is appropriate to order a full evidentiary hearing. This hearing is designed to ensure that the complainants have a full and fair opportunity to present their cases, and that the Commission in turn, has a complete record on which to base its ultimate decision.¹²

Therefore, we set for hearing the contracts listed in Appendix A to this order. These include only those contracts¹³ that were entered into during the time period from

¹¹(...continued)

Stanley in their Confirmation Agreement states: "The rates for service specified in this Agreement shall remain in effect for the term of this Agreement and shall not be subject to change through application to FERC pursuant to the provisions of Section 205 or 206 of the Federal Power Act."

¹²By order issued on February 13, 2002, the Commission directed a staff investigation of potential manipulation of electric and natural gas prices in the West. Indicated Sellers' March 5 Joint Motion requested the Commission to dissociate these complaint proceedings from the February 13, 2002 Staff Investigation. We are setting the instant contracts for hearing under section 206 of the FPA based on the arguments that the dysfunctional spot markets in California caused long-term contracts not to be reasonable, whereas the investigation is looking at whether there was improper behavior by sellers that may have caused prices not to be reasonable.

¹³ Because the Nevada Companies propose that their market-based sales to certain respondents during this same time period should be modified in the same manner, we also set for hearing sell contracts. See, e.g., Complaint of Nevada Power Company and Sierra Pacific Power Company, Docket No. EL02-33-000, at 21 note 56 (December 5, 2001).

November 1, 2000 through June 20, 2001¹⁴, and that have not yet concluded. The Commission in this context has no authority to order refunds for contracts or transactions that conclude prior to the refund effective date. Our authority to modify the long-term contracts at issue here is only from the refund effective date forward.

The hearing is limited to the question of whether the dysfunctional California spot markets¹⁵ adversely affected the long-term bilateral markets, and, if so, whether modification of any individual contract at issue is warranted. The hearing will not address issues concerning the Commission's policies on granting market-based rate authority or on regulation of sellers with such authority. Further, if the judge concludes that modification of one or more of the contracts is warranted, the judge should not attempt at this stage to determine how those contracts should be modified.¹⁶

We expect the parties to present evidence on and direct the judge to consider the totality of purchases and sales and the conditions present at the time the contracts were entered into. In particular, the judge's review should include, but is not limited to, consideration of: complainants' overall portfolio as well as their own sales (*e.g.*, pattern, duration, price); whether complainants transactions were physical or financial in nature and designed to serve complainants' load; the terms, conditions and rate over the entire duration of each contract (*e.g.*, whether the contract is front-end loaded); what other alternatives were available to buyers and sellers; whether, at the time, it was a reasonable decision to

¹⁴The complainants request reformation of contracts entered into during the period November 1, 2000 through June 20, 2001, the date on which the Commission's West-wide mitigation went into effect. *See Answer to Joint Motion for Expedited Consideration*, Docket No. EL02-26-000, *et al.*, at 8 (March 15, 2002).

¹⁵ Spot markets or spot market sales are sales that are 24 hours or less and that are entered into the day of or day prior to delivery. *See San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services*, 96 FERC ¶ 61,120, at 61,515 (2001); *San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services*, 95 FERC ¶ 61,418, at 62,545 n.3 (2001).

¹⁶By order issued on February 13, 2002, the Commission directed a staff investigation of potential manipulation of electric and natural gas prices in the West. Indicated Sellers' March 5 Joint Motion requested the Commission to dissociate these complaint proceedings from the February 13, 2002 Staff Investigation. We are setting the instant contracts for hearing under section 206 of the FPA based on the arguments that the dysfunctional spot markets in California caused long-term contracts not to be reasonable, whereas the investigation is looking at whether there was improper behavior by sellers that may have caused prices not to be reasonable.

enter into these contracts (i.e., duration, scope and time period, and the participants' expectations as to the duration of dysfunctions in the California ISO and PX markets); the terms and conditions of any request for proposals, and the process and procedures the complainants used to evaluate the contracts, including any changes in offered rates, terms, and conditions mandated or negotiated by the complainants; and the relation of the contract rates to the Commission's previously identified benchmark for long-term contracts.¹⁷ Finally, the judge should consider the effect of the contracts on the financial health of complainants and the effect of the contracts on wholesale and retail customers. In addition, the parties may present evidence on: the impacts contract modification may have on the nation's energy markets, including, but not limited to, impacts on investment in new generation and transmission infrastructure, and effect on confidence in competitive markets; the willingness of market participants to enter into long-term contracts in the future and the prices and terms and conditions of such contracts; and the potential modification of other existing energy contracts.

In cases where, as here, the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b) requires that the Commission establish a refund effective date that is no earlier than 60 days after the filing of the complaint, but no later than five months subsequent to the expiration of the 60-day period. Consistent with our general policy of providing maximum protection to customers,¹⁸ we will set the refund effective date as of the date 60 days after the date of the filing of each complaint. For the complaints in Docket Nos. EL02-26-000 and EL02-28-000, the refund effective date is January 29, 2002. For the complaints in Docket Nos. EL02-29-000 and EL02-30-000, the refund effective date is February 2, 2002. In Docket Nos. EL02-31-000, EL02-32-000, EL02-33-000, and EL02-34-000, the refund effective date is February 3, 2002. In Docket No. EL02-38-000, we set a refund effective date on February 4, 2002 and in Docket No. EL02-39-000 on February 5, 2002. For the complaint in Docket No. EL02-43-000, the refund effective date is February 19, 2002. In Docket No. EL02-56-000, the refund effective date is April 12, 2002.

Section 206(b) also requires that, if no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, whichever is earlier, the Commission shall state the

¹⁷ See *supra* note 5.

