





1 APPEARANCES:

2 COMMISSIONERS PRESENT:

3 CHAIRMAN PAT WOOD, III, Presiding

4 COMMISSIONER LINDA KEY BREATHITT

5 COMMISSIONER NORA MEAD BROWNELL

6 COMMISSIONER WILLIAM L. MASSEY

7

8 SECRETARY MAGALIE ROMAN SALAS

9

10 ALICE FERNANDEZ

11 MARK HEGERLE

12 DAVID MEAD

13 DAVID WITHNELL

14 LARRY GREENFIELD

15 DAN NOWAK

16 MORRIS MARGOLIS

17 KATHY WALDBAUER

18 OLGA KOLOTUSHKINA

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21

22 ALSO PRESENT:

23 JANE W. BEACH, Court Reporter

24



## 1 PROCEEDINGS

2 (10:21 a.m.)

3 CHAIRMAN WOOD: Good morning. This open meeting  
4 of the Federal Energy Regulatory Commission will come to  
5 order to consider matters which have been posted in  
6 accordance with the Government in the Sunshine Act for this  
7 time and place.

8 Please join me in the pledge.

9 (Pledge of Allegiance recited.)

10 CHAIRMAN WOOD: Before we go into our cases for  
11 today, I do have a couple of announcements: First, I would  
12 like to, and am pleased to announce that we do have an  
13 Director of the Office of Market Oversight and  
14 Investigation. His name is Bill Hedderman, and he was  
15 officially approved by the Office of Personnel Management  
16 yesterday, and has formally accepted the job. And I expect  
17 him to report for work this week, and we look forward to  
18 getting him to know us and our wonderful staff, and help in  
19 setting up our important Office of Market Oversight and  
20 Investigation, so that's one.

21 And second, I want to, as we do periodically,  
22 recognize one of our outstanding employees today, and today  
23 would like to recognize an outstanding manager, Susan Cort,  
24 who does not know that this is coming.

1

Susan has been at the Commission since 1982, and

1 has worked in a variety of positions during her tenure here,  
2 and in July of 2001, about the time Nora and I both got  
3 here, she began managing the General and Administrative Law  
4 Section of OGC.

5 Today I particularly want to recognize Susan's  
6 hard work and dedication to that position. In particular,  
7 she has led a fantastic team of wonderful employees here at  
8 FERC who have worked tirelessly for many months in two  
9 critical areas for our Commission's efforts: First, in  
10 overseeing the Commission's efforts for increased  
11 infrastructure security, resulting from the September 11th  
12 attacks; and, secondly, responding to the tremendous volume  
13 of inquires from the press and from Congress under Freedom  
14 of Information Act requests, as well, regarding the collapse  
15 of Enron and other regulatory activities that we're engaged  
16 in.

17 And in the middle of all of that, I had the grace  
18 to ask Susan to spearhead a ten-year reunion for the  
19 adoption of Order No. 636 by this Commission, which we held  
20 last Friday with the attendance of the five great Americans  
21 who were Commissioners that time, ten years ago, and adopted  
22 an order that resulted in tens of billions of dollars of  
23 savings for America's customers of natural gas.

24 And so Susan is kind of an all-around trooper of

1           many regards, and I appreciate not only her friendship, but

1 her outstanding managerial and organizational skills that  
2 have made this Commission a very useful part of American  
3 life for the last 20 years. So, Susan, come up and take a  
4 bow. I've got a little something for you.

5 (Applause.)

6 CHAIRMAN WOOD: All right, it says "Presented to  
7 Susan J. Cort, who is hereby deemed and exemplary public  
8 servant for her distinguished career in pursuit of the  
9 vision, mission, and values of the Federal Energy Regulatory  
10 Commission."

11 MS. CORT: Thank you so much; thank you so much.

12 (Applause.)

13 MS. CORT: And that staff is back in the corner.

14 14

15 CHAIRMAN WOOD: Now she knows why they're here.

16 And I want to say one nice thing about Susan. And I  
17 noticed this trait in really almost every successful  
18 manager, how often they deflect their praise to that of the  
19 people who they work with. And I can tell you, whether it's  
20 in public or in private, Susan has always never let you  
21 finish your breath before she tells you how wonderful all  
22 the people in General Administrative Law have been to work  
23 with. So it's a team effort, and I appreciate that.

24 Linda?

1

COMMISSIONER BREATHITT: I would like a short

1 announcement, and let everyone know that I did not scare  
2 Dave Fairburg away in the month that he was on detail to my  
3 office. He is now officially a part of my office, and I'd  
4 like to recognize that, and just thank Dave for a month of  
5 hard work, and many more to go. Thanks.

