

106 FERC ¶ 61, 259
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. ER03-1236-000

ORDER REJECTING TARIFF REVISIONS

(Issued March 19, 2004)

1. In this order, the Commission rejects 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 This order benefits customers by ensuring that the rates, terms and conditions of transmission service are just and reasonable.

I. Background

2. On August 21, 2003, Applicants submitted for filing in the instant proceeding an amendment to section 17.7 of the OATT, asserting that the filing is necessary to address requests for the extension of the commencement of service over Nevada Power's newly constructed Centennial Project.² Specifically, amended section 17.7 provides that if new facilities or upgrades are 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

¹ Nevada Power provides open access transmission services under Sierra Pacific's OATT.

² The Centennial Project involves three new 500 kV transmission lines, three new 500 kV substations, five new kV transformers, and various 230 kV and 13kV transmission facilities. The 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 into Nevada Power's control area at a cost of approximately \$300 million. See Exhibit No. SPR-1 in Docket No. ER03-1328, testimony of Carolyn J. Cowan, at p. 6.

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 to the generators in the form of transmission service credits, without interest, as the transmission customer commences transmission service.

3. In an order issued on October 8, 2003, the Commission established settlement procedures with regard to Applicant's tariff filing in the instant docket as well as the complaint proceedings filed by Pinnacle West Energy Corporation (Pinnacle West) and Southern Nevada Water Authority (SNWA) in Docket Nos. EL03-209-000 and EL03-213-000.³ In the October 8 Order, the Commission directed the settlement judge to issue a report within 120 days of the date of that order concerning the results of the settlement discussions. The Commission further stated that it anticipated that it would issue a further order within 90 days of the settlement judge's report.

4. In a supplemental order issued on October 17, 2003, the Commission accepted and suspended the proposed tariff amendment in the instant docket to become effective March 21, 2004, subject to refund and the outcome of settlement judge procedures.⁴

Complaint Proceedings

5. In August 2001, Applicants filed with the Commission Transmission Service Agreements (TSAs) with several customers under the Sierra Pacific OATT in order for those customers to deliver the output of generating facilities they were developing. These included a TSA with Duke Energy North America, LLC and Duke Energy Trading and Marketing, LLC (Duke) which provided for 600 MW of firm point-to-point service

³ Pinnacle West Energy Corp. v. Nevada Power Co., et al., 105 FERC ¶ 61,053 (2003) (October 8 Order).

⁴ Pinnacle West Energy Corp. v. Nevada Power Co., et al., 105 FERC ¶ 61,070 (2003) (October 17 suspension order).

for five years beginning on July 31, 2003, a TSA with Pinnacle West, providing for 350 MW of long-term point-to-point service for a ten-year term beginning on July 31, 2003, and a TSA with Reliant Energy Services, Inc. (Reliant)⁵ providing for 500 MW of long-term firm point-to-point transmission service beginning on July 31, 2003.⁶

6. 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 the firm transmission service, as required by section 17.7.⁷ Nevada Power returned all three checks and sent written rejections of the requests to defer service stating that when the transmission provider determines that a system impact study is necessary, the provisions of section 19, not section 17.7, of the OATT apply, and that section 19 does not provide for any deferral of service. Nevada Power stated that it would begin charging all three customers for services under their TSAs on a monthly basis.

7. 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.

8. In December 2003, Nevada Power filed on behalf of itself, Pinnacle West, and SNWA an offer of settlement that resolves the issues raised in the complaint proceedings in Docket Nos. EL03-209-000 and EL03-213-000, that were set for settlement judge procedures. On January 12, 2004, the settlement judge certified the settlement to the Commission as an uncontested settlement.

⁵ In December 2002, Nevada Power filed new service agreements to reflect a swap arrangement agreed to between Pinnacle West, Reliant and SNWA. These service agreements were accepted by the Commission by delegated letter order issued February 21, 2003, in Docket No. ER03-340-000.

⁶ Nevada Power Company, *etal.*, 97 FERC ¶ 61,324 (2001) (setting the TSAs for hearing and settlement judge procedures). The parties reached agreement and Nevada Power filed revised service agreements that were accepted by the Commission by delegated letter order issued September 23, 2002.

⁷ 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.”

