

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Colorado River Commission of Nevada

Docket No. EL04-100-000

v.

Nevada Power Company

ORDER DISMISSING COMPLAINT IN PART, GRANTING COMPLAINT IN PART
AND DENYING COMPLAINT IN PART

(Issued November 19, 2004)

1. On May 10, 2004, Colorado River Commission of Nevada (Colorado River) filed a complaint against Nevada Power Company (Nevada Power) alleging that: (1) Nevada Power failed to compensate Colorado River for positive energy imbalances; and (2) Nevada Power failed to file parking service agreements with the Commission and thus should make time value refunds. For the reasons discussed below, we dismiss Colorado River's complaint with regard to the request for compensation for positive energy imbalances, and grant in part and deny in part Colorado River's complaint with regard to its request for time value refunds.

2. This order benefits customers because it ensures administrative efficiency thereby reducing the time and expense involved in resolving this dispute, and it ensures compliance with Commission filing requirements.

Colorado River's Complaint

3. Colorado River requests, with respect to energy imbalances, that the Commission: (1) find that Nevada Power violated its Coordination Tariff and unfiled letter agreements under that tariff when it unilaterally confiscated positive energy imbalances provided by Colorado River over a three-day period in February 2001, and direct Nevada Power to pay Colorado for those positive imbalances; (2) determine whether Nevada Power unlawfully withheld imbalance service payments owed to Colorado River and direct

refunds with interest; and (3) require Nevada Power to provide a full explanation of the methodology it used from June 2000 to the present to calculate incremental and decremental energy costs for purposes of developing rates for energy imbalance charges, and determine the amount of any refunds due for overcharges for imbalance services. Colorado River also requests, with respect to parking services, that the Commission require Nevada Power to provide time value refunds for charges made under verbal, and later written, agreements for certain jurisdictional control area parking services from February 2001 to June 2002, which it claims Nevada Power never filed in violation of the Federal Power Act and the Commission's regulations.

4. Colorado River further notes that it is a party to an arbitration complaint proceeding brought by Nevada Power on January 5, 2004. According to Colorado River, Nevada Power alleged that Colorado River breached and otherwise violated duties in connection with its contracts with Nevada Power by submitting inaccurate energy schedules. Colorado River claims that the arbitrator does not have jurisdiction over the claims that Colorado River is raising in this complaint.

Energy Imbalances

5. Colorado River asserts that the Commission should direct Nevada Power to pay Colorado River for imbalance energy that Nevada Power received, but never paid for, in violation of Nevada Power's 1997 Coordination Tariff. Colorado River states that in February 2001 Nevada Power provided Colorado River with energy imbalance services pursuant to Nevada Power's 1997 Coordination Tariff as supplemented by the parties' February 2000 Letter Agreement. Colorado River further states that the Letter Agreement provided, in relevant part, that "[f]or energy imbalances outside the deviation band ... [Nevada Power] will pay [Colorado River] its hourly average decremental cost in mills/kwh for positive imbalance." Colorado River argues that Nevada Power never compensated it for 1,691,766 kWhs of positive energy imbalances which occurred on February 17, 18 and 19 of 2001, supposedly because Nevada Power had deemed this positive energy imbalance to have been "intentionally delivered." Colorado River asks that Nevada Power be required to provide specific calculations of its decremental cost of energy with appropriate cost support for this period. In total, Colorado River claims that Nevada Power owes it over \$5 million not including interest.

6. Colorado River maintains that Nevada Power has conceded that payments remain due to Colorado River for Colorado River's positive energy imbalances, but has taken the position that it is not required to make payments to Colorado River because of Colorado River's alleged partnership with Enron, which is the subject of the Commission's

investigation in the Show Cause Proceeding.¹ Colorado River argues that no agreement or tariff permits Nevada Power to withhold refunds due Colorado River because Colorado River is involved in the Show Cause Proceeding. Indeed, it claims that the Coordination Tariff and Letter Agreements require that the disputed amount be paid pending resolution of any dispute.

Parking Services

7. Colorado River states that beginning in February 2001, Nevada Power began providing parking services to Colorado River, whereby Nevada Power would park excess energy that Colorado River brought into Nevada Power's control area to satisfy Colorado River's customer load and make third party sales. Colorado River explains that under the arrangement parked energy would be sold by Colorado River during the same hour in which it was brought into Nevada Power's control area. It further explains that while these parking services were initially pursuant to oral agreements, on July 13, 2001, Colorado River and Nevada Power executed a Confirmation Agreement that governed the parking service transactions between them. Colorado River states that the agreement was for a term of approximately one year and two weeks.

