

142 FERC ¶ 61,166
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

NV Energy Operating Companies

Docket No. ER13-684-000

City of Fallon, Nevada
Truckee Donner Public Utility District

Docket No. EL13-44-000

v.

NV Energy Operating Companies

ORDER REJECTING IN PART, ACCEPTING IN PART AND SUSPENDING
PROPOSED RATES, GRANTING COMPLAINT IN PART, ESTABLISHING
HEARING AND SETTLEMENT JUDGE PROCEDURES AND CONSOLIDATING
PROCEEDINGS

(Issued March 1, 2013)

1. On December 31, 2012, in Docket No. ER13-684-000, Nevada Power and Sierra Pacific Power (collectively, NV Energy) filed revisions to the energy imbalance service provisions contained in Schedule 4 of the NV Energy Operating Companies Open Access Transmission Tariff (Tariff or OATT) pursuant to section 205 of the Federal Power Act (FPA).¹ In its filing, NV Energy requests an effective date of March 1, 2013. On January 22, 2013, in Docket No. EL13-44-000, the City of Fallon, Nevada (Fallon) and Truckee Donner Public Utility District (Truckee Donner) (collectively Fallon/Truckee Donner or Complainants) filed a complaint pursuant to sections 206 and 306 of the FPA and Rules 206 and 212 of the Commission's Rules of Practice and Procedure,² challenging NV Energy's current and proposed imbalance provisions. As discussed

¹ 16 U.S.C. § 824d (2006).

² 16 U.S.C. §§ 824e, 825e (2006); 18 C.F.R. §§ 385.206, 385.212 (2012).

below, the Commission rejects in part and accepts in part NV Energy's revised tariff provisions, suspends them for a nominal period and makes them effective March 1, 2013, subject to refund and to hearing and settlement judge procedures. In addition, the Commission grants Fallon/Truckee Donner's Complaint in part and consolidates it with the hearing and settlement judge procedures in Docket No. ER13-684-000.

I. Background

2. In 2003, the Commission approved, as part of a comprehensive settlement regarding transmission and ancillary service rates in Docket Nos. ER02-2609-000 and ER03-37-000,³ a series of energy imbalance provisions proposed by NV Energy which deviated from the then-current Order No. 888 *pro forma* OATT (2003 Settlement).⁴ The provisions resulted from extensive negotiations and reflected unique factors that affected the NV Energy system at the time. The Commission subsequently issued Order No. 890, which, among other things, modified certain energy imbalance and generator imbalance provisions under the *pro forma* OATT.⁵ In 2007, the Commission again reviewed the previously-approved energy imbalance provisions when NV Energy sought to retain them on compliance with Order No. 890. The Commission found the provisions to be consistent with the Order No. 890 *pro forma* OATT.⁶ In the current filing, NV Energy proposes to change certain aspects of the Schedule 4 energy imbalance provisions established by the 2003 Settlement.

³ *Sierra Pacific Power Co.*, 104 FERC ¶ 61,003 (2003).

⁴ *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).

⁵ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009) (Order No. 890).

⁶ *Sierra Pacific Resources Operating Cos.*, 120 FERC ¶ 61,039, at P 13 (2007).

A. NV Energy's Proposed OATT Revisions in Docket No. ER13-684-000

3. NV Energy explains that it currently calculates its Schedule 4 energy imbalance charges based on either: (1) the highest hourly system incremental generation cost for each of the NV Energy Operating Companies' zones, i.e., the Sierra Pacific Power zone (Zone A) and the Nevada Power zone (Zone B); or (2) the hourly market price proxy calculated from the appropriate daily Dow Jones U.S. Electricity Price Index for the applicable zone.⁷ NV Energy then "shapes" the zone-specific market price proxies by a second market price index, in order to derive an hourly, rather than a daily, imbalance price. NV Energy calculates the market price proxy for Zone A as the California-Oregon Border (COB) index price shaped by the Mid-Columbia (Mid-C) hourly index. NV Energy calculates the Zone B proxy as the Mead/Marketplace Index price shaped by the hourly Palo Verde index price.⁸

4. NV Energy's energy imbalance pricing methodology incorporates the shaping mechanisms because neither the COB index nor the Mead/Marketplace index published hourly prices when NV Energy and its customers negotiated the energy imbalance provisions in 2003. Now that the COB index publishes hourly prices, NV Energy explains that the previously-implemented shaping mechanism is no longer necessary. As a result, NV Energy proposes to eliminate it and rely on the COB hourly index prices for Zone A. Since the Mead/Marketplace index does not publish hourly prices, NV Energy proposes to rely on the Palo Verde hourly price index for Zone B. By doing so, NV Energy hopes to preclude the anomalous pricing results that the shaping mechanism often caused in Zone A, particularly during seasonal influxes of large amounts of hydro power caused by snow melt, coupled with excess wind energy production, and further compounded by low load levels in California and the Pacific Northwest. These simultaneous market conditions have often produced near-zero price indexes at Mid-C which, in turn, created anomalous imbalance prices when the shaping algorithm has been applied to the COB index.⁹

