

152 FERC ¶ 61,053
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Philip D. Moeller, Cheryl A. LaFleur,
Tony Clark, and Colette D. Honorable.

Navopache Electric Cooperative, Inc.

Docket No. EL15-59-000

ORDER ON PETITION FOR DECLARATORY ORDER AND ESTABLISHING
HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued July 16, 2015)

1. On April 8, 2015, Navopache Electric Cooperative, Inc. (Navopache) filed a petition for declaratory order (Petition) pursuant to Rule 207(a)(2) of the Commission's Rules of Practice and Procedure,¹ requesting that the Commission confirm Navopache's right, under a Power Sales Agreement (PSA) with Public Service Company of New Mexico (PNM), to purchase power and energy to serve its customers from third-party suppliers without limitations on the amount of such purchases. In this order, we set for hearing and settlement judge procedures the parties' intent in drafting section 10.4 of the PSA and how they intended that provision to be read in conjunction with other provisions of the PSA.

I. Background

2. Under the PSA, PNM provides capacity, energy, transmission, and ancillary services to Navopache. The PSA was executed in July 1999,² and was amended to its current version as part of a settlement agreement between Navopache and PNM, accepted by the Commission on April 15, 2013.³ Under the settlement agreement, PNM granted

¹ 18 C.F.R. § 385.207 (2014).

² Petition at 5 (citing Initial Filing of Public Service Company of New Mexico, Docket No. ER99-3628-000 (July 19, 1999)). On September 9, 1999 and September 20, 2000, the Commission accepted the agreement for filing, effective July 1, 2000. *Pub. Serv. Co. of N.M.*, Docket No. ER99-3628-000 (Sept. 9, 1999) (delegated letter order); *Pub. Serv. Co. of N.M.*, Docket No. ER99-3628-000 (Sept. 20, 1999) (delegated letter order).

³ *Pub. Serv. Co. of N.M.*, 143 FERC ¶ 61,019 (2013).

Navopache a competitive supply right, implemented as section 10.4 in the PSA, which provides that Navopache may acquire, by purchase or construction, alternate sources of power and energy. The settlement agreement also provides for PNM to continue to supply Navopache with wholesale power and energy to serve Navopache's retail load until 2035.

3. In May 2014, Navopache issued a request for proposal to solicit competitive third-party supply offers pursuant to section 10.4 of the PSA. Navopache states that it obtained opportunities to purchase all or a major portion of its power and energy at rates that would provide substantial savings for Navopache's customers. Navopache states that, following its request for proposal, PNM informed Navopache that it intended to engage in litigation designed to prevent Navopache from obtaining third-party suppliers. Navopache states that it is currently in the late stages of the competitive solicitation process, and contends that, if this dispute is not resolved, Navopache will miss the opportunity to acquire competitive third-party supply, which will deprive Navopache and its ratepayers of millions of dollars in annual cost reductions.

4. Navopache asserts that section 10.4 of the PSA grants Navopache the right to acquire up to all of its power and energy from one or more third-party suppliers. Specifically, section 10.4 provides that:

Navopache may acquire, by purchase or construction, alternate sources of Energy and Power. To the extent Navopache acquires such Firm Energy and Firm Power and provides PNM written notice not less than six (6) months prior to the date of the first delivery of such Energy and Power to Navopache, PNM shall not oppose Navopache's acquisition or scheduling of such Energy and Power. Once Navopache provides such notice, PNM will reduce its planning to serve Navopache's load accordingly.^[4]

5. Navopache argues that section 10.4 does not limit the amount of third-party power and energy that Navopache may purchase, and because there is no limit on the quantity of power and energy that can be acquired from a third-party, there is no corresponding limit on the reduction of PNM's obligation to plan for Navopache's load. Therefore, Navopache asserts that, if it decides to acquire all of its power and energy from alternative sources or through construction, PNM will have no obligation to plan for serving Navopache's load.

⁴ Transmittal at 7-8 (quoting PSA section 10.4).

