105 FERC ¶ 61,053
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Pinnacle West Energy Corporation

v. Docket No. EL03-209-000

Nevada Power Company

Southern Nevada Water Authority

v. Docket No. EL03-213-000

Nevada Power Company

and

Sierra Pacific Power Company
Nevada Power Company Docket No. ER03-1236-000
(not consolidated)

ORDER ESTABLISHING SETTLEMENT PROCEDURES

(Issued October 8, 2003)

1. The Commission here establishes settlement judge procedures for complaints filed by Pinnacle West Energy Corporation (Pinnacle West) and Southern Nevada Water Authority (SNWA) against Nevada Power Company (Nevada Power), regarding Section 17.7 of Nevada Power's open access transmission tariff (OATT). We include in the settlement procedures a related matter: Sierra Pacific Power Company (Sierra Pacific) and Nevada Power's joint filing of a proposed amendment to Section 17.7 of Nevada Power's OATT. This order benefits customers because the assistance of a settlement judge may prove useful in resolving this dispute and in ultimately reducing the time and expense to the parties involved.

20031008-3062 Issued by FERC OSEC 10/08/2003 in Docket#: EL03-213-000

2. On July 10, 2003, in Docket No. EL03-209-000, Pinnacle West filed a complaint requesting that the Commission direct Nevada Power to abide by Section 17.7 of its OATT[1] and provide Pinnacle West with a one-year extension for the commencement of transmission service provided pursuant to a transmission service agreement (TSA) entered into between Pinnacle West and Nevada Power. On July 18, 2003, in Docket No. EL03-213-000, SNWA filed a similar complaint requesting the same relief related to a TSA entered into between SNWA and Nevada Power.

3. On August 21, 2003, in Docket No. ER03-1236-000, Sierra Pacific and Nevada Power (collectively, Applicants) submitted for filing an amendment to Section 17.7 of the Sierra Pacific Resources Companies OATT.[2] The Applicants assert that the filing is necessary to address requests for the extension of the commencement of service over Nevada Power's newly constructed Centennial Project.

I. Docket Nos. EL03-209-000 and EL03-213-000

A. Background

4. In August 2001, Nevada Power filed TSAs with several customers under its OATT in order for those customers to deliver the output of generating facilities they were developing. These included TSA No. 100 with Pinnacle West, providing for 350 MW of long-term firm point-to-point service for a ten-year term beginning on July 31, 2004, and TSA No. 101 with Reliant Energy Services, Inc. (Reliant), providing for 500 MW of long-term firm point-to-point service beginning on July 31, 2003.[3] Pinnacle West entered into its service agreement to allow it to deliver power from its Silverhawk generating facility to the Western power markets.

---

[1] Nevada Power provides open access transmission services under Sierra Pacific Resources Operating Companies' OATT.

[2] Sierra Pacific Operating Companies FERC Electric Tariff, Third Revised Volume No. 1.

[3] The Commission set them for hearing and settlement judge procedures. Nevada Power Company, et al., 97 FERC ¶ 61,324 (2001). The parties reached a settlement agreement, and Nevada Power filed revised service agreements that were accepted by the Commission by delegated letter order issued September 23, 2002.

20031008-3062 Issued by FERC OSEC 10/08/2003 in Docket#: EL03-213-000

5. In December 2002, Nevada Power filed new service agreements, as requested by Pinnacle West, Reliant and SNWA, to reflect a swap arrangement agreed to between the three customers. Specifically, Pinnacle West and Reliant agreed to exchange their service agreements, so that the transmission service under Service Agreement No. 100 was transferred from Pinnacle West to Reliant, and the transmission service under Service Agreement No. 101 was transferred from Reliant to Pinnacle West.[4] In addition, Service Agreement No. 101 was bifurcated into Service Agreement No. 101A, providing Pinnacle West 375 MW of long-term firm point-to-point transmission service, and Service Agreement No. 101B providing SNWA with 125 MW.[5] Both Service Agreement 101A and 101B have five-year terms commencing on July 31, 2003.[6]

