

128 FERC ¶ 61,185
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Suedeem G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Nevada Power Company

Docket Nos. EL02-34-000
EL02-34-007

v.

BP Energy Company

ORDER APPROVING UNCONTESTED SETTLEMENT

(Issued August 25, 2009)

1. In this order, the Commission approves an uncontested settlement filed on May 28, 2009 between NV Energy, Inc. (NV Energy), formerly Nevada Power Company (NPC), the Office of the Nevada Attorney General, Bureau of Consumer Protection (Nev-BCP), and BP Energy Company (BP) (collectively, the Parties). The Parties submitted an Explanatory Statement, and a Joint Offer of Settlement and Settlement Agreement (Settlement) that resolves all the issues in the above-captioned proceedings concerning BP's forward sales contracts executed with NV Energy's predecessor, NPC, between March 12, 2001, and June 20, 2001, at market-based rates.

I. Background

2. The background of this long and complex proceeding has been previously described at length.¹ Thus, only the relevant background details are described briefly here.

3. Between December 2001 and February 2002, complaints were filed at the Commission by buyers seeking to abrogate or reform contracts they signed during the Western energy crisis. NV Energy was among the parties that filed a complaint to modify its contracts. The complaints argued that the Commission had already determined that the dysfunctional California Independent System Operator Corporation (CAISO) and California Power Exchange (CalPX) spot markets had produced unjust and

¹ *Nevada Power Co. v. Enron Power Mktg., Inc.*, 125 FERC ¶ 61,312, at P 5-13 (2008).

unreasonable spot prices, the dysfunctional spot markets had tainted the long-term markets and, therefore, the long-term contracts signed during the period of market dysfunction should be found unjust and unreasonable.² Nev-BCP intervened in this proceeding.³

4. The Commission held a hearing on the complaints to address “whether the dysfunctional California spot markets adversely affected the long-term bilateral markets, and, if so, whether modification of any individual contract at issue [was] warranted.”⁴ The hearing also addressed whether the *Mobile-Sierra* public interest standard of review or the ordinary just-and-reasonable standard of review should be applied.⁵ Finally, the Commission instructed the administrative law judge (ALJ) who presided over the hearing to consider the “totality of purchases and sales and the conditions present at the time the contract was entered into.”⁶ After the hearing on the contracts was held, the ALJ issued an initial decision on December 19, 2002.⁷ The ALJ concluded that the *Mobile-Sierra* public interest standard applied, and the buyers had failed to demonstrate that the spot market sufficiently adversely affected the forward market to merit revision of the contracts under that standard.⁸

5. On June 26, 2003, the Commission affirmed the ALJ’s initial decision denying the complaints.⁹ Further, it concluded that the record in the proceeding did not support

² On April 11, 2002, the Commission consolidated NV Energy’s complaint with the other complaints and set them for hearing. *Nevada Power Co. v. Duke Energy Trading and Mktg., L.L.C.*, 99 FERC ¶ 61,047, at 61,191 (2002) (*Nevada Power*).

³ Motion to Intervene and Answer of the Nevada Attorney General’s Office, Bureau of Consumer Protection, Docket No. EL02-34-000 (December 20, 2001). Nev-BCP also intervened in other related dockets.

⁴ *Nevada Power*, 99 FERC at 61,191.

⁵ *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

⁶ *Nevada Power*, 99 FERC at 61,191.

⁷ *Nevada Power Co. v. Enron Power Mktg., Inc.*, 101 FERC ¶ 63,031 (2002).

⁸ *Id.* P 95.

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

modification of the contracts at issue.¹⁰ On November 10, 2003, the Commission denied requests for rehearing of its June 26, 2003 order and reaffirmed its conclusion.¹¹

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

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

¹⁰ *Id.* P 94, P 96-110.

¹¹ *Nevada Power Co. v. Enron Power Mktg., Inc.*, 105 FERC ¶ 61,185 (2003).

¹² *Pub. Util. Dist. No. 1 of Snohomish County v. FERC*, 471 F.3d 1053, 1085-97 (9th Cir. 2006).

