

BEFORE THE PUBLIC UTILITIES COMMISSION OF NEVADA

In re Petition of Nevada Power Company and)
Sierra Pacific Power Company for an Order)
by the Commission establishing a state)
policy with respect to the allocation of) Docket No. 02-5051
transmission rights and resolving issues integral)
to the implementation of Assembly Bill 661 in)
Docket No. 01-7021.)

COMMENTS OF THE NATIONAL ENERGY MARKETERS ASSOCIATION

The National Energy Marketers Association (NEM) hereby submits comments on the "Petition for an Order by the Commission Establishing a State Policy with Respect to the Allocation of Transmission Rights and Resolving Issues Integral to the Implementation of AB 661" [hereinafter "Petition"] filed by Nevada Power Company and Sierra Pacific Power Company [hereinafter "Utilities"] pursuant to the Notice of Petition issued by the Commission on June 24, 2002.

The National Energy Marketers Association (NEM) is a national, non-profit trade association representing wholesale and retail marketers of energy, telecom and financial-related products, services, information and related technologies throughout the United States, Canada and the U.K. NEM's Membership includes wholesale and retail suppliers of electricity and natural gas, independent power producers, suppliers of distributed generation, energy brokers, power traders, and electronic trading exchanges, advanced metering and load management firms, billing and information technology providers, credit, risk management and financial services firms, software developers, clean coal technology firms as well as energy-related telecom, broadband and internet companies.

This regionally diverse, broad-based coalition of energy, financial services and technology firms has come together under NEM's auspices to forge consensus and to

help resolve as many issues as possible that would delay competition. NEM members urge lawmakers and regulators to implement:

- Laws and regulations that open markets for natural gas, electricity and related products, services, information and technology in a competitively neutral fashion;
- Rates, tariffs, taxes and operating procedures that unbundle competitive services from monopoly services and encourage true competition on the basis of price, quality of service and provision of value-added services;
- Competitively neutral standards of conduct that protect all market participants;
- Accounting and disclosure standards to promote the proper valuation of energy assets, equity securities and forward energy contracts, including derivatives; and
- Policies that encourage investments in new technologies, including the integration of energy, telecommunications and Internet services to lower the cost of energy and related services.

The Utilities' Petition raises the following issues: 1) establishment of a statewide transmission policy for the allocation of retail access transmission rights; 2) assessment of an impact charge to departing customers; 3) application requirements with respect to the 10% contracts for southern Nevada; 4) application requirements with respect to customer specific information; and 5) applicability of AB 661 to cogeneration projects and the assessment of an impact charge on these customers. NEM appreciates the opportunity to offer its comments on the vitally important issue of implementation of AB 661. NEM submits its comments on each of the aforementioned issues below.

I. The Utilities Proposed Statewide Transmission Policy for Allocation of Retail Access Transmission Rights Should Be Rejected

A. The Commission Should Not Adopt a Policy Contrary to FERC's Present Requirements and Future Standard Market Design

By the terms of AB 661 certain eligible customers are permitted to purchase electric service from a "provider of new electric resources." As detailed in the Utilities' Petition.

a number of customers have filed applications to avail themselves of this opportunity. These customers requested, "that Nevada Power grant them transmission rights for importation of their full loads from generation plants located outside the congested grid and in some cases outside the state of Nevada." (Petition at page 11). As further discussed in the Petition, Nevada Power told the requesting customers that the capacity is not available. (Id.) The Utilities also argue that, "granting of transmission capacity for the purpose of importing their full loads has a serious detrimental effect on the ability of Nevada Power to continue to operate the transmission system for the benefit of the remaining customers and might have negative impacts on system reliability." (Id.) As a result, the applicant customers, "indicated an intention to seek a ruling from the FERC as to whether Nevada Power has appropriately designated Network Resources under its OATT in order to reserve transmission import capability . . . and to request that the FERC require Nevada Power to grant them transmission rights to import their full loads." (Petition at pages 11-12.)