5. NV Energy also proposes to modify the transmission cost basis it uses to calculate its imbalance charges. NV Energy states that it adjusts its Zone A market price proxy by a transmission cost component that includes the sum of PacifiCorp's and Bonneville Power Administration's (BPA) point-to-point transmission rates, including losses, which

⁷ The incremental cost of energy for energy imbalance service is the higher of (1) or (2) and the decremental cost for energy imbalance service is the lower of (1) or (2).

⁸ NV Energy Transmittal at 2.

⁹ *Id.*

it now seeks to update to reflect the most current PacifiCorp and BPA point-to-point transmission rates. Likewise, NV Energy proposes to include a transmission cost basis to calculate the Zone B market price proxy so that it reflects the point-to-point rates and loss factor found in the OATT of the Salt River Project, which wheels power between Palo Verde and NV Energy's system.¹⁰

6. NV Energy also requests waiver of any filing requirements in Part 35 of the Commission's regulations¹¹ to the extent they are not met or addressed in its filing.¹²

B. Notice of Filing and Responsive Pleadings in Docket No. ER13-684-000

7. Notice of NV Energy's filing was published in the *Federal Register*, 78 Fed. Reg. 2389 (2013), with interventions and protests due on or before January 22, 2013. On January 18, 2013, Powerex Corporation submitted a motion to intervene. On January 22, 2013, Plumas Sierra Rural Electric Cooperative submitted a motion to intervene. On January 22, 2013, Fallon/Truckee Donner filed a motion to intervene and protest, as did the Colorado River Commission of Nevada and Southern Nevada Water Authority (Colorado/Southern Nevada). Deseret Generation & Transmission Co-operative, Inc. (Deseret) also filed a motion to intervene and protest. On February 6, 2013, NV Energy filed an answer. On February 20, 2013, Fallon/Truckee Donner filed an answer to the answer.

8. Protestors generally contend that NV Energy's existing imbalance provisions, as well as its proposed revisions to them, are unjust and unreasonable.¹³ Specifically, Protestors argue that NV Energy's market price proxies can no longer be justified in Zone A, due to the addition of substantial generation.¹⁴ In addition, they argue that NV Energy's use of different values for incremental and decremental costs allows NV Energy to buy low and sell high in a given hour, making imbalance energy a profit center for NV Energy at the expense of the transmission customers.¹⁵ Further, Protesters argue that NV

¹⁰ *Id.* at 3-4.

¹¹ 18 C.F.R. Part 35 (2012).

¹² *Id.* at 4.

¹³ Colorado/Southern Nevada Protest at 6; Deseret Protest at 2, 7, 12-15; Fallon/Truckee Protest at 4-13.

¹⁴ Fallon/Truckee Donner Protest at 7; Deseret Protest at 10.

¹⁵ Fallon/Truckee Donner Protest at 7; Colorado/Southern Nevada Protest at 14.

Energy failed to justify the use of Palo Verde as the market price proxy for Zone B, and that the proxy is therefore unreasonable.¹⁶

9. Protesters also challenge NV Energy's proposal to modify the transmission "basis difference" that it uses to adjust the index energy prices to account for transmission costs in calculating the Zone A market price proxy. According to Protesters, the modification: (1) does not reflect actual rates and losses that NV Energy would pay to deliver energy to or from its system to COB; (2) is based on excessive PacifiCorp tariff rates which the Commission suspended for five months and which are currently being negotiated before a settlement judge; and (3) fails to distinguish between on-peak and off-peak rates; account for discounted point-to-point transmission service; or include update language to cover future changes in rates and losses.¹⁷

10. Fallon/Truckee Donner specifically note that, after the Commission issued Order No. 890, which required use of a single value for both incremental and decremental costs, it was necessary to retain NV Energy's non-conforming imbalance provisions in order to preserve the parties' 2003 Settlement of NV Energy's entire suite of ancillary service rates, terms and conditions. However, all Protesters contend that NV Energy's proposal to change the energy imbalance provisions alone would disrupt the overall balance struck by the parties in the 2003 Settlement. As a result, they request that the Commission review NV Energy's imbalance provisions to determine whether or not they are consistent with or superior to Order No. 890, and if not, require NV Energy to adopt the *pro forma* imbalance provisions as of March 1, 2013, the proposed effective date of NV Energy's filing.¹⁸

1. **Protests Regarding NV Energy's Existing Energy Imbalance Provisions**

a. **Continued Use of Market Price Proxy**

11. Fallon/Truckee Donner argue that NV Energy's use of the market price proxy is no longer justified in Zone A because sufficient generating capacity has been added since

¹⁶ Colorado/Southern Nevada Protest at 10-14.

