

145 FERC ¶ 61,022  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Philip D. Moeller, John R. Norris,  
Cheryl A. LaFleur, and Tony Clark.

Nevada Power Company

Docket No. EC13-96-000

ORDER AUTHORIZING ACQUISITION  
OF INTEREST IN GENERATING FACILITY

(Issued October 7, 2013)

1. On April 22, 2013, Nevada Power Company (Nevada Power) filed an application (Application) under section 203(a)(1) of the Federal Power Act (FPA).<sup>1</sup> Nevada Power requests authorization to acquire the California Department of Water Resources' (CDWR) 67.8 percent ownership interest in Unit No. 4 of the Reid Gardner Station, a 257 MW (net) coal-fired generating facility (Unit 4) located near Moapa, Nevada. Nevada Power currently owns the remaining 32.2 percent interest in Unit 4.
2. The Commission has reviewed the proposed transaction under the Commission's Merger Policy Statement.<sup>2</sup> As discussed below, we will authorize the proposed transaction as consistent with the public interest.

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<sup>1</sup> 16 U.S.C. § 824b (2006).

<sup>2</sup> See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). See also FPA Section 203 *Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007) (Supplemental Policy Statement), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008). See also *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001). See also *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200

(continued...)

## **I. Background**

### **A. Description of the Parties**

#### **1. Nevada Power**

3. Nevada Power, a Nevada corporation, provides retail and wholesale transmission service in southern Nevada. Nevada Power is regulated by the Public Utilities Commission of Nevada (Nevada Commission) and the Commission. Nevada Power is wholly owned-by NV Energy, Inc. (NV Energy), a public utility holding company. NV Energy also wholly-owns Sierra Pacific Power Company (Sierra Pacific), a regulated public utility that provides retail service in northern Nevada and wholesale transmission service to customers in northern Nevada and portions of northern California. Nevada Power and Sierra Pacific serve a combined 45,592-square-mile service territory in the State of Nevada, and together they serve approximately 1.2 million customers. Sierra Pacific and Nevada Power were granted separate market-based rate authorizations by the Commission for wholesale sales outside of their respective balancing authority areas (BAAs) in Nevada.<sup>3</sup> Sierra Pacific and Nevada Power do not have market-based rate authorization for wholesale sales in their respective Nevada BAAs.

#### **2. CDWR**

4. CDWR is an agency of the State of California, headquartered in Sacramento. It is responsible for monitoring, conserving and developing California's water resources, providing public safety, and preventing property damage related to water resources. A primary responsibility of CDWR is the construction, operation, and maintenance of the State Water Project. According to Nevada Power, State Water Project is the largest state-owned, multi-purpose water project in the country, delivering an average of 3.3 million acre-feet of water per year to 29 public agency water contractors throughout California.

### **B. Proposed Transaction**

5. Nevada Power requests Commission approval to acquire CDWR's ownership share in Unit 4. Nevada Power states that Nevada Power and CDWR executed a Participation Agreement on July 11, 1979, which provides for the terms and conditions of

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(2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

<sup>3</sup> See *Sierra Pacific Power Co. and Nevada Power Co.*, 95 FERC ¶ 61,193, *reh'g dismissed*, 96 FERC ¶ 61,050 (2001).

construction, participation, joint ownership and operation of Unit 4. In addition to operation, maintenance and dispatch responsibilities, Nevada Power states that the Participation Agreement gives Nevada Power the right to call upon the entire output of Unit 4 as peaking capacity for up to 1500 hours per year. Nevada Power states that it also has the ability to control, at a minimum, 100 MWs of output from Unit 4 throughout all hours of the year.<sup>4</sup>

6. Nevada Power states that the terms of the proposed transaction are governed by the Participation Agreement and by a Termination Settlement Agreement, dated March 11, 2013 (Settlement Agreement).<sup>5</sup> Nevada Power states that the Participation Agreement identifies three ways in which the agreement may be terminated: upon retirement; upon mutual agreement in the event Unit 4 is unable to obtain initial operation; or 30 years after the Date of Firm Operation. Nevada Power notes that Firm Operation of Unit 4 was established as of July 25, 1983. Therefore, Nevada Power states that, in compliance with the agreement, the Participation Agreement will terminate as of July 25, 2013.<sup>6</sup> Nevada Power states that, upon termination of the Participation Agreement, it is obligated to pay CDWR for any undepreciated cost of capital improvements for Unit 4. The Settlement Agreement sets forth the terms and conditions upon which CDWR is obligated to transfer its interest in Unit 4 to Nevada Power and Nevada Power is obligated to make the required payments under the Participation Agreement. Nevada Power has requested Commission approval for the transaction by July 19, 2013, so that the parties can meet the July 25, 2013 closing date.<sup>7</sup>