6. Navopache states that section 10.4 is implemented in the PSA through several provisions, which similarly do not specify a limit on the amount of power and energy that Navopache may source competitively from third parties. Navopache claims that these additional PSA provisions provide for reductions of: (1) the defined level of service PNM must provide;⁵ (2) the amount of service for which Navopache must pay;⁶ (3) the billing demand;⁷ and (4) the billing energy.⁸ Navopache contends that all of these contract reductions are to correspond to the amount of Navopache's purchases from third parties, and contain no mention of any limitation.

7. Navopache further states that section 2.25 of the PSA sets forth the Navopache/PNM Contract Requirements and specifically excludes power and energy that Navopache acquires subject to section 10.4 of the PSA. Specifically, section 2.25 provides that:

All Power and Energy acquired by Navopache, but excluding Power and Energy (i) acquired by Navopache pursuant to a [Western Area Power Administration (WAPA)] Contract; (ii) supplied by persons or entities, including Navopache, to Navopache Electric Customers pursuant to retail access allowed by Regulatory Authority; (iii) produced from Renewable Resources owned or acquired by Navopache or parties other than PNM; (iv) resulting from Distributed Generation; (v) acquired by the White Mountain Apache Tribe or other entities pursuant to a WAPA Contract; and (vi) **otherwise acquired by Navopache subject to [s]ection 10.4.** Navopache/PNM Contract Requirements are subject to the application of the provisions of [s]ection 10.3.^[9]

8. Navopache explains that section 2.25 begins with all of Navopache's power and energy requirements and then deducts six categories of power supply that Navopache

⁵ See *id.* at 9-10 (quoting PSA section 1.1 (Undertaking of the Parties) and section 4.1 (Service to be Provided)).

⁶ *Id.* at 10-11.

⁷ *Id.* at 11-12 (quoting PSA section 5.1 (Billing Demand)).

⁸ *Id.* at 12 (quoting PSA section 6.2 (System Energy)).

⁹ *Id.* at 10 (emphasis in original).

may acquire from third parties or, alternatively, generate itself. Navopache states that section 2.25 places no cap or limit on the amount of deducted service for Navopache purchases or other acquisitions subject to section 10.4.

9. Navopache avers that the Commission expects that sophisticated contracting parties will clearly draft their intentions, state what they mean, and not expect the Commission to read in unexpressed terms.¹⁰ Navopache explains that the PSA has been subject to extensive negotiations, has been amended twice, and has been approved by the Commission. Navopache contends that, if PNM wanted a limitation on Navopache's competitive supply right, it should have negotiated one with Navopache and included it in the PSA, as it has done for several other provisions in the PSA.¹¹

10. For these reasons, Navopache requests that Commission issue a declaratory order, on or before September 30, 2015, that confirms its right under the PSA to purchase power and energy from third-party suppliers, without limitations on the amount of such purchases, in order to preserve Navopache's opportunity to obtain competitive alternative supply resulting in substantial savings for its customers.

II. Notice of Filing and Responsive Pleadings

11. Notice of Navopache's filing was published in the *Federal Register*, 80 Fed. Reg. 20,490 (2015), with interventions and protests due on or before May 8, 2015. On May 8, 2015, PNM submitted a motion to intervene and protest. On May 20, 2015, Navopache submitted an answer to PNM's protest. On June 4, 2015, PNM submitted an answer to Navopache's answer.

III. PNM's Protest

12. PNM contends that Navopache's interpretation of section 10.4 of the PSA is contrary to the express and sole purpose of the PSA, which is for PNM to supply Navopache with essentially all of its power supply requirements through 2035. PNM argues that interpreting section 10.4 in a manner which would allow Navopache to purchase none, or virtually none, of its power and energy requirements from PNM is contrary to seminal contract interpretation principles requiring that the meaning of a

¹⁰ *Id.* at 15 (citing *Power Auth. of the State of N.Y. v. Long Island Lighting Co.*, 60 FERC ¶ 61,069 (1992); *Winrock Inn Co. v. Prudential Ins. Co. of Am.*, 122 N.M. 562, 567, 928 P.2d 947, 952 (N.M. Ct. App. 1996); *Shaeffer v. Kelton*, 95 N.M. 182, 185, 619 P.2d 1226, 1229 (N.M. 1980)).

