126 FERC ¶ 61,049
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

January 15, 2009

In Reply Refer To:
Sierra Pacific Power Company
Nevada Power Company
Docket Nos. ER07-1371-000
EL08-6-000

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Attn: Matthew W.S. Estes, Esq.
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Dear Mr. Estes:

1. On September 2, 2008, you filed an Offer of Settlement and Settlement Agreement (Settlement) in Docket Nos. ER07-1371-000 and EL08-6-000, by and between Sierra Pacific Power Company and Nevada Power Company (together, the "SPR Operating Companies") and each of the following entities: Truckee Donner Public Utility District, the City of Fallon, Nevada, Newmont Mining Corporation, and Barrick Goldstrike Mines Inc. and Barrick Turquoise Ridge Inc., as manager of Turquoise Ridge Joint Venture, (collectively, Parties). On September 22, 2008, Commission Trial Staff filed comments in support of the Settlement. No other comments were filed. On October 3, 2008, the Settlement was certified to the Commission as uncontested.

2. The Settlement resolves all outstanding contested issues in the above-referenced proceedings. The Settlement is fair and reasonable and in the public interest, and is hereby approved. The rates submitted with the settlement are accepted for filing, and are designated and made effective as shown on the rate schedule designation sheet submitted with the Settlement. Commission approval of the Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding. Section 9 of the Settlement provides that the standard of review for any modifications to the settlement that are not agreed to by the Settling Parties, including any modifications resulting from the Commission acting *sua sponte*, shall be the "public interest" standard under the

Mobile-Sierra doctrine. The standard of review for any modification to the settlement proposal by a non-settling third party shall be the most stringent standard permissible under applicable law. However, nothing in the settlement shall limit any Party's rights to make a filing under section 205 or 206 of the Federal Power Act to modify any of the rates, terms and conditions of the SPR Operating Companies' OATT, including the rates, terms and conditions implemented pursuant to the Settlement, or to affect the standards that would apply to such a filing. Accordingly, the Commission retains the right to investigate the rates, terms and conditions under the just and reasonable and not unduly discriminatory or preferential standard of section 206 of the Federal Power Act, 16 U.S.C. § 824e (2006).

3. This order terminates Docket Nos. ER07-1371-000 and EL08-6-000.[1]

By direction of the Commission. Commissioners Kelly and Wellinghoff concurring in part and dissenting in part with a joint separate statement attached.

Kimberly D. Bose,
Secretary.

cc: All parties of record

[1] The request for rehearing pending in Docket No. ER07-1371-001 is deemed withdrawn upon acceptance of the settlement.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Sierra Pacific Company and Nevada Power Company	Docket Nos. ER07-1371-000 EL08-6-000

(Issued January 15, 2009)

KELLY and WELLINGHOFF, Commissioners, *concurring in part and dissenting in part*:

The instant settlement's standard of review provisions would have the Commission apply the "public interest" standard to any changes to the settlement proposed by the parties or the Commission acting *sua sponte*. The instant settlement also would impose the "most stringent standard permissible under applicable law" with respect to any changes to the settlement proposed by non-parties.

The U.S. Supreme Court has held that whenever the Commission reviews certain types of contracts, the FPA requires it to apply the presumption that the contract meets the "just and reasonable" requirement imposed by the FPA.[1] The contracts that are accorded this special application of the "just and reasonable" standard are those "freely negotiated wholesale-energy contracts" that were given a unique role in the FPA.[2] In contrast, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) determined that the proper standard of review for a different type of agreement, with regard to changes proposed by non-contracting third parties, was the "'just and reasonable' standard in section 206 of the Federal Power Act."[3] The agreement at issue in *Maine PUC* was a multilateral settlement negotiated in a Commission adjudication of a utility's proposal to revise its tariff substantially to enable it to establish and operate a locational installed electricity capacity market. The D.C. Circuit's rationale in *Maine PUC* applies with at least equal force to changes to an agreement sought by the Commission acting *sua sponte*.[4]

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[1] *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County*, 128 S. Ct. 2733, 2737 (2008) (*Morgan Stanley*).

[2] *Id.*

[3] *Maine Pub. Utils. Comm'n*, 520 F.3d 464, 478, *petition for reh'g denied*, 2008 U.S. App. LEXIS 24022 (D.C. Cir. Oct. 6, 2008) (*Maine PUC*).

[4] *See Duke Energy Carolinas, LLC*, 123 FERC ¶ 61,201 (2008) (Comm'rs Wellinghoff and Kelly dissenting in part).

Our review of the instant settlement indicates that it more closely resembles the *Maine PUC* adjudicatory settlement than the *Morgan Stanley* wholesale-energy sales contracts, which, for example, were freely negotiated outside the regulatory process. Therefore, the "most stringent standard permissible under applicable law" as applied here to changes to the settlement proposed by non-parties means the "just and reasonable" standard of review. Further, for the reasons discussed above, we believe that the majority should not have accepted the provision of the instant settlement that applies the "public interest" standard to changes to the settlement resulting from the Commission acting *sua sponte*. Instead, changes proposed by the Commission acting *sua sponte* should be reviewed under the "just and reasonable" standard.

For these reasons, we concur in part and dissent in part.

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Suedeen G. Kelly	Jon Wellinghoff
Commissioner	Commissioner