109 FERC ¶61,295
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Pinnacle West Capital Corporation	Docket Nos.	ER00-2268-005 ER00-2268-006 ER00-2268-007 EL05-10-000
Arizona Public Service Company		ER99-4124-003 ER99-4124-004 ER99-4124-005 EL05-11-000
Pinnacle West Energy Corporation		ER00-3312-004 ER00-3312-005 ER00-3312-006 EL05-12-000
APS Energy Services Company, Inc.		ER99-4122-006 ER99-4122-007 ER99-4122-008 EL05-13-000

ORDER ON UPDATED MARKET POWER ANALYSIS, INSTITUTING SECTION 206 PROCEEDING AND ESTABLISHING REFUND EFFECTIVE DATE

(Issued December 20, 2004)

1. On August 11, 2004, as amended on September 28, 2004 and November 19, 2004, Pinnacle West Capital Corporation (PWC), Arizona Public Service Company (APS), the Pinnacle West Energy Corporation (PWE), and APS Energy Services Company, Inc. (APS Energy) (collectively, the Pinnacle West Companies) submitted for filing an updated market power analysis in compliance with the Commission's order issued on

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May 13, 2004.[1] The May 13 Order addressed the procedures for implementing the generation market power screens announced on April 14, 2004 and clarified on July 8, 2004.[2] In their filings, the Pinnacle West Companies state that they pass both generation market power screens. However, the Commission finds that the Pinnacle West Companies have not provided adequate information for the Commission to determine whether the Pinnacle West Companies pass both generation market power screens.

2. Because we are unable to validate the results of the Pinnacle West Companies' generation market power analysis, as discussed below, in this order, the Commission institutes a proceeding pursuant to section 206 of the Federal Power Act (FPA)[3] to determine whether the Pinnacle West Companies may continue to charge market-based rates and establishes a refund effective date pursuant to the provisions of section 206. The instant section 206 proceeding, as well as any resulting mitigation or refunds, is limited to the APS control area and the Tucson Electric Power Company (TEP) and Public Service Company of New Mexico (PNM) first-tier control areas, since these are the relevant markets for which our analysis indicates that the Pinnacle West Companies could fail the market power screen. The Commission further accepts the Pinnacle West Companies' tariff sheets that include the Market Behavior Rules, as required by the Commission in a previous order.[4]

3. This order, including the refund effective date, will protect customers from excessive rates and charges that may result from the exercise of market power.

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[1] *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004) (May 13 Order).

[2] *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

[3] 16 U.S.C. § 824e (2000).

[4] *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003), *order on reh'g*, 107 FERC ¶ 61,175 (2004) (Market Behavior Rules Order).

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Background

4. On April 11, 2003, the Pinnacle West Companies filed an updated generation market power analysis in compliance with several Commission orders accepting the Pinnacle West Companies' market-based rate tariffs (April 2003 market power analysis).[5] The Pinnacle West Companies state that their updated market analysis demonstrates their continued lack of generation dominance and assert that they continue to fulfill all of the Commission's requirements necessary to retain market-based rate authority.

5. In the April 14 Order, as clarified by the July 8 Order, the Commission adopted two indicative screens for assessing generation market power: a pivotal supplier screen and a wholesale market share screen. The Commission stated that passage of both screens establishes a rebuttable presumption that the applicant does not possess generation market power, while failure of either screen creates a rebuttable presumption that the applicant has generation market power. The Commission further stated that applicants and intervenors may, however, rebut the presumption established by the results of the initial screens by submitting a Delivered Price Test. Alternatively, an applicant may accept the presumption of market power or forgo the generation market power analysis altogether and go directly to mitigation.[6] The May 13 Order directed the Pinnacle West Companies to file, within ninety days of the issuance of that order, generation market power analyses pursuant to these two indicative screens.[7]

6. On August 11, 2004, the Pinnacle West Companies filed an updated market power analysis in compliance with the Commission's May 13 Order (August 2004 filing). The Pinnacle West Companies also submitted revised tariff sheets. On September 28, 2004, the Pinnacle West Companies submitted a supplemental study for its generation market power analysis (September 2004 filing).