¹⁷ Deseret Protest at 14; Fallon/Truckee Donner Protest at 9-13; Colorado/Southern Nevada Protest at 11-14.

¹⁸ Deseret Protest at 8; Fallon/Truckee Donner Protest at 13; Colorado/Southern Nevada Protest at 6.

2007, thereby eliminating the rationale for relying on the market price proxy.¹⁹ Deseret similarly explains that, after the Commission issued Order No. 890, NV Energy added the 541 MW Tracy generating facility to its resources, which reduced the utility's dependence on imported capacity and energy.²⁰

b. Incremental and Decremental Costs

12. As noted, Fallon/Truckee Donner argue that NV Energy's use of different values for incremental and decremental costs allows NV Energy to buy low and sell high in a given hour, which violates Order No. 890's requirement that charges and payments for *all* imbalances be based on the transmission provider's actual cost of the last 10 MWs of energy needed to meet system needs in a given hour.²¹ Deseret also argues that NV Energy failed to explain why the traditional formula using the last 10 MW of energy actually dispatched --- whether from its own generation or from off-system purchases --- will fail to produce a just and reasonable, cost-based result.²²

13. Deseret further contends that NV Energy's use of a disconnected incremental/decremental cost methodology violates Order No. 890 and produces a significant price spread that results in customer overcharges. Deseret explains that the disconnected incremental/decremental energy cost methodology causes incremental energy costs to be set by generation costs while in the same hour the decremental energy cost is set by the market price proxy. According to Deseret, this routinely leads to large incremental/decremental energy cost spreads that do not represent Sierra Pacific Power's actual cost of the service under Schedule 4.²³

c. Treatment of Operation & Maintenance Costs

14. Colorado/Southern Nevada contend that NV Energy's energy imbalance provisions contain two definitions for the "highest hourly system incremental generation cost," one of which excludes operation and maintenance expenses (O&M). Specifically, they note that the price NV Energy sells energy for under its energy imbalance provisions

¹⁹ Fallon/Truckee Donner Protest at 7.

²⁰ Deseret Protest at 10.

²¹ Fallon/Truckee Donner Protest at 10.

²² *Id.* at 10-11.

²³ Deseret Protest at 8.

contains an average O&M expense while the price it must pay for energy does not contain O&M. Therefore, Colorado/Southern Nevada assert that NV Energy maximizes its charges when customers are deficient and must purchase energy and minimizes its obligations to pay for customers' oversupply of energy when it delivers energy above its schedule.²⁴

15. Colorado/Southern Nevada further argue that NV Energy's "highest hourly system incremental generation cost" calculation produces aberrant results in which NV Energy has assessed imbalance energy charges of \$100 to \$500/MWH when the corresponding market price is only \$40/MWH. Colorado/Southern Nevada claim that this happens because NV Energy includes an entire week or a month's worth of O&M costs for a unit into a few hours of service, contrary to the *pro forma* OATT, which requires that incremental cost be calculated based on "the last 10 MWs dispatched for any purpose" pursuant to Order No. 890-A, as well as Commission precedent which requires that energy imbalance provisions specify the incremental cost methodology and how each component of it is developed.²⁵

d. "Intentional Deviation" Language and Practice

16. Colorado/Southern Nevada assert that NV Energy's energy imbalance provisions deviate from the *pro forma* Tariff with respect to "intentionally delivered" energy, and that NV Energy has changed the way it applies the provision over the last two years, without making a correlative tariff filing.²⁶ They explain that, under NV Energy's Tariff, if a customer runs a positive imbalance in excess of the deviation band of 1.5 percent (with a minimum bandwidth of ± 2 MW), and does not correct the imbalance within one hour of being notified by the company to eliminate the imbalance, NV Energy takes all energy that comprises the positive deviation without any payment to the customer. In addition, they assert, NV Energy compounds the problem by declaring an intentional deviation under the Coordination tariff every time the customer exceeds the deviation band. Further, Colorado/Southern Nevada contend that NV Energy interprets the intentional deviation language in its energy imbalance provisions to permit it to confiscate energy both outside and within the deviation band as well, without compensating customers at a rate equal to 100 percent of the decremental energy cost, as the *pro forma* Tariff requires. Furthermore, Colorado/Southern Nevada contend that NV

²⁴ Colorado/Southern Nevada Protest at 15-16.

²⁵ *Id.* at 16-17 (citing Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 304 and *Cleco Power LLC*, 127 FERC ¶ 61,001, at P 22 (2009)).