¹¹ *Id.* at 17 (citing PSA sections 4.3, 6.2).

contract be interpreted based upon the primary purpose of the agreement, which cannot be ignored or overridden.¹² Furthermore, PNM asserts that Navopache provides no examples in the PSA that would allow it to effectively terminate the PSA by reducing its power purchases to zero, or practically zero. Specifically, with respect to Navopache's assertion that certain provisions in the PSA provide for a reduction in the defined level of service PNM must provide (i.e., section 1.1), PNM argues that this section merely establishes that the parties' intent is for PNM to supply Navopache with its power needs, and does not allow Navopache to eliminate its entire purchase obligation.¹³

13. PNM states that Navopache's interpretation of the PSA is also contrary to its own 2012 Board Resolution,¹⁴ which provided, among other things, that one of the goals and objectives of Navopache was to secure an extension of the term of the contract with PNM from 2025 to 2035.¹⁵ PNM argues that, in the Board Resolution, Navopache specifically elected not to seek an alternative supplier, and instead sought to secure a long-term, firm extension of its arrangement with PNM.

14. PNM argues that Navopache's interpretation of section 10.4 would provide Navopache with open purchase optionality under which Navopache could decrease its purchases to zero but then, at any time during the remaining term of the PSA, increase its purchases under the PSA up to its full requirements. PNM states that Navopache's claimed open purchase optionality cannot be squared with the fixed price provided for under the PSA.¹⁶ Additionally, PNM asserts that if Navopache were entitled to call on any quantity of power and energy at any time through the year 2035, PNM would have a contractual obligation to provide such power and energy at the price currently contained in the PSA. This would allow Navopache to drop in and out of the marketplace at will, without corresponding compensation to PNM for a valuable call option.¹⁷ PNM contends

¹² PNM Protest at 6 (citing *Consol. Gas Transmission Corp. v. FERC*, 771 F.2d 1536, 1547 (D.C. Cir. 1985); *Pennzoil Co. v. FERC*, 645 F.2d 360, 388 (5th Cir. 1981); *Grynberg v. FERC*, 71 F.3d 413, 416 (D.C. Cir. 1995)).

¹³ *Id.* at 5 n.12.

¹⁴ PNM notes that the Board Resolution was appended to the PSA during its recent amendment. *Id.* at 3. PNM states that the Board Resolution was adopted by the Navopache Board of Directors at its December 2012 meeting. *Id.*

¹⁵ *Id.* at 7 (citing PSA Exhibit 2, "Certification of Resolution").

¹⁶ *Id.* at 8.

¹⁷ *Id.*

that Navopache's interpretation is arbitrary, capricious, and would lead to a one-sided result that violates the terms of the PSA.

15. PNM claims that section 10.4 of the PSA must be read and interpreted in the context of the rest of the PSA.¹⁸ Specifically, PNM contends that Navopache's interpretation of section 10.4 renders meaningless numerous provisions of the PSA articulating the discrete circumstances under which Navopache may decrease its load, or situations in which Navopache is required by a regulatory authority to acquire competitively priced power and energy (i.e., sections 10.1 through 10.3).¹⁹ Furthermore, while section 3.4 of the PSA only permits early termination in circumstances for a breach of contract, PNM argues that Navopache seeks termination through the right to substantially reduce or even eliminate its purchases from PNM. PNM contends that this interpretation renders the termination language of the PSA meaningless and should be rejected.²⁰

16. PNM states that Navopache's reliance on section 10.4 to effectively terminate the contract is contrary to the legal principle of *ejusdem generis*.²¹ Specifically, section 2.25 of the PSA provides that Navopache is required to purchase all of its power requirements from PNM, except for enumerated exceptions. According to PNM, the exceptions listed in items (i) through (v) of section 2.25 are all small, discrete, identifiable quantities of power and energy. PNM states that the sixth listed exception (power and energy that is "(vi) otherwise acquired by [Navopache] subject to [s]ection 10.4") cannot be read so

¹⁸ *Id.* at 9 (citing *Newmont Nevada Energy Inv., LLC v. Sierra Pac. Power Co.*, 147 FERC ¶ 61,030, at P 38 (2014); *Crow v. Capitol Bankers Life Ins. Co.*, 119 N.M. 452, 457 (N.M. 1995); *Gardner-Zemke Co. v. New Mexico*, 109 N.M. 729, 734 (N.M. 1990); *Schultz & Lindsay Constr. Co. v. State*, 83 N.M. 534, 535 (N.M. 1972)).