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[5] *See Pinnacle West Energy Corp.*, 92 FERC ¶ 61,248 (2000), *reh'g denied*, 95 FERC ¶ 61,301 (2001) (*Pinnacle West Energy*); *Pinnacle West Capital Corp.*, 91 FERC ¶ 61,290 (2000), *reh'g denied*, 95 FERC ¶ 61,300 (2001) (*Pinnacle West Capital*); *APS Energy Services Co.*, 89 FERC ¶ 61,024 (1999); *Arizona Public Service Co.*, 79 FERC ¶ 61,022 (1997).

[6] In addition, as the Commission stated in the April 14 Order, the applicant or intervenors may present evidence such as historical sales data to support whether the applicant does or does not possess market power. April 14 Order, 107 FERC ¶ 61,018 at P 37.

[7] May 13 Order, 107 FERC ¶ 61,168 at Appendix A.

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7. On October 29, 2004, the Director, Division of Tariffs and Market Development – South, acting pursuant to delegated authority, issued a data request seeking additional information relating to the Pinnacle West Companies' submittal.

8. On November 19, 2004, the Pinnacle West Companies filed their response to the data request (November 2004 filing).

Description of the Pinnacle West Companies' Filings

9. The Pinnacle West Companies have provided a generation market power analysis pursuant to the requirements of the Commission's April 14 Order using as the relevant geographic markets their home control area and eight interconnected first-tier control areas. The filing states that the Pinnacle West Companies pass both indicative screens in those markets. In addition, the Pinnacle West Companies have provided a generation market power analysis for the geographic area consisting of the joint Arizona Public Service Company/Salt River Project (APS/SRP) area, which they argue is the relevant geographic market in this case. The filing also states that the Pinnacle West Companies pass both indicative screens for this joint area, and for each directly-interconnected control area.

10. The filing also included revised tariff sheets in which the Pinnacle West Companies incorporated into their market-based rate tariffs the market behavior rules established by the Commission in its Market Behavior Rules Order. In addition, the Pinnacle West Companies have submitted proposed tariff amendments incorporating a *Mobile-Sierra* provision[8] in the respective tariffs.

11. In their November 2004 Filing, the Pinnacle West Companies provided additional information about their simultaneous import studies, provided clarification and supporting data for certain components of their market power analyses, revised their market power analysis for first-tier markets by using nameplate capacities for generation and weekends and holidays in native load calculations, provided additional justification for using the joint APS/SRP area as the relevant market, and provided additional information to show that the Pinnacle West Companies satisfy the Commission's concerns regarding affiliate abuse.

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[8] *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Power Co.*, 350 U.S. 348 (1956) (*Mobile-Sierra*).

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Notice of Filing and Responsive Pleadings

12. Notice of the Pinnacle West Companies' April 2003 market power analysis was published in the *Federal Register*, 68 Fed. Reg. 19,805 (2003), with interventions or protests due on or before May 2, 2003. Panda Gila River, L.P. filed a motion to intervene.

13. Notice of the August 2004 filing was published in the *Federal Register*, 69 Fed. Reg. 52,005 (2004), with interventions or protests due on or before September 1, 2004. Timely motions to intervene raising no substantive comments were filed by Panda Gila River, L.P., El Paso Electric Company, and PNM. A late motion to intervene raising no substantive comments was filed by the Arizona Districts.[9]

14. Notice of the September 2004 Filing was published in the *Federal Register*, 69 Fed. Reg. 60,851 (2004), with interventions or protests due on or before October 15, 2004. A timely motion to intervene and comment was filed by New Harquahala Generating Company, LLC (New Harquahala).

15. Notice of the November 2004 filing was published in the *Federal Register*, 69 Fed. Reg. 69,597 (2004), with interventions or protests due on or before December 7, 2004. None was filed.

Discussion

Procedural Matters

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. The Commission will grant the motion to intervene out-of-time of the Arizona Districts given their interest in this proceeding, the early stage of this proceeding, and the absence of any undue prejudice or delay.