¹⁸ See, e.g., *Seminole Electric Cooperative, Inc. v. Florida Power & Light Company*, 65 FERC ¶ 61,413, at 63,139 (1993); *Canal Electric Company*, 46 FERC ¶ 61,153, at 61,539, *reh'g denied*, 47 FERC ¶61,275 (1989).

reasons why it has failed to do so and shall state the best estimate as to when it reasonably expects to make such a decision. Ordinarily, to implement that requirement, we would direct the presiding judge to provide a report to the Commission in advance of the refund effective date. Here, given that the refund effective date for all the complaints has already passed, the Commission cannot follow its normal procedure.

Although we do not have the benefit of the presiding judge's report, based on our review of the record, we expect that, assuming the cases do not settle, the presiding judge should be able to render a decision within ten months of the commencement of hearing procedures. If the presiding judge is able to render an initial decision by February 28, 2003, and assuming the cases do not settle, we estimate that we will be able to issue our decision within approximately three months of the filing of briefs on and opposing exceptions or by July 31, 2003.

The Nevada PUC filed a motion to consolidate filings in Docket Nos. EL02-26-000, EL02-28-000, EL02-29-000, EL02-30-000, EL02-31-000, EL02-32-000, EL02-33-000, EL02-34-000, EL02-38-000, and EL02-39-000. Given the overlap of issues and factual inquiries, we will consolidate these proceedings as well as Docket Nos. EL02-43-000 and EL02-56-000 into one proceeding for purposes of hearing.

We will not establish a refund effective date for the complaints that the Indicated Sellers allege might be filed in the future. Pursuant to section 206(b) of the FPA, the Commission can establish a refund effective date only when it institutes a proceeding upon a complaint or its own motion. We cannot set refund effective dates for possible future complaints.

Also, we will deny SCWC's motion for an order directing Mirant to put funds into escrow to secure possible refund liability. In its motion, SCWC relies on our decision in the December 19, 2001 order to impose the 10 percent creditworthiness adder for sales in the California markets. In that order, however, the creditworthiness adder was imposed in response to far more significant credit problems encountered by the two principal buyers in California markets, Pacific Gas & Electric Company and Southern California Edison Company, and documented instances of non-performance and delayed performances of payment obligations under the applicable tariff.¹⁹ Moreover, in the December 19, 2001 order, the Commission denied a similar request by San Diego Gas & Electric Company that

¹⁹ See *San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services*, 97 FERC ¶ 61,275 (2001).

the Commission require sellers of wholesale power in California to sequester funds to satisfy refund obligations.²⁰ For these reasons, SCWC's motion is hereby denied.

Mirant filed a motion to lodge the Nevada PUC's order²¹ in which the Nevada PUC made various factual findings and legal determinations with respect to a request by Nevada Power to recover certain accumulated purchase fuel and power costs, including costs associated with the power purchase transactions at issue in these proceedings. We will take official notice of the Nevada PUC's order.²²

The Commission orders:

(A) To the extent parties have not already done so, they are hereby directed to convene a mediation process pursuant to the WSPP Agreement and to file a report with the Commission on the results of these informal negotiations within thirty (30) days of the date of issuance of this order, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter 1), the captioned dockets are consolidated, and an expedited public hearing shall be held concerning the complaints in these proceedings.

(C) A presiding judge, to be designated by the Chief Judge, shall convene a conference in this proceeding to be held within approximately fifteen (15) days of the date the Chief Judge designates the presiding judge, in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is

²⁰ Id. at 62,240.

²¹ Nevada Power Company, Docket No. 01-11-29 (March 29, 2002).

²² The Commission has the power to take official notice of the actions of a sister agency and has done so in the past. See, e.g., Nuclear Plant Decommissioning Trust Fund Guidelines, Order No. 580, FERC Stats. & Regs. Regulations Preambles 1991-1996 P31,023 at 31,360 & n.97 (1995), order on reh'g, Order No. 580-A, FERC Stats. & Regs. Regulations Preambles 1996-2000 P31,055 (1997).

authorized to establish procedural dates and to rule on all motions (except motions to dismiss), as provided in the Commission's Rules of Practice and Procedure.

(D) The refund effective date in Docket Nos. EL02-26-000 and EL02-28-000 established pursuant to Section 206(b) of the Federal Power Act is January 29, 2002. The refund effective date in Docket Nos. EL02-29-000 and EL02-30-000 is February 2, 2002. The refund effective date in Docket Nos. EL02-31-000 and EL02-32-000, EL02-33-000, and EL02-34-000 is February 3, 2002. The refund effective date in Docket No. EL02-38-000 is on February 4, 2002. The refund effective date in Docket No. EL02-39-000 is February 5, 2002. The refund effective date in Docket No. EL02-43-000 is February 19, 2002. The refund effective date in Docket No. EL02-56-000 is April 12, 2002.

(E) The Indicated Sellers' Motion for Expedited Action is hereby denied, as discussed in the body of this order.

(F) Southern California Water Company's Motion For an Order Directing Mirant America Energy Marketing LP to Place Funds into Escrow to Cover Refund Liability is hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Massey concurred in part and dissented in part with a separate statement attached.

(S E A L) Commissioner Brownell concurred with a separate statement attached.

Magalie R. Salas,
Secretary.