²⁶ *Id.* at 17-19.

Energy declares an intentional deviation in negative imbalance situations (e.g., when customers underschedule). Thus, they explain, if a customer overcorrects the underscheduling situation and delivers energy in excess of its schedule, NV Energy can confiscate that energy without payment as well.

2. Protests Regarding NV Energy's Proposed Energy Imbalance OATT Provisions

a. Market Price Proxies

17. As noted above, Deseret and Fallon/Truckee Donner contend that changed circumstances completely vitiate NV Energy's reliance on market proxies for determining the incremental cost of providing energy imbalance service, as significant capacity additions have now removed the rationale for using market proxies. Colorado/Southern Nevada likewise contend that NV Energy cannot justify using Palo Verde as the market price proxy, because Palo Verde is hundreds of miles from Nevada Power's balancing authority area, unlike the Dow Jones Mead/Marketplace Electricity Price Index it is replacing, whose data derive from power transactions at delivery points that are all within or adjacent to Nevada Power's balancing authority area.²⁷ Colorado/Southern Nevada assert that NV Energy has changed the market proxy to exploit higher incremental energy costs and lower decremental energy costs without any pretense of offering the "valid alternative to the incremental cost calculation, reflecting competitive, transparent and liquid conditions. . ." that Order No. 890-A requires.²⁸

b. Transmission Cost Differential

18. As noted, the Protesters challenge NV Energy's proposed changes to the transmission "basis difference" that it uses to adjust the index energy prices to account for transmission costs in calculating the Zone A market price proxy, on grounds that it: (1) does not reflect actual rates and losses; (2) is based on excessive PacifiCorp tariff rates which are currently being negotiated before a settlement judge in Docket No. ER11-3643-000, *et al.*; and (3) fails to distinguish between on-peak and off-peak rates, account for discounted point-to-point transmission service, or include update language to cover future changes in rates and losses.²⁹ Colorado/Southern Nevada point out that the

²⁷ Colorado/Southern Nevada Protest at 10-14.

²⁸ Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 692.

²⁹ Deseret Protest at 14; Fallon/Truckee Donner Protest at 9-13; Colorado/Southern Nevada Protest at 11-14.

transmission “basis difference” includes no “update” language for Zone B, either.³⁰ For these reasons, Protesters argue that, despite the fact that the transmission “basis difference” derives from formula rates which change periodically, absent NV Energy’s inclusion of necessary “updating” language, its proposed tariff modification simply locks in third-party wheeling and losses with stated (i.e., fixed) rates, enabling NV Energy to pocket the difference whenever the underlying PacifiCorp, BPA and Salt River Project rates and losses decrease, and ensures that those rates and losses never align with NV Energy’s transmission cost basis.³¹

c. Requested Relief

19. Colorado/Southern Nevada contend that the Commission must comprehensively review NV Energy’s energy imbalance provisions to determine whether or not they are consistent with or superior to Order No. 890. They argue that NV Energy has failed to provide any testimony or cost support demonstrating how its energy imbalance proposal is consistent with Order No. 890 or that the energy imbalance proposal produces rates that are just and reasonable and not unduly discriminatory. They further argue that, because the energy imbalance schedule is a formula rate, the Commission must review the entire formula rate to ensure that it will produce appropriate charges.

20. Deseret and Colorado/Southern Nevada request that the Commission: (1) direct NV Energy to adopt either the Order No. 890 *pro forma* Tariff language or the language set out in a recent order in *Seminole Electric Cooperative, Inc. v. Florida Power and Light Company*;³² (2) set any remaining issues for hearing and settlement judge procedures; and (3) to the extent necessary, initiate its own investigation of NV Energy’s proposed revisions to its energy and generator imbalance provisions and establish a refund effective date no later than March 1, 2013.³³

21. Fallon/Truckee Donner request that the Commission summarily find that NV Energy has failed to show that its proposed energy imbalance provisions are just and reasonable and consistent with or superior to the *pro forma* Tariff provisions, and

³⁰ Colorado/Southern Nevada Protest at 14.

³¹ *Id.* at 14; Fallon/Truckee Donner Protest at 11-12; Deseret Protest at 14.

³² Deseret Protest at 2; Colorado/Southern Nevada Protest at 20 (citing *Seminole Electric Cooperative, Inc. v. Florida Power and Light Company*, 139 FERC ¶ 61,254 (2012)).