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[9] The Arizona Districts are: Aguila Irrigation District, Buckeye Water Conservation & Drainage District, Electrical District No. 6 of Pinal County, Electrical District No. 7 of Maricopa County, Electrical District No. 8 of Maricopa County, Harquahala Valley Power District, Maricopa County Municipal Water Conservation District No. 1, McMullen Valley Water Conservation & Drainage District, Roosevelt Irrigation District, and Tonopah Irrigation District.

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Market-Based Rate Authorization

17. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. The Commission also considers whether there is evidence of affiliate abuse or reciprocal dealing.[10]

Generation Market Power

18. In conducting their pivotal supplier and wholesale market share screens, the Pinnacle West Companies limited imports into the APS control area and into the joint APS/SRP area, using the results of simultaneous transmission import capability studies that they performed for each season. Our review of the documentation filed to support these studies and our own analysis of the simultaneous transmission import capability into the APS and APS/SRP control areas using information for the base cases from the filing indicate that the import capabilities provided by the Pinnacle West Companies may be overstated. Further, our analysis indicates that the import studies do not comply with the requirements set forth in Appendix E of the April 14 Order since they do not appear to include complete lists of contingencies and monitored/limiting facilities throughout the study area and first-tier areas. The Pinnacle West Companies' potentially overstated simultaneous import capabilities affect the results of the generation market power screens by inflating the amount of uncommitted capacity available from competitors in the wholesale market indicated in the screens. Based on their incomplete simultaneous transmission import capability studies, the Pinnacle West Companies' generation market power studies indicate that they pass the screens. However, if the import studies were performed as required by the April 14 Order, the Pinnacle West Companies could fail the screens. Because we are unable to validate the results of their generation market power analyses, the Commission will not make a determination regarding the Pinnacle West Companies' assertion that the joint APS/SRP area is the proper relevant market at this time. Rather, we will consider this issue in the context of the section 206 proceeding instituted herein.

19. In calculating uncommitted capacity available to APS' first-tier markets, the Pinnacle West Companies erroneously included simultaneous import capacity from control areas which are first-tier to the APS control area but are not directly interconnected to the first-tier market being studied (relevant market), contrary to

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[10] *See, e.g.*, *Progress Power Marketing, Inc.*, 76 FERC ¶ 61,155, at 61,921-22 (1996); *Northwest Power Marketing Co., L.L.C.*, 75 FERC ¶ 61,281, at 61,899-900 (1996); *accord Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223, at 62,062-63 (1994).

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instructions in the April 14 Order.[11] Only those control areas directly interconnected with the relevant market should be included in calculations of simultaneous transmission import capacity. Our analysis of the Pinnacle West Companies' submittal indicates that if the Pinnacle West Companies' calculations were performed as required by the April 14 Order, the Pinnacle West Companies could fail the market share screens in the TEP control area in the winter and spring seasons and in the PNM control area in the spring season.

20. Our preliminary analysis indicates that because the Pinnacle West Companies' simultaneous import capability study is incomplete and because the Pinnacle West Companies included import capacity from control areas not directly interconnected with first-tier markets being studied, the Commission cannot validate the results of the Pinnacle West Companies' generation market power analysis to determine whether the Pinnacle West Companies pass the market share screens in the APS, TEP, and PNM control areas. The Pinnacle West Companies' failure to comply with the April 14 Order provides the basis for the Commission to institute the instant section 206 proceeding, which is limited to the APS, TEP, and PNM control areas, to determine whether the Pinnacle West Companies may continue to charge market-based rates in those markets. Our decision to institute the instant section 206 proceedings does not constitute a definitive finding by the Commission that the Pinnacle West Companies have market power in the APS, TEP, and PNM control areas.

21. Since there is a significant difference between the simultaneous import capability calculations performed by the Commission and the Pinnacle West Companies, the Commission will give the Pinnacle West Companies the option to file, within 60 days from the date of issuance of this order, a revised simultaneous transmission import capability study for the APS control area, which complies with the requirements in Appendix E of the April 14 Order. Alternatively, the Pinnacle West Companies may choose, within 60 days from the date of issuance of this order, to either: (1) file a Delivered Price Test Analysis; (2) file a mitigation proposal tailored to their particular circumstances that would eliminate the ability to exercise market power; or (3) inform the Commission that they will adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates.[12] In addition, as the Commission stated in the April 14 Order,[13] the applicants or intervenors may present

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[11] 107 FERC ¶ 61,018 at P 73.