8. Colorado River states that Nevada Power was required to file the July 13, 2001 Confirmation Agreement with the Commission because it was for a period longer than a year but failed to do so. Colorado River also argues that the oral agreements governing the parking transactions prior to July 13, 2001 should have been filed with the Commission. Colorado River maintains that just because the agreements were oral does not mean that Nevada Power did not have filing responsibilities; Colorado River states that it is Commission policy to not allow parties to evade jurisdiction by using unfiled oral understandings in place of filed written agreements. As a result of Nevada Power not meeting the Commission filing requirements, Colorado River claims that it is entitled to time value refunds. Colorado River further states that it is not required to show that it was harmed by Nevada Power's failure to file, since time value refunds were designed not to redress customer harm but to enforce Commission filing requirements.

¹ *Enron Power Marketing, Inc. and Enron Energy Services, Inc.*, 104 FERC ¶ 61,346 (2004).

Nevada Power's Answer

9. Nevada Power responds that Colorado River's complaint should be dismissed as premature and that Colorado River should be ordered to comply with the alternative dispute resolution procedures set forth in the applicable agreements. Alternatively, Nevada Power argues that the complaint should be denied.

Energy Imbalances

10. Nevada Power argues that the payment for certain positive energy imbalances sought by Colorado River should be denied. Nevada Power asserts that the imbalances are false and contrary to the Coordination Tariff, and therefore not subject to the payments Colorado River demands. In this regard, Nevada Power explains that it provides energy imbalance service to Colorado River under the provisions of its Coordination Tariff, a Commission rate schedule. Under that tariff, Nevada Power states, it is obligated to provide services only in conjunction with a use that is "in keeping with generally accepted good operating standards." Nevada Power asserts that in 2003 it became aware that Colorado River may have been intentionally over-scheduling resources and over-stating customer load in the Nevada Power control area as a means to facilitate various arbitrage or market gaming activities, including in partnership or association with Enron.² It maintains that Colorado River's actions were not "in keeping with generally accepted good operating standards."

11. Nevada Power explains that consistent with the Coordination Tariff³ it sought to resolve this through good faith negotiations. When this failed, and after intervening in the Show Cause Proceedings and securing the Colorado River trader tapes for use outside the Show Cause Proceedings, Nevada Power initiated an arbitration proceeding with the American Arbitration Association on January 5, 2004, to resolve the dispute. It further explains that Colorado River counterclaimed in the arbitration proceeding raising the same issues it now asks this Commission to decide. It also notes that Colorado River never challenged the appropriateness of the arbitration proceeding. Nevada Power adds that an arbitrator has been selected, a pre-hearing conference has been held and a detailed scheduling order has been agreed to by the parties and arbitrator. According to Nevada

² *Citing Commission's Order to Show Cause Concerning Gaming and/or Anomalous Market Behavior Through the Use of Partnerships, Alliance or Other Arrangements and Directing Submission of Information, Enron Power Marketing, Inc. and Enron Energy Services, Inc.*, 104 FERC ¶ 61,346 (2004) (Show Cause Proceedings).

³ *Citing Coordination Tariff at 4-5.*

Power, the arbitration is set to begin on March 14, 2005. It asserts that because the matters pending in arbitration involve claims and counterclaims predicate to the payment issues Colorado River now raises in its complaint, once the arbitration is complete, it is highly unlikely that any issues will remain requiring Commission action. Once the arbitration is complete, Nevada Power asserts, the parties will know whether any of Colorado River's claimed imbalances arose lawfully under the Coordination Tariff, and thus whether any amounts are owed, and to whom, for legitimate imbalances as contemplated by the Coordination Tariff.

12. Nevada Power alleges that it does not need to pay Colorado River because Colorado River violated the "good operating standard" in the *Purchaser's and Nevada Power Company's Responsibility* section of the Coordination Tariff. Nevada Power contends that the "good operating standard" applies to scheduling as well as to operating, and since Colorado River was acting in bad faith, i.e., gaming the system, Nevada Power does not owe Colorado River for the positive energy imbalances.

