

123 FERC ¶ 61,042  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

State of California, *ex rel.* Bill Lockyer,  
Attorney General of the State of California

v.

Docket No. EL02-71-010

British Columbia Power Exchange Corporation,  
Coral Power, LLC, Dynegy Power  
Marketing, Inc., Enron Power Marketing,  
Inc., Mirant Americas Energy Marketing, LP,  
Reliant Energy Services, Inc., Williams  
Energy Marketing & Trading Company,

All Other Public Utility Sellers of Energy and  
Ancillary Services to the California Energy  
Resources Scheduling Division of the  
California Department of Water Resources, and

All Other Public Utility Sellers of Energy and  
Ancillary Services into Markets Operated by the  
California Power Exchange and California  
Independent System Operator

ORDER ON CLARIFICATION

(Issued April 15, 2008)

1. In this order, we address certain requests for clarification and expedited rehearing filed in response to the Commission's March 21, 2008 order,<sup>1</sup> which addressed the

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<sup>1</sup> *State of California, ex rel. Bill Lockyer v. British Columbia Power Exchange Corp.*, 122 FERC ¶ 61,260 (2008) (March 21 Order).

remand by the United States Court of Appeals for the Ninth Circuit, *State of California ex rel. Lockyer v. FERC*.<sup>2</sup> For the reasons discussed below, we will grant certain of the requests for clarification of the March 21 Order.

## **I. Background**

2. In the Ninth Circuit Decision, the court held, among other things, that the Commission erred in ruling that it lacked authority under the Federal Power Act (FPA) to order refunds for violations of the Commission's market-based rate quarterly reporting requirements<sup>3</sup> during the 2000-2001 period at issue in this proceeding and remanded the case for further refund proceedings.<sup>4</sup> The court did not itself order any refunds, leaving it to the Commission to consider appropriate remedial options.<sup>5</sup>

3. On remand, in the March 21 Order, the Commission established a trial-type hearing before an Administrative Law Judge (ALJ) to address whether, based on the facts and circumstances associated with each individual public utility seller, that seller's improper or untimely filing of its quarterly transaction reports masked an accumulation of market power such that the market rates were unjust and unreasonable.<sup>6</sup> In order to make such a determination, the Commission found that it would need to supplement the record and permit wholesale purchasers that made short-term market-based rate purchases through the California Independent System Operator (CAISO), the California Power Exchange (PX), and the California Energy Resources Scheduling Division of the California Department of Water Resources (CERS), from January 1, 2000 to October 1, 2000, to present evidence that any seller that violated the quarterly reporting requirement failed to disclose an increased market share sufficient to give it the ability to exercise market power and thus cause its market-based rates to be unjust and unreasonable.<sup>7</sup> The

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<sup>2</sup> 383 F.3d 1006 (9th Cir. 2004), *cert. denied*, *Coral Power, L.L.C. v. Cal. ex rel. Brown*, 127 S. Ct. 2972, 168 L. Ed. 2d 719 (2007) (Ninth Circuit Decision).

<sup>3</sup> 16 U.S.C. § 824d(c) (2000).

<sup>4</sup> Ninth Circuit Decision, 383 F.3d at 1017. For a detailed recitation of the facts of this proceeding, *see* March 21 Order at P 3-13.

<sup>5</sup> *Id.* at 1018.

<sup>6</sup> March 21 Order at P 32.

<sup>7</sup> *Id.* P 33. Sellers were similarly permitted to present evidence to the contrary.

Commission also directed such “sellers to submit for the hearing record copies of the previously filed proper quarterly reports for the period January 1, 2000 – October 1, 2000...[as well as] any improper quarterly reports that were filed for that period.”<sup>8</sup>

## II. Requests for Clarification or Rehearing

4. On March 28, 2008, the California Parties<sup>9</sup> filed an expedited request for limited rehearing of the March 21 Order asserting that: (a) the March 21 Order erroneously excludes from the remand proceeding sales to CERS during the period from January 18, 2001 - June 20, 2001; and (b) the March 21 Order failed to direct sellers to provide corrected quarterly reports for the January 1 – October 1, 2000 period.

5. Duke Energy Corporation (Duke), on April 4, 2008, and the Settled Parties,<sup>10</sup> on April 7, 2008, filed requests for clarification or rehearing requesting that the Commission

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<sup>8</sup> *Id.* P 35. Regarding the relevant time periods at issue in this case, the Commission explained that California’s March 2002 complaint concerned calendar years 2000 and 2001. Thus, the Commission divided that time period into three segments: (1) from January 1, 2000 until October 1, 2000, the day before the date that the refund period began; (2) from October 2, 2000 until June 20, 2001, the date that the price cap was imposed in California (i.e., the refund period established in the refund proceedings); and (3) from June 21, 2001 until December 31, 2001, which includes the final period covered in California’s complaint during which a price cap was in place. On remand, the Commission only addressed the first of these three periods. *Id.* at 34.

