

108 FERC ¶ 61,005
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Sierra Pacific Power Company
Nevada Power Company

Docket No. ER04-816-000

ORDER CONDITIONALLY ACCEPTING TARIFF REVISIONS

(Issued July 2, 2004)

1. In this order, the Commission conditionally accepts for filing Sierra Pacific Power Company (Sierra Pacific) and Nevada Power Company's (Nevada Power) (collectively, Applicants) proposed amendment to section 17.7 of Sierra Pacific's open access transmission tariff (OATT),¹ to address requests for the extension of the commencement of service over Nevada Power's newly constructed Centennial Project.² This order benefits customers by ensuring that the rates, terms and conditions of transmission service are just and reasonable.

I. Background

A. Section 17.7 of Sierra Pacific's OATT and Past Proceedings

2. In 2000 and 2001, Nevada Power received requests for transmission service from a large number of independent power producers (IPPs). These IPPs primarily requested transmission service to deliver power through Nevada Power's transmission system to the California and Southwest markets from generation facilities they were constructing in

¹ Sierra Pacific Resources Operating Companies FERC Electric Tariff, Third Revised Volume No. 1. Nevada Power provides open access transmission services under Sierra Pacific's OATT.

² The Centennial Project was identified in a Resource Plan filed in 2001 with the Public Utilities Commission of Nevada (Nevada Commission) and is designed to provide up to 3000 MW of transmission capacity in Nevada Power's control area at a cost of approximately \$300 million.

Nevada. As required by Order No. 888³ and the OATT, Applicants state that Nevada Power studied these requests and determined that expansion of the existing transmission system would be required to satisfy the new requests, resulting in the Centennial Project. As pertinent here, the transmission service agreements (TSAs) applicable to service from Pinnacle West Energy Corporation (Pinnacle West), Duke Energy North America, LLC (DENA) and Duke Energy Trading and Marketing, L.L.C. (DETM) (collectively, Duke), and the Southern Nevada Water Authority (SNWA),⁴ provided for the commencement of service on July 31, 2003.⁵

3. On May 23, 2003, June 10, 2003, and June 19, 2003, Pinnacle West, Duke and SNWA, respectively, sent written requests to Nevada Power to invoke section 17.7 of the OATT to extend the commencement date of each TSA for one year and included checks equal to one month's charge for transmission service, as required by section 17.7.⁶ Applicants state that, because the requested delays in the commencement of service would cause Nevada Power to incur significant carrying costs well in excess of one

³ Promoting Wholesale Competition Through Open-Access Non-Discriminatory Transmission Service by Public Utilities and 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 in relevant part 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 v. FERC, 535 U.S. 1 (2002).

⁴ SNWA was not one of the original six IPPs that executed agreements with Nevada Power. Instead, Pinnacle West transferred a portion of its TSA capacity to SNWA.

⁵ Applicants state that, in accordance with the provisions of those TSAs, Nevada Power ensured that the Centennial Project was in service in time to provide the requested service on July 31, 2003.

⁶ Existing section 17.7 states “[t]he Transmission Customer can obtain up to five (5) one year extensions for the commencement of service. The Transmission Customer may postpone service by paying a non-refundable annual reservation fee equal to one month's charge for Firm Transmission Service for each year or fraction thereof.”

month's transmission charges, Nevada Power rejected these requests. Nevada Power relied on Order No. 888-A, where the Commission addressed cost responsibility for deferrals of transmission service for new facilities, which states that:

Because different factual circumstances could exist that may lead to alternative solutions to the problem, we will not adopt a generic resolution. Rather, the Commission believes it appropriate to allow each utility to propose solutions in subsequent section 205 filings with the Commission.⁷

4. Consistent with that directive, Nevada Power took the position that it required full compensation for costs incurred as a consequence of delays in the commencement of service, and that it would file any agreements providing for such compensation (whether resolved through negotiation or through a hearing) with the Commission under section 205 of the Federal Power Act (FPA)⁸ for its review.