7. Nevada Power states that, in conjunction with NV Energy's plans to merge Nevada Power and Sierra Pacific, which was announced in October 2011, and to consolidate the BAAs of the two companies upon completion of a 235-mile 500 kV transmission line (ON Line project), NV Energy has spent considerable time evaluating the presence of coal-fired generation in the companies' generation fleet. In addition to its ownership interest in Reid Gardner Unit 4, Nevada Power owns 100 percent of Units 1, 2, and 3, which have a combined output of 330 MW. Nevada Power further states that NV Energy has proposed legislation in the Nevada Legislature (Senate Bill 123) that would facilitate the early retirement of Units 1-3, as well as Unit 4. Nevada Power notes

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<sup>4</sup> Application at 9.

<sup>5</sup> The Participation Agreement and Settlement Agreement were filed as Exhibit I to the Application.

<sup>6</sup> Application at 12.

<sup>7</sup> *Id.* at 13.

that Senate Bill 123, if passed, would require Nevada Power and Sierra Pacific to file with the Nevada Commission a plan for reducing emissions by retiring coal-fired generating units and replacing the capacity of those units with other resources. According to Nevada Power, the early retirement of Units 1-3 is based on the assumption that Nevada Power will continue to control the entire output of Unit 4 upon termination of the Participation Agreement and transfer of CDWR's ownership interest to Nevada Power.<sup>8</sup>

## **II. Notice of Filing and Responsive Pleadings**

8. Notice of the Application was published in the *Federal Register*, 78 Fed. Reg. 25261 (2013), with interventions and protests due on or before May 13, 2013. A notice of intervention and comments were filed by the Nevada Commission and motions to intervene and comments were filed by Office of the Nevada Attorney General, Bureau of Consumer Protection (Nevada Bureau) and CDWR. Answers to the comments were filed by Nevada Power and CDWR. A response to the answers was filed by the Nevada Commission.

9. On August 2, 2013, the Nevada Commission filed a motion to lodge an order, issued August 1, 2013, in Nevada Commission Docket No. 11-08019, which, among other things, addresses revised requirements for Nevada Power's integrated resource plan as it relates to the retirement of Reid Gardner Units 1-4 following the passage of Senate Bill 123.<sup>9</sup> CDWR filed an answer to the motion. The Nevada Commission filed a response to CDWR's answer.

## **III. Discussion**

### **A. Procedural Matters**

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

11. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure<sup>10</sup> prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We

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<sup>8</sup> *Id.* at 10.

<sup>9</sup> Senate Bill 123 was signed into law on June 11, 2013.

<sup>10</sup> 18 C.F.R. § 385.213(a)(2) (2013).

will accept the answers because they have provided information that assisted us in our decision-making process. We also grant the Nevada Commission's motion to lodge.

**B. Authorization of Proposed Transaction Under Section 203**

**1. Standard of Review Under Section 203**

12. Section 203(a)(4) of the FPA requires the Commission to approve a transaction if it finds that the transaction "will be consistent with the public interest."<sup>11</sup> The Commission's analysis of whether a transaction is consistent with the public interest generally involves the consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.<sup>12</sup> Section 203(a)(4) also requires the Commission to find that the transaction "will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge or encumbrance will be consistent with the public interest."<sup>13</sup> The Commission's regulations establish verification and informational requirements for applicants that seek a determination that a transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.<sup>14</sup>

**2. Effect on Horizontal Competition**

**a. Applicant's Analysis**

13. Nevada Power argues that the proposed transaction will not have an adverse impact on horizontal competition. Nevada Power performed a delivered price test (DPT) for the Nevada Power BAA using both Economic Capacity and Available Economic Capacity. Nevada Power further states that its quantitative analysis focuses on Available Economic Capacity, consistent with the Commission's policy in markets, such as Nevada, where there is no retail access, and it is unlikely that the state will adopt retail access in the foreseeable future.<sup>15</sup> Nevada Power then calculated the increase in the

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<sup>11</sup> 16 U.S.C. § 824b(a)(4) (2006).

<sup>12</sup> See Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

<sup>13</sup> 16 U.S.C. § 824b(a)(4).

<sup>14</sup> 18. C.F.R. § 33.2(j) (2013).

<sup>15</sup> Application, Attachment 1, Navigant Affidavit (Attachment 1), at 4.