6. On May 23 and June 19, 2003, respectively, Pinnacle West and SNWA (collectively, Complainants) made written requests to Nevada Power invoking Section 17.7 of Nevada Power's OATT to extend the commencement date for TSA Nos. 101A and 101B by one year, until July 31, 2004. Both included checks equal to one month's charge for the firm transmission service, as required by Section 17.7. On June 9 and July 7, 2003, Nevada Power sent written rejections of the requests to defer service, and returned the checks. It stated that when the transmission provider determines that a system impact study is necessary, the provisions of Section 19 of its OATT apply, rather than Section 17.7, and that Section 19 does not provide for any deferral of service. Nevada Power stated that it intended to begin charging Complainants for service beginning on July 31, 2003, and would look to the security the customers were required to post for service, if necessary, to satisfy the charges. Complainants state that they attempted to resolve their disputes through the Commission's Enforcement Hotline in June 2003, but were unable to do so.

---

[4] Pinnacle West states that it requested the exchange because it appeared that the transmission line segment to be used in Service Agreement 100 would not be completed on time, and Pinnacle West had to secure alternate arrangements to ensure the delivery of the output of its Silverhawk facility.

[5] Under certain agreements with Pinnacle West, SNWA has an option to purchase a twenty-five percent ownership interest in the Silverhawk facility.

[6] The new service agreements were accepted by the Commission by delegated letter order issued February 21, 2003, in Docket No. ER03-340-000.

20031008-3062 Issued by FERC OSEC 10/08/2003 in Docket#: EL03-213-000

B. The Complaints

7. Complainants argue that Nevada Power's refusal to honor their requests to defer service is unjust and unreasonable, contrary to Commission precedent, and contrary to the terms of Nevada Power's OATT. Complainants also contend that Nevada Power's interpretation of Sections 17.7 and Section 19 of its OATT conflicts with Order No. 888-A and the pro forma OATT, and that Section 17.7 of Nevada Power's OATT is the same as Section 17.7 of the pro forma OATT. Complainants assert that this provision makes it clear that a transmission customer has the option to pay one month's transmission reservation charge to defer service by any period of up to one year.

8. Complainants point out that the Commission denied rehearing requests of Order No. 888[7] that asked the Commission to clarify that, if transmission facilities have been constructed to accommodate a request for transmission service, either delays by the customer in starting service should be prohibited or the customer should pay the full carrying charges on the facilities during the period of deferral (less any revenues received). In Order No. 888-A, the Commission concluded that the OATT's service deferral mechanism applies even where facilities are constructed to provide the service, unless the transmission provider has received Commission authorization otherwise.[8]

9. Complainants further argue that Nevada Power will not be harmed as a result of the requested deferral. They say that the deferral will not affect Nevada Power's construction costs, since the new transmission facilities were constructed not only for service to Complainants, but also to provide service to other transmission customers and Nevada Power's own native load. Moreover, Complainants contend that the deferrals will not prevent Nevada Power from receiving revenues for the postponed service, because Section 17.7 provides that if another customer requests transmission service

---

[7] 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. (Regulations Preambles January 1991 – June 1996) ¶ 31,036 (1996), order on reh'g, Order No. 888-A, FERC Stats & Regs. (Regulations Preambles July 1996 – December 2000) ¶ 31,048 (1997), 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 sub nom. Transmission Access Policy Study Group, et al. v. FERC, 225 F.3d 667 (D.C. Cir. 2000), aff'd sub nom. New York, et al. v. FERC, 535 U.S. 1, 122 S.Ct 1012 (2002).

[8] Order No. 888-A at 30,322.

20031008-3062 Issued by FERC OSEC 10/08/2003 in Docket#: EL03-213-000

during the extension period, and such service can only be provided by releasing the reserved capacity under the service agreements, Complainants must commence service at that time or lose the transmission service reservation to the new customer.