In response, the Utilities propose that, "Native Load will voluntarily release a 'pro rata' share . . . of the Native's Load existing transmission capacity rights for a specific time period," for eligible customers. (Petition Exhibit 1 at page 1.) "[A] resource internal to the uncongested grid [must be designated] for the portion of their requirements not covered by the import allocation." (Petition Exhibit 1 at page 2.) The Utilities propose that this policy be set forth in, "a separate Nevada retail open access section of the Utilities OATT." (Petition at page 13.)

NEM urges the Commission to reject the Utilities proposal. The proposal is an attempt by the Utilities to circumvent the requirement of Section 28.2 of FERC's pro forma tariff

that transmission providers designate the network resources associated with reservations of firm import capacity. The Petition notes the eligible customers' contention that, "Nevada Power does not have Network Resources, i.e., firm contracts, to support its reservation of approximately 2,300 megawatts of import transmission capability from the transmission lines south of Nevada Power's uncongested grid." (Petition at page 16.) The Utilities do not refute this argument. Rather, they merely state that, "[t]he Utilities do not purchase resources well in advance of a projected summer peak. Instead, the Utilities enter into firm purchase agreements when the amount of energy that is actually needed is more predictable." (Petition at page 17.) This is not sufficient to justify the Utilities' refusal to provide the transmission capacity requested by these customers or to impose a pro rata sharing policy.

The Utilities attempt to create the impression that allowing the requesting customers access to import transmission rights would have serious consequences for reliability. They note that, "granting of existing transmission import capability for all customers eligible to depart [would constitute] . . . approximately 1,700 MW in southern Nevada alone." (Petition at page 13.) Yet the Utilities own Petition refutes this doomsday argument as it notes that applicants to switch under AB 661 as well as those eligible to switch under SB 211 only have, "combined loads equa[l] to approximately 150 MW (55 of which are on-peak)."

The Utilities cite a number of cases pertaining to FERC's requirement that transmission providers designate network resources under their OATT and attempt to diminish the scope of its reach. (Petition pages 18-19). Significantly, they discuss Aquila Power Corp., 92 FERC ¶ 61,064 (2000), and argue that the case stands for the proposition that,

"if power was purchased only for bundled retail transmission customers then [FERC] would have no jurisdiction over the transmission service." (Petition at page 19.) NEM submits that the recent decision of the U.S. Supreme Court does not support this argument. In New York v. FERC, the Supreme Court found that the Federal Power Act,

unambiguously authorizes FERC to assert jurisdiction over two separate activities, transmitting and selling. It is true that FERC's jurisdiction over the sale of power has been specifically confined to the wholesale market. However, FERC's jurisdiction over electricity transmissions contains no such limitation. Because the FPA authorizes FERC's jurisdiction over interstate transmissions, without regard to whether the transmissions are sold to a reseller or directly to a consumer, FERC's exercise of this power is valid.¹

Accordingly, the Supreme Court decision strengthens FERC's authority to require the designation of network resources. In fact, in FERC's recent Working Paper and Options Paper released in its Standard Market Design docket RM01-12, it discusses the creation and implementation of a new, "nondiscriminatory, standard transmission service, "Network Access Service," for all customers." (Working Paper at page 7.) FERC explained that,

The electrons moving across the grid do not distinguish between bundled retail and other services, and behave according to the laws of physics rather than the laws of a particular jurisdiction. With more nonintegrated electricity suppliers and a deeper reliance on wholesale electric markets, there are substantial competitive consequences and higher costs to all retail customers if we do not apply consistent, nondiscriminatory rules to all transmission customers. To protect all customers and assure the benefits of competition for all, consistent transmission rules must be applied. (FERC Working Paper at page 2.)

Thus, it appears that the Utilities' proposal is meant not only to circumvent FERC's current requirement for designation of network resources but also to avoid the results of FERC's standard market design. NEM urges the Commission not to implement a policy

that would run counter to FERC Orders, Supreme Court precedent, and the impending implementation of FERC's standard market design.

