

140 FERC ¶ 61,115  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

People of the State of California, *ex rel.*  
Edmund G. Brown, Jr. Attorney General  
of the State of California  
Complainant

v.

Docket No. EL09-56-018

Powerex Corp. (f/k/a British Columbia  
Power Exchange Corp.)  
Sempra Energy Trading, LLC (f/k/a Sempra  
Energy Trading Corp.)  
Allegheny Energy Supply Company, LLC  
TransAlta Energy Marketing (US), Inc.  
Public Service Company of New Mexico  
MIECO, Inc.  
Shell Energy North America (U.S.), L.P.  
(successor by merger to Coral Power LLC)  
Merrill Lynch Capital Services  
TransCanada Energy Ltd. (f/k/a TransCanada  
Power Corp.)  
Commerce Energy Corp. (f/k/a Commonwealth  
Energy Corp.)  
Nevada Power Company  
Tucson Electric Power Company  
American Electric Power Service Corp.  
Commission Federal de Electricidad  
Sierra Pacific Power Company  
Sierra Pacific Industries  
Avista Corp. (f/k/a Washington Water Power Company)  
Avista Energy, Inc.  
Sempra Energy Solutions LLC  
Respondents

## ORDER REJECTING REQUEST FOR REHEARING

(Issued August 7, 2012)

1. On July 13, 2012, the California Attorney General<sup>1</sup> filed a request for rehearing of the Commission's June 13, 2012 order,<sup>2</sup> which denied rehearing of the Commission May 24, 2011 order.<sup>3</sup> The Dismissal Order dismissed the California AG's complaint seeking refunds on sales made by respondents to the California Energy Resources Scheduling Division (CERS) of the California Department of Water Resources during the period January 18, 2001 to June 20, 2001 (the CERS Period). In this order, we reject the California AG's request for rehearing.

**I. Background**

2. A more detailed factual background of these proceedings is included in the Dismissal and Rehearing Orders. As discussed in those orders, in response to the Western Energy Crisis, numerous proceedings were initiated at the Commission. Also, on May 22, 2009, the California AG filed a new complaint alleging that the respondents made short-term, bilateral sales to CERS during the CERS Period at unjust and unreasonable prices.

**Dismissal Order (May 24, 2011)**

3. On May 24, 2011, the Commission rejected the CERS Complaint on a number of grounds. First, the Commission determined that the California AG sought a remedy that was not available, advanced legal theories that were not supportable and, to the extent that he raised a potentially supportable legal theory, the California AG failed to sufficiently support his allegations.<sup>4</sup> Next, the Commission was compelled to dismiss the complaint because the California AG failed to adequately plead or otherwise advance

---

<sup>1</sup> People of the State of California, *ex rel.* Kamala E. Harris, Attorney General (California AG).

<sup>2</sup> *People of the State of California, ex rel. Edmund G. Brown Jr., Attorney General v. Powerex Corp. (f/k/a British Columbia Power Exchange Corp.)*, 139 FERC ¶ 61,210 (2012) (Rehearing Order).

<sup>3</sup> *People of the State of California, ex rel. Edmund G. Brown Jr., Attorney General v. Powerex Corp. (f/k/a British Columbia Power Exchange Corp.)*, (CERS Complaint or Complaint), *dismissed*, 135 FERC ¶ 61,178 (2011) (Dismissal Order).

<sup>4</sup> *See* Dismissal Order, 135 FERC ¶ 61,178 at PP 46-82.

evidence sufficient to overcome the *Mobile-Sierra* presumption<sup>5</sup> regarding contract modification.<sup>6</sup> Finally, the Commission found that the Complaint was filed too late under the federal statute of limitations.<sup>7</sup>

#### **Rehearing Order (June 13, 2012)**

4. On June 23, 2011, the California AG filed a request for rehearing of the Dismissal Order, specifying thirteen errors. In an order issued June 13, 2012, the Commission denied the California AG's rehearing request. In the Rehearing Order, the Commission first rejected the California AG's arguments regarding the adequacy of reporting, finding that the adjudication respecting reporting issues was confined to the *Lockyer*<sup>8</sup> proceeding.<sup>9</sup> Next, the Commission found that certain claims regarding sellers without market-based rates had been mooted by events.<sup>10</sup> Next, the Commission rejected the California AG's arguments under Federal Power Act (FPA) sections 206 and 309,<sup>11</sup> which alleged tariff violations and acts of market manipulation because those allegations were too vague and because the Commission rejected the California AG's "pricing umbrella" theory of culpability.<sup>12</sup>

5. Next, the Commission reiterated its findings regarding the *Mobile-Sierra* presumption.<sup>13</sup> In the Dismissal Order, the Commission found that to the extent the California AG claimed that the short-term, bilateral sales contracts were unjust and

---

<sup>5</sup> *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Mobile-Sierra*).

<sup>6</sup> Dismissal Order, 135 FERC ¶ 61,178 at PP 83-91.

<sup>7</sup> *Id.* PP 94-111.

