

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

San Diego Gas & Electric Company

Docket Nos. EL00-95-189

v.

Sellers of Energy and Ancillary Services Into Markets
Operated by the California Independent System
Operator Corporation and the California Power
Exchange

Investigation of Practices of the California Independent
System Operator and the California Power Exchange

EL00-98-174

ORDER DENYING REHEARING

(Issued February 7, 2007)

1. In this order, we address Californians for Renewable Energy, Inc.'s (CARE) petition for rehearing of the Commission order issued on September 14, 2006.¹ In the September 2006 Order, the Commission granted the California Parties'² motion to

¹ *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 116 FERC ¶ 61,245 (2006) (September 2006 Order).

² The California Parties are the People of the State of California *ex rel.* Bill Lockyer, Attorney General, the California Electricity Oversight Board, the California Public Utilities Commission, Southern California Edison Company, and the Pacific Gas & Electric Company.

compel APX, Inc. (APX) to release certain settlement data,³ subject to the protective order issued in these proceedings.⁴ In this order, we deny CARE's request for rehearing of the September 2006 Order for the reasons stated below.

Background

2. Since year 2000, the Commission has been involved in the process of calculating refunds related to transactions in the markets operated by the California Independent System Operator Corporation (ISO) and the California Power Exchange Corporation (PX) during the period October 2, 2000 through June 20, 2001 (Refund Period).⁵ The Commission gave individual sellers operating within these markets the opportunity to demonstrate that their costs of providing electricity to the ISO/PX markets exceeded the total revenues they received from those markets during the Refund Period.⁶

3. The Commission's January 2006 Order determined which sellers had demonstrated an overall revenue shortfall for their transactions in the ISO/PX markets during the Refund Period, and also determined those sellers' allowed cost offsets from refunds. Pursuant to its determinations, the Commission directed APX to submit final revenue data (*i.e.*, the settlement data) to the Commission.⁷

³ Specifically, the motion concerned the APX settlement data for the October 2, 2000 through June 20, 2001 refund period.

⁴ *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 103 FERC ¶ 63,059 (2003) (Protective Order); *see also* Protective Order, Docket Nos. EL00-95-045 & EL00-98-042 (August 7, 2001) (2001 Protective Order).

⁵ *See San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 96 FERC ¶ 61,120 (2000).

⁶ *See San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 114 FERC ¶ 61,070, at P 3-4 (2006) (January 2006 Order).

⁷ *Id.* at P 389. Though APX was not a buyer or seller of electricity in the ISO/PX markets during the Refund Period, it did serve as a middleman to facilitate its customers' sales or schedules of power in the ISO/PX markets. The Commission found that APX, as well as APX participants, should be held jointly and severally liable for refund liabilities associated with energy scheduled by APX that cannot be apportioned to a specific entity. *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 105 FERC ¶ 61,066 (2003), *clarifying*, *San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Serv.*, 102 FERC ¶ 61,317 (2003).

4. In February 2006, APX provided the requested settlement data to Commission staff informally, along with a request for privileged treatment. APX also gave each of the APX market participants⁸ access to its own respective settlement data through APX's code-protected website.

5. In March 2006, the California Parties filed a Motion to Compel APX to Provide Data, requesting that the Commission direct APX to provide the California Parties with the complete set of APX settlement data for the Refund Period.⁹ The California Parties stated that they needed the settlement data to adequately analyze APX market participants' modified cost filings which claimed cost-based offsets to refunds.¹⁰ According to the California Parties, APX refused to provide them with the settlement data in the absence of a Commission order so requiring.

6. Following discussions with the APX counsel, the California Parties proposed to treat the settlement data as "Protected Materials" subject to the Protective Order adopted in these proceedings. The California Parties stated that this treatment would adequately address APX concerns about releasing data protected under the confidentiality clauses of contracts with its market participants. They thereby requested that the Commission make APX's release of the settlement data subject to the Protective Order.

7. In its answer, APX stated that it did not object to the Commission requiring it to release the data specified by the California Parties. APX cited its contractual obligation to its client customers (*e.g.*, the APX market participants) to "treat all Participant registration data, financial data, and APX Market activity and communications as 'Participant Confidential Information,' whether designated as confidential or not." APX explained that it considers itself bound to protect from disclosure data which falls within this definition, unless specifically directed as a matter of law or regulation. APX agreed to comply with a Commission order specifically directing it to provide to the California Parties a copy of the settlement data tendered to Commission staff on February 27, 2006, provided each party receiving the data be bound by the Protective Order.

⁸ APX market participants include Avista Energy, Inc. (Avista), Tractebel Energy Marketing, Inc. (Tractebel), and TransAlta Energy Marketing, Inc. (TransAlta).

⁹ California Parties' March 29, 2006 Motion to Compel, Docket No. EL00-95-000.

