

121 FERC ¶ 61,305
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Nevada Power Company Docket No. ER07-1409-000

Nevada Power Company and
Sierra Pacific Power Company Docket No. EL02-30-000

v.

Calpine Energy Services, L.P.

Nevada Power Company Docket No. TX07-2-000

ORDER APPROVING UNCONTESTED SETTLEMENT, ACCEPTING
TRANSMISSION SERVICE AGREEMENT AND DIRECTING TRANSMISSION
SERVICE, SUBJECT TO CONDITION

(Issued December 28, 2007)

1. On September 28, 2007, Nevada Power Company (Nevada Power) and Sierra Pacific Power Company (Sierra Pacific) (collectively, the Nevada Companies) filed a stipulation and agreed order resolving claims between Nevada Power Company, Sierra Pacific Power Company, Calpine Corporation, and Fireman's Fund Insurance Company (Settlement) pursuant to Rule 602 of the Commission's Rules of Practice and Procedure.¹ The Settlement resolves all issues related to a complaint filed in Docket No. EL02-30-000² by the Nevada Companies against Calpine Corporation (Calpine) and Calpine

¹ 18 C.F.R. § 385.602 (2007).

² The Commission consolidated this complaint with similar complaints in Docket Nos. EL02-28-000, EL02-29-000, EL02-31-000, EL02-32-000, EL02-33-000, EL02-34-000, EL02-38-000, EL02-39-000, EL02-43-000, and EL02-56-000. *See Nevada Power Co. and Sierra Pacific Power Co. v. Duke Energy Trading and Marketing L.L.P.*,

(continued....)

Energy Services, L.P. As part of the Settlement and pursuant to section 205 of the Federal Power Act (FPA),³ Nevada Power also filed a transmission service agreement between Nevada Power and Calpine (400 MW TSA). In addition, pursuant to the Settlement, Nevada Power filed an application under section 211 of the FPA⁴ and section 5.2 of the Sierra Pacific Resources Open Access Transmission Tariff (OATT) requesting that, upon the Settlement becoming effective, the Commission direct Nevada Power to provide transmission service under the 400 MW TSA. As discussed below, the Commission approves the Settlement, accepts the 400 megawatt TSA for filing, effective January 1, 2008 as requested and grants Nevada Power's request on behalf of Calpine for an order directing transmission service from Nevada Power, subject to condition.

Docket Nos. EL02-30-000 and ER07-1409-000

2. The Nevada Companies state that the Settlement resolves all issues pending in Docket No. EL02-30-000 as well as claims, actions and law suits pending in state and federal courts relating to two transmission service agreements entered into by Nevada Power and Calpine and a related settlement agreement approved by the Commission in 2002.⁵ The Nevada Companies also state that the Settlement was submitted to the United States Bankruptcy Court for the Southern District of New York (Bankruptcy Court) on September 19, 2007, and that the Settlement will become effective when the Bankruptcy Court issues a nonappealable order approving the Settlement. The Settlement reflects an allowance of two unsecured claims against Calpine in favor of the Nevada Companies totaling \$3 million.

3. In addition, the Nevada Companies state that the 400 MW TSA, which has been executed by both parties, provides for long-term point-to-point transmission service from the Harry Allen 500 kV substation to the Mead 230 kV substation. They state that if the

99 FERC ¶ 61,047, *order on reh'g*, 100 FERC ¶ 61,195, *order on reh'g*, 100 FERC ¶ 61,273, *initial decision sub nom. Nevada Power Co. and Sierra Pacific Power Co. v. Enron Power Marketing, Inc.*, 101 FERC ¶ 63,031 (2002), *order on reh'g* 103 FERC ¶ 61,353, *order on reh'g*, 105 FERC ¶ 61,185 (2003), *remanded sub. nom. Public Utility District No. 1 of Snohomish County Washington v. FERC*, 471 F.3d 1053 (9th Cir. 2006), *cert. granted*, No. 06-1457 (U.S. Sept. 25, 2007).

The Settlement only addresses the issues raised in Docket No. EL02-30-000.

³ 16 U.S.C. § 824d (2000).

⁴ 16 U.S.C. § 824j (2000).

⁵ *See Nevada Power Co.*, 99 FERC ¶ 61,301 (2002).

Settlement is approved by the Bankruptcy Court certain bankruptcy claims filed by Nevada Power against Calpine will be amended to reflect allowance of a general unsecured claim against Calpine in favor of Nevada Power in the amount of \$18 million. Under the Settlement, Nevada Power agrees to treat the \$18 million claim as a prepayment for the 400 MW TSA. The Nevada Companies state that the term of the 400 MW TSA will begin on January 1, 2008 and will end approximately March 31, 2010, assuming no change in Nevada Power's OATT service schedules. In the event of changes in Nevada Power's OATT service schedules, the 400 MW TSA will end on the date the \$18 million prepayment is depleted based on the applicable OATT service rate schedule charges.