5. In July 2003, Pinnacle West and SNWA filed complaints in Docket Nos. EL03-209-000 and EL03-213-000, respectively, requesting that the Commission require Nevada Power to apply section 17.7 to the requested extensions and that, absent any amendment to it, Applicants were required to accept one month's transmission charges for every one year of service deferral. They also asserted that Order No. 888-A does not permit a case-by-case approach to requests for the commencement of service on newly constructed facilities and, instead, Nevada Power should have included provisions in section 17.7 of the OATT providing for such payments.

6. As a result, on August 21, 2003, in Docket No. ER03-1236-000, Applicants filed a proposed amendment to their OATT providing that a transmission customer may postpone service over new facilities or upgrades constructed to accommodate its service request 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) the customer's allocated share of the full cost of the facilities, which would be returned in the form of transmission service credits, without interest.

7. On October 8, 2003, the Commission issued an order establishing settlement judge procedures for the complaint proceedings and the amendment proceeding.⁹ On March 25, 2004, in Docket Nos. EL03-209-000 and EL03-213-000, the Commission

⁷ Order No. 888-A at 30,322.

⁸ 16 U.S.C. § 824d (2000).

⁹ Pinnacle West Energy Corp. v. Nevada Power Co., 105 FERC ¶ 61,053, supplemental order, 105 FERC ¶ 61,070 (2003).

approved an uncontested settlement between Applicants and Pinnacle West and SNWA, which resulted in Pinnacle West and SNWA agreeing to make certain payments for an extension of service until May 1, 2004.¹⁰ Duke, the remaining customer requesting an extension of service, and Applicants were unable to resolve the amendment proceeding, and Duke filed a complaint against Nevada Power on February 3, 2004 in Docket No. EL04-73-000, which is presently pending before the Commission.¹¹

8. On March 19, 2004, the Commission issued an order rejecting Applicants' proposed amendment to the OATT, stating that Applicants failed to demonstrate how the amendment was consistent with or superior to the pro forma tariff.¹² The Commission also held that section 35.13 of the Commission's regulations requires the inclusion of cost support for section 205 filings,¹³ that Applicants failed to demonstrate that the proposal did not result in impermissible "and" pricing, and that Applicants failed to provide cost justification or support for the payment obligations in the revised OATT.¹⁴ However, the Commission also stated that:

we continue to find, as we indicated in Order No. 888-A, that it is appropriate for transmission providers to file with the Commission, for prospective application, a proposal to set forth procedures for dealing with requests for delays in commencing service on new transmission facilities constructed to accommodate a request for transmission service. The tariff changes and proposed charges, however, must be fully supported as required by the Commission's regulations, including all underlying cost assumptions. Ideally, such modifications would be filed prior to utilities entering into agreements for service.¹⁵

¹⁰ Pinnacle West Energy Corp. v. Nevada Power Co., 106 FERC ¶ 61,296 (2004).

¹¹ Applicants state that, on March 18, 2004, Duke notified Nevada Power that it intended to delay commencement of service for two additional years.

¹² Sierra Pacific Power Co., 106 FERC ¶ 61,259 at P 26, 28 (2004) (March 19 Order).

¹³ See 18 C.F.R. § 35.13 (2003).

¹⁴ March 19 Order at P 27.

¹⁵ Id. at P 29.

9. Finally, the Commission noted that “we continue to stress the importance of regional planning especially in the climate of uncertainty. A regional view of the load growth, transmission expansion needs, and current and future supply needs combined with a regional cost recovery mechanism could have helped Nevada Power better address the issues it faces today.”¹⁶

B. Applicants’ May 5 Filing

10. On May 5, 2004, Applicants submitted for filing an amendment to section 17.7 of the OATT, in response to the Commission’s March 19 Order, again asserting that their filing is necessary to address requests for the extension of the commencement of service over Nevada Power’s newly constructed Centennial Project (May 5 Filing). Applicants request a July 5, 2004 effective date for the amendment, the first business day following 60 days from the date of filing.