B. The Bases on Which the Utilities Claim the Eligible Customers Applications are Defective Should be Rejected

The Utilities also claim that the applications submitted by the eligible customers run counter to the purpose and requirements of AB 661. By the terms of the statute, eligible customers are able to receive "new electric resources," defined as,

1. The energy, capacity or ancillary services and any increased or additional energy, capacity or ancillary services which are:
 - (a) Made available from a generation asset that is not owned by an electric utility or is not subject to contractual commitments to an electric utility that make the energy, capacity or ancillary services from the generation asset unavailable for purchase by an eligible customer; and
 - (b) Able to be delivered to an eligible customer. (NRS 704B.110)

The utilities claim that the applications are defective because the new electric resources are not "able to be delivered." This is based on the Utilities' own assessment and refusal to deliver, as discussed above, and the unsubstantiated claims that import capability requested by the applicants is not available. Clearly the Utilities should not be able to unilaterally defeat the entire purpose of AB 661 with such circular logic.

The Utilities then take their argument one step further by stating that, "[g]eneration resources that would qualify as new electric resources and allow eligible customers to meet their full load requirements without the use of transmission import capability are limited inside the congested grids in northern and southern Nevada." (Petition at page 9.) They claim their argument is supported by NRS 704B.350(3) that provides that, "[t]he provisions of this chapter do not enlarge or expand any existing rights under federal law

¹ New York et. al. v. FERC et al., slip op. at 17 (March 5, 2002).

or create any other rights with regard to the transmission system of the electric utility." This argument is founded in an interpretation of the word "rights" in the statute. NEM submits that the word "rights" as used in the statute refers to a legal entitlement. The Utilities are interpreting the word to mean "transmission rights." If the legislature had intended this meaning it would have used the full phrase, "transmission rights," but it did not. As noted above, the applicant customers are not seeking an enlargement or expansion of their rights under federal law but merely that the Utilities comply with the pre-existing FERC requirements for the proper designation of network resources.

The Utilities also object to the eligible customers' transactions because they would provide power from generation plants located outside of the congested grid and/or outside of the state. The Utilities urge, "that the intent of NRS 704B.350(3) was to foster the development of new non-utility owned generation inside the congested grid or enhance the capability of the transmission system." (Petition at page 9.) This clearly does not capture the full intent of the law. The Utilities fail to note in their quotation of the purposes of AB 661 Section 1(4) that provides that, "the residents of this state would benefit from construction of new generation assets in this state and from *access to other new electric resources, wherever located*, that provide lower-priced electricity." (emphasis added.) The Utilities also fail to note that the definition of "generation asset" set forth in NRS 704B.100, as that term is encompassed in "new electric resource," is, "any plant, facility, equipment or system which is located *within or outside this state* and which converts nonelectrical energy into electrical energy or otherwise produces electrical energy." (emphasis added). The statute must be read to give full effect to all of its purposes and all of its provisions. Accordingly, the Utilities' proposed interpretation

of NRS 704B.350(3) is contrary to the clear and unambiguous language of the statute itself.

Finally, the Utilities object to the applicant customers' requests that the Utilities provide them with ancillary services. The Utilities claim this, "violates the spirit of the law, which contemplates that the proposed transaction will bring with it ancillary services from the new provider of electric services." (Petition at page 22.) The use of the disjunctive "or" throughout the statute clearly indicates otherwise. For instance, the phrase "energy, capacity or ancillary services," (emphasis added) is used in the definition of "new electric resources" and "provider of new electric resources." Furthermore, in the description of an application for approval of a transaction, NRS 704B.310(a) requires that eligible customers must file an application, "not later than 180 days before the date on which the eligible customer intends to begin purchasing energy, capacity or ancillary services from the provider." (emphasis added.) Similarly, NRS 704B.310(2)(b) requires the application to include, "information demonstrating that the proposed provider will provide energy, capacity or ancillary services from a new electric source." (emphasis added.) As a result, the Utilities' argument that applications are defective because the Utilities are asked to provide ancillary services should be rejected.