¹⁹ *Id.* at 13 (citing PSA sections 2.25 (i)-(v), 4.2, 4.3, 10.1-10.3, 10.5).

²⁰ *Id.* at 10 (citing RESTATEMENT (SECOND) OF CONTRACTS § 203 (1981); *Mayfield Smithson Enters. v. Com-Quip, Inc.*, 120 N.M. 9, 14 (N.M. 1995); *Bilski v. Kappos*, 561 U.S. 593, 607-08 (2010); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979)).

²¹ *Id.* at 11 (citing *Entergy Servs., Inc. v. FERC*, 568 F.3d 978, 981 (D.C. Cir. 2009); *FPL Energy Marcus Hook, L.P. v. PJM Interconnection, LLC*, 118 FERC ¶ 61,169, at P 28 (2007), *reh'g denied*, 123 FERC ¶ 61,289 (2008); *Ne. Utils. Serv. Co.*, 62 FERC ¶ 63,013, at 65,027 & n.7 (1993), *aff'd in relevant part*, Opinion No. 422, 83 FERC ¶ 61,184, *reh'g denied*, Opinion No. 422-A, 84 FERC ¶ 61,159 (1998); *Holguin v. Fulco Oil Servs. LLC*, 149 N.M. 98, 103 (N.M. Ct. App. 2010); *Lucero v. Richardson & Richardson, Inc.*, 131 N.M. 522, 588 (N.M. Ct. App. 2001)).

broadly and generally as to swallow all the other exceptions. PNM argues that, if section 2.25 were read to include all of Navopache's power and energy requirements as Navopache asserts, that interpretation would eviscerate both the plain meaning of the enumerated exceptions as well as the PSA as a whole.

17. Finally, PNM notes that Navopache's reliance on "the contract as a whole" provides no concrete or relevant support.²² PNM states that the sections upon which Navopache relies fail to support its interpretation of section 10.4. PNM states that these provisions are not relevant to determine the meaning of section 10.4, nor do they contain guidance as to the actual amount of service PNM is to provide Navopache.

18. PNM requests that the Commission deny Navopache's petition and request for a summary decision on the meaning of the PSA. Alternatively, if the Commission does not deny the petition, and finds that the PSA is ambiguous, PNM requests that the Commission establish a trial-type hearing to develop a proper record upon which to evaluate the rights and obligations of both parties under the PSA.

IV. Navopache's Answer

19. Navopache argues that the PSA will not terminate if Navopache exercises its rights under section 10.4 to acquire up to all of its power and energy from a third-party supplier. Navopache explains that PNM's concern that it might be subject to unpredictable service requirements for the duration of the PSA is solved by section 10.4, which clearly provides that PNM does not have a contractual obligation to plan to serve Navopache to the extent of its third-party supply.

20. Furthermore, Navopache states that if it chooses to return to PNM's system in the future, PNM has the right to submit a filing under section 205 of the Federal Power Act (FPA)²³ to revise the PSA rates.

21. Navopache asserts that the *ejusdem generis* doctrine is irrelevant to this proceeding. Navopache rejects PNM's contention that since five of the six exceptions in section 2.25 are allegedly "small discrete, identifiable quantities of Power and Energy," then under the doctrine of *ejusdem generis*, the amount of power and energy Navopache may acquire to section 10.4 must similarly be limited.²⁴ To the contrary, Navopache

²² *Id.* at 16 (citing Petition at 9).

²³ 16 U.S.C. § 824d (2012).