9. On January 26, 2004, the settlement judge filed a report to the Commission and Chief Judge noting that she had certified to the Commission an uncontested settlement in Docket Nos. EL03-209-000 and EL03-213-000. The settlement judge requested that the settlement period in the instant proceeding be extended for an additional thirty days until March 8, 2004.

10. On March 8, 2004, the settlement judge filed a final report with the Commission in the instant docket where she states that although the parties attempted to devise a universal method by which they could explain to the Commission the facts they agree upon, and the policies they cannot agree on, “[t]his process crystallized the policy disagreements and the parties’ unified belief that clarification from the Commission on certain policy points is necessary.”⁸

II. Applicants’ Section 205 Filing

11. Applicants assert that their proposed amendment to section 17.7 is necessary to address requests for the extension of the commencement of service over Nevada Power’s newly constructed Centennial Project which Applicants state was built to meet the needs of independent power producers (IPPs).⁹ According to Applicants, in Order No. 888-A, the Commission addressed how requests for deferrals in the commencement of service should be treated when new facilities are being constructed to provide service.¹⁰ In

⁸ Final Report of Settlement Judge issued March 8, 2004, Docket No. ER03-1236-000.

⁹ While Nevada Power states that the Centennial system is a comprehensive transmission project designed to meet the increased need for energy delivery in the Las Vegas valley and to accommodate a number of IPPs proposing to construct generation, its Resource Plan filed with the Nevada Commission in 2001 states that this project was constructed to accommodate native load growth. It appears that Nevada Power used the excess capacity to provide firm transmission service to the IPPs until the capacity is needed to serve native load. See Nevada Power Company, et al., 97 FERC ¶ 61,324 (2001).

¹⁰ See Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmission Utilities, Order 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 (1998), aff’d sub nom. Transmission access Policy Study Group, et al. v. FERC, 225 F.3d667 (D.C. Cir 2000), aff’d sub nom. New York, et al. v. FERC, 122 S.Ct. 1012 (2002).

response to requests that the Commission clarify that, if transmission facilities have been constructed to accommodate a request for transmission service, delays by the customer in commencing service should be prohibited or the customer should pay the full carrying charges on the facilities during the period of delay, Applicants note that the Commission stated: "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."¹¹

12. Applicants submit that the holding in Order No. 888-A to consider other alternatives when requests to delay the commencement of services involve new facilities is well grounded in public policy. According to Applicants:

In order to facilitate the provision of reliable service and competitive markets, it is important for the Commission not to create disincentives for transmission owners to construct new transmission facilities. It is a difficult enough matter to obtain the necessary funds and local approvals to construct new transmission facilities particularly where, as here, the principle purpose of the new facilities appears to be to export power to a different state. If, on top of all those difficulties, transmission owners know that they cannot count on their customers commencing service on the agreed-upon date or providing adequate compensation for any delay, that will provide a major disincentive to the construction of new facilities.¹²

13. In the complaint proceedings, Nevada Power's position was that Order No. 888-A does not require it to amend section 17.7 of the OATT in order to address requests for extension in the commencement of service over new facilities. Applicants assert that they filed the amendment to section 17.7 in the instant docket in the event that the Commission rejects the argument in the complaint proceedings that Nevada Power is entitled to address requests for extensions in the commencement of service on a case-by-case basis.¹³ If, on the other hand, the Commission rejects Nevada Power's argument in

¹¹ Application at 6 (quoting Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,322).

¹² Id.

¹³ Applicants submit that, in the event the Commission accepts the 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 contained in this filing becomes moot. In that event, the Applicants request that they be permitted to withdraw this amendment.

the complaint proceedings, Applicants contend that the Commission must approve the proposed amendments to section 17.7 of the OATT.

14. 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.¹⁴

15. In support of their argument that the proposed amendment is just and reasonable, Applicants state that they believe there is more than one form of compensation that would provide adequate compensation for a delay in the commencement of service. The purpose of the payment would be to compensate Applicants for the costs that they incur in order to construct facilities to provide service to the customers using those facilities. As proposed, Applicants state that the amendment would allow the transmission customers requesting an extension to choose between one of two options.

16. The first option would be for the transmission customer to pay the carrying charges that Applicants would incur as a consequence of the delay. Applicants submit that this approach would keep the Applicants and their other transmission customers financially neutral as a result of a delay in service commencement.