11. Applicants explain that revised section 17.7 of the OATT would not impose responsibility for any particular costs on the customer, but would provide a process for addressing requests for extension of service over new facilities constructed by the transmission provider.¹⁷ If that process does not result in the avoidance of additional costs or an agreement regarding allocation of those costs, the revised proposal authorizes a filing by the transmission provider under section 205 of the FPA to amend the customer’s TSA to allow recovery of proven costs incurred by the transmission provider as a consequence of the extension.

12. Specifically, Applicants explain that existing section 17.7 of the OATT would become a new section 17.7(a) under their proposed amendment, with revisions clarifying that it applies only to existing facilities. A new section 17.7(b) would be inserted to address procedures for obtaining an extension of service when new facilities are constructed to accommodate a transmission service request. Applicants state that step one of those procedures would require the transmission provider to determine whether a requested extension can be granted without incurring additional costs, which could be done by the transmission provider modifying construction schedules or by the transmission customer selling or assigning its rights to another eligible customer.¹⁸

¹⁶ Id. at P 30.

¹⁷ Applicants’ May 5 Filing at 6.

¹⁸ For example, Applicants explain that Nevada Power was able to work out an arrangement with the transmission customers of the last component of the Centennial Project to delay construction to correspond with the delays in their projects. Because the parties worked together well in advance of the construction schedule, this delay was implemented at no cost to the transmission customers.

13. If, however, additional costs cannot be avoided, step two of Applicants' proposal requires the transmission provider and the customer to attempt a negotiated resolution of the dispute. Applicants' procedures require a good faith effort to reach consensus, involving the senior management of the companies if necessary. If such an agreement is achieved, it would be filed under section 205 as an amendment to the customer's TSA. If no agreement is reached, the final step in the process is a filing by the transmission provider detailing the carrying costs and other costs that will be incurred as a consequence of the extension. This filing would include data and workpapers related to the cost of service and would support any claimed cost, including cost of capital, depreciation, income taxes, property taxes, and insurance, if applicable. It also would demonstrate that the proposal does not result in impermissible "and" pricing. If the Commission agreed that the claimed costs were just and reasonable, the TSA would be amended to require the payment of such costs as a condition of the deferral of service.¹⁹

14. In support of the proposed amendment, Applicants argue that when a revision to an OATT and its intended result are consistent with or superior to the pro forma tariff and the policies set forth in Order No. 888, the Commission accepts the revision.²⁰ Applicants' assert that their proposed revision and the policy it supports are consistent with or superior to the pro forma tariff and should be accepted.

15. Specifically, Applicants state that there are three reasons that their proposal is superior to, or at least consistent with, section 17.7 of the pro forma tariff. The first is that the Commission has recognized that the pro forma tariff does not provide a way to address this problem. Applicants state that their proposal fills that gap in a way that is consistent with both Order No. 888-A and the March 19 Order by providing for an

¹⁹ Applicants note that their proposed procedures may not be necessary when a regional cost recovery mechanism is put in place in the West. Nevada Power states that it participates in multiple regional and subregional planning efforts, including the Seams Steering Group - Western Interconnection, the Southwest Area Transmission Study group, the Southwest Transmission Expansion Plan group, Western Arizona Transmission Study group, and the Western Electric Coordinating Council (WECC). Applicants also note that they have been participating in western RTO development efforts for Grid West (formerly RTO West) and Westconnect RTO, but, there have been impediments to these development efforts beyond Applicants' control that have prevented either RTO from coming to fruition.

²⁰ Order No. 888 at 31,770. Under Order No. 888, the Commission accepts only those proposed revisions that are consistent with or superior to the non-rate terms and conditions of Order No. 888's pro forma tariff. See also Applicants' May 5 Filing at 12 (citing PJM Interconnection, LLC, 84 FERC ¶ 61,212 (1998); New York State Elec. & Gas Corp., 78 FERC ¶ 61,114 (1997)).

individual section 205 proceeding that will present the Commission with sufficient cost support to enable it to discern whether the charges are reasonable. Further, Applicants assert that their proposal ensures that the parties first explore all methods of avoiding the dispute.