¹³ *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1 of Snohomish County*, 128 S. Ct. 2733, 2745 and 2747-49 (2008) (*Morgan Stanley*). On November 3, 2008, the Ninth Circuit issued an order vacating its prior decision in the case and remanding the matter to the Commission for further proceedings consistent with the Court's *Morgan Stanley* opinion. *Pub. Util. Dist. No. 1 of Snohomish County v. FERC*, 547 F.3d 1081 (9th Cir. 2008).

¹⁴ *Morgan Stanley* at 2750.

¹⁵ *Nevada Power Co. v. Enron Power Mktg., Inc.*, 125 FERC ¶ 61,312, at P 29-32 (2008).

¹⁶ *Id.* P 33.

8. On May 28, 2009, the Parties submitted the Settlement as a “black box” settlement. They noted that the Settlement was a result of informal discussions and negotiations between the Parties, facilitated by the Commission’s Dispute Resolution Service.¹⁷

II. Procedural Matters

9. The Parties filed the Settlement with the Commission pursuant to Rule 602 of the Commission’s Rules of Practice and Procedure.¹⁸ Pursuant to Rules 602(d)(2) and 602(f),¹⁹ initial comments were due on or before June 17, 2009, and reply comments were due on or before June 29, 2009.

10. No initial comments were filed concerning the Settlement. On June 29, 2009, the Parties filed Joint Reply Comments in Support of Joint Offer of Settlement in which the Parties noted that no parties filed comments regarding the Settlement and thus the Settlement appeared to be unopposed.²⁰

III. The Terms of the Settlement

11. The Parties state that the Settlement is a black box settlement. The principal elements of the Settlement are BP’s one-time, lump-sum \$4.7 million payment to NV Energy in return for NV Energy’s and the Nev-BCP’s release of all claims against BP related to certain of BP’s forward sales contracts executed with NV Energy’s predecessor, NPC, between March 12, 2001, and June 20, 2001, at market-based rates.²¹ The Parties agree that NV Energy is solely responsible for any commitments to its ratepayers, the Nev-BCP, or to other third parties related to the ultimate disposition of the funds paid by BP to NV Energy.²²

12. Under the Settlement, BP agrees to pay NV Energy by wire transfer within 30 days of the effective date of the Settlement, and no interest will accrue on the lump-sum

¹⁷ Explanatory Statement at 3.

¹⁸ 18 C.F.R. § 385.602 (2009).

¹⁹ 18 C.F.R. §§ 385.602(d)(2) and 385.602(f).

²⁰ June 29, 2009 Joint Reply Comments in Support of Joint Offer of Settlement, Docket No. EL02-34-000.

²¹ Settlement at 3-4.

²² *Id.* at 7.

settlement payment if the payment is made on or before the thirtieth day following the effective date of the Settlement.²³

13. The Settlement becomes effective and binds the Parties on the date the Commission's order accepting or approving it becomes final. Within 15 days of the date on which BP has paid the settlement payment to NV Energy, BP commits to file in the above-captioned docket a letter notifying the Commission and all interested parties of the payment by wire transfer. From and after the date on which this notice is filed, BP will be deemed to be a non-party in the above-captioned proceeding and any consolidated matters.²⁴

14. With respect to future changes to the Settlement itself, page 7 of the Settlement provides that:

This Settlement Agreement may only be amended by the agreement, in writing, of all the Parties hereto. The standard of review for any modifications to this Settlement Agreement proposed by any Party to the Settlement after it is approved by the Commission will be the *Mobile-Sierra* public interest standard. The standard of review for any modifications to the Settlement Agreement proposed by any non-party to the Settlement Agreement, after it is approved by the Commission, including any modifications resulting from the Commission acting *sua sponte*, will be the most stringent standard permitted by law.

IV. Commission Determination

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

16. Given that the Parties intend this Settlement to be a full and final settlement of the issues in this proceeding, this order terminates Docket Nos. EL02-34-000 and EL02-34-007.

²³ *Id.* at 4.

²⁴ *Id.* at 5-6.

The Commission orders:

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

By the Commission. Chairman Wellinghoff is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.