³³ Deseret Protest at 2-3, 18-20; Colorado/Southern Nevada Protest at 21-23.

therefore, should be required to conform its imbalance pricing to the *pro forma* provisions establishing incremental and decremental costs as the actual cost to the transmission provider of the last 10 MWhs needed to supply system needs in a given hour, effective March 1, 2013. Alternatively, Fallon/Truckee Donner request that, to the extent the Commission permits the continued use of the market price proxy, that it set for hearing the appropriate transmission cost basis to be used in calculating it, and consolidate this docket with the Complaint which Fallon/Truckee Donner filed in Docket No. EL13-44-000.³⁴

3. NV Energy's Answer

22. On February 6, 2013, NV Energy filed an answer. In its answer, NV Energy states that it proposed to eliminate shaping from the market price proxy to address concerns that it produced anomalies when the market price proxy was zero or negative. NV Energy explains that none of the protestors advocate that NV Energy should maintain the current shaping methodology. Rather, they contend that the revisions to the energy imbalance provisions did not go far enough. NV Energy also indicates that the use of Palo Verde as a pricing proxy is appropriate because the Mead/Marketplace index does not provide hourly settlement prices.³⁵

23. NV Energy explains that it would not object to replacing the fixed transmission cost basis with Tariff language that specifies that the cost basis would be calculated using the sum of the currently effective transmission rates for PacifiCorp and BPA to the extent the Commission requires it. NV Energy indicates that it felt customers benefited from the certainty of a fixed transmission cost basis. Further, NV Energy argues that there is no merit to the argument that the basis is too high because it fails to provide for off-peak rates or the potential for discounting by PacifiCorp or BPA because the complexity of settling those types of transactions would place an undue burden on NV Energy. NV Energy contends that customers can avoid imbalance charges altogether through accurate scheduling and that NV Energy is under no obligation to minimize such imbalance charges or encourage leaning on the system.³⁶

24. NV Energy further contends that the Commission routinely permits public utilities to change rate components without requiring those utilities to justify the unchanged components of those rates and the Commission should do the same here, particularly

³⁴ Fallon/Truckee Protest at 13-14.

³⁵ NV Energy February 6, 2013 Answer at 2-9.

³⁶ *Id.* at 8.

where there appears to be consensus support for the change filed. In addition, NV Energy asserts that changes beyond those proposed in the filing are also unwarranted because imbalance charges can be avoided altogether through accurate scheduling, which is within the customer's control, especially because the NV Energy Tariff permits customers to adjust scheduling tags on an intra-hour basis.³⁷

25. NV Energy states that it opposes the motion to consolidate because consolidation will blur the burdens of proof in the instant filing and the complaint. However, NV Energy does not oppose consolidation to the extent the matters are set for hearing and the Commission clarifies the Complainants bear the burden of proof under section 206 regarding omnibus methodological changes to its energy imbalance provisions such that the entire energy imbalance schedule has become unjust and unreasonable and replacement with the *pro forma* OATT construct is necessary.³⁸

4. Fallon/Truckee Donner and Deseret's Answer

26. On February 20, 2013 Fallon/Truckee Donner and Deseret jointly filed an answer opposing NV Energy's answer, or alternatively, seeking leave to file a response. In their answer, Fallon/Truckee Donner and Deseret reiterate many of the arguments in their protests, to which they assert that NV Energy's answer fails to respond. Instead, Fallon/Truckee Donner and Deseret claim that NV Energy's answer seeks to wave away the issues by suggesting that all customers need to do to avoid imbalance charges is to schedule perfectly.³⁹

27. In addition, Fallon/Truckee Donner and Deseret argue that NV Energy incorrectly claims that its filing to change certain aspects of its Schedule 4 energy imbalance provisions does not open the entire Schedule 4 to review, and that, if it did, there would be no reason for Fallon/Truckee Donner to have filed a section 206 complaint. In response, Fallon/Truckee Donner and Deseret explain that Schedule 4 is a formula rate, and that Commission precedent explicitly provides that a change to a single component of a formula rate opens the entire formula rate to review.⁴⁰ For this reason, Fallon/Truckee Donner and Deseret state that there is no merit to NV Energy's claim that

³⁷ *Id.* at 2, 10.

³⁸ *Id.* at 2-3, 10-11.

³⁹ Fallon/Truckee Donner and Deseret February 20, 2013 Answer at 1-4.

