126 FERC ¶ 61,283
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Suedeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Sierra Pacific Power Company Docket No. ER01-1527-011

Nevada Power Company Docket No. ER01-1529-011

ORDER ON CHANGE IN STATUS FILING

(Issued March 27, 2009)

1. In this order, the Commission accepts a notice of change in status filed by Sierra Pacific Power Company (Sierra Pacific) and Nevada Power Company (Nevada Power) (collectively, the Companies) regarding what the Companies represent are non-material changes in status relating to their market-based rate authorizations.[1] As discussed below, the Commission concludes that the Companies continue to satisfy the Commission's standards for market-based rate authority.

I. Background

2. On June 10, 2008, the Companies filed this notification pursuant to the reporting requirements of Order No. 652[2] for sellers with market-based rate authority and supplemental guidance on the scope of those reporting requirements in Order Nos. 697

[1] Sierra Pacific and Nevada Power were granted separate market-based rate authorizations by the Commission for wholesale sales outside of their respective balancing authority areas in Nevada. *See Sierra Pacific Power Co. and Nevada Power Co.*, 95 FERC ¶ 61,193, *reh'g dismissed*, 96 FERC ¶ 61,050 (2001). Sierra Pacific and Nevada Power do not have market-based rate authorization in their Nevada balancing authority areas.

[2] *Reporting Requirements for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175 (2005), *order on reh'g*, 111 FERC ¶ 61,413 (2005).

and 697-A.[3] The Companies explain that this notification is supplemental to a notice of change in status that they filed on May 8, 2008 in Docket Nos. ER01-1527-010 and ER01-1529-010 (May 8, 2008 notification).[4] They explain that the purpose of the instant notification is to notify the Commission of three additional generation resource acquisitions since the May 8, 2008 notification that, in sum, exceed the net 100 MW nameplate capacity reporting threshold.[5] The three generation resources acquired are: (1) the June 1, 2008 initiation of power deliveries to Nevada Power under a new long-term seasonal tolling agreement with Dynegy Power Marketing, Inc. (Dynegy); (2) the May 12, 2008 initiation of test power deliveries from Block No. 2 of Nevada Power's new Clark Peaking Station; and (3) the June 1, 2008 initiation of power deliveries to Sierra Pacific under a new long-term agreement with Newmont Nevada Energy Investment LLC (Newmont). According to the Companies, none of the three new resource additions addressed in the instant notification would have affected the Commission's prior market power determinations for Nevada Power or Sierra Pacific.

Deliveries to Nevada Power under the Tolling Agreement with Dynegy

3. Under the seasonal tolling agreement with Dynegy, Nevada Power is entitled to schedule power deliveries of up to the full capacity of Dynegy's Griffith Energy Project from June through September of each year from 2008 to 2017. The Griffith Energy Project Plant has a nameplate rating of 654 MW. In addition, the instant notification also reports and considers a net 5 MW increase in capacity resulting from: (1) the termination of a prior 45 MW qualifying facility purchase agreement with LV Cogen 1; and (2) the June 1, 2008 initiation of a 50 MW tolling agreement for the output of the same facility.

4. According to the Companies, Nevada Power's tolling agreement with Dynegy will not change any of the prior screen results for Nevada Power's first-tier markets. They state that all of the seasonal peaking capacity obtained from the tolling agreement with

[3] *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252 (2007) (Order No. 697), *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 (2008), *clarified*, 124 FERC ¶ 61,055 (2008), *order on reh'g*, Order No. 697-B, 73 Fed. Reg. 79,610 (Dec. 30, 2008), FERC Stats. & Regs. ¶ 31,285 (2008).

[4] The Companies' May 8, 2008 notification was accepted by letter order issued on February 6, 2009.

[5] *See* Order No. 652, FERC Stats. & Regs. ¶ 31,175 at P 68, *clarified*, 111 FERC ¶ 61,413 at P 25 (establishing the net 100 MW reporting threshold).

Dynegy is fully committed to serve Nevada Power's native load during the summer peak months and no power will flow under the contract during any other seasonal periods.

Test Power Deliveries from Block No. 2 of Nevada Power's Clark Peaking Station

5. The Companies state that Block No. 1 and Block No. 2 of the Clark Station each consists of four separate gas-fired combustion (peaking) turbines, and each has a nameplate rating of 242 MW. Because test power deliveries from Block No. 1 were to begin in June 2008, and test power deliveries from Block No. 2 were to begin on May 12, 2008, the instant notification includes the combined incremental capacity from both Block Nos. 1 and 2, for a total resource addition of 484 MW.