4. The Nevada Companies request that the Commission issue an order dismissing the complaint filed by Nevada Power and Sierra Pacific against Calpine in Docket No. EL02-30-000, with prejudice, terminate that docket, accept the 400 MW TSA for filing effective January 1, 2008 and approve the Settlement as being in the public interest.⁶

Notice of Filing

5. Notice of the Nevada Companies' filing in Docket Nos. EL02-30-000 and ER07-1409-000 was published in the *Federal Register*, 72 Fed. Reg. 57,924 (2007), with interventions, protests and comments due on or before October 19, 2007. Calpine submitted a timely motion to intervene, comments in support of the filing, and a request for expedited approval of the Settlement. Commission Trial Staff submitted initial comments in support of the Settlement.

Discussion

Procedural Matters

6. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), the timely, unopposed motion to intervene serves to make the entity that filed it a party to this proceeding.

⁶ In footnote 3 of the Explanatory Statement, the Nevada Companies alternatively request that the Commission approve as in the public interest so much of the Settlement as it deems necessary to (1) dismiss with prejudice FERC Docket No. EL02-30-000, and (2) accept for filing the new 400 MW TSA and accept for filing the subsequent notice that Nevada Power will file providing notice that the old 400 MW TSA has been terminated.

Substantive Matters

7. The Settlement resolves all of the issues pending in Docket No. EL02-30-000 concerning long-term “forward” contracts negotiated in the bilateral markets in California, Washington and Nevada between the Nevada Companies and Calpine between April 18, 2001 and June 20, 2001. The Settlement resolves all claims, actions, and lawsuits pending related to two transmission service agreements entered into between Calpine and Nevada Power and a related settlement agreement approved by the Commission in 2002.⁷ The Settlement is fair and reasonable and in the public interest and is hereby approved effective upon approval of the Settlement by the Bankruptcy Court. The Commission’s approval of the Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

8. The standard of review for any modifications to this Settlement made by any of the settling parties or by the Commission acting *sua sponte* is the “public interest” standard under the *Mobile-Sierra* doctrine.⁸ Under limited circumstances, such as when the agreement has broad applicability, the Commission has the discretion to decline to be so bound.⁹ In this case, we find that the public interest standard should apply for any modifications to this Settlement proposed by any of the settling parties without agreement of the other settling parties or by the Commission acting *sua sponte*.

9. Further, we dismiss with prejudice the complaint filed by Nevada Power and Sierra Pacific against Calpine in Docket No. EL02-30-000, terminate Docket No. EL02-30-000,¹⁰ and accept the 400 MW TSA for filing effective January 1, 2008, subject to approval of the Settlement by the Bankruptcy Court. In addition, we direct the Nevada Companies to file a notice to inform the Commission upon approval of the Settlement by the Bankruptcy Court.

⁷ See *Nevada Power Co.*, 99 FERC ¶ 61,301 (2002).

⁸ *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956). As a general matter, parties may bind the Commission to a public interest standard of review. *Northeast Utilities Service Co. v. FERC*, 993 F.2d 937, 960-62 (1st Cir. 1993).

⁹ *Maine Public Utilities Commission v. FERC*, 454 F.3d 278, 286-87 (D.C. Cir. 2006).

¹⁰ Termination of Docket No. EL02-30-000 does not terminate or affect the other dockets which were consolidated with Docket No. EL02-30-000.

Docket No. TX07-2-000

10. In its application under section 211 of the FPA and section 5.2 of the Sierra Pacific Resources OATT¹¹ Nevada Power requests that the Commission direct Nevada Power to provide the transmission service under the 400 MW TSA upon the Settlement becoming effective. Nevada Power states that the purpose of its section 211 application is to preserve the tax-exempt status of its local furnishing bonds.¹² In addition, Nevada Power

¹¹ In Order Nos. 888 and 888-A, the Commission recognized that open access transmission service might jeopardize the tax-exempt status of local furnishing bonds. Accordingly, the Commission required any public utility subject to Order No. 888 that had financed transmission facilities with local furnishing bonds to include in its tariff a provision that it will not contest the issuance of an order under section 211 of the FPA requiring the provision of such service and will, within ten days of receiving a written request by an applicant, file with the Commission a written waiver of its rights to a request for service from the applicant under section 213(a) of the FPA and to the issuance of a proposed order under section 212(c). *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002) (Order No. 888). This provision is contained in section 5 of Sierra Pacific Resources' OATT.