6 CHAIRMAN WOOD: Madam Secretary?

7 SECRETARY SALAS: Good morning, Mr. Chairman, and  
8 good morning, Commissioners. Your consent agenda for today  
9 is as follows:

10 Electric: E-2 through E-9, E-11, E-12, E-14, E-  
11 17, E-19 through E-23, E-26, and E-27;

12 Gas: G-2 through G-7, G-9, G-11, G-12, and G-15  
13 through G-18;

14 Hydro: H-1 through H-6;

15 Certificates: C-1, C-2, and C-4 through C-7.

16 The specific bullets for some of these items are  
17 as follows: E-11, Commissioner Brownell concurring, with a  
18 separate statement; E-14, Commissioner Brownell concurring  
19 with a separate statement; E-19, Commissioner Massey  
20 concurring with a separate statement; E-23, Commissioner  
21 Brownell recused; H-6, Commissioner Brownell concurring with  
22 a separate statement; Commissioner Massey votes first today.

23 23

24 COMMISSIONER MASSEY: Aye, with my concurring

1 statements, as noted.

1 COMMISSIONER BREATHITT: Aye.

2 COMMISSIONER BROWNELL: Aye, with my concurrences  
3 noted, with an addition that I am concurring on E-24, and my  
4 recusal is noted on E-23.

5 CHAIRMAN WOOD: Aye.

6 SECRETARY SALAS: The first item of the  
7 discussion agenda is E-1, Electricity Market Design and  
8 Structure, with a presentation by Alice Fernandez, Mark  
9 Hegerle, David Mead, and David Withnell.

10 MS. FERNANDEZ: Good morning. E-1 is an Options  
11 Paper that is basically a followup to the working paper that  
12 was issued in March on standardized transmission service and  
13 wholesale electric market design.

14 In the working paper, there were a number of  
15 areas that were identified as needing further discussion.  
16 The Options Paper that is before you as E-1 basically tries  
17 to start further discussion on those points.

18 What it does is, it lays out various options that  
19 could be used for resolving those issues. It does not make  
20 any recommendations or state any preferences for those  
21 particular options. Rather, what it does is, tries to go  
22 through the various options available, and the intent is to  
23 give people the options, ask if there are other options  
24 available, and ask for comments on the advantages and

1 disadvantages of the various approaches.

1           Comments would be due on May 1st. That concludes  
2 my presentation.

3           CHAIRMAN WOOD: I should add that the actual  
4 items in here are several. The first three batches are the  
5 manner in which embedded costs of the transmission system  
6 will be recovered, which is really a core rate design issue  
7 that has shown up in a lot of the individual RT dockets.  
8 But it certainly lends itself to some broader discussion.

9           The manner in which transmission rights will be  
10 allocated amongst customers, which, I would say, to me, in  
11 light of where we are today, looks to me like probably the  
12 key issue in kind of getting off the ground with standard  
13 market design.

14           And then, finally, the transition of customers  
15 under existing contracts to new service, which is an issue  
16 that certainly this Commission has a lot of history with,  
17 both in 888 and in the gas side. There are different ways  
18 to slice it, and I think staff has done a nice job of laying  
19 out a variety of options with a lot of analysis, certainly  
20 enough to give people some framework for their comments.

21           Then finally, a different issue is the long-term  
22 generation adequacy, and there are five options for  
23 addressing that. I think it's definitely a step beyond  
24 where we were on our September 26th workpaper that we

1 discussed at open meeting on that topic, and I think we've

1 all learned a lot in both the public hearings and in the  
2 cases we've dealt with on ICAP and the other issues related  
3 to long-term generation adequacy.

4 So I think this tee's up the issues nice and  
5 crisp. Again, it moves it partly down the funnel, so that  
6 we can get people to focus on the exact answer or answers  
7 that might well best serve our country in standardizing  
8 market design. So, I appreciate you all getting it done on  
9 time, and look forward to the comments, and then certainly  
10 to integrating those into a final proposed rule.

11 COMMISSIONER BROWNELL: I just want to thank the  
12 staff for what I think is an incredible level of detail in  
13 getting to the real issues, which is where the money is.  
14 And I think this is what everybody has been waiting for.

15 But I'm particularly grateful because I think you  
16 made a good effort at indicating the impacts on various  
17 classes of customers, as you went through the options. And  
18 I think that we've talked a lot about customers here, and to  
19 keep that in front of us, I think is important, particularly  
20 in the transition period.

21 And I would hope that the commenters would also  
22 help us flesh that out, so we understand more fully, impacts  
23 as we make some, I think, difficult decisions to move  
24 forward, but decisions that, in the end, bring benefits to

1 all customer classes.

1           But this paper really reflects, I think, a  
2 renewed effort to incorporate that into your thinking, and I  
3 appreciate that.

4           COMMISSIONER MASSEY: It's an excellent paper.  
5 I'm glad we're issuing it. I think we need feedback on  
6 these very difficult questions. Some of them are transition  
7 issues. Do move "cold turkey" to this new approach, or do  
8 we phase it in in some way?

