142 FERC ¶ 61,085
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.

J.P. Morgan Ventures Energy Corporation Docket No. EL12-103-001

ORDER GRANTING CLARIFICATION

(Issued February 1, 2013)

1. In an order issued on November 14, 2012,[1] the Commission found that various statements made by J.P. Morgan Ventures Energy Corporation (JP Morgan) violated section 35.41(b) of the Commission's regulations.[2] Consequently, the Commission suspended JP Morgan's market-based rate authority for a period of six months, to become effective on April 1, 2013.[3] On December 14, 2012, JP Morgan filed a request for clarification, and in the alternative, rehearing. As discussed below, we grant JP Morgan's request for clarification of the Suspension Order.

I. Background

2. On September 20, 2012, pursuant to section 206 of the Federal Power Act (FPA),[4] the Commission issued an order directing JP Morgan to show cause why it should not be found to have violated section 35.41(b) of the Commission's regulations.[5] In particular, the Show Cause Order alleged that JP Morgan violated section 35.41(b) by submitting misleading information and omitting material facts in communications with the Commission, the California Independent System Operator Corporation (CAISO), as well

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[1] *J.P. Morgan Ventures Energy Corp.*, 141 FERC ¶ 61,131 (2012) (Suspension Order).

[2] 18 C.F.R. § 35.41(b) (2012).

[3] Suspension Order, 141 FERC ¶ 61,131 at P 1.

[4] 16 U.S.C. § 824e (2006).

[5] *J.P. Morgan Ventures Energy Corp.*, 140 FERC ¶ 61,227 (2012) (Show Cause Order).

as CAISO's Department of Market Monitoring.[6] In response, JP Morgan filed an answer generally contending that the statements identified in the Show Cause Order did not constitute violations of section 35.41(b).[7]

3. In the Suspension Order, the Commission found that the statements identified in the Show Cause Order in fact constituted violations of section 35.41(b) of the Commission's regulations.[8] Consequently, the Commission suspended JP Morgan's authority to sell energy, capacity, and ancillary services at market-based rates for a period of six months, to become effective on April 1, 2013.

II. Request for Clarification and Other Pleadings

4. JP Morgan requests that the Commission clarify that the Suspension Order does not modify or abrogate JP Morgan's contracts for the sale of energy, capacity, and ancillary services entered into with third parties prior to the April 1, 2013 effective date of the suspension of JP Morgan's market-based rate authority (pre-existing contracts).[9] According to JP Morgan, the Commission cannot abrogate the pre-existing contracts absent a finding pursuant to section 206 of the FPA that abrogation is necessary to prevent serious harm to the public interest.[10] JP Morgan posits that the Suspension Order does not conclude that any of the pre-existing contracts are unjust or unreasonable pursuant to section 206.[11] Further, JP Morgan states that the Suspension Order, on its face, does not modify the pre-existing contracts and that the Commission cannot satisfy the *Mobile-Sierra* doctrine with silence.[12] Thus, JP Morgan reasons that, given the absence of an express ruling in the Suspension Order abrogating or modifying the pre-

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[6] *Id.* P 1.

[7] *See* Suspension Order, 141 FERC ¶ 61,131 at P 27 (citing JP Morgan Response to Show Cause Order, 140 FERC ¶ 61,227 at PP 22-31).

[8] *Id.* P 53.

[9] JP Morgan Request for Clarification at 1.

[10] *Id.* at 4 (citing *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165 (2010); *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527 (2008)).

[11] *Id.*

[12] *Id.* at 4-5. The "*Mobile-Sierra*" doctrine derives from two cases: *United Gas Pipe Line v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) (*Mobile*) and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Sierra*).

existing contracts, one must conclude that the Commission did not intend to take such action.

5. Moreover, JP Morgan argues that there is no valid basis upon which the Commission can satisfy the public interest standard because the violations identified in the Suspension Order were not based on an evaluation of the terms of any pre-existing contract. JP Morgan further asserts that the section 35.41(b) violations the Commission found "did not give [JP Morgan] any competitive or otherwise unjust or unreasonable advantage in negotiating or executing any contract." Thus, according to JP Morgan, there "is no basis for finding that any of those contracts are unjust and unreasonable, or that they severely harm the public interest."[13]

6. JP Morgan also points out that where the Commission has previously revoked a seller's market-based rate authority, the Commission has not abrogated the seller's existing contractual agreements.[14] Thus, JP Morgan argues that it would be "arbitrary and irrational for the Commission to take that action here, where its findings have nothing to do with the formation, or terms and conditions, of the pre-existing contracts."[15]

7. JP Morgan also contends that any abrogation of the pre-existing contracts would not only unfairly impact third parties that have contractually agreed to purchase energy products from JP Morgan, but also chill future reliance on the sanctity of private contracts.[16] In this respect, JP Morgan additionally states that clarification is necessary to avoid disruption to its customers and to the electricity markets.[17]

8. To the extent that the Commission rejects JP Morgan's request for clarification, JP Morgan seeks rehearing of the Suspension Order.[18] JP Morgan argues that to the extent that the Commission holds that the market-based rate authority suspension applies to the pre-existing contracts, such a ruling would: (i) exceed the Commission's authority under section 206 of the FPA;[19] (ii) violate the *Mobile-Sierra* doctrine; (iii) arbitrarily and

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[13] *Id.* at 5.