16. Applicants state that their proposal is also superior to, or at least consistent with, the pro forma tariff because it encourages the construction of transmission capacity. They state that, while the one-month reservation charge rule in the pro forma tariff is reasonable for existing facilities, it does not protect transmission providers that incur significant costs to construct new facilities, and then incur carrying charges when a delay is requested after those costs are expended. Applicants explain that, at the time a TSA is initially submitted to the Commission, the transmission provider does not know the final cost of the new facilities, specific facts and circumstances surrounding the extension request, or the potential forms of compensation that might adequately compensate for the delay. Thus, in order to facilitate the development of transmission facilities that will allow the most efficient resources to reach competitive markets in a reliable fashion, Applicants state that it is important for the Commission not to create disincentives for transmission owners to construct new transmission facilities.

17. Finally, Applicants state that their proposal is the most equitable manner in which to treat service commencement delays. Applicants explain that there is no dispute that carrying costs arise when new facilities are constructed and payment for those facilities is deferred. Applicants state that while the transmission customer's eventual payments will reimburse the transmission provider for its revenue requirement, they will not compensate the transmission provider for the time value of the capital investment made by the transmission provider to construct the facilities. Thus, Applicants state that the only question (other than the exact amount of the costs) is who should be responsible for them. If the transmission provider cannot collect them from the transmission customer that originally requested the facilities be in-service by a certain date and then later requests a delay in service, Applicants assert that the other transmission customers of the transmission provider will be required to bear them and this subsidization is an unfair cost shift.

II. Notice of Filing and Pleadings

18. Notice of Applicants' filing was published in the Federal Register, 69 Fed. Reg. 29,295 (2004), with comments, protests, or interventions due on or before May 26, 2004. The Public Utilities Commission of Nevada (Nevada Commission) filed a notice of intervention and the Office of the Attorney General for the State of Nevada, by and through its Bureau of Consumer Protection, and SNWA filed timely motions to intervene. Duke and Calpine Corporation (Calpine) filed timely motions to intervene and protests. Pinnacle West filed a timely motion to intervene and comments. On June 10, 2004, Applicants filed an answer.

III. Discussion

A. Procedural Matters

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,²¹ the notice of intervention and the timely, unopposed motions to intervene serve to make the entities that filed these documents parties to this proceeding.

20. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure,²² prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept Applicants' answer and will, therefore, reject it.

B. Protests

21. In its protest, Duke argues that revised section 17.7 should not apply to existing TSAs. Duke asserts that, although Applicants request a July 5, 2004 effective date, revised section 17.7 purports to apply to extension notices submitted on or after July 5, 2004 under TSAs that were entered into before that date. Thus, Duke requests that the Commission make clear that revised section 17.7 applies only to TSAs entered into after the requested July 5, 2004 effective date.

22. Duke also argues that, to the extent that Nevada Power desires to limit a customer's rights to extend service commencement, it is obligated to do so at the time the customer enters into the TSA. In entering into a TSA, Duke states that Nevada Power has the responsibility, under existing section 17.7, to evaluate the impact of a transmission customer exercising extension rights and put that customer on notice prior to the customer executing a TSA. Duke asserts that Nevada Power failed to raise the issue of service extensions at the time the DETM TSA was entered into and included nothing in the TSA that limited DETM's right to extend the commencement of service, although Nevada Power knew that new facilities were being built, and Nevada Power cannot do so now. Duke argues that the Commission has developed a clear policy that customers cannot have their fundamental service rights revised retroactively and, accordingly, that transmission providers must include any limitations in the TSA at the time it is entered into.²³

²¹ 18 C.F.R. § 385.214 (2003).