<sup>9</sup> The California Parties include the People of the State of California *ex rel.* Edmund G. Brown, Jr., Attorney General; the Public Utilities Commission of the State of California; Pacific Gas and Electric Company; and Southern California Edison Company.

<sup>10</sup> The Settled Parties consist of Mirant Corporation, on behalf of Mirant Americas Energy Marketing, LP, Mirant California LLC, Mirant Delta, LLC, and Mirant Potrero, LLC; Reliant Energy Services, Inc.; Idaho Power Company and IDACORP Energy L.P.; PacifiCorp; BP Energy Company; EI Paso Marketing, L.P.; Portland General Electric Company; Dynegy Power Marketing, Inc.; West Coast Power, LLC; EI Segundo Power LLC; Long Beach Generation LLC; Cabrillo Power I LLC; Cabrillo Power II LLC; Williams Gas Marketing, Inc.; Pinnacle West Capital Corporation, Arizona Public Service Company and APS Energy Services Company (collectively, Pinnacle West Companies); and Public Service Company of Colorado.

clarify that, by virtue of their previous settlements with California, they be dismissed from this proceeding. The Settled Parties request that the Commission issue an order prior to the settlement conference scheduled for April 17, 2008 in this proceeding.<sup>11</sup>

### **III. Discussion**

#### **A. The California Parties' Expedited Request for Rehearing**

##### **1. CERS Transactions**

###### **a. Request**

6. The California Parties argue that the Commission erred by excluding sales to CERS from the *Lockyer* remand proceeding, by limiting the scope of inquiry to sales made to CERS during the period January 1, 2000 through October 1, 2000, a time period during which CERS did not exist.<sup>12</sup> The California Parties assert that, because CERS began making purchases on January 18, 2001, excluding consideration of sales to CERS constitutes legal error.<sup>13</sup> They explain that the March 21 Order limits the temporal scope of the remand proceeding to the January 1 – October 1, 2000 period because the Commission already granted refund relief for sales during the October 2, 2000 – June 20, 2001 period, using the MMCP approach.<sup>14</sup> However, the California Parties argue that the Commission has extended MMCP relief only to ISO and PX spot market transactions, but has not granted any refunds for direct bilateral sales to CERS.<sup>15</sup> Accordingly, the California Parties request that the Commission clarify that this proceeding includes CERS transactions for the January 18 – June 20, 2001 period and that sellers are required

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<sup>11</sup> This order considers only the clarification and rehearing requests described and filed by the California Parties, Duke and the Settled Parties. The Commission will consider other requests for clarification or rehearing of the March 21 Order, if any, in a future order.

<sup>12</sup> California Parties' Rehearing Request at 6 (citing March 21 Order at P 34).

<sup>13</sup> *Id.* (citing Ninth Circuit Decision, 383 F.3d at 1018).

<sup>14</sup> See *San Diego Gas & Elec. Co.*, 96 FERC ¶ 61,120 (2001) and *San Diego Gas & Electric Co.*, 93 FERC ¶ 61,121 (2000).

<sup>15</sup> California Parties' Rehearing Request at 10.

to submit original and corrected transaction reports for all spot market bilateral sales to CERS, including reports for sales to CERS that sellers made under the Western Systems Power Pool Agreement.

**b. Commission Determination**

7. The Commission is not convinced by the California Parties' argument that expedited treatment is warranted on this matter.<sup>16</sup> Accordingly, the Commission will consider this matter in a future order after submission of requests for rehearing of the March 21 Order.

**2. Record Copies of Transaction Reports**

**a. Request**

8. The California Parties argue that the Commission, in the March 21 Order, erred by failing to direct all marketers and other public utility sellers that made short-term sales at market-based rates into the PX, ISO, and CERS markets during the January 1, 2000 through October 1, 2000 period to submit corrected record copies of quarterly transaction reports. The California Parties state that the Commission only directed sellers to submit copies of previously-filed quarterly reports for that period. Thus, the California Parties request that the Commission require prompt submission of both original and corrected reports for the January 1, 2000 - October 1, 2000 time period on an expedited basis in order to aid the settlement process, and preparation for, and conduct of, any hearing.

**b. Commission Determination**

9. In the March 21 Order, the Commission directed that:

[f]or the convenience of the parties to the hearing ordered herein, we will direct such sellers to submit for the hearing record copies of the previously filed *proper quarterly reports for the period January 1, 2000 – October 1, 2000*. We will also direct such sellers to submit for the hearing record copies of any *improper quarterly reports that were filed for that period*.<sup>17</sup>

10. We will grant clarification on this issue and clarify that the Commission, in the March 21 Order, intended that the parties submit for the hearing record copies of both

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<sup>16</sup> California Parties' Rehearing Request at 7-8.

<sup>17</sup> March 21 Order at P 35 (emphasis added).

their original, previously-filed reports (whether those reports complied with our filing requirements or not) as well as new, corrected reports (reflecting transaction-specific data), for all purchases or sales to the ISO and PX for the January 1 – October 1, 2000 period.

