UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Nevada Power Company
and Sierra Pacific Company

v. Docket No. EL04-1-000

Enron Power Marketing Company, Inc.

ORDER SETTING COMPLAINT FOR HEARING AND ESTABLISHING HEARING PROCEDURES

(Issued July 22, 2004)

1. This order addresses a complaint filed by Nevada Power Company and Sierra Pacific Company (Nevada Companies) against Enron Power Marketing, Inc. (Enron). The complaint involves a number of forward bilateral contracts for supply of energy entered into pursuant to the Western Systems Power Pool Agreement (WSPP Agreement) in 2001 and terminated by Enron in May 2002 on the ground that the Nevada Companies failed to fulfill certain contractual requirements.[1]

2. In this order, we require an expedited trial-type evidentiary hearing and establish hearing procedures on whether Enron reasonably exercised its discretion under the

[1] All of the contracts identified in the Nevada Companies' complaint were addressed in our June 26, 2003 Order, in which the Commission denied the Nevada Companies' complaints challenging the forward bilateral contracts with Enron and several other power marketers, concluding that the Nevada Companies failed to meet their burden of proof to show that the contracts were contrary to the public interest. *See* Nevada Power Co. and Sierra Pacific Power Co. v. Enron Power Marketing, Inc., *et al.*, 103 FERC ¶ 61,353 *reh'g denied*, 105 FERC ¶ 61,185 (2003). (June 26 Order).

section 27 termination provision of the WSPP Agreement and whether Enron is entitled to a termination payment. We will also address the Nevada Companies' motion to take official notice of two U.S. District Court decisions and request for a show cause order.

3. This order benefits customers because it ensures that parties have a full and fair opportunity to present their cases and develop a complete record on the issue.

Background

4. Following a March 29, 2002 Order by the Public Utilities Commission of Nevada disallowing a pass-through of $437 million, the Nevada Companies' credit rating was downgraded. Enron then demanded pursuant to section 27 of the WSPP Agreement that the Nevada Companies provide an assurance of their ability to pay for the power to be delivered under the contracts in question. Specifically, Enron requested a full cash prepayment of the contracts. Instead, on April 24, 2002, the Nevada Companies offered (to all of their suppliers) to pay 110 percent of the market price as of May 1, 2002 for all energy delivered during the period May 1, 2002 through September 15, 2002, and to pay the balance of the contract prices, with interest, in the future, beginning in the fourth quarter of 2002. Sierra Pacific promised to honor its contracts with suppliers who continued delivery. While other Nevada Companies' suppliers accepted the offer, Enron responded with a notice of termination on May 1, 2002. On May 9, 2002, Enron demanded a termination payment pursuant to section 22 of the WSPP Agreement.

5. On June 5, 2002, Enron filed a complaint in the bankruptcy court, seeking to compel the Nevada Companies to pay the termination payments. On August 28, 2003, the bankruptcy court ruled in Enron's favor and held that the Nevada Companies must pay Enron $336 million ($300 million in principal and $36 million interest payments) under the contracts in question. The bankruptcy court also stated that it would enforce the contracts at issue unless they were set aside by the Commission. On September 26, 2003, the Nevada Companies filed a motion for a stay pending a determination of their appeals against the decision of the bankruptcy court, and on October 1, 2003, the Nevada Companies filed an appeal in relation to that decision. On October 3, 2003 Enron filed a cross-appeal in relation to the bankruptcy court's decision on the applicable post-judgment rate of interest. The court record reflects that the stay remains in effect.

Complaint

6. In their complaint, the Nevada Companies urge the Commission to assert jurisdiction over the subject matter of the complaint. They also argue that Enron's refusal to accept the Nevada Companies' offer was unreasonable and thus violated

section 27 of the WSPP Agreement. For this reason, the Nevada Companies conclude, Enron did not have the right to terminate and therefore is not entitled to termination payments.

7. Alternatively, the Nevada Companies argue that if the Commission finds that Enron had the right to terminate, Enron should be prevented from collecting the termination payment on the ground that the early termination payments are contrary to the public interest. In support, the Nevada Companies contend that if they are required to pay $336 million for the energy that has never been delivered, they could be forced into bankruptcy, which in turn will have negative effects on third parties and the public. Accordingly, the Nevada Companies request that the Commission set for an evidentiary hearing the issue of whether the termination of the contracts at issue is contrary to the public interest.