6. The Companies state that much of the incremental peaking capacity from Clark Block Nos. 1 and 2 is "uncommitted" during off-peak periods. The Companies represent that this results in nominal violations of the indicative market share screen in one of Nevada Power's first-tier markets. According to the Companies, the high variable cost of this gas-fired, peaking capacity renders it "non-economic" under the delivered price test (DPT) and the absence of any DPT screen failures rebuts any presumption of market power.[6]

Deliveries to Sierra Pacific under the Long-Term Agreement with Newmont

7. The Companies state that Sierra Pacific's long-term agreement with Newmont is a unit contingent agreement under which Sierra Pacific will purchase the output of a new 209 MW coal-fired plant in northern Nevada for a term of 15 years.

8. The Companies represent that much of the Newmont capacity is committed to Sierra Pacific's native load requirements during the summer season and the small increment of uncommitted capacity during other seasons does not materially change prior screen results in any of Sierra Pacific's first-tier markets.

9. Further, the Companies state that, because the changes reported in the instant notification (as well as those reported in the May 8, 2008 notification) concern only changes in generation and do not involve any transmission facilities or other inputs to generation, there are no concerns regarding vertical market power or barriers to entry and the Commission's prior determinations in these areas are not affected. The Companies also state that they have not imposed barriers to entry in the past and will not impose such barriers in the future.

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[6] Companies' June 10 Filing at 3-4, citing Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 13.

II. Notice of Filing

10. Notice of the Companies' filing was published in the *Federal Register*, 73 Fed. Reg. 35,683 (2008), with motions to intervene and protests due on or before July 1, 2008. None were filed.

III. Discussion

11. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, horizontal and vertical market power.[7] As discussed below, the Commission concludes that the Companies satisfy the Commission's standards for market-based rate authority.

Horizontal Market Power

12. The Commission adopted two indicative screens for assessing horizontal market power, the pivotal supplier screen and the wholesale market share screen.[8] Market-based rate sellers that fail either screen will be rebuttably presumed to have market power but may present alternative evidence such as a DPT study to rebut the results of the indicative screens, i.e., to demonstrate that despite a screen failure, they do not have market power.[9]

13. With respect to the additional resources under Nevada Power's tolling agreement with Dynegy and Sierra Pacific's long-term agreement with Newmont, we find that the Companies continue to satisfy the Commission's requirements for market-based rate authority and accept their instant notification with respect to those additional resources.

14. The Companies report limited market share screen failures in the Western Area Power Administration-Lower Colorado (Western Area Lower Colorado) market during the winter seasonal period. As discussed more fully below, after reviewing the Companies' DPT analysis with respect to Block Nos. 1 and 2 of the Clark Station, the Commission finds that the Companies have rebutted the presumption of market power as it relates to the Commission's horizontal market power analysis for market-based rate authorization. Accordingly, the Companies satisfy the Commission's horizontal market power standard for the grant of market-based rate authority.

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[7] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 62, 399, 408, and 440.

[8] *Id*. P 62.

[9] *Id*. P 13, 75.

A. Delivered Price Test

15. As the Commission has previously explained, the DPT identifies potential suppliers based on market prices, input costs, and transmission availability, and calculates each supplier's economic capacity and available economic capacity[10] for each season/load period.[11] Under the DPT, applicants must also calculate market concentration using the Hirschman-Herfindahl Index (HHI).[12] An HHI of less than 2,500 in the relevant market for all season/load periods, in combination with a demonstration that the applicants are not pivotal and do not possess more than a 20 percent market share in any of the season/load periods would constitute a showing of a lack of market power, absent compelling contrary evidence from intervenors. A detailed description of the mechanics of the DPT is provided in Order No. 697.[13]

16. As with our initial screens, applicants and intervenors may present evidence such as historical wholesale sales data, which can be used to calculate market shares and market concentration and to refute or support the results of the DPT.

B. Western Area Lower Colorado Balancing Authority Area

17. The Companies' DPT analysis for the Western Area Lower Colorado balancing authority area indicates that the results for the pivotal supplier, market share and market concentration analyses under the available economic capacity measure are below the thresholds set forth in Order No. 697 for all ten season/load periods under study.[14]

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[10] "Economic capacity" is the total generation capacity of a potential supplier that can compete in the destination market, given its costs and transmission availability. "Available economic capacity" is derived by subtracting each potential supplier's native load obligation from its total capacity and adjusting transmission availability accordingly. *See* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at n.78.

[11] Super-peak, peak, and off-peak, for winter, shoulder, and summer periods and an additional highest super-peak for the summer.

[12] The HHI is the sum of the squared market shares. For example, in a market with five equal size firms, each would have a 20 percent market share. For that market, HHI = $(20)^2 + (20)^2 + (20)^2 + (20)^2 + (20)^2 = 400 + 400 + 400 + 400 + 400 = 2{,}000$.

[13] FERC Stats. & Regs. ¶ 31,252 at P 104-117.

[14] *Id*. P 113.

