

134 FERC ¶ 61,229
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services Docket No. EL00-95-229

Investigation of Practices of the California Independent System Operator Corporation and the California Power Exchange Docket No. EL00-98-214

ORDER REJECTING COMPLIANCE FILING

(Issued March 24, 2011)

1. In this order, the Commission rejects a filing submitted by Avista Energy, Inc. (Avista) in response to an order issued on June 18, 2009.¹ The June 18, 2009 Order granted in part and denied in part requests for rehearing of orders issued on January 26, 2006,² March 27, 2006,³ and November 2, 2006⁴ that addressed requests for cost offsets from refund liability. Our action here enables the California Independent System Operator Corporation (CAISO) to work toward completion of the final refund calculations in the California refund process.

¹ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 127 FERC ¶ 61,269 (2009) (June 18, 2009 Order).

² *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 114 FERC ¶ 61,070 (2006) (January 26, 2006 Order).

³ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 114 FERC ¶ 61,310 (2006).

⁴ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 117 FERC ¶ 61,151 (2006) (November 2, 2006 Order).

I. Background

2. This is the final phase of the third and last category of possible offsets from refund liability stemming from the California energy crisis of 2000-2001. As the Commission has explained, its primary objective during this proceeding has been to remedy rates that buyers may have paid for certain purchases above the zone of reasonableness for energy purchased through the CAISO or California Power Exchange (CalPX) markets during the Refund Period (October 2, 2000 – June 20, 2001). As a result, the Commission established the mitigated market-clearing price (MMCP) refund methodology.⁵ In doing so, the Commission took into account its concomitant statutory obligation to ensure that the MMCP does not result in a confiscatory rate for any individual seller.⁶ This obligation led to the Commission's announcement, early on in the refund proceeding, that it would provide an opportunity at the end of the refund proceeding for sellers to submit cost evidence to prove that the MMCP refund methodology did not enable them to recover the costs of providing electricity through the CAISO and CalPX markets during the Refund Period.⁷

3. On August 8, 2005, the Commission issued an order establishing the framework for the evidence sellers had to submit to demonstrate that application of the MMCP had resulted in an overall revenue shortfall for the seller's relevant transactions during the Refund Period.⁸ In the August 8, 2005 Order, the Commission indicated that it would allow marketers to have the opportunity to receive a return on investment (ROI) of ten percent, based on their total net sales in the relevant markets during the Refund Period.⁹ Subsequently, on September 2, 2005, the Commission clarified that, for the purposes of

⁵ *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 96 FERC ¶ 61,120 (2001) (July 2001 Order). The end date of the Refund Period was established in *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 95 FERC ¶ 61,418 (2001) (June 2001 Order).

⁶ *See, e.g.*, January 26, 2006 Order, 114 FERC ¶ 61,070 at P 4.

⁷ *See San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 97 FERC ¶ 61,275, at 62,193-94 (2001) (providing opportunity for marketers); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 99 FERC ¶ 61,060, at 61,656 (2002) (extending cost offset filing opportunity to all sellers).

⁸ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 112 FERC ¶ 61,176 (2005) (August 8, 2005 Order).

⁹ *Id.* P 81.

ROI, “marketers are allowed to include in their cost filings the product of ten percent times their investment in plant-in-service and/or cash prepayments.”¹⁰

4. In the January 26, 2006 Order, the Commission determined which sellers had demonstrated that the refund methodology resulted in an overall revenue shortfall for their transactions in the California markets during the Refund Period and established the eligible amount of cost offsets.¹¹ In the January 26, 2006 Order, the Commission accepted the ROI claim of Avista.¹² The California Parties (Cal Parties)¹³ requested rehearing of this determination. Among other objections, Cal Parties argued that, in its cost offset filing, Avista failed to support its claimed \$272 million of invested capital as either plant in service or prepayments.¹⁴

5. In the June 18, 2009 Order, the Commission granted Cal Parties’ request for rehearing on the Avista ROI issue, finding that Avista’s demonstration failed the requirements of the September 2, 2005 Order.¹⁵ The Commission explained that “Avista should only be allowed recovery on amounts of the funds that it actually used to fund operations or investment, not on the amount available in an open credit line.”¹⁶ Accordingly, the Commission rejected Avista’s return component, and the associated income tax amount, and directed Avista to revise its approved offset submission with

¹⁰ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 112 FERC ¶ 61,249, at P 1 (2005) (September 2, 2005 Order).

¹¹ January 26, 2006 Order, 114 FERC ¶ 61,070.

¹² *Id.* P 119.

¹³ For the purpose of this proceeding, Cal Parties are 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 & Electric Company, and Southern California Edison Company.

¹⁴ Cal Parties February 27, 2006 Request for Rehearing of January 26, 2006 Order, Docket Nos. EL00-95-000 and EL00-98-000 at 75-76.

¹⁵ June 18, 2009 Order, 127 FERC ¶ 61,269 at P 298.

