

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Pinnacle West Capital Corporation	Docket Nos. ER00-2268-011 EL05-10-003
Arizona Public Service Company	ER99-4124-009 EL05-11-003
Pinnacle West Energy Corporation	ER00-3312-010 EL05-12-003
APS Energy Services Company, Inc.	ER99-4122-012 EL05-13-003

ORDER REJECTING SETTLEMENT AGREEMENT
AND SERVICE AGREEMENTS

(Issued December 22, 2005)

1. In this order, we reject as unnecessary a settlement agreement and accompanying service agreements.

Background

2. On April 11, 2005, the Pinnacle West Companies¹ filed a settlement agreement between APS and the Arizona Districts.² The Pinnacle West Companies state that the settlement agreement resolves all the issues that the Arizona Districts raise in their protest in Docket Nos. ER00-2268-003, *et al.*, *Pinnacle West Capital Corporation, et al.* (*Pinnacle West Proceeding*), including issues relating to the extension of services currently provided under certain Wheeling and Administrative Service Agreements

¹The Pinnacle West Companies are Pinnacle West Capital Corporation, Arizona Public Service Company (APS), the Pinnacle West Energy Corporation, and APS Energy Services Company, Inc.

² The Arizona Districts are Aguila Irrigation District, Buckeye Water Conservation & Drainage District, Electrical District No. 6 of Pinal County, Electrical District No. 7 of Maricopa County, Electrical District No. 8 of Maricopa County, Harquahala Valley Power District, Maricopa County Municipal Water Conservation District No. 1, McMullen Valley Water Conservation & Drainage District, Roosevelt Irrigation District and Tonopah Irrigation District.

(Wheeling Agreements) and the Market Rate Tariff No. 1 Service Agreement between APS and the Arizona Districts, which will terminate on December 31, 2005.

3. Under the settlement agreement, APS and the Arizona Districts agree to new contracts ("service agreements") under APS' Market Rate Tariff No. 1. The Pinnacle West Companies state that each service agreement is between APS and one of the 10 Arizona Districts, with prices based on a comparable retail, cost-based rate. The settlement agreement provides that the contracts subject to the settlement agreement supersede the existing wholesale agreements between APS and the Arizona Districts as of January 1, 2006. Under the terms of the settlement agreement, the contracts cannot take effect until the settlement agreement is approved.

4. On November 14, 2005, APS and the Arizona districts filed a joint motion to expedite consideration of the pending offer of settlement. APS also filed notices of cancellation of the wheeling agreements that APS and each Arizona District entered into between 1986 and 1994 and a notice of cancellation of the Market Tariff Service Agreement between APS and the Arizona Districts. The notices of cancellation state that the cancellations are to become effective December 31, 2005.

Notice of Filings and Responsive Pleadings

5. Notice of the settlement agreement was published in the *Federal Register*, 70 Fed. Reg. 22,019 (2005), with interventions or protests due on or before May 2, 2005. On May 2, 2005, the Yavapai-Apache Energy Office (YAE0) filed a motion to intervene and comments.³ On May 12, 2005, the Pinnacle West Companies filed a response to YAE0's comments.

6. Notice of the November 14, 2005 joint motion to expedite consideration was filed in the *Federal Register*, 70 Fed. Reg. 72,815 (2005), with interventions or protests due on or before December 8, 2005. On December 5, 2005 YAE0 filed an answer to the motion to expedite. On December 13, 2005, the Pinnacle West Companies filed an answer to YAE0's answer.

Discussion

Procedural Matter

7. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the timely, unopposed motion to intervene serves to make YAE0 a party to this proceeding.

³ While YAE0 styles its filing as a protest, we note that YAE0 states that it does not object to the settlement agreement between APS and the Arizona Districts. (*See* YAE0 filing at p. 4). Accordingly, we will not treat the YAE0 filing as a protest.

YAEO's Comments and APS' Response

8. In comments filed in response to the settlement agreement, and in its answer to the joint motion to expedite, YAEO asserts that in the settlement agreement APS is making available to the Arizona Districts certain terms that APS has refused to make available to YAEO. YAEO states that it has negotiated with APS concerning the terms and conditions for the purchase of a portion of the APS distribution system on the Yavapai-Apache Reservation. It states that a "sticking point" in the discussions has been APS' requirement of a reconfiguration of the APS system that would necessitate the installation of as many as three primary meters (at a cost of \$10,000-15,000 per meter, plus about \$70,000 in construction costs).⁴

9. YAEO maintains that the existing secondary meters should be adequate for the small YAEO load and that APS would have full access to read and inspect all meters. YAEO contends that APS is unduly discriminating against YAEO because the settlement agreement indicates that APS is allowing the Arizona Districts to use secondary metering and load profiling.⁵

10. APS responds that because YAEO has not replied to APS' offer to sell its distribution facilities to YAEO, it would be premature for the Commission to analyze the terms and conditions of the sale of facilities.⁶ APS also argues that the installation of primary meters at the points of interconnection is a reasonable requirement.⁷ Finally, APS contends that YAEO's assertion of undue discrimination is misplaced because YAEO and the Arizona Districts are not similarly situated.⁸

Commission Determination

11. We will reject the settlement agreement as unnecessary. The Arizona Districts do not need to file a settlement agreement in order to withdraw their protest. Moreover, Commission regulations provide that public utilities shall not file with the Commission

⁴ YAEO Comments at 3.