II. An Impact Charge Should Not Be Imposed on Departing Customers

NRS 704B.310(7)(b) provides that,

The commission shall order such terms, conditions and payments as the commission deems necessary and appropriate to ensure that the proposed transaction will not be contrary to the public interest. Such terms, conditions and payments:

(1) Must be fair and nondiscriminatory as between the eligible customer and the remaining customers of the electric utility; and

(2) Must include, without limitation, payment by the eligible customer to the electric utility of the eligible customer's load-share portion of any unrecovered balance in the deferred accounts of the electric utility.

The only explicitly enumerated and authorized charge in the statute is that of an eligible customer's share of the deferred energy balance. Accordingly, no other charge need be assessed. NEM submits that recovering impact charges only from departing customers will unfairly and discriminatorily punish these customers and slow the development of functional energy markets, as AB 661 was intended to foster.

The statute requires that any payment be "fair and nondiscriminatory" as to both departing and remaining customers. That means that any charge must fully acknowledge the benefits that the Utilities (and as a result, their customers) receive when a customer departs. This point is also acknowledged by the Utilities. (Petition at page 31.) Prior to assessing any "impact" charge it is necessary determine whether or not the utilities have any lost revenues as a result of a specific transaction and whether those costs are offset. It also implies a utility obligation to productively manage and mitigate revenues losses. Until and unless a formal determination is made of whether the Utilities in fact, have net lost revenues, and that the Utilities have properly managed and mitigated any such losses, it is wholly inappropriate to assess any charges, "impact" or otherwise, against any customers. It is also necessary to definitively establish the amount of net lost revenues so that a date certain is established by which any such amounts are deemed fully recovered and the need for a non-discriminatory "impact" charge is eliminated. Eligible customers and the competitive market participants that wish to serve them must be given a clear indication of the term of any charges (impact of otherwise) so they can form adequate and rational business plans with respect to the Nevada market. NEM urges that no

charges be imposed until a determination is made that the Utilities do in fact have net lost revenues of a nature delineated by statute as recoverable.

The Utilities assert that the basic calculation behind the impact charge should be, "the difference between lost revenues and avoided costs." (Petition at page 30.) The Utilities then argue that the credits to the impact charge suggested by Staff would inappropriately interfere with this method. NEM submits that the departing customers should be given fully allocated embedded cost-based credits for the products, services, information and technology they are no longer receiving from the utility. Once a reasonable time (e.g. one year or 25% migration) has elapsed during which eligible customers are able to shop for one or more competitive services with embedded cost-based credits, then a calculation of the difference between the revenues that the utility would have received using fully embedded cost-based rates and the revenues actually received by the utility due to lost sales of specific services from the menu of competitive products, services, information and technology that each customer actually elects to purchase from the utility versus a competitive supplier should be compared to determine the maximum amount of potentially "qualifying revenue losses" that may be arguably recoverable, subject to the following qualifications:

1. The utility must show that the costs are material.
2. The utility must demonstrate that they have productively managed and reasonably mitigated costs in the subject areas.
3. The utility must not be earning in excess of their earnings/sharing cap, and
4. The utility must identify specifically which costs or revenue losses are a result of (a) the utility being required to provide Provider of Last Resort services and/or (b) the utility's need to provide fully bundled services to customers that do not migrate.

The Utilities' should provide a sufficient explanation of the costs they claim are "unavoidable" because of service obligations to remaining customers and/or to

"unavoidable costs" relating to provider of last resort (POLR) services. The embedded costs of rendering competitive versus POLR-related services should be separately set forth and identified. This is a proper, just and reasonable way to avoid customer confusion and to avoid hidden cross-subsidies in delivery rates. Any costs or lost revenues not connected with utilities' provision of POLR-related services and/or fully bundled sales service should be assessed in a competitively neutral fashion.