¹⁰ In support of their claim for access to the settlement data, the California Parties stated that the Commission's January 2006 Order recognized the APX settlement data as essential to analyses of APX market participant cost filings. *See* Motion to Compel at 4 n. 8 (citing January 2006 Order at P 370).

8. In its September 2006 Order, the Commission granted the California Parties' motion and ordered APX to release the specified data. The Commission found the settlement data necessary to allow the California Parties to analyze APX market participants' cost filings. Since the information had already been compiled and provided to APX market participants, and informally to the Commission, the Commission found that requiring APX to also provide the settlement data to the California Parties would pose no undue burden on APX.

9. Further, the Commission found persuasive the parties' discussions regarding placing confidentiality protections on the released data. Accordingly, the Commission provided that the released settlement data would be subject to the following restriction: that it only be made available to those parties who signed the Protective Order applicable to this proceeding.

Request for Rehearing

10. CARE requests rehearing of the September 2006 Order, specifically of the Commission's determination to place confidentiality protections on the release of the settlement data. CARE bases its request on: 1) the California Parties' and APX's failure to identify any harm that may result from public release of the data, and 2) the Commission's failure to address the harm that restricting the release of the data will cause to the non-market participants CARE represents in these proceedings. To this end, CARE requests that the Commission publicly release the APX settlement data by requiring APX to file its data via the internet, in lieu of a paper filing.

11. CARE states that it uniquely represents the interests of non-market participant end user customers of the three California Public Utility Commission regulated investor owned utilities and various publicly owned utilities. CARE also contends that it particularly represents the interests of customers who are racial minorities with low income. CARE further states that, to date, the settlements between market participant parties have failed to address any of CARE's claims which reflect the interests of its non-market participant members against all market participant parties, including but not limited to those identified by the Commission. CARE claims that the restrictions on accessing the settlement data imposed in the September 2006 Order violate the due process and equal protection rights of CARE itself, its members, and non-market participant members of the public. CARE bases its claims of due process and equal protection violations on the unavailability of legal counsel to CARE and its members due to inadequate resources, in conjunction with the fact that there is no public release of the settlement data.

Discussion

12. APX filed an answer to CARE's request for rehearing on October 17, 2006. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2006), prohibits answers to requests for rehearing. Accordingly, we reject APX's answer to CARE's request for rehearing.

13. We deny CARE's request for rehearing. First, we note that CARE had the opportunity to respond to the California Parties' motion, which addressed making the settlement data subject to the Protective Order; however, CARE failed to respond.¹¹ The Commission generally looks with disfavor on parties raising on rehearing issues that should have been raised earlier. Such behavior is disruptive to the administrative process because it has the effect of moving the target for parties seeking a final administrative decision.¹²

14. Further, we continue to find persuasive the basis for protecting the confidentiality of the APX participants' data. We remain cognizant of APX's contractual obligations of confidentiality to its clients and the potentially sensitive nature of the data itself. Elsewhere in these proceedings we have found it reasonable to condition the release of information on the applicability of a Protective Order.¹³ We see no reason why the

¹¹ In its rehearing petition, CARE claims it was incumbent on the California Parties and APX in their original pleadings to justify the agreed upon confidentiality restrictions by identifying some harm that would result from publicly releasing the settlement data. Indeed, APX did identify a harm: the harm to its clients of releasing proprietary, commercially-sensitive information. APX April 3, 2006 Answer at 2, Docket No. EL00-95-000. CARE also alleges that the Commission failed to address the harm the confidentiality restrictions will cause to the non-market participants CARE represents. We note that CARE did not inform the Commission of these harms at the time the Commission was addressing this issue. Further, CARE has not provided evidence or support for its claims of due process and equal protection violations.

¹² *Californians for Renewable Energy, Inc. v. Calpine Energy Serv.*, 107 FERC ¶ 61,238, at P 7 (2004), citing *Tenaska Power Services Co. v. Southwest Power Pool, Inc.*, 102 FERC ¶ 61,140, at P 14 (2003); *Baltimore Gas & Electric Co.*, 91 FERC ¶ 61,270, at 61,922 (2000); *Northern States Power Co. (Minnesota)*, 64 FERC ¶ 61,172, at 62,522 (1993); *Cities and Villages of Albany and Hanover, Ill.*, 61 FERC ¶ 61,362, at 62,451 (1992).

¹³ See, e.g. *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 116 FERC ¶ 61,183, at P 23 (2006).

settlement data at issue here should not also warrant protected treatment. Moreover, we find that making the settlement data available only to parties who are signatories to the Protective Order is not unduly burdensome. The California Parties, in seeking release of the settlement data, followed the protocol prescribed in the Protective Order applicable to these proceedings.¹⁴ CARE provides no reason why, even without the services of legal counsel, it cannot follow these same procedures to gain access to the information it seeks.

The Commission orders:

The request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Spitzer not participating.

(S E A L)

Magalie R. Salas,
Secretary.

¹⁴ Protective Order, 103 FERC ¶ 63,059.