²² 18 C.F.R. § 385.213(a)(2) (2003).

²³ Duke protest at 6 (citing Nevada Power Co., 97 FERC ¶ 61,324 at 62,493 (2001)).

23. Further, Duke states that, under section 15.3 of the pro forma tariff, a transmission customer has the right to request that the transmission provider file an unexecuted TSA under section 205 when the parties cannot agree on all the terms and conditions of service.²⁴ Duke argues that this right is meaningless if a transmission provider identifies significant service issues years after the TSA is executed.

24. Duke reiterates its argument in the complaint filed in Docket No. EL04-73-000 that Nevada Power: (1) failed to provide notice to DETM, consistent with Order 888-A, of any proposed restrictions on the terms of the service, including extension rights, before DETM committed to the requested transmission service; and (2) failed to propose case-specific modifications to the DETM TSA before DETM committed. Duke argues that if the customer is not informed of limitations or additional charges that may be imposed when it attempts to exercise its rights under the TSA, the customer cannot evaluate the economic consequences of the transaction and cannot make an informed decision as to whether to confirm the reservation or not. Duke states that, if DETM had been apprised of potential limitations on its deferral rights or the potential for additional costs for exercising its OATT rights, DETM might not have confirmed the reservation or might have modified its request for service to mitigate these limits and costs. Thus, DETM requests that the Commission clarify that revised section 17.7 is inapplicable to DETM's timely-provided notices of extension made on July 31, 2003 and March 18, 2004.

25. Calpine states that Applicants' proposal, if accepted, must not be allowed to modify the procedures applicable to existing TSAs, arguing that doing so would upset the balance of interests reached under the settlement agreement regarding the Centennial Project TSAs²⁵ and would be a back-door attempt to revise the TSAs with Calpine and other Centennial Project customers. Calpine argues that the current section 17.7 allows customers to reasonably manage the risks associated with delays in bringing new generation projects online, and that Applicants' proposal would strip customers, such as Calpine, of key economic terms and conditions that they relied on when they entered into their TSAs. Calpine contends that this unilateral attempt to modify existing contracts through a tariff change violates the Mobile-Sierra doctrine²⁶ and thus must be rejected.

²⁴ Id. at 5 (citing Order No. 888 at 31,942).

²⁵ Calpine states that in Nevada Power Co., 99 FERC ¶ 61,301 (2002), the Commission accepted a settlement agreement between Nevada Power and the Centennial Project transmission customers, and the Centennial Project TSAs, including the Calpine TSA, subsequently were filed with and accepted by the Commission. Calpine protest at 3 (citing Nevada Power Co., Docket Nos. ER01-2754-003, et al. (September 23, 2002) (unpublished letter order)).

²⁶ United Gas Pipe Line Company v. Mobile Gas Service Corporation, 350 U.S. 322, 340 (1956); FPC v. Sierra Pacific Power Co., 350 U.S. 348, 353, 355 (1956).

26. Calpine also argues that Applicants' proposal is unsupported, would subject a transmission customer requesting a deferral of service to unknown costs, and fails to rectify the deficiencies in their proposal rejected by the Commission in the March 19 Order. Specifically, Calpine argues that Applicants have again failed to identify the charges that would be imposed on customers under their proposal and have failed again to include underlying support, including cost data and assumptions. Calpine states that the proposed changes to section 17.7 must be rejected, or in the alternative, set for hearing.

27. Finally, Calpine objects to Applicants' claim that their proposal will encourage the construction of new transmission facilities, arguing that the current section 17.7 already provides adequate mitigation of the costs of newly-constructed facilities during extensions of commencement of service by providing for the payment of one month's transmission charges for each year of extension, and allowing the provider to remarket the transmission capacity made available during the delayed period. Calpine contends that a transmission provider should undertake efforts to mitigate the costs of a customer exercising its right to defer service rather than simply imposing the costs onto customers by unilaterally modifying their TSAs.