**B. Duke and the Settled Parties' Requests for Clarification or Rehearing.**

**1. Participation in Hearing**

**a. Request**

11. Duke requests clarification that the Commission give preclusive effect to Duke's Commission-approved global settlement,<sup>18</sup> which resolved all claims against Duke arising out of its participation in the CAISO and the PX markets during the period January 1, 2000 through June 23, 2001.<sup>19</sup> In support, Duke states that, as a condition of the Duke settlement, the California Parties filed, pursuant to Rule 216,<sup>20</sup> a notice of withdrawal of the complaint in the underlying proceeding, as against Duke, on December 17, 2004.<sup>21</sup> Duke parties state that no motion in opposition to the notice of withdrawal of the complaint was filed. Thus, Duke argues that it is no longer a respondent to that complaint and that the March 21 Order has no applicability to Duke.

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<sup>18</sup> Under the terms of its Commission-approved settlement, Duke refers to the following entities: Duke Energy Corporation; Duke Capital LLC; Duke Energy Americas, LLC; Duke Energy Merchants, LLC; Duke Energy Trading and Marketing, L.L.C.; Duke Energy North America, LLC; Duke Energy Morro Bay LLC; Duke Energy Moss Landing LLC; Duke Energy Oakland LLC; Duke Energy South Bay, LLC; DETMI Management, Inc.; DE Power Generating, LLC; Duke Energy California, LLC; Duke Energy Generation Services, LLC; Duke Energy Fossil-Hydro, LLC; Duke Energy Fossil-Hydro California, Inc.; Catawba River Investments II, LLC; and DE Power Generating Holdings, LLC.

<sup>19</sup> The Commission approved the Duke settlement on December 7, 2004, *San Diego Gas & Elec. Co. v. Sellers*, 109 FERC ¶ 61,257, at P 4 (2004), *order on reh'g*, 111 FERC ¶ 61,186 (2005).

<sup>20</sup> 18 C.F.R. § 385.216 (2007).

<sup>21</sup> See Notice of Withdrawal of California Parties, Docket No. EL00-95-000, *et al.* (Dec. 17, 2004).

12. Similarly, the Settled Parties request that the Commission clarify that, by virtue of their settlements with the California Parties, and corresponding releases from the California Parties, they are no longer parties to this proceeding.<sup>22</sup> If the Commission does not grant the Settled Parties' clarification, they request rehearing of the March 21 Order. They state that the Settled Parties' settlements fully encompassed transactions during the period at issue in this proceeding and, as a result, there is no basis for the Settled Parties to participate in further settlement or hearing procedures in this docket.<sup>23</sup> Accordingly, the Settled Parties request that the Commission clarify, on an expedited basis, that they are no longer respondents in this proceeding.

**b. Commission Determination**

13. We will grant the requests for clarification of this issue and direct that both Duke and the Settled Parties be dismissed as parties from this proceeding.<sup>24</sup> The Commission's general policy is to relieve a respondent to a complaint or investigation from further participation where that respondent has settled its potential liability.<sup>25</sup> Further, in the

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<sup>22</sup> The Settled Parties assert that they are authorized to state that the California Parties do not oppose their request that they be dismissed as parties to this proceeding provided that such dismissal does not limit the arguments and evidence the California Parties may offer in support of their requests for relief against parties with which they have not settled. Settled Parties Rehearing Request at 2.

<sup>23</sup> The Settled Parties cite to each of the Commission orders approving the respective settlements in pages 4-6 of their filing. However, they explain that, on April 8, 2008, the Pinnacle West Companies executed a settlement agreement with California in these proceedings, which will be filed with the Commission shortly. They request that the Pinnacle West Companies be dismissed upon approval of that settlement by the Commission.

<sup>24</sup> With respect to the Pinnacle West Companies, we find that they should be dismissed from this proceeding if the Commission approves their settlement with the California Parties.

<sup>25</sup> See *Lockyer v. British Columbia Power Exchange Corp.*, 99 FERC ¶ 61,247, at 61,022 (2002); *Ariz. Pub. Serv. Co.*, 106 FERC ¶ 61,021 (2004), *reh'g pending*; *Colorado River Commission of Nevada*, 106 FERC ¶ 61,022 (2004), *reh'g pending*. For example, in *Enron Power Marketing, Inc.*, 106 FERC ¶ 61,182 (2004), the Commission relieved parties from participating in a proceeding in which they had filed a settlement stating that, to do otherwise, "would undercut the ability of parties to settle - an important tool in managing cases and issues the Commission faces." *Id.* P 12.

March 21 Order, the Commission “encourage[d] the parties to make every effort to settle their dispute before hearing procedures are commenced.”<sup>26</sup> Thus, we find that, both Duke and the Settled Parties should be dismissed from this proceeding, due to their respective Commission-approved settlements resolving all claims against them arising out of their transactions during the period at issue.

The Commission orders:

The Commission grants certain of the requests for clarification in these proceedings, as discussed above.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>26</sup> March 21 Order at P 36.