Parking Services

13. As to Colorado River's parking service refund claims, Nevada Power argues that before any claim can be brought the parties must engage in nonbinding mediation as required by the Western Systems Power Pool Agreement (WSPP Agreement).⁴

14. Nevada Power explains that the parking transactions at issue were first suggested by Colorado River as a means of assisting it in handling a take or pay problem. According to Nevada Power, at Colorado River's suggestion, Nevada Power agreed to consider on a case-by-case basis, oral, short-term parking transactions in order to absorb any excess energy (real-time, hourly or intra-day transactions). Nevada Power states that approximately 97 percent of the amounts parked by Colorado River occurred between February 2001 and July 2001, before the July Confirmation Agreement was established. Because of the frequency of the transactions, the parties executed the written July Confirmation Agreement, which provided for certain scheduling protocols and other pre-set transaction terms.

15. Nevada Power asserts that the July Confirmation Agreement states that Nevada Power would provide any later agreed parking services under Schedule C of the WSPP Agreement, and that the WSPP Agreement requires that before any form of litigation

⁴ *Western Systems Power Pool, Inc.*, 55 FERC ¶ 61,099, *order on reh'g*, 55 FERC ¶ 61,495 (1991); *WSPP Agreement*, Delegated Letter Order in Docket No. ER00-2477-000 dated June 13, 2000.

over any transaction under WSPP Agreement proceeds, parties must first undertake non-binding mediation. Because Colorado River did not first seek mediation, Nevada Power asserts that its complaint is premature.

16. Nevada Power next asserts that Colorado River is not entitled to refunds for the parking transactions. With respect to the oral agreements occurring before the July Confirmation Agreement, Nevada Power explains that it charged Colorado River \$227,472 for parking transactions, which constitutes 97 percent of the \$234,816 that Colorado River contests should be subject to time value of refunds. Nevada Power argues that under the WSPP Agreement and Commission rules, such agreements did not have to be written or filed with the Commission. It asserts that Schedule C of the WSPP Agreement only requires the filing of agreements for transactions of longer than one year if the Commission requires filing of that type of service agreement under a market-based rate tariff. Nevada Power concludes that it does not owe refunds for parking transactions pre-dating the July Confirmation Agreement.

17. Nevada Power argues that it was not required to file the July Confirmation Agreement. It maintains that because the Agreement was entered into under Schedule C of the WSPP Agreement and that Agreement only requires Confirmation Agreements to be filed for each transaction with a term in excess of one year, it was not required to file the July Confirmation Agreement. In this regard, it argues that the Agreement did not contemplate any specific transaction covering more than one year and all of the transactions were short-term, opportunity transactions covering one or several hours within a single day.

18. Nevada Power, however, states that while it did not have an obligation to file any agreement entered into with Colorado River under Schedule C of the WSPP Agreement, it recognizes that under the Commission's rules and orders involving WSPP Agreement transactions, for transactions of less than one year, it was obligated to file transaction reports on a quarterly basis in order to satisfy Commission requirements. It explains that Nevada Power submitted quarterly transaction reports that include the parking transactions to the WSPP and that the WSPP filed a consolidated report each quarter with the Commission. Nevada Power argues that requiring refunds would give Colorado River a windfall and would unfairly punish Nevada Power for what, even accepting Colorado River's arguments, amounts to a technical violation. It adds that the Commission should exercise its discretion and not order refunds. It argues that the contract term exceeded the one-year requirement by only 16 days and had Nevada Power had a marketing affiliate "all would have been well."

Notice of Filing and Responsive Pleadings

19. Notice of the complaint was published in the *Federal Register*, 69 Fed. Reg. 29,293 (2004), with answer, comments, protests or interventions due on or before June 1, 2004. On May 28, 2004, Nevada Power requested an extension of time to file an answer which was granted on June 1, 2004. On June 4, 2004, Nevada Power filed an answer. On June 21, 2004, Colorado River filed an answer and motion for leave to answer. On July 6, 2004, Nevada Power answered Colorado River's motion for leave to answer. On July 21, 2004, Colorado River filed a motion to strike the answer and a motion for leave to answer Nevada Power's answer to Colorado River's motion for leave to answer. On August 5, 2004, Nevada Power filed an answer to Colorado River's motion to strike and second answer to the answer.

Discussion**Procedural Matters**

20. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure 18 C.F.R § 385.213(a)(2) (2004) prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Colorado River or Nevada Power's answers to answers and will, therefore, reject them.