¹⁶ *Id.*

CAISO.¹⁷ The Commission denied Cal Parties' request for rehearing as it pertained to all other issues Cal Parties raised with respect to Avista.¹⁸

6. On July 20, 2009, Avista filed with the Commission what it characterizes as a compliance filing that eliminated amounts available in an open credit line from invested capital for purposes of determining a revised ROI and corresponding cost offset.¹⁹

II. Notice and Responsive Pleadings

7. Notice of Avista's July 2009 Filing was published in the *Federal Register*, 75 Fed. Reg. 15429 (2010), with interventions and comments due on or before March 29, 2010. Cal Parties filed a protest to Avista's July 2009 Filing. Between April 15, 2010 and July 16, 2010, Avista and Cal Parties filed a series of answers.

III. Discussion

A. Procedural Issues

8. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers filed by Avista and Cal Parties and will, therefore, reject them.

B. Avista Filing

9. Avista asserts that its July 2009 Filing is consistent with the Commission's findings in the June 18, 2009 Order. Specifically, Avista states that it has eliminated the \$78.9 million credit facility from invested capital, leaving only the \$140.5 million invested in the company to fund plant and operations and reflected in common stock and the \$52.6 million in actually issued letters of credit, for a total of \$193.1 million invested capital. Avista states that use of this reduced figure results in a reduction of \$97,858 from its claimed ROI cost offset and a \$52,693 reduction in the related tax gross-up, for an overall reduction of \$150,551 that would decrease Avista's claimed cost offset to \$24,371,579.²⁰

¹⁷ *Id.*

¹⁸ *Id.* at P 278-279, 283-284, 288-289, 291, 295-296.

¹⁹ Avista July 20, 2009 Filing, Docket Nos. EL00-95-229 and EL00-98-214 (July 2009 Filing).

²⁰ *Id.* at 3-4.

1. Cal Parties Protest

10. Cal Parties argue that the Commission should reject Avista's entire cost offset. Cal Parties contend that sellers were given two years to perfect their submissions and have been on notice that failure to comply with the Commission's direction would result in rejection of their filings. Cal Parties assert that Avista's cost offset filing has become a "moving target" and insist that Avista should not be provided an additional opportunity to revise its claimed cost offsets when other sellers' filings were rejected for failure to comply with the Commission's directives. In addition, Cal Parties claim that Avista used the wrong version of its cost offset filing as the baseline for its revisions. According to Cal Parties, the Commission directed Avista to use its March 13, 2006 approved offset submission to CAISO as its baseline document. Cal Parties state that, instead of using the version specified in the June 18, 2009 Order, Avista used an earlier version. Thus, Cal Parties argue that Avista's July 2009 Filing violates the directives of the June 18, 2009 Order and should be rejected.²¹

11. In addition, Cal Parties allege that, in the July 2009 Filing, Avista failed to remove its ROI and associated taxes, as directed by the Commission. According to Cal Parties, the Commission's rejection of Avista's ROI in the June 18, 2009 Order did not invite Avista to cure the defects in its ROI with a revised ROI filing. Further, Cal Parties maintain that, even if the Commission did leave open the option of a revised ROI filing, Avista's July 2009 Filing fails to meet the criteria for ROI set forth in the August 8, 2005 and September 2, 2005 Orders and should, therefore, be rejected.²²

12. Finally, Cal Parties assert that a settlement involving APX, Inc. (APX) requires Avista to reduce its cost offset filing by \$400,000 to remove APX related charges.²³ Cal Parties contend that the July 2009 Filing does not reflect this adjustment. Cal Parties argue that this alleged defect constitutes another reason for rejecting Avista's cost offset filing.²⁴

²¹ Cal Parties March 29, 2009 Protest in Docket Nos. EL00-95-000 and EL00-98-000 at 5-7 (Cal Parties Protest).

²² *Id.* at 7-8.

²³ *Id.* at 8. Cal Parties state that the APX settlement and associated term sheet were accepted by the Commission in *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 118 FERC ¶ 61,168 (2007).

²⁴ *Id.* at 8-9.

2. Commission Determination

13. We reject Avista's July 2009 Filing. In the June 18 Order, the Commission directed Avista to remove its ROI and associated taxes from its cost offset demonstration. The Commission agreed with Cal Parties that Avista had not supported its ROI claim. The June 18, 2009 Order specifically stated that "[u]pon further review ... Avista has not provided adequate documentation to verify that the funds allocated to long-term investment in its return calculation were actually used for prepayments or plant in service."²⁵ As a result, the Commission reversed the findings in the January 26, 2006 Order regarding Avista's ROI and rejected Avista's ROI claim and associated income tax amount.²⁶ Accordingly, Avista's ROI and associated tax amount in its cost offset template should be \$0.

14. We note that the Commission directed Avista to submit its revised cost offset template directly to the CAISO.²⁷ The June 18, 2009 Order did not direct Avista to further revise its ROI and make a compliance filing with the Commission. Accordingly, we reject the Avista Filing and again direct Avista to remove the ROI and associated taxes from its March 13, 2006 cost offset template and submit that revised template directly to the CAISO within 15 days of the date of this order.