9           What about the issue of existing contracts? How  
10 do we deal with those? Those were always difficult  
11 questions. They were in Order 636 and Order 888, and they  
12 will be here as well. So you've laid out a thoughtful  
13 approach with a number of options on all of these issues,  
14 and I look forward to the feedback that we get from market  
15 participants.

16           COMMISSIONER BREATHITT: I have a few comments on  
17 this. I, too, am glad that we're continuing to move down the  
18 road and laying forth other options for areas that we quite  
19 simply didn't have time to do in the first go'round of  
20 several weeks ago.

21           But several of the issues addressed in this  
22 particular paper, specifically the recovery of embedded  
23 costs, and the transition of customers under existing  
24 contracts, I think will be among the most controversial

1 issues that we're going to have to address in this standard

1 market design effort.

2 And I think that's because these issues, more  
3 than the others, involve potential cost-shifts and possibly  
4 degradation of service, or that may certainly be alleged.  
5 We still have parties saying on the gas pipeline side, that  
6 we have to watch for degradation of service. So that's an  
7 area that has been hard to figure out for me, and the  
8 comments will help.

9 I continue to think about this, and prefer an  
10 approach on the recovery of embedded costs which is  
11 efficient, but also minimizes cost-shifts, and it's  
12 important to me that the Commission also implement an access  
13 charge methodology. That was another of the four issues  
14 that this paper is addressing, access charges, that  
15 recognizes the longstanding regulatory philosophy that cost  
16 recovery should follow cost causation. Access charges are  
17 another difficult one to come to a final solution on, so the  
18 comments will help us there, as well.

19 And we also address the transition, which my  
20 colleagues have talked about, the transition of customers  
21 under existing contracts, to proposed network service, the  
22 part that talks about moving to the single tariff, which  
23 would be network service. And that is an area that concerns  
24 me and the standard market design issue, not because what

1 we've said is wrong, but just because I think that's another

1 tough area.

2 For me, the conversion of existing contracts, as  
3 well as the initial allocation of transmission rights is a  
4 question of equity and not just necessarily efficiency. One  
5 of the 11 principles that we cited on March the 15th was  
6 that customers under existing contracts should continue to  
7 receive the same level and quality of service.

8 And I've gotten some good feedback from primarily  
9 the states, that they are very pleased that we recognized  
10 that in the paper on the 15th. So that principle is  
11 important to me, and will continue to weigh heavily in my  
12 decisionmaking. And it also is an area where we have said  
13 we will continue to allow for regional differences.

14 And then, finally, the fourth area that we talk  
15 about in this paper is generation adequacy. Adequate  
16 generation resources and reasonable supply reserve margins  
17 are absolutely necessary to ensure a reliable electric grid,  
18 and to allow competitive markets to function efficiently.

19 You know, we all want -- it would be wonderful if  
20 we could figure out exactly the right amount of generation  
21 to have, so you don't over-build and you have real, robust  
22 competitive markets. And I guess you always have swings of  
23 one or the other, but that's -- generation adequacy is going  
24 to be a critical area for us to continue trying to figure

1 out.

1           If we -- but it's not if we provide for long-  
2 term generation adequacy; it's how we do it. And it's been  
3 tough for us to figure out in New England, and the options  
4 are going to keep coming to us from comments, as well as we  
5 think -- as well as thinking about it internally. And I'm  
6 not sure that this is an area where generation adequacy  
7 needs to be addressed exactly the same way in every region  
8 of the country. We may get different solutions for  
9 different parts, but I am hopeful that the comments will  
10 continue to help us, and I think we're giving three weeks  
11 for that.

12           So, we're moving on down the road. Good, thank  
13 you.

14           CHAIRMAN WOOD: Thank you, Linda. I think we'll  
15 just, with some nods, have the staff issue the paper and get  
16 the comments as we did on the working paper, and move on.

17           SECRETARY SALAS: The next item for discussion  
18 this morning is E-24, Mirant Americas Energy Marketing,  
19 Inc., with a presentation by Larry Greenfield, Dan Nowak,  
20 Morris Margolis, and Kathy Waldbauer.

21           MS. WALDBAUER: Good morning. This draft Order  
22 addresses changes to ISO New England's installed capacity or  
23 ICAP market. On August 28, 2001, the Commission accepted a  
24 new ICAP product filed by ISO New England.

1

In that Order, however, the Commission also

1 directed ISO New England to develop an alternative to the  
2 ICAP requirement; in particular, to investigate the  
3 feasibility of a program of acquiring forward reserves and  
4 using demand-side mechanisms to meet ISO New England's  
5 reserve capacity needs.