Enron's Answer to the Complaint

8. Enron urges the Commission to decline to assert jurisdiction over the instant dispute. Enron argues that pursuant to Commission precedent, the Commission is not required to decide a dispute over a party's right to terminate a contract according to its terms.[2] It also asserts that it has been the Commission's practice to decline to entertain disputes involving contract interpretation issues such as the issues raised in the Nevada Companies' complaint.

9. Further, Enron contends that no interim relief should be granted to the Nevada Companies because they are not likely to prevail on the merits and will not suffer irreparable harm if the relief is denied. In Enron's opinion, the Nevada Companies will not prevail on the merits of this case because their claim is barred by the doctrine of *res judicata* and the Commission's policy against relitigation of the same issues. Enron explains that the issues raised in the Nevada Companies' complaint have been resolved by the bankruptcy court, the judgments of which are entitled to the same preclusive effect as decisions by other courts. Based on the above, Enron concludes that the Commission does not have the power to act on the Nevada Companies' complaint.

10. Alternatively, Enron argues that, even if the Commission decides to act on the instant complaint, it does not have the authority to grant the relief requested because section 206 of the Federal Power Act (FPA)[3] prohibits the Commission to retroactively

[2] Enron cites to Blumenthal v. NRG Power Marketing, Inc., 103 FERC ¶ 61,344 *reh'g denied,* 104 FERC ¶ 61,211 (2003). (NRG).

[3] 16 U.S.C. § 824e (2000).

revise agreements that expired more than 18 months ago in order to negate the obligation to pay the termination fee. In addition, Enron argues that FPA section 309 also does not give the Commission independent remedial authority in accordance with well-established court precedent and thus cannot be used to evade section 206 restrictions on the Commission's remedial power.

11. Enron adds that the Commission has previously ruled on the merits of the Nevada Companies' public interest claims pertaining to the contracts at issue and determined that the public interest does not require modification of these contracts. Moreover, according to Enron, the Commission has previously found that the Nevada Companies' performance of their contract obligations at issue in this proceeding would not place the Nevada Companies in severe financial distress. Accordingly, Enron opposes the Nevada Companies' request for an evidentiary hearing on the issue of whether the termination of the contracts at issue is contrary to the public interest.

Notice of the Filing and Responsive Pleadings

12. Notice of the filing was published in the *Federal Register*, 68 Fed. Reg. 60,349 (2003), with comments, protests, or interventions due on October 15, 2003. Time for filing an answer to the merits of the Nevada Companies' complaint was extended until October 27, 2003. Timely motions to intervene were filed by entities listed in the Appendix to this order. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the filing of a timely motion to intervene that has not been opposed makes the movant a party to the proceeding. Electric Power Supply Association and the United States Senators Harry Reid and John Ensign filed motions to intervene out of time that have not been opposed. Given the lack of undue prejudice and the parties' interests, we find good cause to grant under Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214, these unopposed, untimely motions to intervene in this proceeding.

13. MBIA Insurance Corporation (MBIA) filed a motion to intervene out-of-time, which has been opposed by Enron. Given MBIA's interest in the proceeding and the early stage of the proceeding, we find good cause to grant MBIA's late intervention pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2003).

14. The Attorney General for the State of Nevada, Bureau of Consumer Protection (Nevada BCP), the City of Santa Clara, California (Santa Clara), and MBIA filed comments in support of the Nevada Companies' complaint. The Nevada BCP, while it acknowledges that the bankruptcy court order required the Nevada Companies to make termination payments pursuant to the WSPP Agreement, asserts that the bankruptcy court recognized that the Commission is the proper forum to address the propriety of

termination payments. Also, the Nevada BCP does not believe that the Commission's June 26 Order precludes further challenges to the contracts or prejudges the Commission determination to be made in another proceeding. On the merits, the Nevada BCP agrees with the Nevada Companies that Enron should not be allowed to collect termination payments because: (1) Enron failed to comply with the credit assurance provisions of the WSPP Agreement before terminating the contracts; (2) Enron was in violation of the tariff at the time it contracted with the Nevada Companies; and (3) requiring the Nevada Companies to pay the termination payments would violate the public interest, as defined under the *Mobile-Sierra* doctrine.