10. Complainants also contend that Nevada Power cannot argue that if it had known service would be deferred, it would have decided to charge an incremental rate instead of an embedded rate for the construction costs. They explain that Nevada Power's argument is without merit, because Complainants will still be responsible for five years of firm service, although starting a year later. Complainants add that the one month's payment that they offered to Nevada Power is designed to cover the carrying costs resulting from a deferral of service commencement, ensuring that Nevada Power is kept whole in accordance with its OATT.

11. Lastly, Complainants request that the complaints be processed under fast-track procedures, since Nevada Power has stated that it intends to begin charging Complainants for transmission service beginning July 31, 2003.

II. Docket No. ER03-1236-000

12. On August 21, 2003, Applicants submitted for filing an amendment to Section 17.7 of the OATT. Applicants assert that the filing is necessary to address requests for the extension of the commencement of service over Nevada Power's newly-constructed Centennial Project. Specifically, amended Section 17.7 provides that if new facilities or upgrades were required to provide the requested service, the transmission customer may postpone service by paying: (1) the carrying charges (including cost of capital, book depreciation, income taxes deferred, income taxes payable, property taxes, and insurance) for such new facilities or upgrades the transmission provider would incur as a consequence of the delay or (2) a deposit equal to the transmission customer's allocated share of the full cost of the facilities or upgrades constructed to provide the requested firm transmission service. This deposit would be returned in the form of transmission service credits, without interest, as the transmission customer commences transmission service.

13. Applicants assert that the amendment is being filed in the event that the Commission rejects Nevada Power's position in the complaint proceeding that Nevada Power is entitled to address requests for extensions in the commencement of service over new facilities on a case-by-case basis. They contend that by making this filing, they are not changing their position in the complaint proceeding; rather, they are making the filing in light of the arguments advanced in the complaint proceeding to the effect that Nevada

20031008-3062 Issued by FERC OSEC 10/08/2003 in Docket#: EL03-213-000

Power may not address extension requests on a case-by-case basis and is not entitled to more compensation than that provided for in Section 17.7 of its OATT.

14. Applicants submit that if the Commission accepts Nevada Power's argument in the complaint proceeding that Nevada Power is entitled to address requests for extensions in the commencement of service on a case-by-case basis, then the amendment filed in Docket No. ER03-1238-000 becomes moot. In that event, Applicants request that they be permitted to withdraw the amendment. If, on the other hand, the Commission rejects Nevada Power's argument in the complaint proceeding, the Applicants contend that the Commission must approve the proposed amendment to Section 17.7 of the OATT.

15. Applicants request that the amendment be made effective as of May 1, 2003 so that it will apply equally to all transmission customers using the Centennial Project. Alternatively, if the Commission does not permit the amendment to become effective on May 1, 2003, Applicants request that the amendment become effective as of the date of their filing. At the same time, Applicants request that the Commission permit Nevada Power to apply the amendment to the outstanding extension requests, which are still pending.

III. Notice of Filings, Interventions, Protests and Answers

A. Docket Nos. EL03-209-000 and EL03-213-000

16. Notice of Pinnacle West's complaint in Docket No. EL03-209-000 was published in the Federal Register, 68 Fed. Reg. 42,695 (2003), with protests and interventions due on or before July 21, 2003. Motions to intervene were timely filed by the Office of the Attorney General for the State of Nevada, Bureau of Consumer Protection (Nevada BCP); Reliant Energy Bighorn, LLC (Reliant); and Las Vegas Cogeneration II, LLC. SNWA filed a motion to intervene in support of the complaint, and a request for consolidation with Docket No. EL03-213-000. Duke Energy North America, LLC and Duke Energy Trading and Marketing, LLC (collectively, Duke) filed a motion to intervene and comments in support of the complainant. The Public Utilities Commission of Nevada (PUCN) filed a Notice of Intervention and Comments. Sempra Energy Solutions (Sempra) filed a motion to intervene out of time.