17. The second option would be for the transmission customer to make a deposit equal to its allocated share of the full cost of the facilities constructed to provide the requested transmission service. This deposit would be returned in the form of transmission service credits, without interest, as the transmission customer commences service. Applicants argue that this option would allow them to avoid incurring the carrying costs associated with a delay in the commencement of service. Applicants state that they recognize that the Commission's policy is to require interest on prepayments for the construction of facilities to be included when calculating transmission credits. They contend that, in the cases where interest has been required, the prepayments are made before transmission service is scheduled to commence, and the interest is required to compensate the transmission customers for the time value of the funds they expended prior to taking service. In the case of the proposed amendment, Applicants state that the situation is reversed, and the prepayment is being made so that service may commence after the date

¹⁴ As noted above, in the October 17 suspension order, the Commission accepted and suspended the amendment to become effective on March 21, 2004, subject to refund and the outcome of settlement judge procedures.

on which it was contractually supposed to occur. They contend that requiring them to provide interest on a prepayment made by a transmission customer would deprive them of the carrying costs that the prepayment is intended to provide.

III. Protests to Filing

18. As the October 8 Order noted, Duke, Pinnacle West, SNWA, Reliant and Calpine protested Applicants' filing.¹⁵

19. Duke argued in its protest 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 included no case specific provisions that would modify or invalidate section 17.7. Duke asserts that Nevada Power's filing provides no basis for Nevada Power to depart from the requirements of its effective OATT and the unqualified TSAs those transmission customers relied upon when confirming transmission reservations. Duke asserts that there is no conflict between the Order No. 888-A requirement for a case-by-case approach and a timely Section 205 filing. Duke argues that Nevada Power had the opportunity to propose case specific extension terms that depart from the pro forma section 17.7 in the TSAs it tendered to its customers for execution in 2001. Duke states that customers must have notice of the transmission provider's intent to impose terms and conditions other than those set forth in its OATT before they execute the TSA so that the customer can evaluate the economic consequences and modify its requests for service to mitigate the limits or costs.

20. Duke also argues that Nevada Power's proposed amendment is not just and reasonable nor consistent with or superior to the Commission's pro forma OATT. Duke asserts that Nevada Power's proposal lacks the specificity required by the Commission's regulations by failing, among other things, to sufficiently define the term "carrying charges" so the actual costs of the extension can be determined. Additionally, Duke states that Nevada Power has not completed construction of the Centennial Project and has provided no justification to apply a carrying charge to the projected cost of facilities

¹⁵ In the October 8 Order, the Commission addressed the interventions and protests that were filed in Docket No. ER03-1236-000. See Pinnacle West Energy Corp. v. Nevada Power Co., et al., 105 FERC ¶ 61,053 at P 27, 34. That order inadvertently failed to note that the City of Needles filed on October 3, 2003, a motion to file comments out of time in support of Applicants' tariff amendments. The City of Needles, however, did not seek to intervene in this proceeding.

that have not been constructed. Duke argues that the repayment option suffers from similar flaws by, for example, requiring a prepayment based on the total cost of the Centennial Project, including the cost of facilities that have not yet been constructed and were not required to provide Duke's requested service.

21. Duke further asserts that the proposal violates the Commission's pricing policy that limits rates to the higher of average embedded or incremental costs. Duke argues that based on Nevada Power's decision to charge the average cost in lieu of the incremental rate under the Commission's "higher of" policy, Nevada Power will earn revenues of about \$500 million. Duke states that the capacity added by the Centennial Project, 3000 MW, exceeds the amount needed to satisfy the transmission requests. Given that Nevada Power's current cost estimate for completing the entire 3000 MW Centennial Project is \$309 million, Duke contends that the Commission's "higher of" policy appears to provide Nevada Power with revenues that far exceed the incremental cost incurred to provide service under the TSAs. Therefore, Duke submits that allowing Nevada Power to assess an extension charge based on the incremental costs associated with the extension period, as well as an average cost OATT rate for the years the service is provided under the TSA, will produce revenues that will exceed both Nevada Power's incremental and average costs.

22. The other protestors raise similar arguments.¹⁶ For example, Reliant contends that the filing is lacking in 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 for justifying such a significant change. 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.