⁴⁰ *Id.* at 5-9 (citing *Ocean State Power II*, 69 FERC ¶ 61,146, at 61,552 (1994) and citations contained therein).

their Complaint serves no purpose. To the contrary, they point out that it would establish an earlier refund effective date than would apply in a section 205 proceeding.⁴¹

5. NV Energy's Answer

28. On February 26, 2013, NV Energy filed an answer disagreeing with most of Fallon/Truckee Donner's protest. NV Energy argues that, consistent with Commission precedent, it has no obligation to prove that its existing Schedule 4 rates are more just and reasonable than those in the *pro forma* OATT.⁴² NV Energy additionally asserts that it does not have an obligation to prove the unreasonableness of any alternate methodology protesters or Complainants propose pursuant to section 206 of the FPA.⁴³

C. Fallon/Truckee Donner's Complaint in Docket No. EL13-44-000

29. On January 22, 2013, Fallon/Truckee Donner jointly filed a complaint seeking, among other things, investigation of NV Energy's past implementation of the Zone A imbalance provisions as well as the justness and reasonableness of NV Energy's imbalance provisions. Complainants argue that Zone A imbalances must be recalculated for the 2010-2012 period and request that the Commission summarily find that NV Energy's imbalance provisions are not just and reasonable⁴⁴ and must be conformed to the *pro forma* OATT provisions set forth in Order No. 890.⁴⁵ In particular, Complainants contend that NV Energy's continued use of COB pricing and transmission adjustments to

⁴¹ Fallon/Truckee Donner and Deseret February 20, 2013 Answer at 9.

⁴² NV Energy February 26 Answer at 6 (citing *Calif. Indep. Sys. Operator Corp.*, 141 FERC ¶61, 135 (2012) (citing *City of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984) (stating that, under section 205 of the FPA, the Commission limits its evaluation of a utility's proposed tariff revisions to an inquiry into "whether the rates proposed by a utility are reasonable—and not to extend to determining whether a proposed rate schedule is more or less reasonable to alternative rate designs"))).

⁴³ *Id.* at 7 (citing *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 124 FERC ¶ 61, 173 (2008)).

⁴⁴ Complaint at 2, 14-20.

⁴⁵ *Id.* at 15 (citing Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 692 and asserting that Order No. 890 expressly limits use of market proxies in determining imbalance charges, unless the Commission determines --- on a case-by-case basis --- that specific facts warrant such departures).

calculate the market price proxies artificially increases the market price proxy used in developing the incremental cost and reduces the market price proxy used in developing the decremental cost.

30. In their complaint, Fallon/Truckee Donner reiterate and incorporate by reference many of the arguments made in their protest in Docket No. ER13-684-000. Specifically, Complainants note that, in 2003, NV Energy's customers justified the market price proxy alternative to NV Energy's actual incremental generation cost because NV Energy lacked sufficient internal generation resources to supply its load and to provide imbalance service in many hours and, thus, relied extensively on market purchases. However, Complainants assert that, in 2008, NV Energy increased its generating capacity by more than 50 percent after completing construction of the 541 MW Tracy Combined Cycle Plant. Complainants contend that, in light of the increase in NV Energy's capacity, NV Energy's continued use of a market price proxy is no longer just and reasonable.⁴⁶

31. Complainants also challenge NV Energy's use of shaping methodologies to calculate the COB index. Complainants assert that the shaping methodologies were originally a part of the 2003 Settlement, and were intended to produce a reasonable approximation of actual hourly COB prices by adjusting the daily prices to reflect hourly price movements at Mid-C. However, Complainants assert that, by 2010, due to changes in prevailing market conditions at COB and Mid-C as well as periods of spring runoff in the Pacific Northwest, NV Energy's shaping methodology began producing irrational results that the parties could not have anticipated at the time of the 2003 Settlement.⁴⁷ Complainants additionally contend that NV Energy must modify its definitions of incremental and decremental costs to remove the "greater of" and "lesser of" constructs from both definitions.

32. Complainants request the earliest possible refund effective date under section 206 of the FPA, but note that the Commission has previously required transmission providers to issue refunds earlier than the refund-effective date in cases involving a transmission provider's misapplication of the energy imbalance provisions in its OATT.⁴⁸ Complainants finally request that the Commission consolidate the Complaint with the

⁴⁶ *Id.* at 16-17.

⁴⁷ *Id.* at 22 (referencing examples in which NV Energy's shaping methodology produced hourly market price proxy values ranging from a low of negative \$1,063 MW to a high of positive \$1,422 MW in one day).

⁴⁸ *Id.* at 25 (citing *Quest Energy LLC v. The Detroit Edison Co.*, 106 FERC ¶ 61, 227, at PP 20-21 n.12 (2004)) (*Quest Energy*).

proceedings in Docket No. ER13-684-000, and establish hearing and settlement judge procedures.

D. Notice of Filing and Responsive Pleadings in Docket No. EL13-44-000

33. Notice of the Complaint was published in the *Federal Register*, 78 Fed. Reg. 7426 (2013), with interventions and protests due on or before February 11, 2013. On February 6, 2013, Powerex Corporation submitted a motion to intervene. On February 11, 2013, Deseret filed comments in support of the Complaint and NV Energy filed an answer to the Complaint.