Herfindahl-Hirschman Index (HHI)<sup>16</sup> to determine the change in market concentration due to the Transaction. Nevada Power's analysis of Available Economic Capacity demonstrates that the transaction fails the merger screens in the Nevada Power BAA in four of the 10 time periods usually considered— Summer Peak, and the three winter periods (off-peak, peak, and super peak).<sup>17</sup> Nevada Power states that these screen failures result from HHI increases of 149-154 points in moderately concentrated markets, and 96 points in a highly concentrated market. Nevada Power further determined that the number of screen failures increases to five, with three ranging from 102 to 225 points in moderately concentrated markets, and two of 160 and 176 points in highly concentrated markets, under a +10 percent price sensitivity using the Available Economic Capacity measure. Nevada Power states that the proposed transaction fails the screens for Economic Capacity (HHI changes between 180 and 283 points) in highly concentrated markets (HHI > 1800) in all 10 time periods.

14. Nevada Power further analyzes an Available Economic Capacity measure using a combined market, consisting of the BAAs of Nevada Power and Sierra Pacific, to reflect the planned merger of the two entities upon completion of the ON Line project.<sup>18</sup> Using

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<sup>16</sup> The HHI is a widely accepted measure of market concentration, calculated by squaring the market share of each firm competing in the market and summing the results. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. Markets in which the HHI is less than 1,000 points are considered to be unconcentrated; markets in which the HHI is greater than or equal to 1,000 but less than 1,800 points are considered to be moderately concentrated; and markets in which the HHI is greater than or equal to 1,800 points are considered to be highly concentrated. In a horizontal merger, an increase of more than 50 HHI points in a highly concentrated market or an increase of 100 HHI points in a moderately concentrated market fails its screen and warrants further review. Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,129; *see also Analysis of Horizontal Market Power under the Federal Power Act, order reaffirming commission policy and terminating proceeding*, 138 FERC ¶ 61,109 (2012) (affirming the Commission's use of the thresholds adopted in the Merger Policy Statement).

<sup>17</sup> The transaction also fails the Economic Capacity screen in multiple seasons/load periods. However, the Commission places more reliance on the Available Economic Capacity measure of capacity in markets where, as is the case in Nevada, the section 203 applicant has a native load obligation.

<sup>18</sup> Nevada Power states that the commercial operation date of the ON Line project is anticipated to occur December 31, 2013.

the combined system Available Economic Capacity approach, Nevada Power determined that the proposed transaction fails the horizontal screens for the combined market in eight of the 10 time periods, with six HHI changes ranging from 118 to 192 points in moderately concentrated markets and two HHI changes of 164 and 204 points in highly concentrated markets. The proposed transaction fails the screens for Economic Capacity (HHI changes between 236 and 270 points) in highly concentrated markets (HHI > 1800) in all 10 time periods.

15. Notwithstanding these screen failures, Nevada Power argues that this case is one in which the Commission should look beyond the HHI screens and consider other factors that demonstrate that Nevada Power will not have the ability or incentive to withhold output in order to drive up the market price. First, Nevada Power states that the proposed transaction involves the acquisition of baseload coal-fired capacity, noting that the Commission has recognized that baseload capacity is difficult to withhold and also typically uneconomic to withhold. Nevada Power maintains that this fact reduces any incentive that Nevada Power could have to withhold capacity.<sup>19</sup>

16. Second, Nevada Power states that Nevada Power and Sierra Pacific each sell power within their respective BAAs at cost-based rates. Nevada Power asserts that the Commission has found that this mitigates the ability and incentive to withhold output and thus to drive up prices.<sup>20</sup> In addition, Nevada Power states that Nevada Power is required to demonstrate to the Nevada Commission that it is pursuing the lowest cost option for meeting its retail loads. Accordingly, Nevada Power argues that Nevada Power has no ability to raise market prices.<sup>21</sup>

17. Third, Nevada Power states that Nevada Power and Sierra Pacific are each obligated to credit their retail customers with 100 percent of revenues earned from wholesale sales of power. Nevada Power states that the Commission has found that this obligation reduces incentives to manipulate market prices because an applicant will not

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<sup>19</sup> Application at 19-21 (citing *Arizona Pub. Serv. Co.*, 141 FERC ¶ 61,154, at P 33 (2012) (*Arizona Pub. Serv. Co.*)).

<sup>20</sup> *Id.* at 21 (citing *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252 (cross referenced at 119 FERC ¶ 61,295, at P 63 (2007))).