<sup>8</sup> *See Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004), *cert. denied*, 127 S. Ct. 2972 (2007) (*Lockyer*), *order on remand*, 122 FERC ¶ 61,260, *clarified*, 123 FERC ¶ 61,042 (2008), *order on reh'g and clarification*, 125 FERC ¶ 61,016 (2008), *initial decision*, 130 FERC ¶ 63,017 (2010), *order affirming initial decision*, Opinion No. 512, 135 FERC ¶ 61,113 (2011); *order on reh'g*, 139 FERC ¶ 61,211 (2012).

<sup>9</sup> Rehearing Order, 139 FERC ¶ 61,210 at PP 5-18, 21-22.

<sup>10</sup> *Id.* PP 19-20.

<sup>11</sup> 16 U.S.C. §§ 824e and 825h (2006).

<sup>12</sup> Rehearing Order, 139 FERC ¶ 61,210 at PP 23-34.

<sup>13</sup> *Id.* PP 35-53.

unreasonable, the California AG did not adequately plead or otherwise advance evidence sufficient to address the *Mobile-Sierra* presumption regarding contract modification.<sup>14</sup> The Commission found that the California AG's arguments regarding reporting and the *Mobile-Sierra* presumption were erroneous and an impermissible collateral attack on the *Lockyer* proceedings.<sup>15</sup> Next, the Commission rejected the California AG's argument opposing the application of the *Mobile-Sierra* presumption to short-term CERS purchases because the agreement under which these transactions took place contained a *Mobile-Sierra* clause.<sup>16</sup> Next, the Commission found the California AG's argument that the *Mobile-Sierra* presumption does not apply to "dysfunctional" markets was insufficient given the lack of specific allegations.<sup>17</sup> Next, the Commission disagreed with the California AG that the sellers are not entitled to the *Mobile-Sierra* presumption because they were "on notice" from a prior complaint in a different proceeding.<sup>18</sup> Also, the Commission found that the California AG presented insufficient evidence and thus failed to carry the burden to prove that the sellers' "unlawful overcharges" led to an "excessive burden" under a *Mobile-Sierra* legal analysis.<sup>19</sup>

6. The Rehearing Order also addressed statutes of limitations. In the Dismissal Order, the Commission found the Complaint was time-barred by the federal "catchall" statute of limitations.<sup>20</sup> On rehearing, the California AG argued that the Commission erred because: (1) no statute of limitations should have been applied; (2) if a statute of limitations does apply, the Commission ignored the parties' contractual choice of law agreement that would invoke a Utah statute; and (3) the Commission failed to appropriately apply Utah's "savings" clause for the period during which the *CPUC*<sup>21</sup> appeal was pending in the Ninth Circuit. In the Rehearing Order, the Commission found that the California AG was precluded from arguing that no statute of limitations could be applied and that the federal "catchall" statute of limitations was the most analogous and

---

<sup>14</sup> Dismissal Order, 135 FERC ¶ 61,178 at PP 83-91.

<sup>15</sup> Rehearing Order, 139 FERC ¶ 61,210 at PP 37-38.

<sup>16</sup> *Id.* PP 39-40.

<sup>17</sup> *Id.* PP 41-43.

<sup>18</sup> *Id.* PP 44-49.

<sup>19</sup> *Id.* PP 50-53.

<sup>20</sup> Dismissal Order, 135 FERC ¶ 61,178 at PP 94-111.

<sup>21</sup> See *Pub. Util. Comm'n of the State of Cal. v. FERC*, 462 F.3d 1027 (9th Cir. 2006) (*CPUC*), order on remand, 129 FERC ¶ 61,147 (2009), reh'g granted in part and denied in part, 135 FERC ¶ 61,183 (2011).

appropriate to be used in the absence of a specific statute of limitations under the FPA.<sup>22</sup> Finally, the Commission explained that even under the Utah “savings” statute, the California AG still filed the Complaint too late.<sup>23</sup>

7. The Rehearing Order also explained that the Commission properly rejected the California AG’s claim for a market-wide remedy,<sup>24</sup> and that it was appropriate for the Commission to dismiss the Complaint.<sup>25</sup>

## **II. The California AG’s Rehearing Request of the Rehearing Order**

8. The California AG seeks rehearing of the June 13, 2012 Rehearing Order, arguing that the order: (1) incorrectly concluded that the *Mobile-Sierra* just and reasonable presumption applies to the CERS short-term contracts at issue in this proceeding; (2) incorrectly failed to find that the majority of CERS contracts at issue are not subject to the *Mobile-Sierra* presumption; and (3) incorrectly concluded that the California AG is precluded from arguing that the Complaint is not barred by operation of a statute of limitations because the California AG acquiesced to the application of a statute of limitations to the Complaint.