28. Similarly, Pinnacle West comments that the proposed tariff change should not be accepted if it seeks to modify the existing rights of Pinnacle West and SNWA under their existing TSAs with Nevada Power, which are subject to its settlement agreement approved by the Commission. Pinnacle West asserts that the settlement agreement provides that the "public interest" standard of review under the Mobile-Sierra doctrine applies to any amendments not otherwise agreed to by the parties to the TSAs and Applicants have provided no evidence that the section 17.7 amendment satisfies that elevated standard. Further, Pinnacle West states that, in the event that Applicants clarify that the section 17.7 amendment is intended to adversely impact Pinnacle West's rights under its existing TSA, Pinnacle West reserves the right to submit further comments and/or protest the entirety of the proposed amendment

29. Pinnacle West argues that the two options in Applicants' proposal fail to consider certain factors. First, Pinnacle West contends that Nevada Power should not be entitled to any additional compensation beyond the one month's reservation fee if a request for extension does not extend beyond the planned in-service date for newly constructed transmission facilities. Second, Pinnacle West argues that the proposed tariff change should not absolve Applicants from their obligation to mitigate unnecessary upgrade costs when the construction of facilities could be delayed at little or no expense to meet a transmission customer's deferred commencement date. Third, Pinnacle West argues that the proposal fails to provide any efficiencies with respect to future extension requests and appears to have little effect other than to provide Nevada Power with the upper hand in

the event that it seeks to impose carrying and other charges upon a transmission customer which seeks to defer service. Finally, Pinnacle West argues that the proposal effectively amounts to a generic solution to address service extension requests across newly-constructed facilities, which was prohibited in Order 888-A.

C. Commission Determination

30. As stated above, in Order No. 888-A, the Commission opted not to adopt in the pro forma tariff a “generic resolution” to accommodate requests for deferrals of transmission service, but rather concluded that it would be more “appropriate” to allow each utility to propose a solution in a subsequent section 205 filing to address cost responsibility associated with any deferrals of transmission service where new facilities were involved.²⁷ Here, recognizing the large up-front expenditures required for these types of projects and noting the Commission’s suggestion in Order No. 888-A that public utilities could propose solutions in section 205 filings, Applicants have made such a section 205 filing.

31. We find that their proposal is consistent with the pro forma tariff. The proposal treats all customers comparably by setting forth an open process in the OATT whereby all new requesters of transmission service are aware up front of the potential for additional costs above and beyond those already provided for in the OATT should they seek to subsequently defer transmission service. Further, the proposal does not absolve Applicants from their obligation to mitigate any costs associated with a deferral, such as by remarketing the transmission capacity to others or possibly delaying or extending construction. Thus, the Commission finds that Applicants’ proposed amendment is consistent with or superior to the pro forma tariff. Therefore, we will conditionally accept Applicants’ proposed amendment to section 17.7 of their OATT, to become effective July 5, 2004, as requested.

32. However, in the March 19 Order, we also stated that “it is appropriate for transmission providers to file with the Commission, for prospective application, a proposal to set forth procedures for dealing with requests for delays in commencing service on new transmission facilities constructed to accommodate a request for transmission service.”²⁸ Consistent with that order, although Applicants’ proposed amendment to section 17.7 of their OATT would apply to all of their existing TSAs, it must only be applied prospectively, *i.e.*, it should only be applied to deferral requests made on or after the July 5, 2004 effective date. Applicants must submit a compliance filing within 30 days of the date of this order incorporating such language into section 17.7 of their OATT.

²⁷ Order No. 888-A at 30,322.

²⁸ March 19 Order at P 29 (emphasis added).

The Commission orders:

(A) Applicants' proposed amendment to section 17.7 of the Sierra Pacific OATT is hereby conditionally accepted, to become effective July 5, 2004, as requested, as discussed in the body of this order.

(B) Applicants are hereby directed to make a compliance filing within thirty (30) days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.