

129 FERC ¶ 61,266
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Nevada Power Company and Sierra Docket Nos. EL02-38-000
Pacific Power Company EL02-38-007

v.

American Electric Power Service
Corporation

ORDER APPROVING UNCONTESTED SETTLEMENT

(Issued December 23, 2009)

1. In this order, the Commission approves an uncontested settlement filed on November 20, 2009 between NV Energy, Inc. (NV Energy), formerly Nevada Power Company (NPC) and Sierra Pacific Power Company (SPPC), the Office of the Nevada Attorney General, Bureau of Consumer Protection (Nev-BCP), and American Electric Power Service Corporation (AEP) (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 AEP's forward sales contracts executed with NV Energy's predecessors, NPC and SPPC, between August 4, 2000 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

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

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 spot markets had produced unjust and 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

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. EL02-38-000 (December 20, 2001). Nev-BCP also intervened in other related dockets.

⁴ *Nevada Power*, 99 FERC ¶ 61,047 at 61,191.

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

⁶ *Nevada Power*, 99 FERC ¶ 61,047 at 61,191.

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

⁸ *Id.* P 95.

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 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

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

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.

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

8. On November 20, 2009, the Parties submitted the Settlement as a “black box” settlement. They noted that the Settlement was a result of informal settlement 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 Rule 602(f), initial comments were due on or before December 10, 2009, and reply comments were due on or before December 21, 2009.¹⁹ No comments were filed concerning the Settlement.

III. The Terms of the Settlement

10. The Parties state that the Settlement is a black box settlement. The principal elements of the Settlement are AEP’s one-time, lump-sum \$7.6 million payment to NV Energy in return for NV Energy’s and the Nev-BCP’s release of all claims against AEP related to certain of AEP’s forward sales contracts executed with NV Energy between August 4, 2000 and June 20, 2001, at market-based rates.²⁰ 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 AEP to NV Energy.²¹ The Parties state that they intend the Settlement to be a full and final settlement of the issues in the proceeding.

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

¹⁶ *Id.* P 33.

¹⁷ Explanatory Statement at 2-3.

¹⁸ 18 C.F.R. § 385.602 (2009).

¹⁹ *Id.* § 385.602(f).

²⁰ Explanatory Statement at 2.

²¹ *Id.* at 5.

11. Under the Settlement, AEP 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 settlement payment if the payment is made on or before the thirtieth day following the effective date of the Settlement.²²

12. 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 AEP has paid the settlement payment to NV Energy, AEP 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, AEP will be deemed to be a non-party in the above-captioned proceeding and any consolidated matters.²³

13. With respect to future changes to the Settlement itself, page 8 of the Settlement Agreement 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 without the consent of all other Parties after the Settlement 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

14. 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.

15. 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. EL02-38-000 and EL02-38-007.

²² Settlement Agreement at 4-5.

²³ *Id.* at 6.

The Commission orders:

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.