[14] *Id.* at 5-6 (citing *Pinnacle W. Capital Corp.*, 115 FERC ¶ 61,055, at P 5 n.5 (2006); *Duke Power*, 111 FERC ¶ 61,506, at P 4 n.8 (2005)).

[15] *Id.* at 6.

[16] *Id.* at 6-7.

[17] *Id.* at 7.

[18] *Id.* at 2, 7-8.

[19] 16 U.S.C. § 824e.

unfairly harm innocent third parties in addition to the market; (iv) constitute unreasoned decision-making; and (v) arbitrarily depart from prior precedent without explanation.[20]

9. On November 14, 2012, the South Carolina Public Service Authority (Santee Cooper) filed a motion to intervene out-of-time and comment. Santee Cooper asserts that granting its motion to intervene will not disrupt this proceeding or prejudice any other party. On December 28, 2012, Santee Cooper filed an answer in support of JP Morgan's request for clarification.

10. The Independent Market Monitor for PJM (Market Monitor) filed a motion to intervene out-of-time on December 7, 2012. On January 9, 2013, the California Department of Water Resources State Water Project (SWP) filed a motion to intervene out-of-time and answer in response to JP Morgan's request for clarification. On January 18, 2013, JP Morgan filed an answer opposing SWP's motion to intervene and answer.

III. Discussion

A. Procedural Matters

11. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention. Santee Cooper, the Market Monitor, and SWP have not met this higher burden of justifying their late interventions, and thus we reject their motions to intervene.[21]

12. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2012), prohibits answers to a request for rehearing or clarification. Therefore, we reject Santee Cooper's December 28 Answer as well.

13. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2012), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept JP Morgan's answer and will, therefore, reject it.

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[20] JP Morgan Request for Clarification at 8.

[21] *See, e.g.*, *Midwest Indep. Transmission Sys. Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

B. Substantive Matters

14. We grant JP Morgan's request for clarification.[22] In Order No. 697, the Commission explained that mitigation imposed on sellers that are found to have market power would only take effect prospectively.[23] Further, the Commission specifically clarified that such mitigation would not modify, abrogate, or otherwise affect existing contractual arrangements.[24] Thus, where the Commission has previously suspended a seller's market-based rate authority upon finding or presuming that a seller has market power, the contractual obligations entered into by the seller prior to the suspension have remained in effect.[25]

15. Consistent with this precedent, the Commission did not modify or abrogate pre-existing contracts in the Suspension Order. Rather, pursuant to section 206 of the FPA, the Commission suspended JP Morgan's authorization to enter into new arrangements to sell electric energy, capacity, and ancillary services at market-based rates on a prospective basis.[26] The Commission delayed the date on which the suspension of JP Morgan's market-based rate authority would take effect until April 1, 2013 in order to afford time to take steps necessary to maintain system reliability during the suspension

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[22] Because we grant JP Morgan's request for clarification, its alternative request for rehearing is dismissed as moot.

[23] *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at PP 817, 822, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied sub nom. Pub. Citizen, Inc. v. FERC*, 133 S. Ct. 26 (2012).

[24] *Id.* P 822 (citing *S. Car. Elec. & Gas. Co.*, 114 FERC ¶ 61,143, at P 18 (2006) (accepting mitigation on a prospective basis; existing long-term agreements remain in effect until terminated pursuant to their terms)).

[25] *See, e.g.*, *Pinnacle W. Capital Corp.*, 115 FERC ¶ 61,055 at P 5 n.5; *Duke Power*, 111 FERC ¶ 61,506 at P 4 n.8.

[26] Suspension Order, 141 FERC ¶ 61,136 at PP 1, 53.

period.[27] Accordingly, we clarify that the suspension of JP Morgan's market-based rate authority does not modify or abrogate the pre-existing contracts.[28]

The Commission orders:

JP Morgan's request for clarification is hereby granted, as discussed in the body of this order.

By the Commission. Commissioner LaFleur concurring with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

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[27] *Id.* P 53.

[28] Because we grant JP Morgan's request for clarification, consistent with the aforementioned precedent, we need not address the various other arguments raised by JP Morgan in support of its request for clarification.

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LaFLEUR, Commissioner, *concurring*:

I support the decision in today's order to grant the request for clarification. I write separately solely to reiterate my broader opposition to the suspension of JP Morgan's market-based rate authority in this proceeding. As explained in my earlier dissent, I believe that JP Morgan's alleged misrepresentations should have been addressed as part of the ongoing investigation of JP Morgan's bidding activities, either as separate counts of obstruction, or as aggravating circumstances that factor into the determination of any civil penalty.

Therefore, I respectfully concur.

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Cheryl A. LaFleur
Commissioner