<sup>21</sup> *Id.*

receive any benefit from the additional revenue that might result if they were to manipulate market prices.<sup>22</sup>

18. Fourth, Nevada Power states that if the Commission were to deny the Application, Nevada Power would have no choice but to enter into more expensive power purchase arrangements, otherwise dispatch more expensive resources, and/or delay the retirement of Units 1, 2, and 3. Nevada Power argues that, in such a case, Nevada Power's market share would remain the same, but its retail customers would be required to bear the cost of more expensive generation.<sup>23</sup>

19. Finally, Nevada Power maintains that the proposed transaction will not result in the elimination of a competitor, since CDWR has not sold into the Nevada Power or Sierra Pacific BAAs. Nevada Power states that CDWR historically has exercised its rights under the Participation Agreement to serve its own needs within the State of California. Accordingly, Nevada Power would not be acquiring capacity that has heretofore been operated by a competitor in Nevada electricity markets.<sup>24</sup>

**b. Protests**

20. The Nevada Commission argues that information concerning Nevada Power's resource plan is necessary to enable the Commission "to look beyond the HHI screen failures" shown by Nevada Power. In this regard, the Nevada Commission notes that Nevada Power is under an obligation in Nevada Commission Docket No. 11-08019 to file a resource plan amendment with the Nevada Commission on August 15, 2013, which will include specific information regarding retirement of the Reid Gardner Units, and that Nevada Power's plans for reducing emissions from coal-fired generation may also be affected if Senate Bill 123 becomes law.<sup>25</sup> As to the latter, the Nevada Commission

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<sup>22</sup> *Id.* (citing *Arizona Pub. Serv. Co.*, 141 FERC ¶ 61,154 at P 33).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 22.

<sup>25</sup> Nevada Commission Protest at 4-8. A copy of Senate Bill 123 is appended to the Nevada Commission Protest as Exhibit B. Under Section 7 of the bill, Nevada Power and Sierra Pacific would be required to file a comprehensive plan for the reduction of emissions from coal-fired electric generating capacity and for the replacement of the capacity of those plants with increased capacity from renewable energy facilities and natural gas-fired generation plants. Section 7(2)(a) of the bill provides that the emissions reduction and capacity replacement plan must provide, at a minimum, for the retirement

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argues that if Senate Bill 123 passes, it may require replacement of coal-fired capacity with a larger amount of natural gas-fired capacity and renewables beginning as early as 2014. The Nevada Commission reasons that this possible event will have an effect on Nevada Power's claim that baseload capacity is difficult to withhold.<sup>26</sup>

21. The Nevada Commission argues that Nevada Power's assertion that its market share will remain the same after this transaction will become clear within the normal 180-day timeframe permitted for the Commission's determination. The Nevada Commission adds that information regarding the status of Senate Bill 123 is relevant to whether this transaction is in the public interest, and should be provided by Nevada Power to supplement the Application as required by 18 C.F.R. § 2.26.<sup>27</sup>

22. The Nevada Commission states that it has 135 days to complete its review of Nevada Power's resource plan amendment and any included revision of retirement dates for any of the Reid Gardner Units. Therefore, the Nevada Commission requests that the Commission deny Nevada Power's request for expedited treatment so that the Nevada Commission may complete its review of Nevada Power's resource plan amendment and provide the Commission with updated, accurate information regarding these dates.<sup>28</sup>

23. Finally, concerning Nevada Power's reference to the planned merger of Nevada Power and Sierra Pacific and completion of the ON Line project, the Nevada Commission notes that applications for approval of the merger have not been filed and that, whether or not the merger of the two companies is in the public interest, will depend upon evidence before the Nevada Commission in the actual merger filing. The Nevada Commission states that, depending on the timing of the merger filing and the timelines applicable to the Nevada Commission's determination in such proceeding, there may be relevant factual information in the merger proceedings that might bear on whether the proposed transaction is in the public interest. Accordingly, the Nevada Commission urges the Commission to delay action on the proposed transaction until the timing of the Nevada Commission's determination on the merger filing is known.<sup>29</sup>

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or elimination of not less than 300 megawatts of coal-fired electric generating capacity on or before December 31, 2014.

<sup>26</sup> Nevada Commission Protest at 8.

<sup>27</sup> *Id.* at 8-9.

<sup>28</sup> *Id.* at 6.

<sup>29</sup> *Id.* at 9-13.