¹² Sections 142(a)(8) and 142(f) of the Internal Revenue Code (IRS Code) of 1986 provide an exemption, for federal income tax purposes, for the interest on certain debt issued by a local government to provide financing for eligible facilities that are part of a system for the "local furnishing" of electric energy. "Local furnishing" of electric energy is defined as furnishing service "solely within the area consisting of (A) a city and 1 contiguous county, or (B) 2 contiguous counties." 26 U.S.C. §§ 142(f)(1)(2000). The Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (1992), amended section 142(f)(2)(A) of the IRS Code to preserve the tax-exempt status of interest on local furnishing bonds if other transmission services were provided pursuant to a Commission order issued under section 211 or section 213 of the FPA and the portion of the cost of the facilities used to provide the directed transmission service that is financed with tax-exempt bonds is not greater than the portion of the cost of the facility which is allocable to the local furnishing of electric energy.

states that it waives its right to a prior request for service under section 213(a) of the FPA¹³ and the issuance of a proposed order under section 212(c) of the FPA.¹⁴

Notice of Filing

11. Notice of Nevada Power's filing in Docket No. TX07-2-000 was published in the *Federal Register*, 72 Fed. Reg. 58,837 (2007), with interventions and protests due on or before October 29, 2007. Calpine filed a timely motion to intervene, comments in support of Nevada Power's application and a request for expedited approval of Nevada Power's application.

Discussion

Procedural Matters

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), the notices of intervention and timely, unopposed motion to intervene serves to make the entity that filed it a party to this proceeding.

Substantive Matters

A. Local Furnishing Bonds and Waiver of Certain Procedural Rights Under Sections 211 and 212 of the FPA

13. In its filing, Nevada Power waives its right to a prior request for service under section 213(a) of the FPA and to the issuance of a proposed order under section 212(c) of the FPA. The Commission stated in Order No. 888-A that "upon receipt of the transmission provider's waiver of its rights to a request for service under section 213(a) and to the issuance of a proposed order under section 212(c), [the Commission] shall issue an order under section 211."¹⁵ Accordingly, as discussed further below, the Commission grants Nevada Power's request and issues an order under section 211 of the FPA directing Nevada Power to provide the requested transmission service to Calpine. As Nevada Power has waived its rights to a proposed order under section 212(c), this order is a final order, effective upon the effective date of the Settlement as discussed above.

¹³ 16 U.S.C. § 824l (2000).

¹⁴ 16 U.S.C. § 824k (2000).

¹⁵ Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, at 30,296.

B. Requirements of Sections 211 and 212

14. As discussed below, we find that Nevada Power's application meets the requirem

1. Jurisdiction

15. Under section 211(a) of the FPA, any electric utility, federal power marketing agency, or any other person generating electric energy for sale for resale may apply to the Commission for an order requiring a transmitting utility to provide transmission services to the applicant. Additionally, the Commission has previously recognized that “[t]here is nothing in the plain language or legislative history of section 211 that prohibits a customer from designating an agent, including the transmitting utility from whom it seeks transmission service, to apply on its behalf.”¹⁶ In the abovementioned Settlement, Calpine—an electric utility and customer of Nevada Power—explicitly agreed that Nevada Power should file this section 211 application for an order directing service on Calpine's behalf. Therefore, Nevada Power is authorized to request an order on Calpine's behalf.

2. Good Faith Request

16. Because Nevada Power has waived its rights under sections 211 and 213 to a request for service and is willing to provide the transmission service requested by Calpine under the Settlement, compliance with this requirement is not necessary here.

3. Public Interest

17. Section 211(a) of the FPA provides that the Commission may issue an order directing transmission service if the order meets the requirements of section 212 and would otherwise be in the public interest. In *Florida Municipal Power Agency v. Florida Power & Light Company*,¹⁷ the Commission determined that, as a general matter, the availability of transmission service enhances competition in power markets by increasing power supply options of buyers and sales options of sellers, and that this should result in lower costs to consumers.

18. The same principles apply here. Accordingly, the Commission finds that the public interest will be served by directing Nevada Power to provide the requested transmission service to Calpine.

¹⁶ *Nevada Power Co.*, 110 FERC ¶ 61,029, at P 9 (2005).

¹⁷ 65 FERC ¶ 61,125, *reh'g dismissed*, 65 FERC ¶ 61,372 (1993), *final order*, 67 FERC ¶ 61,167 (1994), *order on reh'g*, 74 FERC ¶ 61,006 (1996), *order on reh'g*, 96 FERC ¶ 61,130 (2001).