[12] Id. at P 201, 207-209.

[13] 107 FERC ¶ 61,018 at P 37.

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evidence such as historical sales data to support whether the applicants do or do not possess market power.

22. In addition, for the PNM and TEP first-tier control areas, the Commission will give the Pinnacle West Companies the option to file, within 60 days from the date of issuance of this order, revised wholesale market share analyses which exclude uncommitted capacity imports from control areas which are not directly interconnected with the PNM or TEP control areas. Alternatively, for the PNM and TEP control areas, the Pinnacle West Companies may choose, within 60 days from the date of issuance of this order, to either: (1) file a Delivered Price Test Analysis; (2) file a mitigation proposal tailored to their particular circumstances that would eliminate the ability to exercise market power; or (3) inform the Commission that they will adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates. In addition, as the Commission stated in the April 14 Order,[14] the applicants or intervenors may present evidence such as historical sales data to support whether the applicants do or do not possess market power.

23. Furthermore, in their November 2004 filing, the Pinnacle West Companies include weekends and NERC holidays in their calculations of native load proxies for the seasonal wholesale market share screens for first-tier markets. The Commission hereby clarifies that weekends and NERC holidays may be excluded when determining the peak load day for each season because weekends and holidays are not typical load days. Therefore, the Commission will give the Pinnacle West Companies the opportunity, at their discretion, to file, within 60 days from the date of issuance of this order, revised seasonal wholesale market share screens for first-tier control areas which exclude weekends and NERC holidays from the calculation of proxies for native load obligations.

24. This order establishes a refund effective date in order to put in place the necessary procedural framework to promptly impose an effective remedy, in case the Commission determines that such a remedy is required. Our decision to establish a refund effective date does not constitute a determination that refunds will be ordered.

25. In cases where, as here, the Commission institutes section 206 proceedings on its own motion, section 206(b) requires that the Commission establish a refund effective date that is no earlier than 60 days after publication of notice of the initiation of the Commission's proceeding in the Federal Register, and no later than five months subsequent to the expiration of the 60-day period. In order to give maximum protection

[14] 107 FERC ¶ 61,018 at P 37.

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to customers, and consistent with Commission precedent,[15] the Commission will establish a refund effective date, at the earliest date allowed. This date will be 60 days from the date on which notices of the initiation of the proceedings in Docket Nos. EL05-10-000, EL05-11-000, EL05-12-000, and EL05-13-000 are published in the *Federal Register*. In addition, section 206 requires that, if no final decision has been rendered by that date, the Commission must provide its estimate as to when it reasonably expects to make such a decision. Given the times for filing identified in this order, and the nature and complexity of the matters to be resolved, the Commission estimates that it will be able to reach a final decision by April 29, 2005.

Transmission Market Power

26. When a transmission-owning public utility seeks market-based rate authority, the Commission has required the public utility to have an open access transmission tariff (OATT) on file before granting such authorization. The Pinnacle West Companies state that they have an OATT on file with the Commission. We note that the Pinnacle West Companies' OATT was accepted by Commission order in *Arizona Public Service Co.*, 86 FERC ¶ 61,314 (1999). Furthermore, no intervenor raises transmission market power concerns. Based on the Pinnacle West Companies' representations, we find that the Pinnacle West Companies satisfy the Commission's transmission market power standard for the grant of market-based rate authority.

Other Barriers to Entry

27. The Pinnacle West Companies state that they do not own gas transmission facilities, railroads, field gas supplies or coal mines.[16] The Pinnacle West Companies further state that while they do have fuel and transportation contracts to supply their generating stations, these contracts do not provide them with the ability to frustrate entry. Further, no intervenor raises concerns regarding barriers to entry.

