

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

City of San Diego,	)	
Petitioner	)	
	)	
v.	)	No. 00-71701
	)	
Federal Energy Regulatory	)	
Commission,	)	
Respondent	)	

**MOTION OF RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION  
TO DISMISS PETITION FOR REVIEW FOR LACK OF JURISDICTION  
AND TO SUSPEND THE REQUIREMENT  
TO FILE THE CERTIFIED INDEX TO RECORD**

Pursuant to Fed.R.App.P. 27(a) and Circuit Rule 27-1, the Federal Energy Regulatory Commission ("FERC" or "Commission") moves to dismiss Petitioner's petition for review for lack of jurisdiction. Petitioner seeks review of (1) an order proposing remedies and (2) an order implementing remedies, but does not seek review of an order on rehearing, as required by Section 313 of the Federal Power Act ("FPA"), 16 U.S.C. § 825*l*, before review can be sought. In fact, the Commission has yet to issue a rehearing of either order, and the time for filing rehearing requests of the second order is still running. Because rehearing is still pending, the Commission also requests that the Court suspend the deadline for filing the certified index to record,

which would otherwise be due on or about February 12, 2001, so that the Commission can retain jurisdiction to address rehearing requests.

### **BACKGROUND**

In August 2000, the Commission initiated hearing procedures under FPA § 206, 16 U.S.C. §825e, to address matters affecting the bulk power markets and wholesale energy prices in California, and a separate staff fact-finding investigation of the conditions in the electric bulk power markets in various regions of the country. After analyzing the bulk power market report as it pertained to California and the Western Region, as well as other submissions, in the first order for which review is sought, FERC proposed possible remedies to address dysfunctions in California's wholesale bulk power markets and to ensure just and reasonable wholesale power rates by public utility sellers in California. *See San Diego Gas & Electric Company, et al.*, "Order Proposing Remedies for California Wholesale Electric Markets," 93 FERC ¶ 61,121 (2000) ("November 1 Order")(slip opinion appended to this motion).

On November 22, 2000, Petitioner filed comments in response to the Commission's request in the November 1 Order. On December 1, 2000, Petitioner file a request for rehearing of the November 1 Order, which remains pending.

On December 15, 2000, in the second order for which review is sought, the Commission outlined a way to begin to solve the problems in California's electricity

marketplace. *San Diego Gas & Electric Company, et al.*, "Order Directing Remedies for California Wholesale Electric Markets," 93 FERC ¶ 61,294 (2000) ("December 15 Order") (slip opinion appended to this motion). The Commission undertook this action, in the interest of protecting consumers, ensuring creditworthiness of market participants, and moving the Western markets toward the kind of rules that will sustain the electric industry in the long run.

Petitioner filed its petition for review of the November 1 Order and the December 15 Order on December 21, 2000.

The time for filing rehearing requests of the December 15 Order will not run until January 16, 2001. As of the time of preparation of this motion, Petitioner had not filed a rehearing request of the December 15 Order, although three other parties had.

### **ARGUMENT**

FPA § 313 expressly provides that a party may only seek review of a final FERC order. FPA § 313(a), 16 U.S.C. § 825l(a), states: "No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon." FPA § 313(b), 15 U.S.C. § 825l(b), states: "Any party in a proceeding . . . aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals . . . by filing in such court, within sixty days after the order of

the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part." Together, these provisions establish the jurisdictional prerequisites for judicial review of FERC orders – a party must file a request for rehearing of an order, the Commission must then issue an order on rehearing, and then, and only then, the party may seek review.

Plainly, as Petitioner has not yet requested rehearing of the December 15 Order and the Commission has not yet issued an order on rehearing of either order, the judicial review requirements of the Federal Power Act have not been satisfied. Axiomatically, Petitioner must file a request for rehearing as to the December 15 Order before seeking to have this Court take jurisdiction over its claims. *See State of Cal., ex rel. State Water Resources Bd. v. FERC*, 877 F.2d 743, 745 (9th Cir. 1989)(jurisdiction limited to objections raised in the petitioner's application for rehearing before the Commission). Moreover, as the D.C. Circuit has emphasized, the failure to do so is jurisdictional and requires dismissal:

We hold therefore that when a petition for review is filed before the challenged action is final and thus ripe for review, subsequent action by the agency on a motion for reconsideration does not ripen the petition for review or secure appellate jurisdiction. To cure the defect, the challenging party must file a new notice of appeal or petition for review from the now-final agency order.

*TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 134 (D.C.Cir.1989). And the jurisdictional prematurity principles apply whether a party voluntarily seeks agency reconsideration before, simultaneously with, or after filing an appeal. *Wade v. FCC*, 986 F.2d 1433, 1434 (D.C. Cir. 1993). Moreover, as Petitioner's rehearing request is still pending on the November 1 Order, a petition for review of that order is likewise "incurably premature." *See Tennessee Gas Pipeline Co. v. FERC*, 9 F.3d 980, 981 (D.C. Cir. 1993). Obviously, Petitioner must file a timely request for rehearing of the December 15 Order, and if it still believes that it is aggrieved after the Commission issues an order on rehearing, it should then file a timely petition for review.

Petitioner cannot save the day by claiming that the December 15 Order is an order on rehearing of the November 1 Order. As an initial matter, by its very terms, the November 1 Order simply proposed remedies, to which the Commission invited comments – an invitation Petitioner accepted by filing comments on November 22, 2000. As such, it is an unreviewable interlocutory order. *See FPC v. Metropolitan Edison Co.*, 304 U.S. 375, 384 (1938)("The provision for review thus relates to orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case"). The Commission then considered Petitioner's and other parties' comments in the December 15 Order to craft remedies to address the situation in California, while

leaving rehearing requests of the November 1 Order to another day. Nowhere in the December 15 Order does the Commission address, respond to, or otherwise dispose of any of those rehearing requests, including Petitioner's; all of which remain pending. In other words, the December 15 Order is not an order on rehearing of the November 1 Order, and is not, therefore, a final order for the purpose of judicial review under the Federal Power Act.

For all these reasons, the Court should dismiss the petition for review for lack of jurisdiction.

For the same reasons, the Commission requests that the Court suspend the requirement to file the certified index to record, which is due on or about February 12, 2001, *see* Fed.R.App.P. 17(a), pending the Court's consideration of the Commission's motion to dismiss. Suspending the filing of the certified index to record will avoid a potential waste of resources that could result from filing a record in the likely event the petition is dismissed. More important, suspending the requirement is necessary to allow the Commission to retain jurisdiction to act on the rehearing requests pending before it. *See* 16 U.S.C. § 825l(b) (vesting the court of appeals with exclusive jurisdiction over a proceeding once the record is filed); *Public Util. Comm'n of California v. FERC*, 100 F.3d 1451, 1457 (9th Cir. 1996)(same).

## CONCLUSION

For the reasons stated, San Diego's petition for review should be dismissed, and the requirement to file the certified index to record should be suspended pending action by the Court on the motion to dismiss.

Respectfully submitted,

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