LIST OF CONTRACTS SET FOR HEARING

Nevada Power Company and Sierra Pacific Power Company
v. Duke Energy Trading and Marketing, L.L.C.
Docket No. EL02-26-000

	<u>SELLER/BUYER</u>	<u>TRANSACTION DATE</u>	<u>IDENTIFICATION CODE</u>
1.	Duke/Nevada	12-07-00	000108157
2.	Duke/Nevada	12-15-00	000109303
3.	Duke/Nevada	01-18-01	000113173
4.	Duke/Nevada	01-30-01	000114341
5.	Duke/Nevada	01-30-01	000114320
6.	Duke/Nevada	01-30-01	000114350
7.	Duke/Nevada	02-06-01	000114964
8.	Duke/Nevada	02-21-01	000116780
9.	Duke/Nevada	03-15-01	000119759
10.	Duke/Nevada	03-20-01	000120412
11.	Duke/Nevada	03-26-01	000120680
12.	Duke/Nevada	03-26-01	000120681
13.	Duke/Nevada	03-28-01	000121308
14.	Duke/Nevada	04-03-01	000122579
15.	Duke/Nevada	04-04-01	000122777
16.	Duke/Nevada	04-06-01	000122896
17.	Duke/Nevada	04-10-01	000123665
18.	Duke/Nevada	04-10-01	000123666
19.	Duke/Nevada	04-09-01	000123076
20.	Duke/Nevada	04-17-01	000124726
21.	Duke/Nevada	04-18-01	000124758
22.	Duke/Nevada	04-30-01	000127072
23.	Duke/Sierra	01-10-01	000112257
24.	Duke/Sierra	01-11-01	000112388
25.	Duke/Sierra	01-18-01	000113256
26.	Duke/Sierra	02-20-01	000116595
26.	Duke/Sierra	03-15-01	000119758
27.	Duke/Sierra	03-21-01	000120405

	<u>SELLER/BUYER</u>	<u>TRANSACTION</u>	<u>IDENTIFICATION</u>
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		DATE	<u>CODE</u>
28.	Duke/Sierra	04-17-01	000124716
29.	Duke/Sierra	04-17-01	000124717
30.	Duke/Sierra	04-17-01	000124723
31.	Duke/Sierra	04-18-01	000124757
32.	Nevada/Duke	01-18-01	Not Coded
33.	Nevada/Duke	01-30-01	Not Coded
34.	Nevada/Duke	01-01-02	Not Coded
35.	Nevada/Duke	01-30-01	Not Coded
36.	Nevada/Duke	02-21-01	Not Coded
37.	Nevada/Duke	03-20-01	Not Coded
38.	Nevada/Duke	08-15-01	Not Coded
39.	Nevada/Duke	08-17-01	Not Coded
40.	Nevada/Duke	08-20-01	Not Coded
41.	Nevada/Duke	08-21-01	Not Coded
42.	Nevada/Duke	04-03-01	Transaction Sheet Not Provided

Nevada Power Company and Sierra Pacific Power Company
v. Enron Power Marketing, Inc.
Docket No. EL02-28-000

1	Enron/Nevada	12-17-00	480727
2	Enron/Nevada	01-04-01	489916.01
3.	Enron/Nevada	01-09-01	492900.01
4.	Enron/Nevada	01-10-01	494010.01
5.	Enron/Nevada	01-16-01	498114.01
6.	Enron/Nevada	01-23-01	503214.01
7.	Enron/Nevada	02-06-01	515363.01
8.	Enron/Nevada	02-08-01	517883.01
9.	Enron/Nevada	02-14-01	523027
10.	Enron/Nevada	02-21-01	528030
11.	Enron/Nevada	02-27-01	532755
12.	Enron/Nevada	03-13-01	548871
13.	Enron/Nevada	04-11-01	579011

<u>SELLER/BUYER</u>	<u>TRANSACTION</u>	<u>IDENTIFICATION</u>
	<u>DATE</u>	<u>CODE</u>

14.	Enron/Nevada	04-11-01	579015
15.	Enron/Nevada	04-11-01	579023
16.	Enron/Nevada	04-12-01	580253
17.	Enron/Nevada	04-17-01	584105
18.	Enron/Nevada	04-17-01	584112
19.	Enron/Nevada	04-20-01	587477
20.	Enron/Nevada	05-09-01	606734
21.	Enron/Nevada	05-22-01	618330
22.	Enron/Nevada	05-22-01	618364
23.	Enron/Nevada	06-05-01	633722
24.	Enron/Nevada	06-05-01	633719
25.	Enron/Nevada	06-05-01	633725
26.	Enron/Sierra	01-04-01	489727.01
27.	Enron/Sierra	01-10-01	494014.01
28.	Enron/Sierra	01-16-01	498108.01
29.	Enron/Sierra	01-18-01	499877.01
30.	Enron/Sierra	02-06-01	514866.01
31.	Enron/Sierra	02-07-01	516607.01
32.	Enron/Sierra	02-08-01	517599.01
33.	Enron/Sierra	03-13-01	548872.01
34.	Enron/Sierra	03-21-01	556514.01
35.	Enron/Sierra	04-05-01	571926.01
36.	Enron/Sierra	04-05-01	572027.01
37.	Enron/Sierra	04-18-01	585279.01
38.	Enron/Sierra	04-18-01	585388.01
39.	Nevada/Enron	02-21-01	528031
40.	Nevada/Enron	03-14-01	550385.1
41.	Nevada/Enron	05-22-01	618331
42.	Nevada/Enron	06-05-01	633723
43.	Nevada/Enron	06-05-01	633720

	<u>SELLER/BUYER</u>	<u>TRANSACTION DATE</u>	<u>IDENTIFICATION CODE</u>
1.	Morgan Stanley/ Nevada	04-17-01	1470
2.	Morgan Stanley/ Nevada	05-14-01	1716
3.	Morgan Stanley/ Nevada	05-22-01	1786
4.	Morgan Stanley/ Nevada	05-22-01	1787
5.	Morgan Stanley/ Nevada	05-23-01	1799
6.	Morgan Stanley/ Nevada	05-23-01	1801
7.	Morgan Stanley/ Nevada	05-23-01	1804
8.	Nevada/Morgan Stanley	05-22-01	1785

Nevada Power Company and Sierra Pacific Power Company
v. Calpine Energy Services
Docket No. EL02-30-000

