

110 FERC ¶ 61,258
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Texas New Mexico Power Company

Docket Nos. EL04-15-000,
EL04-15-001,
ER04-768-000

v.

El Paso Electric Company

ORDER APPROVING SETTLEMENT, AS MODIFIED

(Issued March 7, 2005)

1. In this order, the Commission approves the settlement agreement (Settlement), as modified, filed by El Paso Electric Company (El Paso) and Texas New Mexico Power Company (TNMP) with the Commission. The Commission directs the removal from the Settlement of vacatur language regarding the initial decision in this proceeding. This order benefits customers by resolving issues of transmission service rollover rights.

Background

2. On November 3, 2003, TNMP filed a complaint in Docket No. EL04-15-000 against El Paso primarily asking the Commission to determine that TNMP had a rollover right to continue the network-type transmission service component of a power sale agreement between TNMP and El Paso. On February 18, 2004, the Commission issued an order setting the complaint for hearing.¹

¹ *Texas-New Mexico Power Co. v. El Paso Electric Co.*, 106 FERC ¶ 61,169 (2004) (February 18 Order).

3. El Paso filed a motion to dismiss TNMP's complaint and to lodge a termination letter and a request for rehearing of the February 18 Order. TNMP filed a motion for clarification. On June 25, 2004, the Commission denied El Paso's motion and request for rehearing and granted TNMP's request for clarification.²

4. During the proceeding in Docket No. EL04-15-000, El Paso filed a notice of cancellation of the power sale agreement on April 27, 2004, in Docket No. ER04-768-000. On June 25, 2004, the Commission accepted El Paso's notice of cancellation of the power sale agreement, suspended it for five months to be effective November 27, 2004, subject to refund, set it for hearing, and consolidated the proceeding with Docket No. EL04-15-000.³

5. On September 20, 2004, the presiding judge issued an initial decision.⁴ On December 1, 2004, El Paso and TNMP jointly filed the instant Settlement resolving all outstanding issues in the above-referenced dockets.

Responsive Pleadings

6. Trial Staff filed initial comments in support of the Settlement, but raised several concerns.⁵ It states that it is unusual for a complainant (TNMP) seeking relief from the Commission to end up paying a sum of money (\$500,000) to its alleged wrongdoer (El Paso). Trial Staff states that it may not be proper for TNMP to pass these costs on to its ratepayers. It also states that although the Commission already set an effective date of November 27, 2004 for the termination of the service agreement at issue, the Settlement includes an effective date of January 1, 2003. Trial Staff further states that, contrary to

² *Texas-New Mexico Power Co. v. El Paso Electric Co.*, 107 FERC ¶ 61,316 (2004).

³ *El Paso Electric Co.*, 107 FERC ¶ 61,314 (2004).

⁴ *Texas-New Mexico Power Co. v. El Paso Electric Co.*, 108 FERC ¶ 63,045 (2004).

⁵ The Commission's trial staff is a participant, not a party, to hearing proceedings. *See* Rule 102(b)(2), 18 C.F.R. §385.102(b)(2) (2004). Accordingly, pursuant to Rule 602(g) and (h), the instant Settlement is uncontested, notwithstanding Staff's objections, as no party to this proceeding has objected to the Settlement. *See* 18 C.F.R. § 385.602(g)-(h) (2004).

Commission policy, the Settlement vacates the initial decision issued in these proceedings.

7. El Paso filed reply comments in support of the Settlement. It states that TNMP's \$500,000 payment does not compensate El Paso for any provision of service subject to the Commission's jurisdiction, but removes the risk associated with separate litigation in state court. El Paso also states that the January 1, 2003 effective date is appropriate for cancellation of the service agreement because (1) the Commission's order establishing a November 27, 2004 effective date was not a permanent measure, and (2) there is no reason for the Commission not to alter the effective date now.

8. With regard to the initial decision, El Paso states that while Trial Staff may be correct that the Commission's policy is not to allow vacatur, this policy is not absolute and the Commission continues to permit vacatur of decisions in appropriate cases.⁶ El Paso states that the Settlement's provision for vacation of the initial decision was central to the parties' ability to reach agreement resolving this proceeding and that vacatur will "dispel any cloud of potential precedential weight the initial decision's factual findings might have."⁷

Discussion

9. We agree with El Paso that TNMP's monetary payment to El Paso is acceptable. The Commission has approved settlements that resolve both Commission-jurisdictional questions and include payment or other provisions related to proceedings outside the Commission's purview.⁸ With regard to the termination date, because both El Paso and TNMP have agreed to an earlier date, we find the date to be acceptable as well.

10. We disagree, however, with the Settlement's provision vacating the initial decision. As we have explained, in reaching a decision, the Commission expends valuable time and resources by conducting hearings, compiling evidentiary records, and

⁶ *Citing Southern California Edison Co.*, 106 FERC ¶ 61,206 at P 16 (2004); *Public Utilities Commission of California v. El Paso Natural Gas Co.*, 106 FERC ¶ 61,315 at P 51 (2004).

⁷ El Paso's Reply Comments at 9.

⁸ *See, e.g., San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 108 FERC ¶ 61,002 at P 5 (2004).

engaging in extensive deliberations.⁹ It does not serve the public interest to vacate such decisions simply because the parties have settled.¹⁰ In addition, an initial decision pending before the Commission on exceptions is not a final Commission decision, and as such does not create binding precedent.¹¹ Thus, there is no need to vacate the initial decision to “dispel any cloud of potential precedential weight the initial decision’s factual findings might have.”¹² Accordingly, the parties to the Settlement have failed to carry their burden to demonstrate that vacatur is appropriate in this instance, and the parties are directed to remove the vacatur language from the Settlement.

11. The Settlement, as modified, constitutes a reasonable resolution of these proceedings and will be approved.

The Commission orders:

The Commission hereby approves the Settlement, as modified, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

⁹ See *KeySpan Energy Development Corp. v. New York Independent System Operator, Inc.*, 108 FERC ¶ 61,201 at P 4 (2004).

¹⁰ *Id.* (citing *Panhandle Eastern Pipe Line Co.*, 83 FERC ¶ 61,008 at 61,030 (1998)).

¹¹ See *id.* See also *Illinois Power Co.*, 62 FERC ¶ 61,147 at 62,062 n.17 (1993); *Southern Company Services, Inc.*, 61 FERC ¶ 61,339 at 62,336 n.63 (1992).

¹² See *supra* note 7.