The Utilities also assert that Staff's proposed impact charge fails to protect the utilities and their customers as is required by law. (Petition at page 29.) The Utilities allege that, "to the extent that a customer's departure causes one customer to pay increased costs, the proposed transaction may not be in the public interest." They base this argument on NRS 704B.310(6) which provides that,

In determining whether the proposed transaction will be contrary to the public interest, the commission shall consider without limitation:

- (a) Whether the electric utility that has been providing electric service to the eligible customer will be burdened by increased costs as a result of the proposed transaction or whether any remaining customer of the electric utility will pay increased costs for electric service as a result of the transaction;
- (b) Whether the proposed transaction will impair system reliability or the ability of the electric utility to provide electric service to its remaining customers; and
- (c) Whether the proposed transaction will add energy, capacity or ancillary services to the supply in this state.

The Utilities would have the Commission stop its analysis after subsection (a) and the consideration of impacts on customers. However, the statute sets forth three considerations in an application for approval of a proposed transaction that the Commission must cumulatively consider as is required by the use of the conjunctive "and" in this section.

III. Compliance with the 10% Contract Requirement Should Permit Submission of Amended Information

Pursuant to NRS 704B.320(2), certain customers eligible to depart must also,

(a) Contract with the provider to purchase:

(1) An additional amount of energy which is equal to 10 percent of the total amount of energy that the eligible customer is purchasing for its own use under the proposed transaction and which is purchased at the same price, terms and conditions as the energy purchased by the eligible customer for its own use; and

(2) The capacity and ancillary services associated with the additional amount of energy at the same price, terms and conditions as the capacity and ancillary services purchased by the eligible customer for its own use; and

(b) Offers to assign the rights to the contract to the electric utility for use by the remaining customers of the electric utility.

The Utilities claim the applicants have not provided sufficient information consistent with this obligation. Specifically, the Utilities claim the applicants have not provided information about the price, terms and conditions of the 10% set aside. (Petition at page 51.) The Utilities state in their Petition that the customers have argued it is, "not possible, nor practical to provide the information at the time that the application is filed." (Petition at page 52.) NRS 704B.320(4) recognizes that price and other terms and conditions are commercially sensitive information entitled to confidential treatment but permits the Commission's regulatory operations staff, the consumer advocate and staff and the relevant utility to have access. NEM submits that the statute does not bar customers from submitting amended information to their applications as it becomes timely and available, and it should not be interpreted as not in compliance particularly since such amendments will allow the relevant parties to engage in an analysis of the most accurate and relevant information with respect to a proposed transaction. Furthermore, NEM submits that

these amendments should not trigger a new starting point to the 180-day transaction evaluation process.

IV. Customers Must Be Permitted to Supplement Their Applications Without Triggering a New Evaluation Period

The Utilities have asked the Commission to provide guidance on, "what information is mandatory when an application is filed, whether the application can be supplemented with additional account or load information, and what a Commission order authorizing departure of a customer means." (Petition at pages 52 and 57.) The Utilities argue that any change to account or load information or points of delivery should trigger a new beginning to the transaction approval process. (Petition at page 55.) They also argue that an application must have all account numbers, all current and forecasted future loads, and detailed information about each point of delivery. (Petition at page 56.) The Utilities also argue that, "the Commission's order approving an application limit their approval only to the specific service locations and accounts detailed in the application." (Petition at page 58.)

NEM submits that the statute does not provide guidance on the procedures for amending or supplementing applications. However, NEM submits that the restrictions proposed by the Utilities would unfairly and unnecessarily deter eligible customers from submitting full and complete applications. Some methodology must be determined by which a customer can modify an application in a manner that does not impair the Commission's ability to review the transaction and also does not require a new tolling of the 180 day review process. The nature of application modifications and the impact on the proposed transaction should be tantamount factors as to when such submissions are deemed timely. However, NEM urges that eligible customers must be provided a means to supplement

their applications, as necessary, in order to encourage the production of the most complete record upon which the Commission can make a decision.

