

125 FERC ¶ 61,218  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Powerex Corp.	Docket Nos. EL03-166-004
Powerex Corp.	EL03-199-004

FURTHER ORDER DENYING REHEARING

(Issued November 24, 2008)

1. On November 14, 2008, the Commission issued an order denying rehearing of three orders issued on March 26, 2004,<sup>1</sup> approving settlement agreements between the Commission's Trial Staff and several entities, including Powerex Corp.<sup>2</sup> In this order, the Commission addresses a request for rehearing of the Powerex Settlement Order by the California Parties that was not addressed in the November 14 Order.<sup>3</sup> The Powerex settlement agreement resolved disputes that

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<sup>1</sup> *Aquila Merchant Services, Inc.*, 125 FERC ¶ 61,175 (2008) (November 14 Order). This order denied rehearing of three orders approving a number of settlements in various show cause proceedings. The order also terminated Docket Nos. EL03-160-003 and EL03-195-004, relating to Morgan Stanley Capital Group Inc., as the only pending request for rehearing in those proceedings had been withdrawn. November 14 Order, 125 FERC ¶ 61,175 at n.1.

<sup>2</sup> *Powerex Corp.*, 106 FERC ¶ 61,304 (2004) (Powerex Settlement Order). The Commission addressed the captioned proceedings, including the Powerex proceedings in Docket Nos. EL03-166-004 and EL03-199-004, in its November 14 Order. The instant order addresses discrete issues raised in the California Parties' separate request for rehearing of the Powerex settlement.

<sup>3</sup> California Parties include the following entities: People of the State of California, *ex rel.* Edmund G. Brown, Jr., Attorney General, the California Electricity Oversight Board, the California Public Utilities Commission, Pacific Gas and Electric Company and Southern California Edison Company.

arose as a result of events in the California Independent System Operator Corporation (CAISO) and California Power Exchange (CalPX) energy and ancillary services markets during the period from January 1, 2000, through June 1, 2001, as they relate to Powerex. The Commission will deny the request for rehearing for the reasons discussed below.<sup>4</sup>

## **I. Background**

2. Following alleged market abuses in the Western energy markets in 2000 and 2001, the Commission issued two show cause orders directing certain entities to explain why they should not be found to have engaged in gaming and/or anomalous market behavior in violation of the CAISO and CalPX tariffs.<sup>5</sup> Commission Trial Staff subsequently entered into settlement agreements with several of the entities named in those Show Cause Orders.

## **II. Request for Rehearing**

3. California Parties' request for rehearing of the Powerex Settlement Order specifies six errors.<sup>6</sup> With the exceptions discussed below, the errors specified in this request for rehearing were nearly identical to the errors specified in California Parties' requests for rehearing in the other proceedings addressed in the November 14 Order. For this reason, the Commission incorporates herein the discussion of those errors and its determinations with respect to those errors,<sup>7</sup> because they are pertinent to the Powerex settlement agreement as well as the settlement agreements addressed in the November 14 Order.

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<sup>4</sup> The Commission denied requests for rehearing of the Powerex Settlement Order filed by parties other than the California Parties in the November 14 Order. Its denial of the California Parties' rehearing request in this order has no effect on the rehearing requests made by the California Parties or any other parties that the Commission denied in the November 14 Order.

<sup>5</sup> *American Electric Power Serv. Corp.*, 103 FERC ¶ 61,345 (2003) (Gaming Order); *Enron Power Mktg., Inc.*, 103 FERC ¶ 61,346 (2003) (Partnership Order) (collectively, Show Cause Orders).

<sup>6</sup> See California Parties Request for Rehearing at 4.

<sup>7</sup> See November 14 Order, 125 FERC ¶ 61,175 at P 6-9, 13, 16-22.

**A. Scope of the Settlement**

4. California Parties assert that several issues of material fact are in dispute, including the extent to which Powerex engaged in or participated in certain practices to manipulate the relevant energy markets.<sup>8</sup> In addition, the California Parties assert that the Commission has improperly limited the scope of the proceedings against Powerex. California Parties would include the following practices within the scope: load shift, wheel out, circular scheduling/death star, paper trading, cutting non-firm, high bidding, and manipulative parking arrangements. Because the evidentiary record is “woefully inadequate,” California Parties assert that the settlement agreement cannot be approved under *Trailblazer*.<sup>9</sup>

**B. Access to Evidence**

5. In addition, California Parties contend that, months after Trial Staff entered into the settlement agreement with Powerex, the Colorado River Commission of Nevada (CRC) produced recordings that shed new light on Powerex’s partnership with CRC. They contend that these materials should have been produced as part of CRC’s show cause response, which was filed on September 2, 2003.<sup>10</sup> California Parties state that the materials in question include transcripts of recorded telephone calls between representatives of CRC and Powerex and concern Powerex’s participation in partnerships and alliances, including the use of a parking arrangement with CRC, to manipulate Western energy markets. California Parties assert that such materials “did not become available until February 13, 2004—several months after the Powerex Settlement was filed with the Commission.”<sup>11</sup> California Parties state that they “were not privy to these recordings before they submitted their comments opposing the Powerex Settlement.”<sup>12</sup> They assert that this evidence was not available to Trial Staff at the time it entered into the Powerex settlement agreement “to ensure a full and fair airing of the issues,” was not available to California Parties at the time they filed

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<sup>8</sup> California Parties Request for Rehearing at 8-9.