15. Santa Clara states that as with the Nevada Companies, Enron has attempted to abuse termination provisions in its contracts with Santa Clara by manufacturing a claim for early termination payment. Although the basis for Enron's termination action against Santa Clara is not a change in credit condition, Santa Clara believes that the complaint raises policy and jurisdictional issues that are common to the circumstances surrounding Enron's attempt to terminate energy contracts with Santa Clara. It asserts that where a contract does not contain an automatic termination clause, the Commission requires that it be allowed to review a challenged termination before it goes into effect. Santa Clara also regards Enron's actions as an attempt in effect to modify the contract by seeking to cancel it. As such, Santa Clara contends that Enron must meet the *Mobile-Sierra* standard of proof, *i.e.*, show that the change is in the public interest. Finally, Santa Clara argues that the Commission would be justified in using its FPA section 309 authority to prevent additional harm to customers that would be caused by Enron's exit strategy.

16. MBIA argues that the Nevada Companies' complaint sets forth sufficient evidence for the Commission to conclude that Enron is not entitled to receive unjustified windfall profits in the form of the termination payments from the Nevada Companies. MBIA believes that the Commission has the jurisdiction over the instant dispute pursuant to Commission precedent. MBIA also states that the requirement to pay the termination payments will negatively affect the Nevada Companies' financial health, which in turn will have an adverse impact on the Nevada Companies' ability to fulfill their load serving obligations. In MBIA's opinion, the energy markets may also be adversely affected if Enron's improper market behavior is rewarded with windfall profits.

17. Morgan Stanley Capital Group (MSCG), Indicated Sellers, Inc. (Indicated Sellers) and J. Aron & Company (J.Aron) (collectively, Protestors) filed comments opposing the complaint. Specifically, Protestors contend that the issues in the Nevada Companies' complaint have already been raised, litigated and denied in the bankruptcy court decision and the Commission's June 26 Order and thus are precluded by the doctrines of

res judicata and collateral estoppel from being relitigated before the Commission.[4] Even if the Commission would decide to entertain the instant complaint, Protestors assert that, contrary to the Nevada Companies' claim, the Commission has not determined in prior cases that it has exclusive jurisdiction over termination of contracts by bankrupt suppliers. According to Protestors, at most the Commission has determined that it has concurrent jurisdiction, which it may decide to exercise or not. They note that while the Commission has held that contract interpretation is within its jurisdiction, it has usually declined to exercise that jurisdiction unless the matter requires some special expertise possessed by the Commission, requires a need for uniformity of interpretation and presents a significant issue in relation to the Commission's regulatory responsibilities. Protestors argue that none of these factors are involved in the present dispute. Protestors further argue that the relief requested by the Nevada Companies would violate the filed rate doctrine in that it would require retroactive modification of a filed rate schedule. Finally, Protestors contend that public policy weighs against the grant of the relief requested by the Nevada Companies. They suggest that for the Commission to even assert jurisdiction could cause power marketers to be less willing to enter into new transactions and affect the liquidity of the market. They also believe that the relief would interfere with the promotion of prudent credit risk management, which is necessary for efficient wholesale markets to exist and could require Commission adjudication of numerous termination disputes, thus impairing the stability and certainty vital to the development of wholesale markets.

Nevada Companies' Response to Protests

18. The Nevada Companies filed an answer to the protests. Rule 213(a) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a), prohibits an answer to a protest, unless otherwise permitted by the decisional authority. We will accept the Nevada Companies' answer to the protests, as the Commission permits parties to respond to answers when doing so, as here, will assist the Commission's understanding of the issues raised.[5]

19. Contrary to Protestors' arguments, the Nevada Companies state that they do not seek to have section 27 of the WSPP Agreement interpreted in a way that conflicts with

[4] Although the Protestors filed separate motions to intervene or protests, they present many of the same arguments, which will be discussed collectively.