1.	Calpine/Nevada	04-19-01	14765
2.	Calpine/Nevada	05-22-01	17258
3.	Calpine/Nevada	05-22-01	17261
4.	Calpine/Nevada	05-22-01	17335
5.	Calpine/Nevada	05-29-01	1820
6.	Calpine/Nevada	05-30-01	17758
7.	Calpine/Nevada	05-31-01	17855
8.	Calpine/Nevada	06-05-01	18323
9.	Calpine/Sierra	04-18-01	Not Coded
10.	Calpine/Sierra	04-23-01	14724
11.	Nevada/Calpine	05-22-01	17259
12.	Nevada/Calpine	05-22-01	17249
13.	Nevada/Calpine	05-22-01	Illegible
14.	Nevada/Calpine	05-22-01	Illegible
15.	Nevada/Calpine	05-22-01	17336
16.	Nevada/Calpine	05-31-01	17858
17.	Nevada/Calpine	06-05-01	18322
18.	Nevada/Calpine	05-21-01	19586

Nevada Power Company v. Reliant Energy Services
Docket No. EL02-31-000

	<u>SELLER/BUYER</u>	<u>TRANSACTION</u>	<u>IDENTIFICATION</u>
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		<u>DATE</u>	<u>CODE</u>
1.	Southern/Nevada	11-10-00	614745
2.	Southern/Nevada	11-21-00	618739
3.	Southern/Nevada	12-13-00	636918
4.	Southern/Nevada	01-10-01	651715

Nevada Power Company v. Mirant Americas Energy Marketing, L.P.

Docket No. EL02-32-000

1.	Reliant/Nevada	02-07-01	1140
1.	Reliant/Nevada	05-29-01	1817
2.	Reliant/Sierra	03-14-01	2063
3.	Reliant/Nevada	03-14-01	2062
4.	Nevada/Reliant	03-14-01	2064
5.	Sierra/Reliant	03-14-01	2061

Nevada Power Company and Sierra Pacific Power Company

v. El Paso Merchant Energy

Docket No. EL02-33-000

1.	El Paso/Nevada	12-12-00	85832
2.	El Paso/Nevada	12-27-00	86895
3.	El Paso/Nevada	01-04-01	87422
4.	El Paso/Nevada	04-04-01	97326
5.	El Paso/Nevada	04-17-01	99095
6.	El Paso/Nevada	05-22-01	105266
7.	El Paso/Nevada	05-30-01	Illegible
8.	El Paso/Nevada	05-30-01	106386
9.	El Paso/Nevada	05-31-01	106629
10.	El Paso/Nevada	06-18-01	109787
11.	El Paso/Sierra	01-23-01	89353
12.	El Paso/Sierra	02-13-01	91853
13.	El Paso/Sierra	03-28-01	96325
14.	El Paso/Sierra	04-02-01	96960
15.	El Paso/Sierra	04-02-01	96961

	<u>SELLER/BUYER</u>	<u>TRANSACTION</u>	<u>IDENTIFICATION</u>
		<u>DATE</u>	<u>CODE</u>

16.	El Paso/Sierra	04-04-01	97326
17.	Sierra/El Paso	02-13-01	91852

Nevada Power Company v. BP Energy Company
Docket No. EL02-34-000

1.	BP Energy/Nevada	03-12-01	9744
2.	BP Energy/Nevada	04-18-01	12705
3.	BP Energy/Nevada	05-29-01	16510
4.	BP Energy/Nevada	05-29-01	16504
5.	BP Energy/Nevada	05-30-01	16752

Nevada Power Company and Sierra Pacific Power Company
v. American Electric Power Services Corp.
Docket No. EL02-38-000

1.	AEP/Nevada	11-29-00	11291701
2.	AEP/Nevada	12-01-00	12011804
3.	AEP/Nevada	12-01-00	12011805
4.	AEP/Nevada	12-15-00	12151801
5.	AEP/Nevada	01-04-01	01041702
6.	AEP/Nevada	01-04-01	01041700
7.	AEP/Nevada	04-11-01	04111804
8.	AEP/Nevada	05-30-01	05301806
9.	AEP/Nevada	05-30-01	05301807
10.	AEP/Nevada	06-08-01	06081806
11.	AEP/Sierra	01-05-01	01051704
12.	AEP/Sierra	04-18-01	1505
13.	AEP/Sierra	05-29-01	05291807
14.	AEP/Sierra	05-30-01	05301802
15.	AEP/Sierra	01-09-01	Transaction Sheet Not Provided

Nevada Power Company v. Allegheny Energy Supply Company, L.L.C.
Docket No. EL02-39-000

<u>SELLER/BUYER</u>	<u>TRANSACTION</u>	<u>IDENTIFICATION</u>
	<u>DATE</u>	<u>CODE</u>

1.	Allegheny/Nevada	12-04-00	113034
2.	Allegheny/Nevada	01-16-01	114758
3.	Allegheny/Nevada	02-07-01	116320

Southern California Water Company v. Mirant Americas Energy Marketing, L.P.
Docket No. EL02-43-000

1.	Mirant/SCWC	03-16-01	695088
2.	Mirant/SCWC	03-16-01	695257

Public Utility District No. 1, Snohomish County, Washington
v. Morgan Stanley Capital Group, Inc.
Docket No. EL02-56-000

1.	Morgan Stanley/ Snohomish	01-26-01	Not Coded
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Appendix B

Nevada Power Company and Sierra Pacific Power Company
v. Duke Energy Trading and Marketing, L.L.C.
Docket No. EL02-26-000

Avista Energy, Inc.
Calpeak Project Companies
Calpine Energy Services, L.P.
Cities of Anaheim, Azusa, Banning, Colton, and Riverside, California
Constellation Power Source, Inc.
Coral Power, L.L.C.
El Paso Merchant Energy L.P.
Electric Power Supply Association* **
Exelon Corporation on behalf of Exelon Generation Company, LLC, PECO Energy Company,
and Commonwealth Edison Company
Dynergy Power Marketing, Inc.*
IDACORP Energy L.P.
Mirant Americas Energy Marketing, L.P.
Morgan Stanley Capital Group Inc.
Nevada Attorney General's Office, Bureau of Consumer Protection*
Nevada Independent Energy Coalition
Pacific Gas and Electric Company
Pinnacle West Capital Corporation
Portland General Electric Company
Public Service Company of New Mexico
Public Utilities Commission of the State of California**
Public Utilities Commission of Nevada*
Public Utility District No. 1 of Snohomish County, Washington*
TransAlta Energy Marketing (US) Inc.