V. The Provisions of AB 661 Should Not Apply to Customers Seeking to Install Cogeneration

The Utilities request in their Petition that the Commission make a determination as to whether customers seeking to install cogeneration come within the ambit of AB 661. NEM submits that whether or not these customers fall within the ambit of AB 661, that separate rules must be devised and implemented for their unique circumstances. For instance, as noted by the Utilities, these customers may want to use utility standby service. Accordingly, NEM recommends that the Commission implement a separate proceeding to design rates, tariffs and interconnection practices that encourage these investments and recognize their ability enhance system-wide reliability in a cost-effective manner.

NEM also recommends that the Commission should not place "exit fees" (payments for electric services that a consumer no longer wishes to buy from the utility) on investors who decide to generate their own power. Charges that directly or indirectly operate as an "exit fee" or penalty are contrary to the public interest, unjust and unreasonable and should not be imposed. Consumers that invest in and install self-generation should not be penalized, forced to pay for services they do not require or charged fees that typical, electricity-consuming customers do not pay. Such practices and rate designs are inconsistent with today's need to enhance security, competitive energy options, lower costs and improve reliability.

VI. Conclusion

For the foregoing reasons, NEM urges the Commission to reject the Utilities' pro rata transmission right policy; to evaluate the propriety of assessing an impact charge; to permit modifications to applications, including those pertaining to 10% contracts, to permit receipt of timely information; and to separately evaluate cogeneration projects.

Sincerely,

Craig G. Goodman, Esq.
President,
National Energy Marketers Association
3333 K Street, NW
Suite 425
Washington, DC 20007
Tel: (202) 333-3288
Fax: (202) 333-3266
Email: cgoodman@energymarketers.com
Website-www.energymarketers.com

Dated: July 17, 2002.

PROOF OF SERVICE

I hereby certify that I have this day served the foregoing, "COMMENTS OF THE NATIONAL ENERGY MARKETERS ASSOCIATION," upon all parties of Record and petitioners to intervene in the proceeding by delivering by U.S. Mail, copies thereof, properly addressed, for mailing to the following:

Kathleen Drakulich
Sierra Pacific Power Company
PO Box 10100
Reno, NV 89520-0024

F. Robert Reeder
Parson Behle & Latimer
201 S. Main Street, Suite 1800
Salt Lake City, UT 84111

Sierra Pacific Power Co.
Gas Department
PO Box 10100
Reno, NV 89520

Steven King
City of Fallon
PO Box 1203
Fallon, NV 89407-1203

Gail Bates
Colorado River Commission
555 E. Washington Avenue, Suite 3100
Las Vegas, NV 89101-1048

Gerald Lopez
Colorado River Commission
555 E. Washington Avenue, Suite 3100
Las Vegas, NV 89101

David Gildersleeve
Nevada Energy Buyers Network
8685 W. Sahara Avenue, #200
Las Vegas, NV 89117

Steven Boss
Nevada Energy Buyers Network
8685 W. Sahara Avenue, Suite 200
Las Vegas, NV 89117

Bill Malone
Newmont Gold Company
PO Box 669
Carlin, NV 89822-0669

Tim Shuba
Shea & Gardner
1800 Massachusetts Avenue, Suite 800
Washington, DC 20036

Keith Lee, Esq.
The Maple Companies
3400 Kauai Ct., Suite 204
Reno, NV 89506

Geoffrey Inge
KTM Inc.
4909 Pearl East Circle, Suite 104
Boulder, CO 80301

Patrick Fagan
Allison Mackenzie Et. al.
The Northern Nevada Industrial
PO Box 646
Carson City, NV 89702

Dated this 17th day of July, 2002.

Stacey L. Rantala
National Energy Marketers Association
3333 K Street, NW, Suite 425
Washington, DC 20007
Tel: (202) 333-3288