²⁴ Navopache Answer at 7 (citing PNM Protest at 12 & n.28).

explains that the *ejusdem generis* doctrine applies when there is a non-exhaustive, illustrative list of enumerated items in a contract or statute followed by a general clause, and a party asserts that another item should be included as within the general clause. Navopache notes that the additional item that was not explicitly enumerated in the statute must share common characteristics with those items that were explicitly enumerated in the statute in order to be included.

22. Navopache states that there is a clear distinction in the instant filing, because Navopache has not asked the Commission to add an item that is not explicitly enumerated in the contract itself. Navopache contends that section 10.4 is not an implied right, nor is the requirement that the power and energy supplied by PNM and received by Navopache reduced by the power and energy that Navopache otherwise acquires pursuant to section 10.4; rather, both are explicit rights and obligations. Navopache states that PNM seeks to treat the PSA as though section 10.4 does not exist and as though the PSA included a clause such as “and other similar resources.”²⁵ To the contrary, Navopache states that section 10.4 does exist and does not contain any limitation on amount. Therefore, Navopache concludes that *ejusdem generis* does not apply here.

23. Navopache states that PNM uses misleading or superficial and erroneous contract interpretation to impose limits on the amount of energy and power Navopache can receive from third-party suppliers.²⁶ Navopache contends that the PSA does not support PNM’s position that section 1.1 of the PSA, which requires PNM to provide and Navopache to purchase “Navopache Firm Power and Firm Energy in amounts equal to the Navopache/PNM Contract Requirements” under the PSA, means Navopache must acquire “essentially all” of its requirements from PNM.²⁷ Rather, Navopache argues that it provides that PNM will sell, and Navopache will purchase, power and energy subject to Navopache’s third-party supply right under section 10.4.²⁸ In addition, Navopache disputes PNM’s assertion that other subsections of section 10 limit Navopache’s ability to purchase power and energy from third-party providers.²⁹ Navopache states that sections 10.1 through 10.3 do not apply to section 10.4.

²⁵ *Id.* at 9.

²⁶ *Id.* at 3.

²⁷ *Id.* at 9 (citing PNM Protest at 5-6 & n.12).

²⁸ *Id.* at 10.

²⁹ *Id.* (citing PNM Protest at 14).

24. Navopache recognizes that the December 2, 2012 Settlement, as stated in the Board Resolution, extended the PSA by 10 years. However, Navopache contends that the general statements in the resolution upon which PNM relies do not deprive Navopache from exercising its rights under section 10.4.³⁰

V. PNM's Answer

25. PNM reiterates its arguments that Navopache is attempting to convert the PSA into a unilateral option contract, and that Navopache's interpretation of the PSA contradicts the fundamental legal tenet that a contract term cannot be interpreted to render the other provisions meaningless. In addition, PNM argues that Navopache mischaracterizes PNM's arguments with respect to sections 10.1 through 10.3. Specifically, PNM clarifies that the purpose of sections 10.1 through 10.3 is to demonstrate that the parties expressly intended to reflect Navopache's ability to reduce its contract demand, and that Navopache's interpretation of section 10.4 would render these sections superfluous.³¹

VI. Discussion

A. Procedural Matters

26. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R § 385.214 (2014), the timely, unopposed motion to intervene of PNM serves to make it a party to this proceeding

27. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We accept PNM's and Navopache's answers because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

28. We find that Navopache's Petition raises issues of material fact that cannot be resolved based on the record before us and are more appropriately addressed in the hearing and settlement judge procedures ordered below. Specifically, it is unclear whether the parties intended the contract to limit the amount of power and energy that Navopache may acquire through third-party purchase or construction, including their

³⁰ *Id.* at 3-4.

³¹ PNM Answer at 3.

intent when they included section 10.4 and its relationship to the other parts of the contract.

29. In the absence of complete information regarding the parties' intent in drafting section 10.4, we find that hearing and settlement judge procedures will provide the parties with a forum for addressing such issues, and we encourage the parties to work to expeditiously resolve their contract dispute.

30. While we are setting this matter for trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.³² If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.³³

31. The settlement judge shall report to the Chief Judge and the Commission within thirty (30) days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to the presiding judge.