34. In its comments, Deseret contends that Complainants have demonstrated that NV Energy's imbalance provisions are unjust and unreasonable.⁴⁹ Deseret also seeks to incorporate all of its arguments from Docket No. ER13-684-000 into any future proceedings on the Complaint.⁵⁰ Deseret notes that its customer, Mt. Wheeler, is entitled to non-discriminatory retrospective relief from NV Energy's unjust and unreasonable OATT provisions since Mt. Wheeler became an NV Energy customer.⁵¹ Deseret argues that the Commission should: (1) grant the Complaint and find that NV Energy's imbalance provisions are unjust and unreasonable and must be replaced with the *pro forma* imbalance provisions from Order No. 890; (2) initiate an investigation into NV Energy's past implementation of the Zone A imbalance provisions and establish a refund effective date as of the date of the Complaint.⁵² Deseret also supports the Complainants' request to set the complaint for hearing and settlement judge procedures, and consolidate this proceeding with Docket No. ER13-684-000.⁵³

35. In its answer, NV Energy asserts that its OATT provisions are just and reasonable and should not be modified. NV Energy also concludes that Complainants' arguments

⁴⁹ Deseret Complaint Comments at 3.

⁵⁰ *Id.* at 6.

⁵¹ *Id.* at 7-8 & n.8. (citing *Quest Energy*, noting that the Commission directed Detroit Edison to reimburse Quest and all other customers who took Energy Imbalance Service under Detroit Edison's OATT, with interest, for any under-compensation for over-deliveries outside the deviation band due to Detroit Edison's misapplication of the decremental cost formula in its OATT).

⁵² *Id.* at 3.

⁵³ *Id.*

regarding NV Energy's Zone A OATT provisions are moot, because NV Energy intends to remove those provisions.⁵⁴

36. NV Energy claims that its use of a market price proxy is just and reasonable because, according to NV Energy, virtually all non-RTO public utilities in the Western Interconnection use a market price proxy. Furthermore, NV Energy asserts that, without market price proxies, its market participants may game the system by reselling NV Energy's imbalance energy at higher market prices. NV Energy also states that the change in circumstances since the execution of the 2003 Settlement does not make NV Energy's OATT provisions unjust and unreasonable. NV Energy further asserts that Complainants do not adequately support their proposal to alter the definitions of decremental and incremental energy costs. NV Energy concludes that the Complainants' request for refunds lacks merit because: (1) NV did not violate the filed rate; (2) Complainants concede that NV Energy's divergent shaping methodology results were caused by market forces; and (3) Complainants failed to show how NV Energy should have calculated charges under its OATT.⁵⁵

II. Discussion

A. Procedural Matters

37. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), timely, unopposed motions to intervene serve to make the entities that filed them parties to the proceeding in which they intervened.

38. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2012), prohibits an answer to a protest and an answer to an answer unless otherwise ordered by the decisional authority. We will accept NV Energy's answers and Fallon/Truckee Donner and Deseret's joint answer in Docket No. ER13-684-000 because they provide information that has assisted us in our decision making process.

B. Summary Disposition in Docket Nos. ER13-684-000 and EL13-44-000

39. The Commission finds that NV Energy's inclusion of transmission costs in its energy imbalance provisions is not just and reasonable. In Order No. 890, the Commission concluded that it is appropriate to define incremental cost, for purposes of imbalance energy provisions, as the transmission provider's actual average hourly cost of

⁵⁴ NV Energy February 11, 2013 Answer at 5-6.

⁵⁵ *Id.* at 7-16.

the last 10 MW dispatched to supply the transmission provider's native load, based on the replacement cost of fuel, unit heat rates, start-up costs, incremental operation and maintenance costs, and purchased and interchange power costs and taxes, as applicable.⁵⁶ When the Commission accepted NV Energy's inclusion of transmission costs in its energy imbalance provisions in 2007, the Commission relied upon comments that supported the continuation of this practice in order to maintain the balance struck in the 2003 Settlement between NV Energy and its customers. Given that circumstances have changed since the 2003 Settlement, the Commission now finds these provisions to be unjust and unreasonable. Accordingly, to the extent that the Complaint seeks to exclude the transmission charges from NV Energy's energy imbalance provisions under section 206, we will grant partial summary disposition of Fallon/Truckee Donner's Complaint in Docket No. EL13-44-000. For these same reasons, we also find that NV Energy's proposal in Docket No. ER13-684-000 to include transmission charges that are not clearly based on the actual cost of the delivery of imbalance energy is not just and reasonable. We will therefore reject NV Energy's inclusion of transmission charges in Docket No. ER13-684-000.⁵⁷

40. While we reject the inclusion of the stated transmission costs for the energy imbalance charges for the refund period established by the Complaint, NV Energy may, in the proceedings established by this order, seek to demonstrate that its incremental costs should include the actual cost of transmission associated with purchased power.