17. Notice of SNWA's complaint in Docket No. EL03-213-000 was published in the Federal Register, 68 Fed. Reg. 44,536 (2003), with protests and interventions due on or before July 31, 2003. Motions to intervene were timely filed by Reliant, Calpine Corporation (Calpine), and Sempra. Duke filed a motion to intervene and comments in support of the complainant. The PUCN filed a Notice of Intervention and Comments.

20031008-3062 Issued by FERC OSEC 10/08/2003 in Docket#: EL03-213-000

The parties filing motions raised virtually the same arguments and issues set forth above in the Pinnacle West complaint.

18. On July 21 and July 31, 2003, Nevada Power filed answers to the complaints stating that it is not opposed to granting deferrals as long as it is adequately compensated and the rates for Nevada Power's other customers are not increased unfairly as a result of such deferrals. Nevada Power states that the Commission recognized in Order No. 888-A that the payment of one month's transmission charges may not be adequate compensation for a deferral where, as in the case here, new facilities have been constructed to provide service.

19. Nevada Power explains that in 2000 and 2001, it received requests for transmission service from a large number of independent power producers. These independent power producers for the most part did not intend to serve loads in Nevada Power's service territory, but instead requested transmission service to deliver power through Nevada Power's transmission system to the California and Southwest markets from generation facilities they were developing in Nevada. Nevada Power studied the requests and determined that expansion of the existing transmission system (the Centennial Project) would be required to satisfy the new requests. Nevada Power states while processing the transmission service requests, it underwent severe financial distress as a result of extremely high power supply costs, combined with the disallowance of the recovery in its retail rates of a portion of these costs. Nevada Power’s credit rating was later downgraded, making the funding for construction projects more difficult and more expensive to obtain.

20. Nevada Power stresses that it offered service at its rolled-in rate in accordance with the Commission's pricing policy, which allows transmission providers to recover the cost of new facilities at the higher of the incremental cost of the facilities or the transmission provider's rolled-in rate. Based on the commitments that Nevada Power received, the independent power producers would fully pay for the Centennial project at the rolled-in rate. However, if the independent power producers had committed to take and pay for less transmission capacity, or requested significantly difference service commencement dates at the time the service agreements were finalized, the Centennial Project would have been priced at the incremental cost of the new facilities.

21. Nevada Power states that the Commission addressed in Order No. 888-A the exact question raised by Complainants: how should requests for deferrals of service be treated when new facilities are being constructed to provide service? Nevada Power argues that Order No. 888-A states that fairness requires that the customer bear its cost responsibility for the new construction at the time the facilities are ready to be used, and argues that

20031008-3062 Issued by FERC OSEC 10/08/2003 in Docket#: EL03-213-000

Order No. 888-A permits it to at least propose that Complainants not be entitled to deferrals.[9]

22. Nevada Power explains that its primary concern is what compensation Complainants should have to provide for deferrals. It suggests two options: (1) Complainants could pay Nevada Power the carrying charges that Nevada Power would incur during the period of deferral, or (2) Complainants could make deposits to Nevada Power equal to their allocated share of the full cost of the facilities constructed to provide the requested transmission service to Complainants. The deposits would be returned to Complainants in the form of transmission service credits, without interest, as Complainants take transmission service.

23. Finally, Nevada Power emphasizes that failure to provide full compensation for deferrals of service when new facilities are constructed would be bad public policy. Nevada Power argues that if Nevada Power is required to "take a financial hit" to accommodate a deferral of Complainants' service, a chilling signal would be sent to transmission owners faced with similar transmission service requests that would place future transmission infrastructure expansions in jeopardy.

24. In its comments, the PUCN states that Pinnacle West's request to defer transmission service by one year raises serious concerns regarding the viability of Nevada Power's Centennial Project. Should Pinnacle West ultimately fail to honor its contract with Nevada Power, a significant financial burden will shift to Nevada Power's retail customers. This was not contemplated by the PUCN when it approved Nevada Power's request to build the Centennial Project. Moreover, the PUCN states that the deferrals, if granted, would contravene the express intent of the PUCN to require those parties who requested the transmission line to pay for the project. The PUCN stresses that a ruling in favor of Pinnacle West would not only unfairly enrich the Complainant to the detriment of Nevada Power and its retail customers, it would establish a precedent that other Centennial Project participants may follow.