[5] *See, e.g.*, Atlantic City Electric Co., 90 FERC ¶ 61,268, at 61,898 (2000) (Atlantic City) and New York Independent System Operator, Inc., 91 FERC ¶ 61,128 (2000) (NYISO).

the plain meaning of the provision. Rather, the Nevada Companies state, the essence of their complaint is that Enron failed to exercise reasonable discretion, as required by section 27, in rejecting the Nevada Companies' proposed method of providing assurances that they would fulfill their obligations under the contracts. On several grounds, the Nevada Companies disagree that the doctrines of *res judicata* and collateral estoppel apply here to prevent the litigation of the instant complaint before the Commission. First, they assert that the bankruptcy court decision did not address the central claim of the complaint, whether Enron's conduct was reasonable, and they interpret the decision as having determined to leave the reasonableness of Enron's conduct and any remedy therefore to the jurisdiction of the Commission. Second, the Nevada Companies contend that new evidence not available to the bankruptcy court reveals a pre-determined plan by Enron to terminate the contracts.[6] Thus, the Nevada Companies argue, this proceeding would examine whether such conduct is consistent with the tariff obligation to exercise reasonable discretion. Third, the Nevada Companies contend that the Complaint presents different claims or issues than were before the bankruptcy court. They note that they have requested that the Commission invoke its equitable powers to prevent Enron from benefiting from its unreasonable demand for assurances under section 27 of the WSPP Agreement and that the Commission disallow the termination payments based on the *Mobile-Sierra* doctrine. The Nevada Companies point out that the bankruptcy court does not have authority to provide equitable relief to ratepayers and has no jurisdiction to apply the *Mobile-Sierra* doctrine. Fourth, the Nevada Companies claim that the reasonableness of Enron's action in terminating the contracts was explicitly not addressed by the Commission in the prior complaint proceeding and was also not a subject at issue in the Commission's orders revoking Enron's market-based rate authority.

20. Further, the Nevada Companies argue that Commission disposition of their complaint will promote judicial and administrative economy. They suggest that not only will piece-meal litigation be avoided but that Commission action will set standards of reasonableness in the exercise of termination/default provisions of the tariff, thus promoting consistency and contract certainty and preventing abuse of discretion. In response to claims that they unreasonably delayed in taking this action, the Nevada Companies state that they consistently asked the bankruptcy court to defer to the primary jurisdiction of the Commission and that they wrongly assumed that the bankruptcy court would not rule on a motion for summary judgment that involved issues

[6] The new evidence consists of e-mails that purportedly show Enron intended to terminate the contracts on the slightest pretext. The Nevada Companies argue that Enron implemented its plan to diminish the threat posed by the filing of the Nevada Companies' complaint in Docket No. EL02-28-000 and to evade the Commission's jurisdiction in the process.

of material fact. In any case, the Nevada Companies point out that they filed this complaint shortly after the Commission issued its decision in *NRG*,[7] which held that actions taken by a bankruptcy court do not inhibit the Commission from exercising its lawful authority under the FPA. Here, the Nevada Companies believe that the Commission's exercise of primary jurisdiction is warranted under tests historically used by the Commission. Contrary to Protestors' claims, the Nevada Companies assert that the Commission has a specialized expertise in contract interpretation to assess Enron's conduct as it seeks to leave wholesale markets. The Nevada Companies also believe that there is a need to provide uniformity of interpretation to all parties to the WSPP Agreement.

21. Finally, the Nevada Companies deny that the Complaint seeks unlawful retroactive relief. They note that since no early termination payments have been made to or collected by Enron, no refunds are involved. Instead, the Nevada Companies claim, the Complaint seeks a ruling as to whether such early termination payments in the future will violate the public interest or otherwise be incompatible with the FPA and the Commission's prior orders. They state that the Complaint does not ask for suspension of any provision of the tariff. Rather, the Nevada Companies ask the Commission to maintain the status quo, because of concerns about the legality of Enron's collection of the payments, the financial distress that will be caused by such payments and the associated effects on the public interest, and the need for the Commission to preserve its jurisdiction.