Energy Imbalances

21. We agree with Nevada Power that Colorado River's complaint with respect to energy imbalances is premature given the ongoing arbitration proceeding initiated pursuant to the terms of the Coordination Tariff. As Nevada Power points out, that arbitration is centered on Colorado River's actions that led to the positive imbalances and the resolution of that matter could obviate the need for Commission action. In these circumstances, "the assistance of an arbitrator may be helpful in discerning the rights and obligations of the parties, thus, arbitration may prove to be useful in ultimately reducing the time and expense involved in resolving this dispute."⁵ Because the Coordination Tariff mandates arbitration and that process is ongoing, we will dismiss without prejudice Colorado River's complaint with respect to energy imbalances.⁶

⁵ *PPL Energy Plus, LLC*, 98 FERC ¶ 61,151 at 61,539 (2002).

⁶ *See, e.g., PPL Energy LLC*, 98 FERC ¶ 61,151 (2002); *Am. Mun. Power-Ohio, Inc. v. Ohio Edison Co.*, 42 FERC ¶ 61,141 (1988); *Texas-New Mexico Power Co. v.*

Parking Services

22. We will grant in part and deny in part Colorado River's complaint as to parking services. Nevada Power improperly failed to file its long-term Confirmation Agreement and we will require Nevada Power to make time value refunds, as discussed further below.⁷ As Nevada Power recognizes, "Schedule C of the WSPP Agreement requires filing of agreements for transactions of longer than one year's duration if FERC requires filing of that type of service agreement under a market-based rate tariff."⁸ The Confirmation Agreement was for a term of more than one year and thus is a long-term agreement that the Commission required, prior to Order No. 2001,⁹ to be filed with the Commission.

23. The Commission has noted that if a utility files a rate less than 60 days prior to the proposed effective date of new service, and waiver is denied, the Commission will require the utility to refund to its customers the time value of the revenues collected, calculated pursuant to section 35.19a of the Commission's regulations¹⁰ for the entire period that the rate was collected without Commission authorization.¹¹ Here, Nevada Power failed to file the Confirmation Agreement with the Commission and, accordingly, must make time value refunds.

El Paso Electric Co., 30 FERC ¶ 61,242 (1985); *Kansas Gas and Electric Co.*, 28 FERC ¶ 61,112 (1984).

⁷ Under the circumstances of this case, we will not require that the parties first engage in mediation, as argued by Nevada Power. There is currently no mediation ongoing with respect to this matter, and the only matter at issue is whether Nevada Power complied with the Commission's filing requirements. Accordingly, we will decide the issue in this order.

⁸ Answer at 17.

⁹ *Revised Public Utility Filing Requirement*, Order 2001, 67 Fed. Reg. 31,044 (July 8, 2002), FERC Stats. & Regs., Regulations Preambles ¶ 31,127 (2002).

¹⁰ 18 C.F.R. § 35.19a (2004).

¹¹ *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 at 61,980, *order on reh'g*, 65 FERC ¶ 61,081 (1993).

24. Whether or not a party actually suffered any harm is irrelevant to our inquiry here. The injury being remedied by refunds for late filing is not merely redress for the customer but particularly “the Commission’s ability to enforce FPA section 205’s requirement that there be prior notice and that the rates charged be just and reasonable at the time they are being charged.”¹²

25. We further find that Nevada Power properly reported the oral transactions that occurred from February 2001 through July 12, 2001. Nevada Power satisfied its obligation to report the oral transactions by submitting quarterly reports to the WSPP which in turn filed quarterly transaction reports with the Commission. Therefore, we will not order refunds for the oral transactions during the time period from February 2001 through July 12, 2001, the day prior to the effective day of the Confirmation Agreement.

The Commission orders:

(A) We dismiss Colorado River’s complaint regarding compensation of positive energy imbalances without prejudice, as discussed in the body of this order.

(B) Nevada Power is hereby directed to make time value refunds to Colorado River within 30 days of the date of this order, as discussed in the body of this order.

(C) Nevada Power is hereby directed to file a refund report with the Commission within 15 days of the date refunds are made.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.

¹² *El Paso Electric Co.*, 105 FERC ¶ 61,131 at P 21 (footnote omitted) (*citing Carolina Power & Light Co.*, 84 FERC ¶ 61,103 (1998), *order on reh’g*, 87 FERC ¶ 61,083 at 61,356 (1999)).