6 ISO New England made a filing on December 3 that  
7 sets forth its progress in that regard. The draft Order  
8 here does not rule on that filing, which, in any case, is  
9 not a tariff change under Section 205, but this draft Order  
10 does address interim filings that it is our hope will be  
11 milestones on the road to meeting New England's capacity  
12 needs through forward reserves.

13 This Order basically does two things: In the  
14 August 28th Order, the Commission stressed that ISO New  
15 England must inform its member load-serving entities, or  
16 LSEs, of their entire ICAP responsibility for each month,  
17 prior to the beginning of the month, so that they can have  
18 their ICAP lined up before the month starts.

19 ISO New England had proposed a cure period of two  
20 weeks at the end of each month, during which LSEs could  
21 purchase a portion of their ICAP responsibility for the  
22 proceeding month, without being liable for a penalty.

23 This draft Order rejects the idea of after-the-  
24 fact cure period as being inconsistent with the Commission's

1 goal of having all LSEs able to know and meet their ICAP

1 responsibility before the start of each month.

2 MR. MARGOLIS: Okay, the draft Order also  
3 addresses a compliance filing in which ISO New England set  
4 forth its method for allowing 100 percent of each LSE's ICAP  
5 responsibility to be purchased on a forward basis. ISO New  
6 England states that it does not yet have in place, the  
7 necessary infrastructure to know the mix of customers served  
8 by each LSE, and, therefore, cannot track load shifts on a  
9 real-time basis.

10 It proposes, therefore, to calculate each LSE's  
11 ICAP responsibility on the basis of historical data, using  
12 the months two months prior to each supply month as a base  
13 month to set each LSE's obligation for the supply month.

14 ISO New England states that it cannot account for  
15 load shifts after the 15th calendar day of the month prior  
16 to the supply month. It does allow for one exception,  
17 however: If, pursuant to state regulatory action, the  
18 requirements to offer last-resort service shift from one LSE  
19 to another, the ISO will accommodate that change up to the  
20 day prior to the supply month.

21 The draft Order accepts the overall method  
22 proposed by ISO New England, but because the proposal has a  
23 two-month lag between the base month or allocator, and the  
24 supply month, the Commission is requiring the ISO to modify

1 the ICAP allocation method to take seasonal changes and load

1 profiles into account when allocating the total ICAP among  
2 the LSEs.

3 The draft Order requires the ISO to develop a  
4 more reasonable method to take into account, load shifts.  
5 The Order further requires similar treatment for all class  
6 of load shifts, by rejecting the exception that the ISO  
7 allowed for last-minute adjustment of ICAP obligations for  
8 certain state-mandated load shifts. Thank you.

9 CHAIRMAN WOOD: It was this latter batch of  
10 issues that I was, I guess, a little less than exuberant  
11 about in this Order. I think it goes without saying that  
12 ICAP is not one of my very favorite items. I'm not still  
13 convinced of its necessity, but I'm not going to argue that  
14 in this case.

15 But the actual way that it's implemented in New  
16 England, to me, you know, conceptually is probably the right  
17 direction to do it. What I worry about here is the  
18 specifics of us coming back. They have narrowed it down to  
19 where if you're trying to figure out your ICAP obligation or  
20 requirement for July, you look two months over into May, and  
21 that's the proportion of May peak that you had, and it  
22 becomes then the portion of July peak that you're obligated  
23 to do. Is that the fair way to say that?

24 MR. MARGOLIS: (Nods affirmatively.)

1

CHAIRMAN WOOD: So if you had 40 percent of the

1 May peak, then you've got to get 40 percent of the July  
2 ICAP, and I think certainly changing that from what I think  
3 in the prior world had been what you did last year,  
4 certainly narrows the window.

5 What we recommend in this draft Order is to try  
6 to narrow the window even further, and I do worry that the  
7 amount of effort that is required to basically probably do a  
8 lot of manual overrides in the system that is not set up to  
9 do this ICAP very well, as we have learned over way too many  
10 cases in the short time I've been here, that I wonder if the  
11 attempt to get that more precise is going to be worth the  
12 effort.

13 I think I would characterize this Order as  
14 interim, subject to what we ultimately decide regarding  
15 generation adequacy, as I think Linda laid out real well in  
16 the last presentation. It may well be different in New  
17 England, but we'll probably want it to be better than what  
18 we've got today.

19 My big concern is why this mechanism when we've  
20 got, for example, the procurement of operating reserves? If  
21 you're a load-serving entity, you know what ancillary  
22 services you need to get and bring with your transactions to  
23 meet your load to the RTO or to the ISO.

24 And I don't know why ICAP has to be so

1 dramatically different in the mechanism that is used to

1 procure it, than something like operating reserves, which  
2 is, admittedly, much more short-term than are you going to  
3 have enough capacity in New England three years from now.  
4 But, you know, certainly the mechanisms that we us -- the  
5 big arguments here seem to be equity and certainty.