Enron's Supplementary Filing and the Nevada Companies' Response

22. On November 17, 2003, Enron submitted a letter to inform the Commission that the bankruptcy court granted a stay of enforcement of its judgment requiring the Nevada Companies to pay the termination payments to Enron, pending the Nevada Companies' appeal of the bankruptcy court's decision to the United States District Court for the Southern District of New York. In connection with this, Enron argues that the granted stay has obviated any need for the Commission to take an interim or emergency action to preserve the status quo of the Nevada Companies' complaint. On November 19, 2003, the Nevada Companies filed a response to Enron's pleading, arguing that the Commission's prompt action is needed because the bankruptcy court's granted stay does not provide the interim relief sought by the Nevada Companies. Specifically, the Nevada Companies requested the Commission to assert jurisdiction over the subject matter of the

[7] Blumenthal v. NRG Power Marketing, Inc., 103 FERC ¶ 61,344 *reh'g denied*, 104 FERC ¶ 61,211 (2003). (NRG).

instant dispute and prohibit Enron from collecting the termination payments, pending the Commission's review of whether Enron violated the tariff.

23. In its letter to the Commission, Enron also responds to the Nevada Companies' answer to the protests filed in this proceeding. In their responsive pleading to Enron's letter, the Nevada Companies also challenge Enron's arguments responding to the Nevada Companies' answer to the protests. Rule 213(a) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a), prohibits answers to answers, unless otherwise permitted by the decisional authority. We will accept Enron's and the Nevada Companies' answers to answers to the extent they assist the Commission's understanding of the issues raised.[8]

24. Specifically, Enron challenges the Nevada Companies' statement that there is no retroactive effect to their request, as no liability has yet attached because there is no final court judgment. According to Enron, there is a final court judgment requiring the Nevada Companies to pay the termination payments. Enron further states that the Nevada Companies conceded in their answer to the protests that the bankruptcy court had jurisdiction over the dispute in question and that the Nevada Companies' only objection to the bankruptcy court's decision is the result reached. Enron also denies the Nevada Companies' claim that it terminated the contracts at issue because it never intended to deliver power under these contracts. Enron states that, as a seller in the Chapter 11 bankruptcy proceeding, it needed assurance of the Nevada Companies' ability to pay under the contracts.

25. The Nevada Companies respond that the issue before the Commission is whether it has the authority to assert jurisdiction over the instant dispute. They also state that the bankruptcy court held that an assessment of Enron's conduct was a matter for Commission review and that the Commission is not precluded by *res judicata* from determining whether Enron's conduct violated the Commission-approved tariff. According to the Nevada Companies, the Commission has the broad remedial authority to address tariff violations similar to the violation committed by Enron when it unreasonably refused to accept the assurance of payment offered by the Nevada Companies. The Nevada Companies further argue that because the termination payments have not yet been made, the action to be taken by the Commission on the instant complaint will be prospective, rather than retroactive.

[8] *See, e.g.*, Atlantic City and NYISO.

Nevada Companies' Motion to Take Official Notice and Request for Show Cause Order

26. On February 10, 2004, the Nevada Companies filed a motion to request that the Commission take official notice of the following decisions by two U.S. District Courts: (1) the February 2, 2004 decision of the U.S. District Court of Nevada in *Nevada Power Company v. Morgan Stanley* and (2) the December 23, 2003 decision by the U.S. District Court for the Northern District of Texas in *In Re: Mirant Corporation, et al.* (Mirant). The February 2, 2004 U.S. District Court decision stayed further proceeding in litigation between the Nevada Companies and MSCG regarding termination rights under section 27 of the WSPP Agreement. The *Mirant* decision addressed the issue of the Commission's jurisdiction over the matters pending before federal courts.

27. In addition, the Nevada Companies allege that Enron's termination of contracts in question was premeditated. According to the Nevada Companies, Enron never intended to provide power to the Nevada Companies for the full duration of the contract, and that Enron's rejection of the Nevada Companies' offer was motivated by a desire to trigger termination payments. The Nevada Companies also argue that the lawfulness of Enron's termination of various other contracts entered into with different parties pursuant to the WSPP Agreement should also be questioned. The Nevada Companies thus request that the Commission issue a show cause order requiring Enron to demonstrate why it should not be found to have systematically abused its discretion under section 27 of the WSPP Agreement.

28. Enron and MSCG filed answers in opposition to the Nevada Companies' motion. Enron argues that the court rulings that the Nevada Companies request to be lodged in this proceeding are not relevant to the instant case. MSCG also states that the Nevada Companies mischaracterized the meaning of the court decisions in question. Enron also believes that the Nevada Companies' request for a show cause order should be rejected, since it asks the Commission to review the termination in 61 adversarial proceedings that are pending before the bankruptcy court supervising Enron's bankruptcy, to 60 of which the Nevada Companies are not parties.