**c. Answers**

24. Nevada Power states that it has submitted a complete application to the Commission. Nevada Power argues that the existence of uncertainties regarding future generation retirements or the merger of Nevada Power and Sierra Pacific does not preclude the Commission from making a determination based upon the filed Application.<sup>30</sup> Insofar as the merger of the two companies has any bearing on the Commission's competition analysis, Nevada Power notes that the Application reflects both Nevada Power's current single transmission system *and* changes for a transmission system combined with Sierra Pacific.<sup>31</sup>

25. The Nevada Commission reiterates in its response to Nevada Power's answer that the conditions that Nevada Power asks the Commission to consider when evaluating the impact of the proposed transaction on horizontal competition are subject to change by pending merger applications and the outcome of Senate Bill 123.<sup>32</sup>

**d. Commission Determination**

26. Nevada Power has shown that the proposed transaction does not raise any horizontal market power concerns. In Order No. 642, the Commission stated that it will look beyond the HHI screens if a transfer does not meet the HHI thresholds set forth in the Merger Policy Statement.<sup>33</sup> The Commission clarified that applicants showing screen failures could address market conditions beyond the change in HHI such as demand and supply elasticity, ease of entry and market rules, as well as technical conditions, such as the types of generation involved.<sup>34</sup> In its Supplemental Policy Statement, the Commission stated that in horizontal mergers, if an applicant fails the Competitive Analysis Screen (one piece of the Appendix A analysis), the Commission's analysis

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<sup>30</sup> Nevada Power Answer at 3.

<sup>31</sup> *Id.* at 4.

<sup>32</sup> Nevada Commission Response at 5.

<sup>33</sup> *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (*Merger Policy Statement*).

<sup>34</sup> *Duke Energy Corp.*, 136 FERC ¶ 61,245, at P 126 (2011).

focuses on the effect on the merged firm's *ability* and *incentive* to withhold output in order to drive up the market price.<sup>35</sup>

27. In the present case, Nevada Power has presented several factors specific to the proposed transaction that indicate that there will not be an ability and incentive to withhold output. First, baseload capacity is difficult and uneconomic to withhold, as the Commission has stated.<sup>36</sup> As Nevada Power notes, in *Arizona Pub. Serv. Co.*, a case involving the purchase of baseload coal-fired capacity with a number of similar factors that exist in the present case, the Commission considered the fact that Arizona Public Service Company served its wholesale customers under long-term agreements that did not allow it to benefit from temporary price increases.<sup>37</sup>

28. Second, Nevada Power is required to fully credit any profits from wholesale sales to retail customers through a fuel adjustment clause, removing any incentive for Nevada Power to raise prices. As the Commission determined in *Arizona Pub. Serv. Co.*, the requirement to credit retail customers with revenue from wholesale sales reduces the incentive to exercise market power because the seller will not receive any benefit from the additional revenue received from manipulating market prices.<sup>38</sup>

29. Third, we are persuaded that the proposed transaction will not result in the elimination of a competitor, since CDWR has not sold into the Nevada Power or Sierra Pacific BAA.<sup>39</sup> Fourth, we note that while it is difficult to quantify Nevada Power's right to call upon the entire output of Unit 4 as peaking capacity for up to 1500 hours each year, the existence of this contractual right suggests that Nevada Power already has significant control over the output of Unit 4 during peak periods. The Commission's concerns regarding the potential exercise of market power are the most acute during these periods. Moreover, the fact that this contractual right already exists suggests that the proposed transaction will have little effect on Nevada Power's control over Unit 4 in peak periods, further diminishing the potential of the proposed transaction to have an adverse

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<sup>35</sup> Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253 at P 60.

<sup>36</sup> See *FirstEnergy Corp.*, 133 FERC ¶ 61,222, at P 50 (2010) (finding that withholding baseload generation capacity would not increase prices enough to offset lost revenue).

<sup>37</sup> *Arizona Pub. Serv. Co.*, 141 FERC ¶ 61,154 at P 33.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* P 34.

impact on horizontal competition.<sup>40</sup> These factors, when taken together, demonstrate that Nevada Power does not have the *ability* and *incentive* to withhold output in order to drive up the market price.

30. For these reasons, we find that the proposed transaction will not result in an adverse effect on competition in the Nevada Power BAA or the combined BAAs consisting of Nevada Power and Sierra Pacific.

### **3. Effect on Vertical Competition**

#### **a. Applicant's Analysis**

31. Nevada Power argues that the proposed transaction will not have any adverse effect on vertical competition because the proposed transaction is narrowly focused on a single generation plant. It does not include any transmission assets or other inputs to electricity generation such as fuel supply or transportation facilities or new sites for generation. Thus, Nevada Power asserts that no change in control over electric transmission assets will occur as a result of the proposed transaction. Nevada Power adds that it operates its transmission system pursuant to an OATT on file with the Commission, and that the Commission has held that having such a tariff on file adequately mitigates any transmission market power.<sup>41</sup>

#### **b. Commission Determination**

32. As the Commission has previously found, transactions that combine electric generation assets with inputs to generating power (such as natural gas, transmission, or fuel) can harm competition if the transaction increases a firm's ability or incentive to exercise vertical market power in wholesale electricity markets. For example, by denying rival firms access to inputs or by raising their input costs, a firm created by the

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<sup>40</sup> As noted above, one of the periods in which Nevada Power's analysis of Available Economic Capacity demonstrates that the transaction fails the merger screens is the Summer Peak period. Although there are also screen failures in the three Winter periods, winter is an off-peak season in the Southwest region, and there is typically a substantial amount of excess capacity in the market, frustrating any ability Nevada Power might have to withhold output to drive up prices.