6 We want to know ahead of time, with some  
7 certainty, what the load-serving entity's got to procure,  
8 and we want their procurement to be equitable, vis a vis  
9 everybody else in the market, so that one LSE is not bearing  
10 an unfair proportion of the ICAP requirement.

11 It's not a question of how much ICAP to get; it's  
12 a question of how to divvy it up amongst everybody. So the  
13 divvying up here seems to me to be really trees-oriented,  
14 and not very forest-oriented, and I'm just wondering, not  
15 for staff to answer, but we've left it open for the ISO New  
16 England to come back on a further compliance filing and kind  
17 of crispen this up.

18 And, you know, again, if there is a different way  
19 of getting the load-serving entities to get their  
20 proportionate, equitable share of ICAP bought and paid for  
21 in advance, then that's a good -- you know, certainly a  
22 better world than the one we're in.

23

24



1           I do, with some I guess lack of joy, vote for  
2           this order, because I do kind of sense Celene Dion singing  
3           the "Titanic" theme behind me about the deck chairs being  
4           rearranged here, and I worry that despite our cajoling and  
5           urging last August in an order to look at a different type  
6           of procurement totally for ICAP up in New England, that  
7           we're really still kind of playing with a relatively arcane  
8           mechanism. But I'll be informed by the parties' comments on  
9           that by what ISO New England comes back with on compliance  
10          and look forward to kind of following it through and  
11          appreciate you all's briefing yesterday. It sure clarified  
12          how the mechanism works.

13                 COMMISSIONER BROWNELL: I think the New England  
14          ICAP filings actually do win the frequent flyer award this  
15          year. We'd have to count, and I hope it won't continue to  
16          be the winner.

17                 I share Pat's frustration with the evolution of  
18          ICAP and really understanding how to create a mechanism to  
19          make it work. But I just have a couple of quick questions,  
20          actually one question and one comment. One, I would  
21          encourage the New England ISO to talk to the market  
22          participants and really work out with them what is the most  
23          appropriate short-term interim, underlined five times,  
24          solution until we deal with this.

1

But my question is, is New England and New York

1 as part of their engagement ritual, are they working towards  
2 the same ICAP market? Do they have the same ICAP market  
3 today? It doesn't seem as if they do.

4 MR. MARGOLIS: No, they don't have the same ICAP  
5 market, although the December 3rd filing that ISO New  
6 England made they did state that they were working towards  
7 and intend to adopt some of the same mechanisms that PJM and  
8 New York currently have.

9 COMMISSIONER BROWNELL: I remember that. But we  
10 don't see any progress on that at this moment in time,  
11 right?

12 MR. MARGOLIS: No.

13 COMMISSIONER BROWNELL: I'm concerned about  
14 people going out and spending a whole lot of money on  
15 systems or devoting manpower to manual overrides without  
16 looking at the long-term picture about where we're going or  
17 where the neighbors are going or where the fiancee is going,  
18 so I would also encourage New England to do that.

19 CHAIRMAN WOOD: Let's vote.

20 COMMISSIONER MASSEY: Aye.

21 COMMISSIONER BREATHITT: Aye.

22 COMMISSIONER BROWNELL: Aye.

23 CHAIRMAN WOOD: Aye.

24 SECRETARY SALAS: The next item on the discussion

1 agenda is E-28, Nevada Power Company, with a presentation by

1 Olga Kolotushkina.

2 MS. KOLOTUSHKINA: Good morning, Mr. Chairman,  
3 Commissioners. The E-28 draft order addresses complaints  
4 filed by Nevada Power Company, NCR Pacific Power Company,  
5 Southern California Water Company and Public Utility  
6 District Number 1, Snohomish County, the state of  
7 Washington.

8 This complaint alleges that dysfunctions in the  
9 California electricity spot markets force long-term  
10 contracts negotiated in the bilateral markets in California,  
11 Washington and Nevada to be unjust and unreasonable, and  
12 seek the extraordinary remedy of contract modification.

13 To ensure that the complainants have a full and  
14 fair opportunity to present their cases and that the  
15 Commission in turn has a complete record on which to base  
16 its decision, the draft order sets these complaints for an  
17 evidentiary hearing. The complainants will bear the burden  
18 of proving that the contract modification is justified.

19 The draft order also notes that this burden is a  
20 heavy one and that the evidence contained in the complaints  
21 alone does not carry that burden. Furthermore, the order  
22 directs the parties to comply with the mediation requirement  
23 of the Western Systems Power Pool Agreement and strongly  
24 urges the parties to make every effort to settle their

1           disputes during that mediation.

1           This concludes my presentation.

2           CHAIRMAN WOOD: Thank you, Olga. I guess as a  
3           way of introducing this, I think it's for me certainly and I  
4           hope for the world no surprise that these are going to  
5           hearing. It's an important issue that is being asked of the  
6           Commission here, and there are very many different fact  
7           issues that need to be brought before a finder of fact in  
8           our capable law judge corps, and I look forward to that.