29. The NPUC and the Nevada BCP filed answers in support of the Nevada Companies' motion to take official notice and request for a show cause order. Nevada BCP argues that the U.S. District Court rulings in question are relevant to the instant proceeding because they support the Nevada Companies' claim that the Commission should assert jurisdiction over the instant dispute. Nevada BCP supports the Nevada Companies' request for a show cause order because it believes that the evidence presented by the Nevada Companies demonstrates that Enron was not dealing with the Nevada Companies in good faith when it demanded assurances from the Nevada Companies and subsequently terminated its contracts with the Companies. NPUC argues

that the Commission has already determined that Enron manipulated the markets, which, in NPUC's opinion, is a sufficient ground for the Commission to now examine whether Enron's actions to generate cash through offensive use of contract termination have been undertaken for similarly bad purposes.

30. On March 4, 2004, the Nevada Companies filed an answer to answers in opposition to their motion and request for show cause order. As stated above, answers to answers are generally not permitted pursuant to Rule 213(a)(2) of the Commission's Rules of Practice and Procedure,[9] unless otherwise permitted by the decisional authority. We are not persuaded to allow the Nevada Companies' answer to Enron's and MSCG's answers.

31. On March 15, 2004, Enron filed an answer to the Nevada Companies' motion to file an answer to answers in opposition to their motion. On March 30, 2004, the Nevada Companies again filed a response to Enron's pleading of March 15, and on April 14, 2004, Enron responded to the March 30 pleading of Nevada. Having denied the answer of the Nevada Companies filed on March 4, 2004, we will also deny these successive answers for the same reasons.

Discussion

A. The Nevada Companies' Complaint

32. The instant dispute involves interpretation of the WSPP Agreement, a jurisdictional, wholesale agreement that is on file with the Commission. The terms of the WSPP Agreement constitute the rates, terms, and conditions of service by a public utility. Therefore, the terms and conditions of the WSPP Agreement are clearly subject to the Commission's jurisdiction and review under sections 205 and 206 of the FPA.[10] Accordingly, we find that the Commission has jurisdiction over the instant dispute.

33. Section 27 of the WSPP Agreement provides in pertinent part:

> [s]hould a Party's creditworthiness, financial responsibility, or performance viability become unsatisfactory to the other Party in such other Party's reasonably exercised discretion..., the dissatisfied Party (the "First Party")

[9] 18 C.F.R. § 385.213(a)(2) (2003).

[10] *See, generally*, NRG.

> may require the other Party (the "Second Party") to provide, at the Second Party's option (but subject to the First Party's acceptance based upon reasonably exercised discretion), either (1) the posting of a Letter of Credit, (2) a cash prepayment, (3) the posting of other acceptable collateral or security by the Second Party, (4) a Guarantee Agreement executed by a creditworthy entity; or (5) some other mutually agreeable method of satisfying the First Party.

Thus, if the First Party reasonably exercises its discretion in demanding financial assurance, the Second Party may choose the means of providing such assurance, subject to the First Party's acceptance based on reasonably exercised discretion. Section 27 further states that one of the events that may cause the First Party to question the Second Party's creditworthiness, financial responsibility, or performance viability is a downgrading of debt to below investment grade, or if the debt is already below investment grade, a further downgrading of the debt. When Enron requested financial assurance after the downgrading of the Nevada Companies' debt, the Nevada Companies offered to pay 110 percent of the market price as of May 1, 2002 for all energy delivered during the period May 1, 2002 through September 15, 2002, and to pay the balance of the contract prices beginning in the fourth quarter of 2002. Enron rejected the Nevada Companies' proposal and demanded a termination payment. The Nevada Companies challenge Enron's right to such a payment. They allege that Enron did not act reasonably in rejecting the proposed assurance. The Nevada Companies also argue that Enron never intended to provide power to the Nevada Companies for the full duration of the contract, and that Enron's rejection of the Nevada Companies' offer was motivated by a desire to trigger termination payments.