Nevada Power Company and Sierra Pacific Power Company
v. Enron Power Marketing, Inc.
Docket No. EL02-28-000

Avista Energy, Inc.
California Electricity Oversight Board
Calpeak Project Companies
Calpine Energy Services, L.P.
Cities of Anaheim, Azusa, Banning, Colton, And Riverside, California
City of Burbank, California
Constellation Power Source, Inc.
Coral Power, L.L.C.
El Paso Merchant Energy L.P.
Electric Power Supply Association** *

Exelon Corporation on behalf of Exelon Generation Company, LLC, PECO Energy Company,
and Commonwealth Edison Company
Duke Energy Trading and Marketing, L.L.C.**
Dynergy Power Marketing, Inc.*
IDACORP Energy L.P.
Mirant Americas Energy Marketing, L.P.*
Morgan Stanley Capital Group Inc.
Nevada Attorney General's Office, Bureau of Consumer Protection*
Nevada Independent Energy Coalition
Pacific Gas and Electric Company
Pinnacle West Capital Corporation
Portland General Electric Company
Public Service Company of New Mexico
Public Utilities Commission of the State of California
Public Utilities Commission of Nevada*
Public Utility District No. 1 of Snohomish County, Washington
TransAlta Energy Marketing (US) Inc.

Nevada Power Company v. Morgan Stanley Capital Group
Docket No. EL02-29-000

Avista Energy, Inc.
California Electricity Oversight Board
Calpeak Project Companies
Calpine Energy Services, L.P.
Cities of Anaheim, Azusa, Banning, Colton, And Riverside, California
Constellation Power Source, Inc.
Coral Power, L.L.C.
El Paso Merchant Energy L.P.
Electric Power Supply Association** *
Exelon Corporation on behalf of Exelon Generation Company, LLC, PECO Energy Company,
and Commonwealth Edison Company
Duke Energy Trading and Marketing, L.L.C.
Dynergy Power Marketing, Inc.*
IDACORP Energy L.P.
Mirant Americas Energy Marketing, L.P.*
Nevada Attorney General's Office, Bureau of Consumer Protection*
Nevada Independent Energy Coalition
Pacific Gas and Electric Company
Pinnacle West Capital Corporation
Portland General Electric Company

Public Service Company of New Mexico
Public Utilities Commission of the State of California
Public Utilities Commission of Nevada*
Public Utility District No. 1 of Snohomish County, Washington*
TransAlta Energy Marketing (US) Inc.

Nevada Power Company and Sierra Pacific Power Company
v. Calpine Energy Services
Docket No. EL02-30-000

Avista Energy, Inc.
California Electricity Oversight Board
Calpeak Project Companies
Cities of Anaheim, Azusa, Banning, Colton, And Riverside California
Constellation Power Source, Inc.
Coral Power, L.L.C.
El Paso Merchant Energy L.P.
Electric Power Supply Association
Exelon Corporation on behalf of Exelon Generation Company, LLC, PECO Energy Company,
and Commonwealth Edison Company
Duke Energy Trading and Marketing, L.L.C.
Dynergy Power Marketing, Inc.*
IDACORP Energy L.P.
Mirant Americas Energy Marketing, L.P.*
Morgan Stanley Capital Group Inc.* **
Nevada Attorney General's Office, Bureau of Consumer Protection*
Nevada Independent Energy Coalition
Pacific Gas and Electric Company
Pinnacle West Capital Corporation
Portland General Electric Company
Public Service Company of New Mexico
Public Utilities Commission of the State of California

Public Utilities Commission of Nevada*
Public Utility District No. 1 of Snohomish County, Washington*
TransAlta Energy Marketing (US) Inc.

Nevada Power Company v. Reliant Energy Services
Docket No. EL02-31-000

Avista Energy, Inc.
California Electricity Oversight Board
Calpeak Project Companies
Calpine Energy Services, L.P.
Cities of Anaheim, Azusa, Banning, Colton, and Riverside, California
Constellation Power Source, Inc.
Coral Power, L.L.C.
El Paso Merchant Energy L.P.
Electric Power Supply Association** *
Exelon Corporation on behalf of Exelon Generation Company, LLC, PECO Energy Company,
and Commonwealth Edison Company
Duke Energy Trading and Marketing, L.L.C.
Dynegy Power Marketing, Inc.*
IDACORP Energy L.P.
Mirant Americas Energy Marketing, L.P.*
Morgan Stanley Capital Group Inc.** *
Nevada Attorney General's Office, Bureau of Consumer Protection*
Nevada Independent Energy Coalition
Pacific Gas and Electric Company
Pinnacle West Capital Corporation
Portland General Electric Company
Public Service Company of New Mexico
Public Utilities Commission of the State of California**
Public Utilities Commission of Nevada*
Public Utility District No. 1 of Snohomish County, Washington*
TransAlta Energy Marketing (US) Inc.