25. On August 5, 2003, Pinnacle West filed an answer to Nevada Power's answer, which argues, among other things, that Nevada Power and the PUCN have mischaracterized the motivations behind the Centennial Project's construction. Specifically, Pinnacle West argues that Nevada Power's claims of financial harm and misplaced reliance arising from the deferral request are unfounded, because Nevada

[9] Nevada Power's Answer at page 6, citing Order No. 888-A at 30,322.

20031008-3062 Issued by FERC OSEC 10/08/2003 in Docket#: EL03-213-000

Power has not identified any portion of the Centennial Project that could have been deferred as a result of Pinnacle West's deferral request.

26. On August 12, 2002, Nevada Power filed a response to Pinnacle West's answer, arguing that Pinnacle West has mischaracterized its position. Nevada Power acknowledges that a portion of Centennial is dedicated to serving native load, and states that it has never claimed otherwise, and that this does not bear on the merits of Nevada Power's position. Nevada Power states that it did not obtain any security from independent power producers for the share of the Centennial Project dedicated to native load, and that the native load customers will pay for their share of the Centennial Project. Nevada Power stresses however, that the independent power producers are also obligated to pay for their share of the Centennial Project.

B. Docket No. ER03-1236-000

27. Notice of Applicants' filing was published in the Federal Register, 68 Fed. Reg. 52,582 (2003), with comments, protests, or interventions due on or before September 11, 2003. The PUCN filed a notice of intervention. The Nevada BCP filed a timely motion to intervene. Timely motions to intervene and protests were filed by Pinnacle West, Calpine, Reliant, SNWA, and Duke. Additionally, SNWA made a conditional request for consolidation and Duke requested expedited action.

28. Duke argues that the explicit purpose of the proposed amendment is to legitimize, through a Section 205 filing, Nevada Power's refusal to apply Section 17.7 of its existing OATT to extension requests that were tendered by customers before July 31, 2003 under TSAs that include no case-specific provisions that would modify or invalidate Section 17.7. It asserts that the filing provides no basis for Nevada Power to depart from the requirements of its then-effective OATT and the unqualified TSAs that customers relied upon when they confirmed their transmission reservation. Duke contends that the amendment is not reasonable for application to TSAs entered into prospectively because it is inconsistent with Order No. 888-A's rejection of generic amendments and requirement for case-specific proposals codified in the TSA tendered to the customer before service commences. It also argues that Nevada Power has not demonstrated that its proposed amendment is just and reasonable because it has failed to include any support or justification for the specific proposal. Finally, Duke contends that Nevada Power's request for waiver of the Commission's prior 60-day notice requirement should be denied.

29. Pinnacle West argues that the proposed amendment seeks to retroactively modify the terms and conditions of the currently effective Section 17.7 of Nevada Power's

20031008-3062 Issued by FERC OSEC 10/08/2003 in Docket#: EL03-213-000

OATT and Pinnacle TSA. It asserts that the TSA does not limit its ability to defer service pursuant to Section 17.7 and that transmission customers must be able to rely upon the terms and conditions of their Commission-approved TSAs, along with the terms and conditions of the currently effective OATT. Pinnacle West contends that Section 17.7 of the OATT should not be amended on a generic basis, and any limitations placed on the ability to defer transmission service should have been incorporated in the TSA. It further asserts that the amendment does not provide any justification for the proposed retroactive service date.

30. Reliant similarly protests the inclusion of generic language in Section 17.7 of the OATT regarding payment of alleged extra costs without any showing that these extra costs will be incurred by Applicants or are appropriate to be charged to all customers on a generic basis. It contends that the filing lacks the detailed justification necessary before the Commission could approve the amendment. Additionally, Reliant contends that Applicants are proposing a significant generic change to the OATT based on two limited situations. It argues that the Commission should not make what in essence will become a generic change to Section 17.7 of the OATT for every transmission owner in the United States without a better record justifying such a significant change.