<sup>41</sup> Application at 23.

transaction could impede entry of new competitors or inhibit existing competitors' ability to undercut an attempted price increase in the downstream wholesale electricity market.<sup>42</sup>

33. The Commission finds that the proposed transaction does not raise any vertical market power concerns. The proposed transaction does not include any transmission assets or other inputs to electricity generation such as fuel supply or transportation facilities or new sites for generation. Thus, no change in control over electric transmission assets will occur as a result of the proposed transaction, and the proposed transaction will not increase Nevada Power's ability to erect barriers to entry.

#### **4. Effect on Rates**

##### **a. Applicant's Analysis**

34. Nevada Power argues that the proposed transaction will have no adverse impact on wholesale requirements customers or transmission customers. Nevada Power states that neither the OATT nor any other Nevada Power transmission service agreement includes formula rates, so the proposed transaction will not have any automatic effect on wholesale transmission rates. Nevada Power states that any subsequent filing to revise those rates to recover the cost of the Unit 4 will be fully subject to Commission review and approval.<sup>43</sup>

##### **b. Commission Determination**

35. The Commission finds that the proposed transaction will not have an adverse effect on rates to wholesale requirements customers or transmission customers. Neither Nevada Power's OATT nor any other Nevada Power transmission service agreement includes formula rates, so the proposed transaction will not have any automatic effect on wholesale transmission rates. Likewise, any subsequent filing to revise those rates to recover the cost of Unit 4 will be fully subject to Commission review and approval. We note that no parties have argued that the proposed transaction will have an adverse impact on rates.

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<sup>42</sup> *Duke Energy Corp.*, 136 FERC ¶ 61,245, at P 160 (2011).

<sup>43</sup> Application at 24.

## 5. Effect on Regulation

### a. Applicant's Analysis

36. Nevada Power maintains that the proposed transaction will not have an adverse impact on regulation, at either the federal or state level. Nevada Power will remain subject to the Commission's jurisdiction under the Federal Power Act, and will continue to be subject to regulation by the Nevada Commission. Accordingly, Nevada Power argues that the proposed transaction will have no adverse effect on regulation.<sup>44</sup>

### b. Protests

37. As previously noted, the Nevada Commission asserts that there are too many relevant factors in flux at present and in the near future to determine whether state regulation will be impaired by the proposed transaction. The Nevada Commission states that the most recent retirement date that the Nevada Commission has approved for Units 1 – 3 is 2020, and the question of early retirement of these units is dependent on a large number of factors to be considered in Nevada Power's resource plan amendment to be filed on August 15, 2013. The Nevada Commission questions Nevada Power's assertion that if the Commission were to deny approval of the Application, Nevada Power would have no choice but to enter into more expensive power purchase agreements, otherwise dispatch more expensive resources, and/or delay the retirement of Units 1, 2, and 3. The Nevada Commission states that it will examine these assertions in Nevada Power's upcoming amendment to its resource plan.<sup>45</sup>

38. The Nevada Commission further states that, if Senate Bill 123 becomes law, it is possible that the Nevada Commission's authority to review the disposition of Reid Gardner coal-fired units will be uncertain until roughly two weeks after the end of the session of the Nevada Legislature on June 3, 2013. Thus, the Nevada Commission requests that the Commission delay a determination on the Application until the results of the legislative session in Nevada are known and can be evaluated.<sup>46</sup>

39. Similarly, with respect to the planned merger of Nevada Power and Sierra Pacific, the Nevada Commission urges the Commission to delay any final determination on the

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<sup>44</sup> *Id.*

<sup>45</sup> Nevada Commission Protest at 4-5.

<sup>46</sup> *Id.* at 8.