15. Although we reject Avista's Filing, we deny Cal Parties' request to reject Avista's entire cost offset. We find that this request constitutes an impermissible collateral attack on the January 26, 2006 and November 2, 2006 Orders. As the Commission has previously found, "[c]ollateral attacks on final orders and relitigation of applicable precedent by parties that were active in the earlier cases thwart the finality and repose that are essential to administrative efficiency and are strongly discouraged."²⁸ Throughout the cost offset phase of the refund proceeding, Cal Parties have consistently opposed Avista's claimed cost offsets. Cal Parties first protested numerous aspects of

²⁵ June 18, 2009 Order, 127 FERC ¶ 61,269 at P 298.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Entergy Nuclear Operations, Inc. v. Consolidated Edison Co.*, 112 FERC ¶ 61,117, at P 12 (2005); *see also EPIC Merchant Energy NJ/PA, L.P. v. PJM Interconnection, L.L.C.*, 131 FERC ¶ 61,130 (2010) (dismissing as an impermissible collateral attack a complaint that merely sought to re-litigate the same issues as raised in the prior case citing no new evidence or changed circumstances).

Avista's original cost offset filing.²⁹ In the January 26, 2006 Order, the Commission conditionally accepted Avista's cost offset filing and directed Avista to make a compliance filing to reflect the specified revisions.³⁰ Cal Parties then protested Avista's compliance filing, which the Commission accepted in the November 2, 2006 Order.³¹ Cal Parties subsequently requested rehearing of the Commission's determinations regarding Avista in the January 26, 2006 and November 2, 2006 Orders.³² In the June 18, 2009 Order, with the exception of the ROI issue discussed above, the Commission denied Cal Parties' requests for rehearing and affirmed its prior acceptance of Avista's cost offset filing and associated compliance filing.³³

16. Cal Parties cite no new evidence or changed circumstances in their protest that justify reconsideration of our previous acceptance of Avista's cost offset filing. We find that the arguments offered as grounds for rejection by Cal Parties here echo objections they have been raising since 2005 – that Avista's cost offset filing contains numerous errors and lacks adequate support and should, therefore, be rejected. As discussed above, the Commission has previously considered and rejected such arguments on multiple occasions. Avista's erroneous submission of a compliance filing in response to the June 18, 2009 Order does not open the door for Cal Parties to make another attempt to challenge Avista's entire cost offset.

17. Similarly, we reject Cal Parties' argument regarding the \$400,000 adjustment to the costs associated with Avista's APX transactions as an impermissible collateral attack on the June 18, 2009 Order. On rehearing of the January 26, 2006 and November 2, 2006 Orders, Cal Parties argued that Avista's cost offset claim for its APX transactions should

²⁹ California Parties October 11, 2005 Comments and Testimony in Opposition to Avista Cost Filing, Docket Nos. EL00-95-148 and EL00-98-135. *Id.*

³⁰ January 26, 2006 Order, 114 FERC ¶ 61,070 at P 175-182. We note that, based on Cal Parties' protest, we denied Avista's recovery of certain wind-up costs. *Id.* P 179.

³¹ November 2, 2006 Order, 117 FERC ¶ 61,151 at P 12-14.

³² Cal Parties February 27, 2006 Request for Clarification and Rehearing of the January 26, 2006 Order in Docket Nos. EL00-95-000, *et al.*, and EL00-98-000, *et al.* (Cal Parties Request for Rehearing of January 26, 2006 Order); Cal Parties December 4, 2006 Request for Clarification and Rehearing of the November 2, 2006 Order in Docket Nos. EL00-95-190 and EL00-98-175 (Cal Parties Request for Rehearing of November 2, 2006 Order).

³³ June 18, 2009 Order, 127 FERC ¶ 61,269 at P 278-279, 283-284, 288-289, 291, 295-296, 298.

have been disallowed.³⁴ In the June 18, 2009 Order, the Commission denied rehearing on this issue, noting that the Commission had addressed this issue in the January 26, 2006 Order.³⁵ Thus, the Commission has twice considered and rejected Cal Parties' arguments regarding the APX transaction costs. Cal Parties have not presented evidence or a change in circumstances to persuade us to reconsider this issue.

The Commission orders:

(A) Avista's filing is hereby rejected, as discussed in the body of this order.

(B) Avista is hereby directed to revise its approved offset submission and file it with CAISO within 15 days of the date of this order, as discussed in the body of this order.

(C) Cal Parties' requests that the Commission reject Avista's entire cost offset filing and disallow Avista's cost offset claim for its APX transactions are hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

³⁴ Cal Parties Request for Rehearing of January 26, 2006 Order at 73-74; Cal Parties Request for Rehearing of November 2, 2006 Order at 31.

³⁵ June 18, 2009 Order, 127 FERC ¶ 61,269 at P 283-284. We note that Cal Parties did not raise this issue on rehearing of the June 18, 2009 Order.