9           So the fact that it's going to hearing is to me  
10          not so much noteworthy as is our referral order. I think  
11          certainly it's been with some care and thoughtfulness that  
12          we have worked on this order over the past several weeks,  
13          because it's important in a case like this.

14          I wouldn't call it necessarily a case of first  
15          impression, but it's certainly a case of recent impression  
16          for us to discuss the extraordinary remedy of contract  
17          modification. It's one that we talked about in the context  
18          of the prior rulemaking that we just discussed under E-1.  
19          It's one we've discussed on the major initiatives this  
20          Commission did on the gas and the electric agendas. And on  
21          occasion we have modified contracts. So it's not unheard  
22          of. But I do think it was important for us to clarify that  
23          it is a high standard we're talking about here and one that  
24          should be dictated by the unique facts of the contract

1 negotiations and the parties' intent and not just kind of

1 broad brush allegations about events going on in the  
2 marketplace at the time. Those are relevant but not  
3 dispositive in my mind.

4 I do hope that as this moves forward the judge  
5 can -- there's a number of contracts here that as certain  
6 types of contracts or certain individual contracts do, are  
7 allowed to be basically dismissed from the complaint, that  
8 certainly the judges could do that to keep the focus on the  
9 complaints that are most fact-intensive.

10 We do not dictate here how the judge should  
11 perform such administrative activities, but I think it's  
12 important for the stability of the marketplace to, in its  
13 recovery from the events of the West in the years 2000,  
14 2001, that we try to clarify these things as quickly as  
15 possible. So I hope and expect that the hearing will be  
16 productive, that the relevant facts get up before the finder  
17 of fact and determinations as to whether these contracts  
18 should be reformed under Section 206 get made early in the  
19 process.

20 COMMISSIONER MASSEY: I will be concurring in  
21 part on this order and dissenting in part, and I want to set  
22 out this morning some of the things I will say in my  
23 concurrence and in my dissent.

24 First the concurrence. As has been pointed out,

1 this order establishes hearing procedures to develop a

1 record upon which the Commission will decide whether to  
2 modify the terms of a series of long-term contracts  
3 negotiated when the California spot markets were wildly out  
4 of control.

5 All of the contracts were negotiated pursuant to  
6 the umbrella agreement of the Western System Power Pool and  
7 are subject to its terms. One of those terms requires the  
8 parties to attempt to resolve disputes by mediation  
9 provisions. Today's order requires the parties to fulfill  
10 that provision before formal hearing procedures are begun.

11 And consistent with our policy regarding 206 investigations,  
12 the order establishes a refund effective date. I agree with  
13 those basic decisions reached in this order. They are the  
14 right thing to do.

15 I'm aware that the Commission's precedent says  
16 that a party seeking to set aside a contract bears a heavy  
17 burden if they are to succeed. We follow that precedent  
18 here, as we should. The Federal Power Act also forcefully  
19 declares that any terms of jurisdictional contracts that are  
20 unjust and unreasonable are flat unlawful. We must follow  
21 that statutory requirement here. We must keep both of these  
22 guideposts in mind in our deliberations in cases like those  
23 addressed in this order.

24 The atmosphere in which these contracts were

1 negotiated was unprecedented. The spot markets were out of

1 control. The Commission had declared them to be  
2 dysfunctional. They were driving prices throughout the  
3 West. There was a perceived need to get load off the spot  
4 market and into forward contracts. Yet it must have been  
5 extraordinarily difficult for the contracting parties to  
6 negotiate long-term contracts under these circumstances.  
7 After all, the most influential benchmark used in  
8 negotiating forward contracts, which is the spot market and  
9 expectations of future spot prices, was dysfunctional.

10 The Commission has explicitly recognized this  
11 critical relationship between the spot market and the long-  
12 term contract market. In our AEP Power Marketing Order that  
13 we issued just last fall, we recognized that, quote:  
14 "Maintaining an accurately priced spot market is the single  
15 most important element for disciplining longer-term  
16 transactions." Unquote. Yet this single most important  
17 element was nonexistent when the contracts at issue were  
18 negotiated here.

19 In the draft that is before us on pages 13 and  
20 14, the order says as follows: "In the evidence presented  
21 thus far, the complainants have failed to show that the  
22 dysfunctional California ISO and Power Exchange spot markets  
23 had an adverse effect on the long-term bilateral markets in  
24 California, Nevada and Washington."

1

I think what it's saying is the complainants

1 haven't yet proved their case to our satisfaction, and that  
2 is true. Yet I disagree with the tone of this stark  
3 declaration that they have failed to show that the  
4 dysfunctional spot market had an adverse effect on the long-  
5 term bilateral markets in California. I'm surprised with  
6 the tone of this statement, especially given Commission  
7 precedent that I just quoted. The relationship between the  
8 spot market price and the long-term contract price seems to  
9 me to be rather obvious.