18. The Companies assert they are not pivotal under the available economic capacity measure. The Companies explain that they do not have available economic capacity during many periods as their capacity is either used to serve load or much of their uncommitted capacity is higher cost gas-fired peaking generation. The Companies state that, to assess wholesale customers' ability to find substitutes among potential suppliers under a range of different demand and supply conditions, the Companies conducted the DPT analysis for three to four time periods within each season from winter 2005/2006 to fall 2007, covering a total of 14 time periods.[15] The Companies' combined market shares in all 14 time periods are less than five percent. All of the HHIs are below 2,500 with the exception of three off-peak periods.[16] The Companies represent that they have a zero percent market share in the Western Area Lower Colorado balancing authority area during these three off-peak periods, and therefore have no ability to exercise market power in these periods.

19. In addition, the Companies represent that there are no screen failures in any of the time periods under the economic capacity measure. The HHIs in the Western Area Lower Colorado balancing authority area for all 14 time periods range from 610 to 1,527, below the Commission's threshold of 2,500, and the combined market shares of the Companies are below 14 percent. Furthermore, the total competing supply in the Western Area Lower Colorado destination market is at least four times the amount of load in each period, demonstrating that the Companies are not a pivotal supplier.

C. <u>Commission Determination</u>

20. After weighing all of the relevant factors, the Commission finds that, on balance, based on the Companies' DPT analysis in the Western Area Lower Colorado balancing authority area, the Companies have rebutted the presumption of horizontal market power and satisfy the Commission's horizontal market power standard for the grant of market-

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[15] The Commission requires that a total of ten season/load levels for studied years be analyzed: Super-Peak, Peak, and Off-Peak, for winter, shoulder, and summer periods, and an extreme Summer Peak (*see AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018, at Appendix F (2004)). The examination of more than ten season/load levels for performing a DPT analysis can be considered a more accurate measure of a company's position in the market than that of only ten season/load levels because the sampling hours for studied years are expanded, which, in turn, encourages the most complete analysis of competitive conditions in the markets as the data allow. *See* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 111.

[16] The Companies' HHIs for these three off-peak periods are 4,320 in the summer, 2,920 in the winter, and 2,568 in the spring.

based rate authority.[17] As noted above, the Companies' DPT analysis for the Western Area Lower Colorado balancing authority area varies depending on whether the economic capacity or available economic capacity measure is used. As the Commission has stated, the DPT does not function like the initial screens – i.e., failure of either the economic capacity or available economic capacity analyses does not result in an automatic failure of the test as a whole. Neither measure is definitive; the Commission weighs the results of both the economic capacity and the available economic capacity analyses and considers the arguments of the parties.[18]

21. The Commission has recognized that not all generation capacity is available all of the time to compete in wholesale markets and that some accounting for native load requirements is warranted.[19] In the DPT analysis, available economic capacity accounts for native load requirements. The Companies' DPT indicates that the market shares are below 20 percent in all periods. With the exception of three off-peak periods, the HHIs are below 2,500. Using the available economic capacity measure, the Companies' market share is zero percent during those three off-peak periods. Because the Companies have no market shares in the Western Area Lower Colorado balancing authority area for these three off-peak periods, they therefore have no ability to exercise market power in these periods.

22. While available economic capacity reflects native load obligations when assessing the potential for horizontal market power, a clear distinction between generation serving native load and generation competing for wholesale load is not easily made.[20] The Commission therefore also considers economic capacity in assessing horizontal market power. The Companies' DPT analysis indicates that, using the economic capacity measure, the Companies are not a pivotal supplier in any season/load periods. Further, using the economic capacity measure, the Companies' market shares range from one percent to four percent, which is below the 20 percent threshold for all of the season/load periods under study. Additionally, using the economic capacity measure, the Companies' market concentration analysis indicates that the HHIs are below 2,500 for all season/load periods under study (the lowest being 610 and the highest being 1,527).

23. As described above, the Companies' DPT results using available economic capacity and economic capacity measures are below the market share thresholds.

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[17] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 111.

[18] *Id*. P 112.

[19] *Id*.

[20] *Id.* P 112.

Accordingly, after weighing all of the relevant factors, the Commission concludes that, on balance, based on the Companies' DPT analysis, the Companies have rebutted the presumption of market power and satisfy the Commission's horizontal market power standard for the grant of market-based rate authority in the Western Area Lower Colorado balancing authority area.

Vertical Market Power and Barriers to Entry

24. As noted above, the Companies represent that the changes reported in the instant notification (as well as those reported in the May 8, 2008 notification) concern only changes in generation and do not involve any transmission facilities or other inputs to generation. The Companies therefore assert that there are no concerns regarding vertical market power or barriers to entry and the Commission's prior determinations in these areas are not affected. The Companies also state that they have not imposed barriers to entry in the past and will not impose such barriers in the future. Based on these representations, we find that the Companies' instant notification raises no issues concerning vertical market power.

The Commission orders:

The Companies' notification of change in status filing is hereby accepted for filing, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.