Application until the timing of the Nevada Commission's determination on the merger filing is known.<sup>47</sup>

40. The Nevada Bureau requests that the Commission affirm that its approval of the Application under FPA section 203 does not preempt the Nevada Commission's authority under state law to review Nevada Power's resource planning decisions or the Nevada Commission's authority to review the retail rate impacts associated with the proposed transaction. The Nevada Bureau further asks that the Commission affirm that any approval of the Application under FPA section 203 does not preempt the Nevada Commission's authority under state law to review and accept (or find inadequate) Nevada Power's plan to acquire CDWR's interest in Unit 4 or the Nevada Commission's authority to evaluate whether any consideration Nevada Power pays to CDWR to acquire CDWR's interest in Unit 4 – including any payment pursuant to section 36.1 of the Participation Agreement – is eligible to be recovered in retail rates under Nevada state law.<sup>48</sup>

**c. Answers and Other Filings**

41. In its answer, Nevada Power argues that no decision made by the Commission in this proceeding can or will impact the Nevada Commission's statutorily-granted authority over Nevada Power.<sup>49</sup>

42. CDWR states in its answer that, despite the Nevada Commission's suggestion to the contrary, honoring the terms of a Commission-approved contract will not impair state regulation.<sup>50</sup>

43. The Nevada Commission argues in its response that whether the proposed transaction will impair effective state regulation remains unclear because it is interconnected with many other proceedings and venues in which determinations affecting the future regulation of Nevada Power are currently being made. The Nevada Commission adds that assuming that Senate Bill 123 becomes law and the proposed transaction is approved, Unit 4 will become part of a statutory plan to retire coal plants

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<sup>47</sup> *Id.* at 11-12.

<sup>48</sup> Comments of the Nevada Bureau at 4-5.

<sup>49</sup> Nevada Power Answer at 6.

<sup>50</sup> CWDR Answer at 3.

and add additional generation capacity in Nevada, over which the Nevada Commission will arguably have more limited authority.<sup>51</sup>

44. As noted above, on August 2, 2013, the Nevada Commission filed a motion to lodge an order issued on August 1, 2013 in Nevada Commission Docket No. 11-08019 relating to Nevada Power's integrated resource plan. The Nevada Commission states that the August 1, 2013 order makes findings and conclusions that are relevant to the immediate proceeding. Specifically, the Nevada Commission notes that, on June 11, 2013, Senate Bill 123 was passed into law. According to the Nevada Commission, Senate Bill 123 requires Nevada Power to retire specific amounts of coal generation over the next six years. As a result of the passage of Senate Bill 123, the Nevada Commission states that it has vacated its directive to Nevada Power to file an integrated resource plan amendment by August 15, 2013. Instead, the Nevada Commission states that it will determine the continuing relevance of certain matters required to be addressed in the integrated resource plan amendment (including the retirement dates of the Reid Gardner Units) as part of a pending rulemaking proceeding to implement Senate Bill 123. The Nevada Commission noted that the timeframe for making this determination was unclear at this juncture.

45. In its response to the motion to lodge, CDWR argues that the order that the Nevada Commission seeks to lodge has nothing to do with the performance of the contract between Nevada Power and CDWR. Further, CDWR asserts that the proffered order indicates an indefinite delay in the Nevada proceedings, and provides the Commission with no information that will assist its decision making. Accordingly, CDWR argues that the Commission should deny Nevada Commission's motion.<sup>52</sup>

46. The Nevada Commission answers that it does not believe its proffered order is unrelated to this proceeding. The Nevada Commission states that it felt it prudent to inform the Commission of a change in the proceedings described in the Nevada Commission's previous comments, because this change affected the timing and nature of the Nevada Commission's inquiry into retirement dates for the Reid Gardner Units. The Nevada Commission adds that it is not requesting delay, but only, out of an abundance of caution, providing updated information to allow the Commission to determine whether further delay is appropriate.<sup>53</sup>

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<sup>51</sup> Nevada Commission Response at 5-6.

<sup>52</sup> CDWR Response at 1-3.

<sup>53</sup> Nevada Commission August 29, 2013 Answer at 2-3.



**d. Commission Determination**

47. We find no evidence that either state or federal regulation will be impaired by the proposed transaction. The Commission's review of a transaction's effect on regulation focuses on ensuring that it does not result in a regulatory gap at the federal or state level.<sup>54</sup> We find that the proposed transaction will not create a regulatory gap at the federal level because the Commission will retain its regulatory authority over the companies after the proposed transaction is consummated.