28. Based on the Pinnacle West Companies' representations, the Commission is satisfied that the Pinnacle West Companies cannot erect barriers to entry. However, should the Pinnacle West Companies or any of their affiliates deny, delay or require unreasonable terms, conditions or rates for natural gas service to a potential electric competitor in bulk power markets, that electric competitor may file a complaint with the

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[15] *See, e.g., Canal Electric Company*, 46 FERC ¶ 61,153 (1989), *reh'g denied*, 47 FERC ¶ 61,275 (1989).

[16] The Pinnacle West Companies note that PWE owns a short spur pipe.

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Commission that could result in the suspension of the Pinnacle West Companies' authority to sell power at market-based rates.[17]

Affiliate Abuse

29. The Commission is also concerned with the potential for affiliate abuse. The Pinnacle West Companies state that they are currently authorized to transact with each other and to share market information pursuant to Commission orders.[18] Further, they state that APS' retail customers are protected from potential affiliate abuse through state monitoring of power procurement for standard offer retail customers and/or the ability of APS' retail customers to choose their electric supplier. The Pinnacle West Companies state that the Commission determined in *Pinnacle West Capital*, the order granting market-based rate authority to Pinnacle West Capital Corporation, that APS' captive wholesale customers were adequately protected from affiliate abuse when it accepted proposed safeguards capping certain rate components.[19]

30. New Harquahala expresses concern about the Pinnacle West Companies' potential for affiliate abuse. New Harquahala notes that the Commission has previously granted PWE's request to make sales to its affiliates at market-based rates and waived certain reporting requirements.[20] New Harquahala states that the blanket approval and waiver may no longer be appropriate or may allow PWE and its affiliates to circumvent the Commission's standards regarding affiliate transactions.

31. Based on the Pinnacle West Companies' representations, the Commission finds the Pinnacle West Companies satisfy the Commission's concerns with regard to affiliate abuse. However, the Commission has become increasingly concerned about the potential adverse impact affiliate transactions may have not only on customers, but also on wholesale competition. New Harquahala has raised similar concerns as to the need for the Commission to examine affiliate transactions to ensure that they do not adversely impact either customers or wholesale competition. We appreciate New Harquahala's

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[17] *See, e.g., Louisville Gas & Electric Co.*, 62 FERC ¶ 61,016 (1993).

[18] *See Pinnacle West Energy*, 92 FERC ¶ 61,248; *Pinnacle West Capital*, 91 FERC ¶ 61,290.

[19] 91 FERC ¶ 61,290.

[20] *Citing Pinnacle West Energy*, 92 FERC ¶ 61,248 and *Pinnacle West Capital*, 91 FERC ¶ 61,290.

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concerns in this regard and believe that it may be appropriate for the Commission to reexamine its affiliate sales and code of conduct policy, including the standard for allowing waivers. However given the number of waivers that have been granted to utilities in past cases, we believe that this issue is more appropriately addressed in the context of the comprehensive, generic market-based rate rulemaking proceeding that the Commission has initiated in Docket No. RM04-7-000 to ensure that all interested parties have adequate notice and opportunity to comment and that any changes to Commission policy are applied equally to all affected utilities on a prospective basis. The rulemaking will address, among other things, whether the Commission should retain or modify its existing four-prong test for market-based rate authority and whether the Commission should adopt different approaches to affiliate transactions than it currently does.

Market Behavior Rules

32. In the Market Behavior Rules Order, the Commission directed market-based rate sellers to include as an amendment to their market-based rate tariff the market behavior rules at such time as they seek continued authorization to sell at market-based rates.[21] The Pinnacle West Companies have filed the market behavior rules set forth in Appendix A to the Market Behavior Rules Order. Accordingly, the Pinnacle West Companies have complied with this directive.

***Mobile-Sierra* Provision**[22]

33. The Pinnacle West Companies propose to adopt language in the respective tariffs providing that unless both parties agree to a proposed change, the standard of review for changes to the rate proposed by either party, or the Commission acting *sua sponte*, shall be the "public interest" standard of review.[23] As we stated in *Public Service Company of*

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[21] Market Behavior Rules Order, 105 FERC ¶ 61,218 at Ordering Paragraph (A).