<sup>9</sup> *Id.* at 9 (referring to *Trailblazer Pipeline Company*, 85 FERC ¶ 61,345 (1998), *reh’g denied*, 87 FERC ¶ 61,110, *reh’g denied*, 88 FERC ¶ 61,168 (1999) (*Trailblazer*)).

<sup>10</sup> *Id.* at 3 (citing Partnership Order, 103 FERC ¶ 61,346 at P 47 and Ordering Para. (A)).

<sup>11</sup> *Id.* at 17.

<sup>12</sup> *Id.* at 17-18.

comments opposing the settlement agreement, and was not available to the presiding judges and the Commission when they certified and approved the settlement agreement.<sup>13</sup>

### III. Answers

6. CRC's answer to California Parties' request for rehearing takes no position on the merits of the California Parties' request for rehearing,<sup>14</sup> but it disputes California Parties' contention that certain materials relating to CRC's disclosure obligations under paragraph 47 of the Partnership Order were not timely disclosed.<sup>15</sup> CRC states that it "expressly made its telephone recordings available for on site review" in its September 2, 2003 show cause response. CRC states that, in the affidavit attached to its answer, it provided that "CRC will make the recordings available on-site at its offices for review by FERC Staff upon request or by any other party in response to a discovery order."<sup>16</sup> CRC avers that in response to California Parties' October 29, 2003 motion to compel production of the recordings it reiterated that the recordings had been available since September 2, 2003. CRC points out that on December 15, 2003, Nevada Power Company and Sierra Pacific Power Company began listening to the recordings.

7. Powerex points out that the Commission's show cause order addressed only alleged partnership arrangements between Powerex and Enron and Powerex and Public Service Company of New Mexico. Thus, according to Powerex, the California Parties' concern about the CRC evidence is misplaced and beyond the scope of the show cause order. Powerex contends that the California Parties "had every opportunity in discovery to ask follow-up questions and seek additional documents and data regarding the Option Agreement [with CRC] (including transcripts of trader tapes), but did not avail themselves of these procedures."<sup>17</sup> Further, Powerex asserts that the California Parties had failed to provide evidence supporting any of its gaming and partnership claims with respect to Powerex.<sup>18</sup>

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<sup>13</sup> *Id.* at 19, 21.

<sup>14</sup> CRC Answer at 2 n.3.

<sup>15</sup> *See* Partnership Order, 103 FERC ¶ 61,346 at P 47.

<sup>16</sup> CRC Answer at 3 & n.7 (citing Affidavit of Gail A. Bates ¶ 10).

<sup>17</sup> Powerex Limited Response at 5.

<sup>18</sup> *Id.* at 3, 5.

#### **IV. Discussion**

8. As a preliminary matter, Rules 213(a)(2) and 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2), 385.713(d)(1) (2008), prohibit an answer to a request for rehearing unless otherwise ordered by the decisional authority. We will accept the CRC and Powerex answers because they provided information that assisted us in our decision-making process.

##### **A. Scope of the Proceedings**

9. Although the show cause proceedings as to Powerex focused on the relationship between Powerex and Enron and Powerex and Public Service of New Mexico, the settlement agreement is not so limited. Section 4.4 provides:

Payment of the settlement amount constitutes complete and total satisfaction of the causes of action in the instant dockets related to Powerex allegedly engaging in False Import, Cutting Non-Firm, Circular Scheduling, Scheduling Counterflows on Out of Service Lines, Load Shift or Paper Trading or any other Gaming Practice identified in the Commission's Gaming and/or Partnership Order, whether individually or jointly through any alleged partnership, alliance or other arrangement with any other entity, including but not limited to Enron and [Public Service of New Mexico]... regardless of how those practices may be defined or named in the future, and Powerex shall not be subject to any additional monetary or non-monetary remedies or further proceedings with regard to these allegations, claims or causes of action.

Section 4.5 goes on to say that the settlement agreement is contingent upon the Commission assuring that Powerex will not be subject to further scrutiny at the Commission for actions alleged to have taken place during the relevant period in 2000-2001. Section 4.5 makes an exception from this general release of claims with respect to the Commission's June 25, 2003 Order.<sup>19</sup>

10. While the scope of the show cause proceedings as to Powerex focused on its relationships with Enron and Public Service of New Mexico, the settlement agreement between Powerex and the Commission's Trial Staff was not so limited.