31. SNWA contends that Applicants' proposed amendment further demonstrates that SNWA's and Pinnacle's complaints in Docket Nos. EL03-213-000 and EL03-209-000 should be granted. It asserts that Applicants' request for a retroactive effective date violates the filed rate doctrine. SNWA also contends that Applicants' equitable arguments should not affect the Commission's determination on the merits. Finally, SNWA requests that, if the Commission believes that further proceedings are required, this matter should be consolidated with the pending complaints in Docket Nos. EL03-209-000 and EL03-213-000.

32. Calpine argues that the proposal would change the terms of existing transmission service agreements and fundamentally alter the allocation of risk agreed to by the parties. It also asserts that the Applicants inappropriately tie their filing to the complaint proceeding.

33. On September 26, 2003, Applicants filed an answer in response to the protests. Specifically, Applicants assert that they must be permitted to address extension requests on either a case-by-case basis or in their OATT. They submit that the Commission should not impose a retroactive requirement that extensions of the commencement of service must be addressed in TSAs. Applicants also contend that Pinnacle West and SNWA represented to Nevada Power that Pinnacle West and SNWA would retain the commencement of service dates provided in their TSAs. Applicants further assert that

20031008-3062 Issued by FERC OSEC 10/08/2003 in Docket#: EL03-213-000

Nevada Power has not claimed that the Centennial Project was constructed solely for generators. Additionally, Applicants submit that nothing in the TSAs bars them from amending their OATT, and they contend that Duke's arguments regarding the amount of payment required are mostly without merit. Finally, Applicants assert that waiver of the prior notice requirement is appropriate in the unique circumstances present here.

IV. Discussion

A. Procedural Matters

34. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §385.214 (2003), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. The Commission will grant the late motions to intervene filed by Sempra given its interest in the proceedings, the early stage of the proceedings, and the absence of any undue prejudice or delay. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. §384.213(a)(2) (2003) prohibits an answer to a protest or an answer to an answer unless otherwise ordered by the decisional authority. We will accept them because they have provided information that assisted us in our decision-making process.

B. Resolution

35. Under the Commission's complaint regulations (18 C.F.R. § 385.206(b)(9) (2003)), Complainants must state whether dispute resolution procedures were used, and whether the complainant believes that alternative dispute resolution (ADR) under the Commission's supervision could successfully resolve the complaint. While the Complainants explain that they attempted settlement through the Commission's hotline procedures, the Commission believes that a more structured settlement environment would be more conducive to reaching a satisfactory resolution of the issues raised in these proceedings.

36. Accordingly, the Commission is establishing in Docket Nos. EL03-219-000, EL03-213-000, and ER03-1236-000 settlement judge procedures pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.[10] If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding;

[10] 18 C.F.R. §385.603 (2003).

20031008-3062 Issued by FERC OSEC 10/08/2003 in Docket#: EL03-213-000

otherwise, the Chief Administrative Law Judge will select a judge for this purpose.[11] The settlement judge shall issue a report to the Chief Judge and the Commission within 120 days of the date this order issues concerning the results of settlement discussions. At that time, the Commission will take appropriate action, including, if appropriate, ordering the Chief Judge to provide the parties with additional time to continue their settlement discussions.[12]

37. If the parties' dispute is not resolved through settlement judge proceedings, the Commission will set a refund effective date five months subsequent to the expiration of the 60-day period following the filing of Pinnacle West's complaint.

The Commission orders:

(A) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §385.603 (2003), the Chief Administrative Law Judge is hereby authorized to appoint a settlement judge. 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.

(B) Within 120 days of the date this order issues, the settlement judge shall file a report with the Chief Judge and the Commission on the results of the settlement discussions.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.

---

[11] 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 days of this order. The Commission's website contains a listing of the Commission's judges and a summary of their background and experience. (www.ferc.gov -- click on Offices under Commission Matters).

[12] The Commission anticipates that it will issue a further order within 90 days of the settlement judge's report.