10 Thus the primary focus of the hearings, in my  
11 judgment, should be how this out-of-control spot market and  
12 the parties' expectations of future spot market conditions  
13 affected the negotiations of the contracts. Did the parties  
14 have, during this critical time, during these negotiations,  
15 did the parties have reason to expect that the Commission  
16 would allow prices to continue to soar indefinitely? During  
17 the timeframe of these negotiations would the agency  
18 forcefully intervene to control prices or was the solution  
19 for Californians to start digging?

20 Now my dissent. There's an aspect of today's  
21 order that I do not agree with, and I will write a separate  
22 dissent on that part of the order. The order sets for  
23 hearing the issue of whether the complainants should be  
24 bound to a Mobil Sierra public interest burden of proof or a

1 just and reasonable burden of proof. I don't think a

1 hearing is necessary to resolve this point. The just and  
2 reasonable standard should govern these proceedings.

3 First in interpreting the intent of a contract  
4 provision, we should look first to the plain language of the  
5 contract. The relevant contract here is the WSPP umbrella  
6 agreement, and the relevant part of the agreement is Section  
7 6.1. That section states, quote: "Nothing contained herein  
8 shall be construed as affecting in any way the right of the  
9 parties to jointly make application to the FERC for a change  
10 in the rates and charges, classification, service, terms or  
11 conditions affecting WSPP transactions under Section 205 of  
12 the Federal Power Act and pursuant to FERC rules and  
13 regulations promulgated thereunder."

14 That language defines the rights of the parties  
15 to jointly seek changes under Section 205 to the agreed upon  
16 terms. There's nothing that even hints or implies that the  
17 buyers' rights to seek changes under Section 206, which is  
18 what we have here, are restricted. Second, there is case  
19 law that holds that a customer must specifically weigh its  
20 Section 206 just and reasonable rights, and that a customer  
21 can waive its 205 rights without any effect on its 206 just  
22 and reasonable rights. That case is Papago Tribal Authority  
23 versus the FERC. There is no language in the WSPP contract  
24 whereby customers have explicitly waived their 206 just and

1 reasonable rights.

1           For these reasons, I believe that the just and  
2 reasonable standard is the proper standard in these cases,  
3 and that we need not send the question of the proper  
4 standard to the judge. We ought to resolve that ourselves  
5 right now. So I will be dissenting on that point. I  
6 appreciate Staff's hard work on this very difficult case.

7           As we approach these cases, I think we should  
8 keep a sense of balance. I agree that the sanctity of long-  
9 term contracts is important in a competitive market  
10 environment. But there will be no viable path to achieve  
11 our pro-competitive goals if consumers lack confidence that  
12 this Commission will insist on just and reasonable  
13 contracts. So we should keep these two competing points of  
14 view in mind.

15           I will be concurring in part and dissenting in  
16 part to this order. Thank you, Mr. Chairman.

17           CHAIRMAN WOOD: Thank you, Bill.

18           COMMISSIONER BREATHITT: This has been a doozy.

19 We've been trying to figure out what to do on these for a  
20 number of weeks and today's the day. Given the many  
21 complexities of these cases that we're consolidating, the  
22 level of information that we are asking the judge to collect  
23 and sort through and all of the contracts at issue, the  
24 Commission has set quite an ambitious date for issuing a

1 final decision of May 30th, 2003. But I agree, Mr.

1 Chairman, that we do need to get these issues resolved and  
2 put to bed for a lot of reasons.

3 So we're consolidating a number of dockets and  
4 we're setting forth an ambitious schedule for about this  
5 time next year, May 30th of next year.

6 The marketplace desperately needs certainty.  
7 Consumers need certainty. And it seems that every day we  
8 hear the story of a load-serving entity or a generation  
9 marketer teetering close to the edge of insolvency. A  
10 protracted hearing does not give us the certain we all seek.  
11 Nevertheless, this is the course we are choosing. Because  
12 in this instance, we all agree this is an appropriate course  
13 of action.

14 So it is my sincere hope that parties will come  
15 to the table and renegotiate these contracts as the Order  
16 directs and provides for under the mediation agreement. We  
17 direct that the parties come together. We hope that they  
18 will renegotiate as the Order provides for under the  
19 mediation section of the WSPP agreement. And if that  
20 doesn't work, which I'm not even going to go there yet, we  
21 do have the hearing.

22 So I am voting this Order out without concurrence  
23 or dissent. I think it strikes a good balance, and it's not  
24 going to take too terribly long to get this resolved, given

1           how long some cases go on here at the Commission and then

1 beyond. So I will be joining in the majority.