Nevada Power Company v. Mirant Americas Energy Marketing, L.P.
Docket No. EL02-32-000

Avista Energy, Inc.
California Electricity Oversight Board
Calpeak Project Companies
Calpine Energy Services, L.P.
Cities of Anaheim, Azusa, Banning, Colton, and Riverside, California
Constellation Power Source, Inc.
Coral Power, L.L.C.
El Paso Merchant Energy L.P.
Electric Power Supply Association** *

Exelon Corporation on behalf of Exelon Generation Company, LLC, PECO Energy Company,
and Commonwealth Edison Company
Duke Energy Trading and Marketing, L.L.C.
Dynergy Power Marketing, Inc.*
IDACORP Energy L.P.
Morgan Stanley Capital Group Inc.**
Nevada Attorney General's Office, Bureau of Consumer Protection*
Nevada Independent Energy Coalition
Pacific Gas and Electric Company
Pinnacle West Capital Corporation
Portland General Electric Company
Public Service Company of New Mexico
Public Utilities Commission of the State of California
Public Utilities Commission of Nevada*
Public Utility District No. 1 of Snohomish County, Washington*
TransAlta Energy Marketing (US) Inc.

Nevada Power Company and Sierra Pacific Power Company
v. El Paso Merchant Energy
Docket No. EL02-33-000

Avista Energy, Inc.
California Electricity Oversight Board
Calpeak Project Companies
Calpine Energy Services, L.P.
Cities of Anaheim, Azusa, Banning, Colton, and Riverside, California
Constellation Power Source, Inc.
Coral Power, L.L.C.
Electric Power Supply Association** *
Exelon Corporation on behalf of Exelon Generation Company, LLC, PECO Energy Company,
and Commonwealth Edison Company
Duke Energy Trading and Marketing, L.L.C.
Dynergy Power Marketing, Inc.*
IDACORP Energy L.P.
Mirant Americas Energy Marketing, L.P.*
Morgan Stanley Capital Group Inc.
Nevada Attorney General's Office, Bureau of Consumer Protection*
Nevada Independent Energy Coalition
Pacific Gas and Electric Company
Pinnacle West Capital Corporation
Portland General Electric Company

Public Service Company of New Mexico
Public Utilities Commission of the State of California
Public Utilities Commission of Nevada
Public Utility District No. 1 of Snohomish County, Washington*
TransAlta Energy Marketing (US) Inc.

Nevada Power Company v. BP Energy Company
Docket No. EL02-34-000

Avista Energy, Inc.
California Electricity Oversight Board
Calpeak Project Companies
Calpine Energy Services, L.P.
Cities of Anaheim, Azusa, Banning, Colton, and Riverside, California
Constellation Power Source, Inc.
Coral Power, L.L.C.
El Paso Merchant Energy L.P.
Electric Power Supply Association** *
Exelon Corporation on Behalf of Exelon Generation Company, LLC, PECO Energy Company,
and Commonwealth Edison Company
Duke Energy Trading and Marketing, L.L.C.*
Dynergy Power Marketing, Inc.*
IDACORP Energy L.P.
Mirant Americas Energy Marketing, L.P.*
Morgan Stanley Capital Group Inc.
Nevada Attorney General's Office, Bureau of Consumer Protection*
Nevada Independent Energy Coalition
Pacific Gas and Electric Company
Pinnacle West Capital Corporation
Portland General Electric Company
Public Service Company of New Mexico
Public Utilities Commission of the State of California
Public Utilities Commission of Nevada*
Public Utility District No. 1 of Snohomish County, Washington*
TransAlta Energy Marketing (US) Inc.

Nevada Power Company and Sierra Pacific Power Company
v. American Electric Power Services Corp.
Docket No. EL02-38-000

Avista Energy, Inc.

Calpeak Project Companies
Calpine Energy Services, L.P.
Cities of Anaheim, Azusa, Banning, Colton, and Riverside, California
Constellation Power Source, Inc.
Coral Power, L.L.C.
El Paso Merchant Energy L.P.
Electric Power Supply Association** *
Exelon Corporation on behalf of Exelon Generation Company, LLC, PECO Energy Company,
and Commonwealth Edison Company
Duke Energy Trading and Marketing, L.L.C.
Dynergy Power Marketing, Inc.*
IDACORP Energy L.P.
Mirant Americas Energy Marketing, L.P.*
Morgan Stanley Capital Group Inc.
Nevada Attorney General's Office, Bureau of Consumer Protection*
Nevada Independent Energy Coalition
Pacific Gas and Electric Company
Pinnacle West Capital Corporation
Portland General Electric Company
Public Service Company of New Mexico
Public Utilities Commission of the State of California
Public Utilities Commission of Nevada*
Public Utility District No. 1 of Snohomish County, Washington
TransAlta Energy Marketing (US) Inc.

Nevada Power Company v. Allegheny Energy Supply Company, L.L.C.
Docket No. EL02-39-000

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Southern California Water Company v. Mirant Americas Energy Marketing, L.P.
Docket No. EL02-43-000

Bear Mountain Inc.
California Electricity Oversight Board
California Power Exchange Corporation**
Calpine Energy Services, L.P.
Pacific Gas and Electric Company
Public Utilities Commission of the State of California
Southern California Edison Company

Public Utility District No. 1, Snohomish County, Washington
v. Morgan Stanley Capital Group, Inc.
Docket No. EL02-56-000

American Public Power Association*
California Electricity Oversight Board**
Duke Energy North America, LLC and Duke Energy Trading and Marketing, LLC Electric Power
Supply Association*
IDACORP Energy L.P.
Industrial Customers of Northwest Utilities**
Mirant Americas Energy Marketing, LP
Nevada Power Company and Sierra Pacific Power Company
Portland General Electric Company
Sacramento Municipal Utility District

* comments and/or protests

** out-of-time motion to intervene

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Nevada Power Company and
Sierra Pacific Power Company

v.