The Commission orders:

(A) 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 by the FPA, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R. Chapter I), a public hearing shall be held in Docket No. EL15-59-000 concerning the parties' intent in drafting section 10.4 of the PSA and how they intended that provision to be read in conjunction with other provisions of the PSA. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (B) and (C) below.

³² 18 C.F.R. § 385.603 (2014).

³³ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five (5) days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2014), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(C) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(D) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Rules of Practice and Procedure.

By the Commission. Commissioner LaFleur is dissenting with a separate statement attached. Commissioner Clark is concurring with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Navopache Electric Cooperative, Inc.

Docket No. EL15-59-000

(Issued July 16, 2015)

LaFLEUR, Commissioner *dissenting*:

The petition of Navopache Electric Cooperative Inc. (Navopache) for declaratory order seeks expedited Commission action regarding a discrete contract interpretation dispute with Public Service Company of New Mexico (PNM). Specifically, Navopache argues that the power sales agreement with PNM allows Navopache to choose to procure its power and energy without limit from alternative suppliers, rather than procure its requirements solely from PNM. Based on my review of the contract and the record, I agree with Navopache that the plain language of the agreement, particularly section 10.4, grants Navopache that choice.¹ Because the contract is clear and unambiguous, I believe there are no issues of material fact to be resolved at a hearing.

For these reasons, I disagree with the Commission's decision to set this matter for hearing. Today's order introduces unnecessary additional process and delays the swift resolution that Navopache seeks, and to which I think it is entitled based upon the plain language of the agreement. Nonetheless, while I disagree with today's order, I respect the Commission's findings and recognize that additional facts will be identified and considered as part of the hearing process, unless this matter is resolved through settlement. If this matter comes before the Commission again, I will consider those facts in reaching a merits determination.

Accordingly, I respectfully dissent.

Cheryl A. LaFleur
Commissioner

¹ Section 10.4 provides that:

Navopache may acquire, by purchase or construction, alternate sources of Energy and Power. To the extent Navopache acquires such Firm Energy and Firm Power and provides PNM written notice not less than six (6) months prior to the date of the first delivery of such Energy and Power to Navopache, PNM shall not oppose Navopache's acquisition or scheduling of such Energy and Power. Once Navopache provides such notice, PNM will reduce its planning to serve Navopache's load accordingly.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Navopache Electric Cooperative, Inc.

Docket No. EL15-59-000

(Issued July 16, 2015)

CLARK, Commissioner *concurring*:

I write separately to note that section 10.4 of the Power Sale Agreement (PSA) between Navopache Electric Cooperative (Navopache) and Public Service Company of New Mexico (PNM) does not appear particularly ambiguous. Thus, I find myself in a similar position to that expressed in Commissioner LaFleur's dissent.

Nonetheless, I am willing to grant PNM one more chance to supplement the record to help us understand why section 10.4 does not mean what it says.¹ PNM argues that Navopache may only purchase "small, discrete, identifiable quantities of power and energy"² yet provides no language within the four corners of the PSA that supports a small limitation, or a discrete limitation, or identifies a specific quantity of power and energy that Navopache may purchase from alternative suppliers.³

If this additional process provides an opportunity for the parties to reach settlement – then all the better – but otherwise, I would not expect a hearing to be a particularly protracted affair.

Accordingly, I respectfully concur.

Tony Clark

¹ See *Penzoil Co. v. FERC*, 645 F.2d 360, 388 (5th Cir. 1981), citing *Texas Eastern Transmission Corp. v. FPC*, 306 F.2d 345, 347-48 (5th Cir. 1962), *cert. denied*, 375 U.S. 941 (1963) (finding parties should be bound to the precise language within the settlement, because of the close scrutiny with which the Commission reviews proposed settlements before giving its approval).

² PNM Protest at 12.

³ See *Power Authority of the State of New York v. Long Island Lighting Co.*, 60 FERC ¶ 61,069 (1992) (finding the Commission expects contracting parties to clearly express their intentions and not require the Commission to subsequently read into their agreements what is not there), citing *Consolidated Gas Supply Corp. v. FERC*, 745 F.2d 281, 291 (4th Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985) ("One sure way to discourage voluntary settlements is . . . to read into contracts things which are simply not expressed or not there.").