2 COMMISSIONER BROWNELL: Just a couple of things I  
3 would add. I think the uncertainty could be dealt with  
4 expeditiously if the parties took seriously the opportunity  
5 to enter into mediation. I was surprised and dismayed in  
6 fact that some of the parties who had agreed to this then  
7 refused to come to the table, and that's not something I  
8 think that this Commission approves of. In fact, we've  
9 encouraged parties, who after all know their own businesses  
10 better than we do, to avail themselves of that opportunity.

11 Because I think the uncertainty has hurt  
12 everyone, perhaps not equally in the market, but I think  
13 everyone, most particularly the customer who has a harder  
14 time dealing with uncertainty, but certainly I think the  
15 reaction of the investment community to these issues has  
16 penalized otherwise potentially successful companies.

17 Further, I'd like to commend the Staff for I  
18 think outlining very clearly the elements that need to be  
19 considered in terms of looking at these contracts. And by  
20 the way, those considerations for me is probably the most  
21 difficult thing that I've had to think about since we got  
22 here, because I think the sanctity of contracts is what the  
23 economy of this country is all about.

24 But I think we have to remember, there are more

1 than one or two elements that go into the dynamics of

1 negotiating a contract, and certainly the situation in the  
2 market is one of them, but it's one of many. We need to --  
3 and this hearing allows the Commission to lay out elements  
4 that influence the decision. What did the parties ask for?  
5 What were the elements of the negotiation? How were those  
6 contracts constructed? There are many, many, many elements  
7 that I think need to be considered as we weight what in fact  
8 did influence the outcome. And indeed, whether those  
9 outcomes were in fact a reflection of the realities of many  
10 of the existing dynamics.

11           So I appreciate the work that the Staff put into  
12 that to make sure that we have guided the parties in terms  
13 of developing their case in a way that we can understand.  
14 Because in fact at this point, there is insufficient  
15 evidence. And I think people will need to be very  
16 disciplined. I think we'll need to give this judge a bonus  
17 if he survives the masses of information that he will get.

18           And I think it is appropriate to set for hearing  
19 the standard by which we'll use, because there is a lack of  
20 clarity, and I think there's a lack of understanding of the  
21 intent. Many of the contracts were silent on I think the  
22 issue. So I'm comfortable with that. I'll be adding a  
23 concurrence to my vote. But I do appreciate the work that  
24 was done and I approve of the direction that we're taking,

1            although I will say again and again and again, mediation is

1 the way to resolve these. Thank you.

2 CHAIRMAN WOOD: All right.

3 COMMISSIONER MASSEY: I will be concurring in  
4 part and dissenting in party.

5 COMMISSIONER BREATHITT: Aye.

6 COMMISSIONER BROWNELL: Aye with concurrence.

7 CHAIRMAN WOOD: Aye. Before we close, I do want  
8 to say, because I get to.

9 (Laughter.)

10 CHAIRMAN WOOD: With some humble eating of pie to  
11 my dear friend Linda, I just read the 637 decision, and I do  
12 note that your concurrences which are dissents in part --  
13 I'm not sure what they are on gas.

14 COMMISSIONER BREATHITT: It was a dissent on that  
15 issue followed by two-line dissents in a number of cases  
16 referring back.

17 CHAIRMAN WOOD: We just call it the Linda forward  
18 haul, backward haul issue. And that's a shorthand for okay,  
19 Linda's going to dissent on that. Okay. So I read this  
20 decision the other day, and I'm like it's just like reading  
21 Linda's original dissent. And I'm like, gosh. So I tip my  
22 hat to you, my dear, and look forward.

23 COMMISSIONER BREATHITT: Thank you.

24 CHAIRMAN WOOD: And I do want to just say in

1           general, we've had a number of big decisions from courts

1           lately, three in the last 20 days, starting with 888 from  
2           the Supreme Court, 637 from the Court of Appeals and then  
3           yesterday or the day before, a court on the New York  
4           Independent System Operator Transmission Offices cases. And  
5           I appreciate, because you all don't get the face time, the  
6           folks that work in the Solicitor's office, and certainly at  
7           the Solicitor General for the Supreme Court case. But I  
8           know, Cindy, you and Marsha and your staffs work a lot with  
9           the solicitors in Dennis's office. But I just wanted to say  
10          that is a not-so-visible but very critical part of our broad  
11          regulatory agenda is not only to make good policy but to  
12          have it affirmed by courts. And I appreciate and admire the  
13          hard work of the Staff in that regard and to our friends at  
14          the Attorney General's office when they're involved as well.

15                 So I tip my hat to you all and thank you very  
16          much.

17                 Short day, but, boy, bring your pup tent for the  
18          next meeting.

19                 (Laughter.)

20                 CHAIRMAN WOOD: Meeting adjourned.

21                 (Whereupon, at 11:10 a.m. on Wednesday, April 10,  
22          2001, the meeting was adjourned.)

23

24