48. We affirm that our approval of the proposed transaction under section 203 of the FPA does not affect or preempt any state proceedings under Nevada law, and that the timing of our determination does not have any impact on state jurisdiction. We also note that it is not our policy to delay ruling on an application when there are parallel proceedings.<sup>55</sup>

49. With respect to the request from the Nevada Bureau, we affirm that our approval of the application under FPA section 203 does not preempt the Nevada Commission's authority under state law to review Nevada Power's resource planning decisions or the Nevada Commission's authority to review the retail rate impacts associated with the proposed transaction. We further affirm that any approval of the proposed transaction under FPA section 203 does not preempt the Nevada Commission's authority to evaluate whether any consideration Nevada Power pays to CDWR to acquire CDWR's interest in Unit 4 – including any payment pursuant to section 36.1 of the Participation Agreement – is eligible to be recovered in retail rates under Nevada state law.

**6. Cross-Subsidization**

**a. Applicant's Analysis**

50. With respect to cross-subsidization, Nevada Power argues that the proposed transaction falls within the scope of the safe harbor for transactions between non-affiliated entities and thus does not present any issue with respect to cross-subsidization. Specifically, Nevada Power states that the proposed transaction is a bona fide, arm's-length, bargained-for exchange between non-affiliated entities. Nevada Power further states that the Commission's primary tool for providing ongoing protection against cross-subsidization is its rate authority pursuant to sections 205 and 206, and the Commission has and will continue to have authority over the rates, terms, and conditions of

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<sup>54</sup> Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

<sup>55</sup> *Id.* at 30,127-128.

transmission service provided by Nevada Power. Nevertheless, Nevada Power states that, based on the facts and circumstances known to it or that are reasonably foreseeable, the proposed transaction will not result in, at the time of the proposed transaction or in the future, cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company.

51. Specifically, Nevada Power states that no pledges or encumbrances of any assets of a traditional public utility that has captive customers or provides transmission service over jurisdictional transmission facilities will occur as a result of the proposed transaction; the proposed transaction does not involve a transfer of facilities between a traditional public utility associate company that has captive ratepayers, or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; the proposed transaction does not involve any new issuance of securities by a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; the proposed transaction does not involve any encumbrance of assets (of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company); or any new affiliate contract between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review under sections 205 and 206 of the Federal Power Act.<sup>56</sup>

**b. Commission Determination**

52. Based on the representations made by Nevada Power, we find that the proposed transaction will not result in cross-subsidization or the pledge or encumbrance of utility assets for the benefit of an associate company. We note that no party has argued otherwise.

**7. Other**

53. Order No. 652 requires that sellers with market-based rate authority timely report to the Commission any change in status that would reflect a departure from the

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<sup>56</sup> 18 C.F.R. § 33.2(j)(1)(iii) (2013).

characteristics the Commission relied upon in granting market-based rate authority.<sup>57</sup> To the extent that the foregoing authorization results in a change in status, Nevada Power is advised that it must comply with the requirements of Order No. 652. In addition, Nevada Power shall make any appropriate filings under section 205 of the FPA to implement the proposed transaction.

54. Information and/or systems connected to the bulk power system involved in this transaction may be subject to reliability and cyber security standards approved by the Commission pursuant to FPA section 215. Compliance with these standards is mandatory and enforceable regardless of the physical location of the affiliates or investors, information databases, and operating systems. If affiliates, personnel or investors are not authorized for access to such information and/or systems connected to the bulk power system, a public utility is obligated to take the appropriate measures to deny access to this information and/or the equipment/software connected to the bulk power system. The mechanisms that deny access to information, procedures, software, equipment, and the like, must comply with all applicable reliability and cyber security standards. The Commission, North American Electric Reliability Corporation, or the relevant regional entity may audit compliance with reliability and cyber security standards.

The Commission orders:

(A) The proposed transaction is hereby authorized, as discussed in the body of this order.

(B) Nevada Power must inform the Commission within 30 days of any material change in circumstances that departs from the facts the Commission relied upon in granting the application.

(C) The foregoing authorization is without prejudice to the authority of the Commission or any other body with respect to rates, service, accounts, valuation, estimates or determinations of costs, or other matter whatsoever now pending or which may come before the Commission.

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<sup>57</sup> *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005). See 18 C.F.R. § 35.42 (2013).

(D) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted.

(E) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate.

(F) Nevada Power shall make any appropriate filings under section 205 of the FPA, as necessary, to implement the proposed transaction.

(G) Nevada Power shall account for the transaction in accordance with Electric Plant Instruction No. 5 and Account 102, Electric Plant Purchased or Sold, of the Uniform System of Accounts. Nevada Power shall submit its final accounting entries within six months of the date that the transaction is consummated, and the accounting submissions shall provide all the accounting entries and amounts related to the transfer along with narrative explanations describing the basis for the entries.

(H) Nevada Power shall notify the Commission within 10 days of the date on which the proposed transaction is consummated.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

Document Content(s)

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