[22] The Pinnacle West Companies have also proposed to modify or delete various tariff provisions in the APS tariff. Specifically, the Pinnacle West Companies propose to modify or delete sections 4.3.1, 4.3.2, 5.1.1, 5.1.2 and 8. These modifications or deletions appear to be consistent with the procedures adopted in *Revised Public Utility Filing Requirements, Order No. 2001,* 67 Fed. Reg. 31,043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002). Accordingly, we will accept these provisions.

[23] Specifically, the Pinnacle West Companies propose to add the following provision, in relevant part:

(continued)

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New Mexico,[24] the proper place for specifying the standard of review for rate changes is in the individual agreements negotiated by the parties. Accordingly, the Pinnacle West Companies' proposed change to its market-based rate tariff is rejected. Therefore, we direct the Pinnacle West Companies to submit a compliance filing, within 15 days of the date of this order, to revise their tariffs, as discussed.

Reporting Requirements

34. Consistent with the procedures the Commission adopted in Order No. 2001, an entity with market-based rates must file electronically with the Commission an Electric Quarterly Report containing: (1) a summary of the contractual terms and conditions in every effective service agreement for market-based power sales; and (2) transaction information for effective short-term (less than one year) and long-term (one year or greater) market-based power sales during the most recent calendar quarter.[25] Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.[26]

> Unless otherwise specified, the rate for service that was negotiated and agreed upon between the purchaser and [the Pinnacle West Companies] shall remain in effect for the term specified and shall not be subject to change under section 205 or Section 206 of the Federal Power Act absent the agreement of all parties to the proposed change, except when the standard of review as stated below has been met. The standard of review for changes (including the rate for service) proposed by a party, a non-party or the Federal Energy Regulatory Commission (FERC) acting *sua sponte* shall be the "public interest" standard of review set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp*., 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co*., 350 U.S. 348 (1956) (the "Mobile-Sierra" doctrine).

[24] 108 FERC ¶ 61,092 (2004) (PNM).

[25] *Revised Public Utility Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31,043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002). Required data sets for contractual and transaction information are described in Attachments B and C of Order No. 2001. The Electric Quarterly Report must be submitted to the Commission using the EQR Submission System Software, which may be downloaded from the Commission's website at http://www.ferc.gov/Electric/eqr/eqr.htm.

[26] The exact dates for these reports are prescribed in 18 C.F.R. § 35.10b (2004). Failure to file an Electric Quarterly Report (without an appropriate request for extension), (continued)

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35. With regard to reporting changes in status that would reflect a departure from the characteristics the Commission has relied upon in approving market-based pricing, in a Notice of Proposed Rulemaking in Docket No. RM04-14-000, the Commission is proposing to amend its regulations and to modify the market-based rate authority of current market-based rate sellers to establish a reporting obligation for changes in status that apply to public utilities authorized to make wholesale power sales in interstate commerce at market-based rates.[27] Accordingly, the change in status reporting obligation for the Pinnacle West Companies is subject to the outcome of the rulemaking.

The Commission orders:

(A) The Pinnacle West Companies' updated market power analysis for all relevant markets not subject to the section 206 proceeding is hereby accepted for filing, as discussed in the body of this order.

(B) The Pinnacle West Companies' tariff sheets that include the Market Behavior Rules are accepted for filing, effective December 17, 2003, as discussed in the body of this order.

(C) The Pinnacle West Companies' proposed tariff revision concerning a *Mobile-Sierra* provision is hereby rejected, as discussed in the body of this order.

(D) The Pinnacle West Companies are hereby directed to submit a compliance filing, within 15 days of the date of this order, as discussed in the body of this order.

(E) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the 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), the Commission hereby institutes proceedings in Docket Nos. EL05-10-000, EL05-11-000, EL05-12-000, and EL05-13-000 concerning the justness and reasonableness of the Pinnacle West Companies' market-based rates, as discussed in the body of this order.