EL02-26-000, EL02-28-000,
EL02-33-000, and EL02-38-000

Duke Energy Trading and Marketing, L.L.C.
Enron Power Marketing, Inc.
El Paso Merchant Energy
American Electric Power Services Corp.

Nevada Power Company

v.

EL02-29-000, EL02-30-000, EL02-31-000,
EL02-32-000, EL02-34-000, and EL02-39-
000

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

Southern California Water Company

v.

EL02-43-000

Mirant Americas Energy Marketing, L.P.

Public Utility District No. 1
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v.

EL02-56-000

Morgan Stanley Capital Group, Inc.

(Consolidated)

(Issued April 11, 2002)

MASSEY, Commissioner, concurring in part and dissenting in part:

Concurrence

This order establishes hearing procedures to develop a record upon which the Commission will decide whether to modify the terms of a series of long term contracts negotiated when the California spot markets were wildly out of control. All of the contracts were negotiated pursuant to the umbrella agreement of the Western Systems Power Pool and are subject to its terms. One of those terms requires that parties attempt to resolve disputes by the WSPP's mediation provisions. Today's order requires the parties to fulfill that provision before

formal hearing procedures are begun. And, consistent with our policy regarding 206 investigations, the order establishes a refund effective date. I agree with those basic decisions reached in this order.

I am aware that the Commission's precedent says that a party that seeks to set aside a contract bears a heavy burden. We follow that precedent here, as we should. At the same time, the Federal Power Act also forcefully declares that any terms of jurisdictional contracts that are unjust and unreasonable are flatly unlawful. We must follow that statutory requirement here. We must keep both of these guideposts firmly in mind in our deliberations in these cases.

The atmosphere in which these contracts were negotiated was unprecedented. The California spot markets were out of control - - this Commission declared them dysfunctional - - and they were driving prices throughout the West. There was an urgent need to get load off of the spot market and into forward contracts. Yet it must have been extraordinarily difficult for the contracting parties to negotiate long term contracts under these circumstances. After all, the most influential benchmark used in negotiating forward contracts - - the spot market and expectations of future spot prices - - was wildly dysfunctional. The Commission has explicitly recognized this critical relationship. In the AEP Power Marketing order issued just last Fall, we recognized that "maintaining an accurately priced spot market is the single most important element for disciplining longer term transactions."¹ Yet this single most important element was out of control when the contracts at issue were negotiated. Unfortunately, this agency failed to intervene forcefully and effectively until June 20, 2001, more than a full year after the market dysfunction began.

Today's order states that in "the evidence presented thus far, the complainants have failed to show that the dysfunctional California Independent System Operator (ISO) and Power Exchange (PX) spot markets had an adverse effect on the long-term, bilateral markets in California, Nevada, and Washington." I disagree with the tone of this stark declaration. The relationship between the spot market price and long term contract prices seems rather obvious, and Commission precedent has explicitly recognized it. It would be shocking indeed if an out of control spot market had no adverse effect on the negotiation of long term contracts.

Thus, while the complainants seeking to modify contracts have a heavy burden, some of the necessary spade work has already been done in this case. The Commission has declared time and again that the California spot market was dysfunctional, and has already recognized the critical importance of a well functioning spot market in disciplining long term transactions.

¹AEP Power Marketing, 97 FERC ¶ 61,219 (2001) at 61,972.

In these circumstances, the primary focus of the hearings we order today should be how that out of control spot market - - and the parties' expectations of future spot market conditions - - affected the negotiations of the contracts. Did the parties have reason to expect that the Commission would allow prices to continue to soar indefinitely? Should they have believed that the only way out of the crisis was to "start putting shovels in the ground," as the Commission's chairman reportedly advised at the time?²

Dissent

I disagree with the decision in today's order to set for hearing the question whether the complainants should be bound to a Mobile-Sierra "public interest" burden of proof, or instead to a "just and reasonable" burden of proof. I do not believe that a hearing is necessary on this question. The just and reasonable standard should govern these proceedings.

First, in interpreting the intent of a contract provision, I would look first to the plain language of the contract. The relevant contract here is the WSPP umbrella agreement and the relevant part of the WSPP agreement is section 6.1. That section states that "...Nothing contained herein shall be construed as affecting in any way the right of the Parties to jointly make application to FERC for a change in the rates and charges, classification, service, terms, or conditions affecting WSPP transactions under Section 205 of the Federal Power Act and pursuant to FERC rules and regulations promulgated thereunder." That language defines the rights of the parties jointly to seek changes under section 205 to the agreed upon terms. There is nothing there that even hints or implies that the buyer's rights to seek changes under section 206 are restricted.

Second, a customer's waiver of section 206 just and reasonable rights must be explicit. As the Commission observed in Order 888-A:

"We note that the fact that a contract may bind a utility to a Mobile-Sierra public interest standard does not necessarily mean that the customer is also bound to that standard. Unless a customer specifically waives its section 206 just and reasonable rights, the Commission construes the issue in favor of the customer. See Papago Tribal Utility Authority v. FERC, 723 F.2d 950, 954 (D.C. Cir. 1983)."³

Thus, this Commission and the courts give great respect to the customer's right to complain under section 206 that a contract term is not just and reasonable. Any waiver of this right must

²Statement attributed to Chairman Hebert, San Francisco Chronicle, April 12, 2001 (as reported on the San Francisco Chronicle's web site - - www.sfgate.com.)

³Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997) at 30, 191, footnote 31.

be unmistakable and negotiated in circumstances where market power has been neutralized. These were all sophisticated parties who could have easily spelled out any intentions that 206 rights be waived. There is, however, no language in the WSPP agreement whereby customers have explicitly and freely waived their section 206 rights.