C. Hearing and Settlement Procedures

41. The Commission finds that NV Energy's proposed revisions in Docket No. ER13-684-000 to its Schedule 4 energy imbalance provisions raise issues of material fact that cannot be resolved based on the record before us and are more appropriately addressed in the hearing and settlement procedures ordered below. Our preliminary analysis indicates that NV Energy's proposed revisions to its energy imbalance provisions have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. We will, therefore, reject NV Energy's proposed OATT revisions in part as discussed above, accept the balance of NV Energy's proposed OATT revisions for filing, suspend them for a nominal period, make them effective March 1, 2013, subject to refund, and set them for hearing and settlement judge

⁵⁶ Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 687. *See also* Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at PP 309-313.

⁵⁷ *See, e.g., Idaho Power Co.*, 121 FERC ¶ 61,181, at P 28 (2007).

procedures.⁵⁸ We also find that NV Energy has not provided any basis for waiver of 18 C.F.R Part 35. We therefore deny waiver.

42. The Commission finds that Fallon/Truckee Donner's Complaint in Docket No. EL13-44-000 raises issues of material fact that cannot be resolved based on the record before us and are more appropriately addressed in the hearing and settlement judge procedures ordered below. Accordingly, we will set the complaint for investigation and a trial-type evidentiary hearing and settlement judge procedures under section 206 of the FPA.

43. In cases where, as here, the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b), requires that the Commission establish a refund effective date that is no earlier than the date a complaint was filed, but no later than five months after the filing date. Consistent with our general policy of providing maximum protection to customers,⁵⁹ we will set the refund effective at the earliest date possible, i.e., the date of the filing of the Complaint, which is January 22, 2013.

44. Section 206(b) of the FPA requires that, if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. Based on our review of the record, we expect that, if this case does not settle, the presiding judge should be able to render a decision within nine months of the commencement of hearing procedures, or, if the case were to go to hearing immediately, by December 31, 2013. Thus, we estimate that if the case were to go to hearing immediately, we would be able to issue our decision within approximately six months of the filing of briefs on and opposing exceptions, or by June 30, 2014.

45. We will consolidate Docket Nos. ER13-684-000 and EL13-44-000 for the purposes of settlement, hearing, and decision because the proceedings present common issues of law and fact.

⁵⁸ We agree with Fallon/Truckee Donner and Deseret that the Commission's formula rate precedent opens NV Energy's entire Schedule 4 to review. For this reason, we will establish hearing and settlement judge procedures designed to explore, without limitation, the justness and reasonableness of NV Energy's Schedule 4 imbalance service.

⁵⁹ See, e.g., *Seminole Elec. Coop., Inc. v. Florida Power & Light Co.*, 65 FERC ¶ 61,413, at 63,139 (1993); *Canal Elec. Co.*, 46 FERC ¶ 61,153, at 61,539 (1989), *reh'g denied*, 47 FERC ¶ 61,275 (1989).

46. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.⁶⁰ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.⁶¹ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) NV Energy's inclusion of transmission costs in its energy imbalance provisions in Docket No. ER13-684-000 is hereby rejected, as discussed in the body of this order.

(B) NV Energy is hereby directed to make a compliance filing in Docket No. ER13-684-000 within thirty (30) days of the date of issuance of this order revising its tariff records to remove the transmission costs from its energy imbalance provisions.

(C) NV Energy's proposed energy imbalance provisions, in Docket No. ER13-684-000, excluding those that the Commission summarily dismissed in Ordering Paragraph (A) above, are hereby accepted for filing and suspended for a nominal period, effective March 1, 2013, subject to refund and to the outcome of the hearing and settlement judge procedures ordered below, as discussed in the body of this order.

(D) NV Energy's request for waiver of 18 C.F.R Part 35 is hereby denied, as discussed in the body of this order.

⁶⁰ 18 C.F.R. § 385.603 (2012).

⁶¹ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five (5) days of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

(E) Fallon/Truckee Donner's Complaint in Docket No. EL13-44-000 is granted in part, and set for hearing in part, as discussed in the body of this order.

(F) The refund effective date in Docket No. EL13-44-000, established pursuant to section 206(b) of the FPA, is January 22, 2013.

(G) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held in Docket No. ER13-684-000 concerning NV Energy's revisions to its energy imbalance provisions, as discussed in the body of this order. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (J) and (K) below.

(H) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held in Docket No. EL13-44-000 concerning Fallon/Truckee Donner's Complaint, net of summary disposition, as discussed in the body of this order. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (J) and (K) below.

(I) Docket Nos. ER13-684-000 and EL13-44-000 are hereby consolidated for purposes of the hearing and settlement judge procedures ordered in Ordering Paragraphs (G) and (H) above.

(J) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2012), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(K) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty

(60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(L) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.