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or failure to report an agreement in an Electric Quarterly Report, may result in forfeiture of market-based rate authority, requiring filing of a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

[27] *Reporting Requirement for Changes in Status for Public Utilities With Market-Based Rate Authority*, 69 Fed. Reg. 61,180 (Oct. 15, 2004), FERC Stats. & Regs. ¶ 32,576 (2004).

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(F) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of the proceedings under section 206 of the FPA in Docket Nos. EL05-10-000, EL05-11-000, EL05-12-000, and EL05-13-000.

(G) The refund effective date established pursuant to section 206(b) of the FPA shall be 60 days following publication in the Federal Register of the notice discussed in Ordering Paragraph (F) above.

(H) As discussed in the body of this order, the Pinnacle West Companies are hereby directed, for the APS control area, within 60 days from the date of issuance of this order, to either: (1) file a revised simultaneous transmission import capability study which complies with the requirements in Appendix E of the April 14 Order; (2) file a Delivered Price Test analysis; (3) file a mitigation proposal tailored to their particular circumstances that would eliminate the ability to exercise market power; or (4) inform the Commission that they will adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates.

(I) As discussed in the body of this order, the Pinnacle West Companies are hereby directed, for the PNM and TEP control areas, within 60 days from the date of issuance of this order, to either: (1) file a revised wholesale market share analysis; (2) file a Delivered Price Test analysis; (3) file a mitigation proposal tailored to their particular circumstances that would eliminate the ability to exercise market power; or (4) inform the Commission that they will adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates.

By the Commission. Commissioner Brownell dissenting in part with a separate statement attached.
Commissioner Kelliher dissenting in part with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

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(Issued December 20, 2004)

Nora Mead BROWNELL, Commissioner *dissenting in part*:

The Pinnacle West Companies propose to adopt language in their respective market-based-rate tariffs providing that unless both parties agree otherwise, the standard of review for changes to the rate proposed by either party, or the Commission acting *sua sponte*, shall be the *Mobile-Sierra* "public interest" standard. This order rejects the proposed amendments. For the reasons I explained in my separate statement in *Public Service Company of New Mexico*, 108 FERC ¶ 61,092 (2004), where Public Service Company of New Mexico made a similar proposal, I would have accepted the Pinnacle West Companies' proposal.

Nora Mead Brownell

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(Issued December 20, 2004)

Joseph T. KELLIHER, Commissioner *dissenting in part*:

I dissent from the part of this order that institutes proceedings under section 206 of the Federal Power Act[28] in Docket Nos. EL05-10-000, EL05-11-000, EL05-12-000 and EL05-13-000 concerning the justness and reasonableness of the Pinnacle West Companies continuing to charge market-based rates. In this order, the Commission does not find that the Pinnacle West Companies failed either indicative screen. Instead, the Commission finds that the Pinnacle West Companies improperly calculated simultaneous transmission import capability. In essence, the Commission is initiating a section 206 proceeding and

[28] 16 U.S.C. § 824e (2000).

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setting a refund effective date for failure to properly administer our new market power test, not for failure of this test. Significantly, the Commission does not find that Pinnacle West Companies acted in bad faith by failing to properly administer our test. I would afford Pinnacle West Companies another opportunity to properly calculate transmission import capability. Accordingly, I would not, at this time, initiate section 206 proceedings in Docket Nos. EL05-10-000, EL05-11-000, EL05-12-000 and EL05-13-000 or take any additional actions related to the initiation of section 206 proceedings.

On a separate matter, I note that in the April 14 Order, the Commission stated it will first look to the control area market where the applicant is physically located to determine the default relevant geographic markets under both screens.[29] However, because we recognized that defining the relevant geographic market on a control area basis may not always be appropriate, we allowed applicants to demonstrate that some other geographic market would be more appropriate.[30]

Pinnacle West Companies now propose a different geographic market for the Commission to consider in its evaluation of whether the Pinnacle West Companies pass the indicative screens. I believe that Pinnacle West Companies' proposed geographic market has merit and should seriously be considered.

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Joseph T. Kelliher

[29] *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (2004) at P73.

[30] *Id.* at P75.