Thus, the just and reasonable standard is clearly the proper standard in these cases and a hearing is not needed on this question.

As we approach these cases, the Commission must keep a sense of balance. I agree that the sanctity of long term contracts is important in a competitive market environment. But there will be no viable path to achieve our pro-competitive goals if consumers lack confidence that this Commission will insist that long term contracts are just and reasonable.

For these reasons, I concur in part with, and dissent in part from, this order.

William L. Massey
Commissioner

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(Issued April 11, 2002)

BROWNELL, Commissioner, concurring

I support the reasoning and result of this order, but am writing separately to further explain my thoughts on two issues. First, while I agree that these cases should be set for hearing, I would like to emphasize the unique circumstances that lead me to that conclusion. The complaints rely on broad allegations about the effect of the California spot markets on bilateral markets in California, Washington, and Nevada, and provide little evidence to support those allegations, let alone modification of the particular contracts at issue. In another context, I might have concluded that dismissal was appropriate, given the level of evidence offered. However, in this context, I have concluded that a greater airing of the evidence for and against modification of these contracts is more likely to resolve the controversy that plagues these markets. Once all parties have had an opportunity to develop their evidence and arguments at hearing, the Commission will then have a complete record on which to base its decision.

Second, I would like to offer my views on the Mobile-Sierra issue. Faced with balancing the sanctity of contracts against the Commission's statutory duty to review the justness and reasonableness of rates, the Supreme Court in Mobile, Sierra, and subsequent cases concluded that, absent contractual language to the contrary, the Commission could not approve a seller's unilateral contract modification unless the modification was necessary to the public interest.¹ In this proceeding, buyers, rather than sellers, seek unilateral changes. The umbrella WSPP Agreement does not explicitly address a buyer's right to seek unilateral changes. Moreover, Section 6.1 of the Agreement states that nothing in the Agreement affects the rights of parties to make joint application for modification under section 205. The question, then, is whether buyers, like sellers, should be held to the public interest, rather than the just and reasonable, standard, when contracts lack language authorizing them to seek unilateral changes.

As the order notes, competitive markets rely on investors to provide the capital needed to build generation. Investors will not participate in a market in which disgruntled buyers are allowed to break their contracts, at least not without charging a significant risk premium—a cost that will ultimately be borne by consumers. Therefore, today's order correctly concludes that a buyer seeking unilateral modification of a market-based contract bears a heavy burden. By the same token, I believe it may be appropriate, as policy matter, to hold buyers and sellers to the same standard when they propose unilateral changes to market-based contracts.

Further, I see nothing in the Mobile-Sierra case law that bars the Commission from ruling that a market-based contract's silence on a buyer's rights to seek changes under section 206 triggers the public interest standard. In 1997, the Commission did state in a footnote to Order No. 888-A that:

[T]he fact that a contract may bind a utility to a Mobile-Sierra public interest standard does not necessarily mean that the customer is also bound to that standard. Unless a customer specifically waives its section 206 just and reasonable rights, the Commission construes the issue in favor of the customer.²

¹See United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956); FPC v. Sierra Pacific Power, 350 U.S. 348 (1956); and United Gas Pipeline Co. v. Memphis Light, Gas and Water Div., 358 U.S. 103 (1958).

²Promoting 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-A, 62 FR 12,274 (March 14, 1997), FERC Stats. & Regs. ¶ 31,048 at 30,191 n. 31 (1997).

The only judicial support the Commission offered for this statement was a 1983 D.C. Circuit opinion, Papago Tribal Utility Authority v. FERC, in which the court upheld a Commission order issued under section 206 that increased a contract rate under the just and reasonable standard.³ However, subsequent to the issuance of Order 888-A, the D.C. Circuit in Texaco Inc. v. FERC stated:

The court [in Papago] did not suggest that the parties' failure to explicitly foreclose the Commission's authority to replace rates [under section 206] would leave it intact. The law is quite clear: absent contractual language susceptible to the construction that the rate may be altered while the contract subsists, the Mobile-Sierra doctrine applies.⁴

Also, the First Circuit has held that, in the absence of clear contractual language allowing contract modifications under section 206, the Commission could not reduce a contract rate unless the public interest standard was met.⁵ The court stated:

[T]he specification of a rate or formula by itself implicates Mobile-Sierra (unless the parties negate the implication). . . . FERC should stop trying to rewrite deals that the parties have already made under the aegis of Mobile-Sierra—unless it properly makes the public interest standard.⁶

The Commission itself, citing Texaco, held a buyer to the public interest standard in San Diego Gas & Electric Company v. Public Service Company of New Mexico, notwithstanding the fact that the contract was silent as to the buyer's section 206 rights and "the evidence introduced at the hearing similarly reflected that the parties did not ever discuss either Section 206 or the applicable standard of review were a Section 206 complaint to be filed."⁷ In that case, the Commission interpreted contractual language restricting the seller's right to seek certain unilateral rate decreases under section 205 as an implicit waiver of the buyer's right to do the same under section 206.

³723 F.2d 950 (D.C. Cir. 1983).

⁴148 F.3d 1091, 1096 (D.C. Cir. 1998).

⁵Boston Edison Co. v. FERC, 233 F.3d 60, 67 (1st Cir. 2000).

⁶Id. at 67 & 68.

⁷91 FERC ¶ 61,233, at 61,851-53 (2000).

I think it may be appropriate to conclude that the public interest standard applies based solely on the WSPP Agreement's silence on buyer's section 206 rights. That conclusion is further bolstered by the presence of Section 6.1, which could be read to mean that the only avenue for either party to change rates is through a joint section 205 filing. However, I am comfortable setting this issue for hearing to determine if there is any extrinsic evidence on the parties' intent.

For these reasons, I respectfully concur with this order.

Nora Mead Brownell