9. The California AG argues that the Rehearing Order does not properly address the argument on rehearing that the *Mobile-Sierra* presumption does not apply in the context of short-term bilateral contracts under the Western Systems Power Pool (WSPP) Agreement. The California AG argues that the Rehearing Order: (1) misconstrued the California AG’s argument concerning short-term sales; and (2) overlooked the argument that, to the extent the *Mobile-Sierra* presumption applies to the short-term CERS contracts that are the subject of this proceeding, a separate provision of the WSPP Agreement operates as a *Memphis* clause.<sup>26</sup>

---

<sup>22</sup> Rehearing Order, 139 FERC ¶ 61,210 at PP 54-61.

<sup>23</sup> *Id.* PP 62-67.

<sup>24</sup> *Id.* PP 68-69.

<sup>25</sup> *Id.* PP 70-72.

<sup>26</sup> In *United Gas Pipeline Co. v. Memphis Light and Water Div.*, 358 U.S. 103, 110-113 (1958), the Supreme Court held that parties could contract out of the *Mobile-Sierra* presumption by specifying in their contracts that a new rate filed with the Commission would supersede the contract rate. Such a clause has come to be known as a “Memphis” clause.

10. Next, the California AG reiterates that most of the short-term, bilateral sales to CERS cited in the Complaint are also the subject of the pending FPA section 206 proceeding in Docket No. EL01-10 pursuant to the Ninth Circuit's remand to the Commission in the *Port of Seattle* case.<sup>27</sup> Once again, the California AG argues that the *Mobile-Sierra* presumption does not apply to the majority of short-term, bilateral CERS purchases, which were subject to the "notice" of potential refunds in Docket No. EL01-10.

11. Finally, the California AG argues that despite the California AG having consistently argued that no statute of limitations applies to bar the Complaint, the Rehearing Order relies on a phrase from an earlier pleading and erroneously concludes that the California AG "is now precluded from arguing that no statute of limitations could be applied" because in that instance the Attorney General "did not disagree with the general premise that a statute of limitations of some sort applies."<sup>28</sup>

### III. Discussion

12. We reject the California AG's second rehearing request. The Commission does not allow rehearing of an order denying rehearing.<sup>29</sup> Any other result would lead to never-ending litigation as every response by the Commission to a party's arguments would allow yet another opportunity for rehearing unless presumably that response were word-for-word identical to what the Commission earlier said.<sup>30</sup> Litigation before the Commission cannot be allowed to drag on indefinitely – at some point it must end. So, the Commission does not allow parties to seek rehearing of an order denying rehearing. And, as the United States Court of Appeals for the District of Columbia Circuit has put it, even "an improved rationale" would not justify a further request for rehearing.<sup>31</sup>

---

<sup>27</sup> *Port of Seattle, Wash. v. FERC*, 499 F.3d 1016 (9th Cir. 2007) (Port of Seattle).

<sup>28</sup> Rehearing Order, 139 FERC ¶ 61,210 at P 58.

<sup>29</sup> See, e.g., *KeySpan-Ravenswood, LLC v. New York Indep. Sys. Operator, Inc.*, 112 FERC ¶ 61,153 (2005); *Southern Company Services, Inc.*, 111 FERC ¶ 61,329 (2005); *AES Warrior Run, Inc. v. Potomac Edison Company d/b/a Allegheny Power*, 106 FERC ¶ 61,181 (2004); *Southwestern Public Service Co.*, 65 FERC ¶ 61,088, at 61,533 (1993).

<sup>30</sup> Accord, e.g., *Canadian Association of Petroleum Producers v. FERC*, 254 F.3d 289, 296 (D.C. Cir. 2001) (rejecting the notion of "infinite regress" that would "serve no useful end").

<sup>31</sup> See *Southern Natural Gas Co. v. FERC*, 877 F.2d 1066, 1073 (D.C. Cir. 1999) (*Southern*) (citing *Tennessee Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1109-10 (D.C.

13. Rehearing of an order on rehearing lies only when the order on rehearing modifies the result reached in the original order in a manner that gives rise to a wholly new objection.<sup>32</sup> In fact, a second rehearing request is required in instances when the later order modifies the results of the earlier order in a significant way.<sup>33</sup>

14. Here, that is not the case. As discussed above, the Dismissal Order rejected the CERS Complaint on a number of grounds. The Rehearing Order then confirmed the Dismissal Order and rejected the California AG's arguments, including the arguments regarding application of the *Mobile-Sierra* presumption and a statute of limitations, finding them unpersuasive. In these circumstances, the second rehearing request was neither required nor appropriate, and so it will be rejected.

The Commission orders:

The California AG's request for rehearing of the June 13, 2012 Rehearing Order in this proceeding is hereby rejected.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

---

Cir. 1988)); *see also Londonderry Neighborhood Coalition v. FERC*, 273 F.3d 416, 423-24 (1st Cir. 2001) (*Londonderry*).

<sup>32</sup> *See Londonderry*, 273 F.3d at 423.

<sup>33</sup> *See Cal. Dep't of Water Res. v. FERC*, 306 F.3d 1121, 1125 (D.C. Cir. 2002); *Town of Norwood, Mass. v. FERC*, 906 F.2d 772, 775 (D.C. Cir. 1990).