⁵ *Id.* at 3-4. YAEO Answer to Motion to Expedite at 3-4.

⁶ Pinnacle West Answer to YAEO's Comments at 2.

⁷ *Id.* at 2-3.

⁸ *Id.* at 3. According to APS, YAEO is a utility system, while the Arizona Districts consist primarily of isolated pumps served by APS' distribution system.

market-based rate agreements that they negotiate under their market-based rate tariffs.⁹ We will, therefore, reject the service agreements that the Pinnacle West Companies have filed. We will accept the notices of cancellation of the pre-existing wheeling agreements between APS and each Arizona District, and the notice of cancellation of the Market Tariff Service Agreement between APS and the Arizona Districts, effective December 31, 2005, as, by their own terms, these agreements expire on that date.

12. We note that the issue of whether APS can continue to charge market-based rates is pending before the Commission in the *Pinnacle West Proceeding*.¹⁰ Accordingly, the market-based rates that APS has negotiated with the Arizona Districts are subject to refund pending the outcome of that proceeding.¹¹

⁹ *Public Utility Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31,043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002). Order No. 2001, which implemented 18 C.F.R § 35.1(g) (2005), obviates the need to file with the Commission service agreements under market-based rate power sales tariffs, and requires, among other things, that public utilities with market-based rate authority electronically file Electric Quarterly Reports, which include a summary of the contractual terms and conditions in every effective service agreement for market-based power sales.

¹⁰ *See, e.g., Pinnacle West Capital Corp.*, 109 FERC ¶ 61,295 (2004) (Commission instituted a proceeding pursuant to section 206 of the Federal Power Act, 16 U.S.C. § 824e (2000) to determine whether the Pinnacle West Companies may continue to charge market-based rates and established a refund effective date. The Commission also gave the Pinnacle West Companies the option to file a revised simultaneous transmission import capability study and revised wholesale market share analyses.).

¹¹ *See AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018, *order on reh'g*, 108 FERC ¶ 61,026 (2004) (April 14 Order), where the Commission stated that Applicants that have a presumption of market power (*i.e.*, those failing one or both of the indicative screens) will have their rates prospectively made subject to refund. The Commission further stated that it will not revoke market-based rates and impose cost-based rates until it has found that the applicant has market power (*i.e.*, after the Commission has ruled on a Delivered Price Test analysis) or, where the applicant accepts a presumption of market power, the Commission issues an order addressing whether the Applicant must charge default or case-specific cost-based rates. The Commission noted in the April 14 Order that proposals for alternative mitigation in these circumstances could include cost-based rates or other mitigation that the Commission may deem appropriate. April 14 Order, 107 FERC ¶ 61,018 at P 149 and n. 143.

13. In light of our rejection of the settlement agreement, we will not address here the arguments that YAEO raises concerning discriminatory treatment, the use of primary (as opposed to secondary) meters, and the availability of load profiling. Nevertheless, if YAEO believes that APS is treating it in an unduly discriminatory manner, it can file a complaint with this Commission under section 206 of the FPA.

The Commission orders:

- (A) The settlement agreement is hereby rejected, as discussed in the body of this order.
- (B) The service agreements are hereby rejected, as discussed in the body of this order.
- (C) The notices of cancellation are hereby accepted for filing.

By the Commission. Commissioner Brownell dissenting with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

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Nora Mead BROWNELL, Commissioner *dissenting*:

The Arizona Districts are protestors in the section 206 proceeding examining APS' authorization to sell power at market-based rates. The Arizona Districts have now come to the Commission with a settlement that would resolve their portion of the ongoing litigation against APS by providing the Arizona Districts with new cost-based power contracts to replace their expiring market-based-rate agreements. The settlement provides that the new power contracts cannot take effect until the settlement agreement is approved by the Commission. APS has agreed to the settlement, and the only other intervenor does not object to the settlement. Nevertheless, the majority rejects the settlement as "unnecessary" and treats the proposed power contracts as simply additional market-based-rate agreements that do not need to be filed for Commission approval. The majority goes on to subject the settling parties' agreements to refund, given the ongoing section 206 proceeding. As a result, not only are these parties denied the closure they seek, but also the Arizona Districts, some of the very customers we sought to protect by instituting the section 206 proceeding, may be left without any power contracts on December 31, 2005. The settlement agreement and proposed power contracts appear fair and equitable to me; therefore, I would have approved them.

Nora Mead Brownell