IV. Discussion

23. As discussed above, in the October 17 suspension order, the Commission accepted and suspended Applicants' proposed tariff amendment, to become effective March 21, 2004, subject to refund and the outcome of settlement judge procedures and a subsequent

¹⁶ As noted above, the settlement judge certified to the Commission an uncontested settlement between Nevada Power, Pinnacle West and SNWA in Docket Nos. EL03-209-000 and EL02-213-000. The settlement provides that, upon Commission approval of the settlement, Pinnacle West and SNWA will withdraw their protests filed in this proceeding.

order.¹⁷ In a final report, dated March 8, 2004, the settlement judge stated the parties' belief that clarification from the Commission on certain policy issues is necessary. Upon the results of the settlement negotiations and the further analysis that we have undertaken in response to the settlement negotiations, as discussed below, we will reject the proposed tariff amendment as of the date of issuance of this order. As a result, the proposed tariff amendment is rejected before the end of the suspension period and before the proposed amendment otherwise would have become effective subject to refund.

24. As discussed above, section 17.7 of Sierra Pacific's OATT, which is identical to the same section of the pro forma OATT, gives transmission customers the right to defer service regardless of whether new facilities must be constructed. It provides in relevant part:

The 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.

25. As the Commission noted in Order No. 888-A, "[s]everal utilities ask the Commission to clarify that, if transmission facilities have been constructed to accommodate a request for transmission service, delays by the customer in commencing service should be prohibited or the customer should pay the full carrying charges on the facilities during the period of delay (less any revenues received)."¹⁸ In response to these arguments, the Commission concluded that "[b]ecause 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."¹⁹

26. In the instant case, Applicants have filed a proposed amendment to section 17.7 of the OATT that would allow them to charge a transmission customer for a delay in the commencement of service, where transmission facilities have been constructed to accommodate the customer's request for service. However, we agree with protesters in this proceeding that Applicants have failed to demonstrate that their proposed amendment to section 17.7 is consistent with or superior to the pro forma OATT. Other than the Applicants equity argument for the proposed amendment, they make no showing as to why or how the provision is consistent with or superior to the pro forma OATT.

¹⁷ See October 8 Order, 105 FERC ¶ 61,053 at n. 12 (where we stated that we anticipated we would issue a further order).

¹⁸ Order No. 888-A, FERC Stats. and Regs. ¶ 31,048 at 30,322.

¹⁹ Id.

27. Additionally, among other things, Applicants have proposed that the customer pay carrying charges (including cost of capital, book depreciation, income taxes deferred, income taxes payable, property taxes and insurance) in order to defer commencement of service. However, Section 35.13 of the Commission's regulations requires the inclusion of cost support for Section 205 filings.²⁰ Applicants have neither demonstrated that the proposal does not result in "and" pricing, nor have they included any data or workpapers related to the cost of service including development of the charges for depreciation, income taxes, property taxes or rate of return, among other things. Accordingly, Applicants have failed to provide sufficient cost justification or support for their proposed amendment.

28. Therefore, on the record before us, Applicants' proposed amendment to section 17.7 has not been shown to be consistent with or superior to the pro forma OATT and is not cost justified. Accordingly, we will reject the filing.

29. Although we are rejecting the proposed tariff amendment here, 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.

30. Additionally, 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.

²⁰ See 18 C.F.R. § 35.13 (2003).

Docket No. ER03-1236-000

- 11 -

The Commission orders:

Applicants' proposed amendment to section 17.7 of the Sierra Pacific OATT is hereby rejected, as of the date of issuance of this order, as discussed in the body of this order.

By the Commission. Commissioner Kelly concurring with a separate statement attached.

(S E A L)

Magalie R. Salas
Secretary

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Sierra Pacific Power Company
Nevada Power Company

Docket No. ER03-1236-000

(Issued March 19, 2004)

KELLY, Commissioner, concurring:

This order rejects the proposed amendment to Sierra Pacific's OATT on the basis that Applicants failed to meet their burden to demonstrate that the proposal is consistent with or superior to the pro forma OATT and failed to provide sufficient cost justification or support. Therefore, I do not think it is necessary for the Commission to opine in this order on what may have led to Nevada Power Company's current situation.

Sudeen G. Kelly