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<sup>19</sup> *Investigation into Anomalous Bidding Behavior and Practices in the Western Markets*, 103 FERC ¶ 61,347 (2003). This order required a demonstration that certain bids, between May 1, 2000, and October 2, 2000, did not constitute anomalous market behavior, as described in CAISO's and CalPX's Market Monitoring and Information Protocols. *See id.* P 12-13, 15.

In proceedings leading up to the issuance of the show cause order, California Parties had ample opportunity to convince the Commission that the scope of its proceedings with respect to Powerex should be broader than those ultimately identified in the show cause order, and it was an active litigant in these proceedings. Nevertheless, as was stated in the Commission's order denying rehearing of the Partnership and Gaming Orders,

[t]he determination of which practices to investigate in these show cause proceedings falls within the Commission's discretion, which is recognized by the courts. That is, decisions whether to prosecute and decisions whether to settle fall within this discretion. Here, we exercised our discretion not to prosecute certain practices, which we found, in this instance, did not lead to unjust profits.<sup>[20]</sup>

Thus, the Commission's decision to approve the Powerex settlement agreement was within its discretion.

11. In its evaluation of a contested settlement agreement, the Commission must be able to make an independent determination based on substantial record evidence that the settlement agreement will result in just and reasonable rates,<sup>21</sup> or in the context of the proceeding, will produce an acceptable outcome.<sup>22</sup> *Trailblazer* outlines four circumstances under which the Commission may approve a contested settlement: (1) the Commission may make a merits determination on each contested issue; (2) even if some aspects of a settlement are problematic, the Commission nevertheless may approve a contested settlement as a package upon determining that the overall result of the settlement is just and reasonable; (3) the Commission may determine that the benefits of the settlement outweigh the nature of the objections and the contesting parties' interest is too attenuated; or (4) the Commission may sever the contesting parties, approving the settlement agreement as uncontested as to the settling parties only and leaving the contesting parties free to pursue their claims through continued litigation. Further, if a party's interests are not immediately and irreparably affected by approval of a settlement agreement in a consolidated docket, that party's opposition to a settlement

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<sup>20</sup> *American Electric Power Serv. Corp.*, 106 FERC ¶ 61,020, at P 85 (2004) (citing *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)); see also *Baltimore Gas & Elec. Co. v. FERC*, 252 F.3d 456, 461 (D.C. Cir. 2001).

<sup>21</sup> *Mobil Oil Corp. v. FERC*, 417 U.S. 283, 314 (1974).

<sup>22</sup> *Trailblazer*, 85 FERC at 62,342.

agreement does not create a genuine, material issue.<sup>23</sup> In the absence of any genuine, material issue, the Commission can dispose of the matter before it in a summary fashion.

12. On balance, the approval of this settlement agreement would provide significant benefits, including certainty and finality on major issues. In addition, the settlement agreement would not adversely affect the interests of those parties that continue to litigate their claims. Accordingly, under the second *Trailblazer* approach, the Commission approved this settlement agreement as a package that produces overall just and reasonable results. In the same vein, under the third approach, the Commission finds that the benefit of this settlement agreement outweighs the nature of the California Parties' objections. As the Commission reasoned in the orders below, a principal benefit of this settlement package is that Powerex will return the total revenues from its participation in the alleged gaming practices, not merely the profits, and a settlement that will return total revenues as opposed to profits alone may be more than would be achieved through litigation.<sup>24</sup> The Commission balanced the risks and rewards—or losses and gains—assumed under this settlement agreement and found it to produce as a whole an acceptable outcome of the contested issues. Therefore, the Commission properly approved the settlement agreements in accord with Rule 602.<sup>25</sup>

### **B. Access to Evidence**

13. The Commission finds that, as of September 2, 2003, the date of CRC's response to the show cause order in Docket No. EL03-181-000, all parties to the CRC proceedings, including the California Parties and the Commission Trial Staff, had the right to make a discovery request to review the recordings that CRC made known in its responsive submission to the Partnership Order. California Parties could have reviewed the CRC evidence on site after obtaining a discovery order. Thus, it is incorrect for the California Parties to assert that they had no access to this information until months later, and after the Powerex settlement agreement was filed. The Commission did not "preclude the development of an evidentiary record," as alleged by the California Parties. It was up to the California Parties to avail themselves of the opportunity to evaluate whether this evidence had any probative value with respect to its claims as to Powerex. The Commission will therefore deny California Parties' request for rehearing on this issue.

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<sup>23</sup> *El Paso Natural Gas Co.*, 25 FERC ¶ 61,292, at 61,673 (1983).

<sup>24</sup> Gaming Order, 103 FERC ¶ 61,345 at P 1, 2, 72; Partnership Order, 103 FERC ¶ 61,346 at P 2, 3, 48.

<sup>25</sup> 18 C.F.R. § 385.602(h)(1)(i).

The Commission orders:

California Parties' request for rehearing is hereby denied as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.