4. Reliability

19. Section 211(b) precludes a transmission order that would unreasonably impair the continued reliability of affected electric systems. We find that ordering the requested transmission service will not unreasonably impair the continued reliability of affected electrical systems.

5. Effect on Contracts or Rate Schedules

20. Section 211(c)(2) provides that no order may be issued under section 211(a) that requires the transmitting utility subject to the order to transmit, during any period, an amount of electric energy that replaces any amount of electric energy that is required to be provided to the applicant pursuant to a contract during such period or that the utility subject to the order currently provides to the applicant pursuant to a rate schedule on file with the Commission. Section 211(c)(2) has been interpreted to prohibit the issuance of an order directing the transmission of electric energy to a transmission customer, which electric energy the customer is currently purchasing from the transmission provider.¹⁸ Here, however, Nevada Power states that it is not selling to Calpine the energy that is to be transmitted under the 400 MW TSA. Therefore, section 211(c)(2) does not preclude an order for transmission service in this case.

6. Rates

21. Section 212(a) requires that the transmitting utility subject to an order under section 211 provide wholesale transmission services at rates, charges, terms and conditions that permit the recovery by such utility of all the costs incurred in connection with the transmission services and necessary associated services. Section 212(a) further provides, to the extent practicable, for the recovery of such costs from the applicant for such order and not from a transmitting utility's existing wholesale, retail, and transmission customers. The order requested here would not shift costs to other customers because transmission service will be provided under the rates, terms, and conditions in Nevada Power's OATT. We find that this satisfies the requirements of section 212(a).

The Commission orders:

(A) The Settlement filed in Docket Nos. EL02-30-000 and ER07-1409-000 is hereby conditionally approved, subject to the issuance of a nonappealable order by the Bankruptcy Court, as discussed in the body of this order.

¹⁸ *Nevada Power Co.*, 110 FERC ¶ 61,029, at P 13 (2005) (citing *Kiowa Power Partners, LLC*, 99 FERC ¶ 61,251 at P 41 (2002)).

(B) Nevada Power's 400 MW TSA is hereby accepted for filing, effective January 1, 2008, as discussed in the body of this order.

(C) Nevada Power is hereby directed, pursuant to section 211 of the FPA, to provide transmission services to Calpine under the applicable tariffs and rate schedules, as discussed in the body of this order.

(D) The complaint filed by Nevada Power and Sierra Pacific against Calpine in Docket No. EL02-30-000 is dismissed with prejudice and Docket No. EL02-30-000 is terminated, subject to condition, as discussed in the body of this order.

(E) The Nevada Companies are hereby directed to file a notice to inform the Commission upon approval of the Settlement by the Bankruptcy Court, as discussed in the body of the order.

By the Commission. Commissioner Kelly concurring with a separate statement attached.
Commissioner Wellinghoff dissenting in part with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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KELLY, Commissioner, *concurring*:

The parties to this settlement request that the *Mobile-Sierra* “public interest” standard of review apply with respect to any future modifications to the settlement, whether proposed by a party, a non-party or the Commission acting *sua sponte*. This uncontested settlement resolves issues related to transmission service agreements entered into between Nevada Power Company and Calpine Corporation. These agreements are bilateral contracts between the parties, similar to the contracts at issue in *Mobile*¹ and *Sierra*,² and they do not appear to affect non-settling parties. Therefore, while I do not agree with the order’s statements regarding the applicability of the *Mobile-Sierra* “public interest” standard of review, I concur with the order’s approval of this settlement agreement.

Suedeem G. Kelly

¹ *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) (*Mobile*).

² *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Sierra*).

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WELLINGHOFF, Commissioner, dissenting in part:

The parties in this case have asked the Commission to apply the “public interest” standard of review when it considers future changes to the instant settlement that may be sought by any of the parties, a non-party, or the Commission acting *sua sponte*.

Because the facts of this case do not satisfy the standards that I identified in *Entergy Services, Inc.*,¹ I believe that it is inappropriate for the Commission to grant the parties’ request and agree to apply the “public interest” standard to future changes to the settlement sought by a non-party or the Commission acting *sua sponte*. In addition, for the reasons that I identified in *Southwestern Public Service Co.*,² I disagree with the Commission’s characterization in this order of case law on the applicability of the “public interest” standard.

For these reasons, I respectfully dissent in part.

Jon Wellinghoff
Commissioner

¹ 117 FERC ¶ 61,055 (2006).

² 117 FERC ¶ 61,149 (2006).