34. The primary issue here is whether Enron lawfully exercised its contract rights in accordance with the terms of section 27 of the WSPP Agreement. We find that these issues are more appropriately addressed after an evidentiary hearing, to ensure we have a comprehensive record to inform our decision. We therefore set the question of whether Enron reasonably exercised its discretion under the section 27 provision for a trial-type evidentiary hearing.

35. We recognize that the type of provision in question in this proceeding is common in forward contracts and is critical to assuring that the credit standing of the "out of the money" counterparty is adequate to support the unperformed portion of the contract. By our action setting this matter for hearing, we do not intend to undermine the efficacy of such provisions in assuring liquidity in forward power markets. However, due to the financial significance of this proceeding and the need to develop a record on the factual issues raised in the complaint, we will set the matter for a trial-type evidentiary hearing to assure that we afford all parties the opportunity to provide all relevant factual and legal

arguments to the ALJ. The hearing will address whether Enron reasonably exercised its discretion under section 27 of the WSPP Agreement.

36. Nevada Companies also request an alternative relief, *i.e.*, if section 27 of the WSPP Agreement is construed in Enron's favor, they ask us to modify the terminated contracts in order to eliminate the termination payment obligation under the WSPP Agreement as contrary to the public interest. We will not include this issue in the hearing ordered today. Instead, we will consider this request at the appropriate time if necessary.

37. In cases where, as here, the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b) requires that the Commission establish a refund effective date that is no earlier than 60 days after the filing of the complaint, but no later than five months subsequent to the expiration of the 60-day period. Consistent with our general policy of providing maximum protection to customers,[11] we will set the refund effective date as of the date 60 days after the date of the filing of the complaint. The refund effective date is therefore December 5, 2003.

38. Section 206(b) also requires that, if no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state the best estimate as to when it reasonably expects to make such a decision. Although we do not have the benefit of the presiding judge's decision, based on our review of the record, we expect that, assuming the cases do not settle, the presiding judge should be able to render a decision within four months of the commencement of hearing procedures. If the presiding judge is able to render an initial decision by the end of December 2004 and assuming the cases do not settle, we estimate that we will be able to issue our decision within approximately three months of the filing of briefs on exceptions and briefs on opposing exceptions, or by May 31, 2005.

39. In addition, we deny the Nevada Companies' motion to take official notice of, and to lodge, two U.S. District Court decisions, as we find that these decisions are not relevant to the instant proceeding and thus were not helpful in deciding whether the Commission should assert jurisdiction over the instant dispute.

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[11] *See, e.g.*, Seminole Electric Cooperative, Inc. v. Florida Power & Light Company, 65 FERC ¶ 61,413, at 63,139 (1993); Canal Electric Company, 46 FERC ¶ 61,153, at 61,539, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

B. The Nevada Companies' Request for a Show Cause Order

40. The Nevada Companies request that the Commission issue a show cause order on the ground that Enron's rejection of the Nevada Companies' offer, as well as Enron's termination of various other contracts entered into with different parties pursuant to the WSPP Agreement, was motivated by a desire to trigger termination payments. We believe that the Nevada Companies' request is unjustified. The show cause proceeding that the Nevada Companies request consists of proceedings currently pending before the bankruptcy court, to which the Nevada Companies are not parties and which involve different factual and legal issues.

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and 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 1), an expedited public hearing shall be held concerning the complaint in this proceeding.

(B) A presiding judge, to be designated by the Chief Judge, shall convene a conference in this proceeding to be held within approximately fifteen (15) days of the date the Chief Judge designates the presiding judge, in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss), as provided in the Commission's Rules of Practice and Procedure.

(C) The refund effective date established pursuant to section 206(b) of the Federal Power Act is December 5, 2003.

(D) The Nevada Companies' motion to take official notice and request for a show cause order are hereby denied for the reasons stated in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

Appendix

List of Intervenors

Nevada Power Company and Sierra Pacific Company v.
Enron Power Marketing Company, Inc.
Docket No. EL04-1-000

Attorney General for the State of Nevada, Bureau of Consumer Protection*
City of Santa Clara, California*
Electric Power Supply Association
Indicated Sellers, Inc.*
J. Aron & Company*
MBIA Insurance Corporation
Morgan Stanley Capital Group*
Public Utilities Commission of Nevada.
Reliant Energy Services, Inc.
United States Senators Harry Reid and John Ensign

* Comments and/or protests