

129 FERC ¶ 61,276
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, and Philip D. Moeller.

State of California, *ex rel.* Bill Lockyer,
Attorney General of the State of California

v.

Docket No. EL02-71-014

British Columbia Power Exchange Corporation,
Coral Power, LLC, Dynegy Power
Marketing, Inc., Enron Power Marketing,
Inc., Mirant Americas Energy Marketing, LP,
Reliant Energy Services, Inc., Williams
Energy Marketing & Trading Company,

All Other Public Utility Sellers of Energy and
Ancillary Services to the California Energy
Resources Scheduling Division of the
California Department of Water Resources, and

All Other Public Utility Sellers of Energy and
Ancillary Services into Markets Operated by the
California Power Exchange and California
Independent System Operator

ORDER REJECTING REQUEST FOR REHEARING

(Issued December 28, 2009)

1. In this order, we address the California Parties'¹ request for rehearing and clarification of the Commission's October 6, 2008 order² issued in this proceeding. The October 6 Order granted in part and denied in part the requests for rehearing and clarification of the Commission's March 21, 2008 order,³ which addressed the remand by the United States Court of Appeals for the Ninth Circuit, *State of California ex rel. Lockyer v. FERC*.⁴ For the reasons discussed below, we will reject the California Parties' request for rehearing and clarification of the October 6 Order.

Background

2. The March 21 Order addressed the Ninth Circuit's Decision that the Commission erred in ruling that it lacked authority under the Federal Power Act (FPA) to order refunds for violations of the Commission's market-based rate quarterly reporting requirements⁵ during the 2000-2001 period at issue in this proceeding and remanded the case for further refund proceedings.⁶ The court did not itself order any refunds, leaving it to the Commission to consider appropriate remedial options.⁷

3. Specifically, in the March 21 Order, the Commission established a trial-type hearing before an Administrative Law Judge (ALJ) to address whether, based on the facts

¹ The California Parties include the People of the State of California, *ex rel.* Edmund G. Brown, Jr., Attorney General; the Public Utilities Commission of the State of California (California Commission); Pacific Gas & Electric Company; and Southern California Edison Company.

² *State of California, ex rel. Bill Lockyer v. British Columbia Power Exchange Corp.*, 125 FERC ¶ 61,016 (2008) (October 6 Order).

³ *State of California, ex rel. Bill Lockyer v. British Columbia Power Exchange Corp.*, 122 FERC ¶ 61,260 (March 21 Order), *order on reh'g*, 123 FERC ¶ 61,042 (2008) (April 15 Order).

⁴ 383 F.3d 1006 (9th Cir. 2004), *cert. denied*, *Coral Power, L.L.C. v. Cal. ex rel. Brown*, 551 U.S. 1140 (2007) (Ninth Circuit Decision).

⁵ 16 U.S.C. § 824d(c) (2006).

⁶ Ninth Circuit Decision, 383 F.3d at 1017.

⁷ *Id.* at 1018.

and circumstances associated with each individual seller, that seller's improper or untimely filing of its quarterly transaction reports masked an accumulation of market power such that the market-based rates were unjust and unreasonable.⁸ In order to make such a determination, the Commission found that it would need to supplement the record and permit wholesale purchasers that made short-term market-based rate purchases through the California Independent System Operator (CAISO), the California Power Exchange (PX), and the California Energy Resources Scheduling Division of the California Department of Water Resources (CERS), from January 1, 2000 to October 1, 2000, to present evidence that any seller that violated the quarterly reporting requirement did or did not gain an increased market share sufficient to give it the ability to exercise market power and thus cause its market-based rates to be unjust and unreasonable.⁹ The Commission also directed such "sellers to submit for the hearing record copies of the previously filed proper quarterly reports for the period January 1, 2000 – October 1, 2000...[as well as] any improper quarterly reports that were filed for that period."¹⁰

4. As relevant here, in the October 6 Order, the Commission granted the California Parties' request for rehearing of the March 21 Order that sales made to CERS for the January 18, 2001 – June 20, 2001 period are included in this proceeding.¹¹ However, the

⁸ March 21 Order, 122 FERC ¶ 61,260 at P 32.

⁹ *Id.* P 33. Sellers were similarly permitted to present evidence to the contrary. *Id.* P 2.

¹⁰ *Id.* P 35. On March 27, 2008, the Chief Judge designated Judge Karen V. Johnson as the Settlement Judge in this proceeding. On April 14, 2009, Settlement Judge Johnson reported that settlement discussions between the parties had reached an impasse and recommended that a Presiding Judge be designated, but to continue Settlement Judge procedures concurrently with the hearing. On April 21, 2009, Administrative Law Judge Judith A. Dowd was designated to preside at the hearing and a procedural schedule was adopted on May 5, 2009.

¹¹ October 6 Order, 125 FERC ¶ 61,016 at P 18-20. The Commission noted that CERS did not begin making purchases until January 18, 2001 and that because the bilateral sales to CERS were not made through the CAISO or PX spot markets, such sales were not extended the same mitigated market clearing price (MMCP) relief that the Commission extended to sales in the CAISO and PX spot markets during the January 18, 2001 – June 20, 2001 period. *See San Diego Gas & Elec. Co.*, 96 FERC ¶ 61,120 (2001) and *San Diego Gas & Electric Co.*, 93 FERC ¶ 61,121 (2000).

Commission denied the California Parties' request that evidence of market manipulation and other tariff violations should be permitted in the proceeding.¹² On November 5, 2008, the California Parties filed a request for rehearing and clarification of the October 6 Order to the extent that it excluded from the proceeding evidence of market manipulation and tariff violations related to bilateral sales to CERS.

Discussion

A. The California Parties' Rehearing Request

5. The California Parties seek rehearing of paragraph 32 of the October 6 Order, which excluded from this proceeding's hearing evidence of tariff violations involving sellers that manipulated the relevant markets.

6. Specifically, the California Parties seek rehearing to the extent that that the Commission excluded from this proceeding evidence of market manipulation and tariff violations related to bilateral sales to CERS. They explain that the Commission based its decision on the fact that the remand proceeding "is not a proceeding to address other potential tariff violations (such as gaming and anomalous bidding behavior), which is the subject of the *CPUC*¹³ proceeding."¹⁴ However, the California Parties assert, this rationale does not apply to evidence of market manipulation and tariff violations involving bilateral sales to CERS, because sales to CERS are not an issue in the *CPUC* proceeding on remand.¹⁵ Accordingly, the California Parties argue, even if the Commission's rationale for excluding market manipulation and tariff violation evidence from this proceeding was valid, that rationale cannot apply to CERS bilateral transactions.

7. The California Parties also argue that compelling reasons support inclusion of market manipulation and tariff violation evidence with respect to the CERS transactions. They assert that the best evidence of the existence of market power is direct evidence of

¹² March 21 Order, 122 FERC ¶ 61,260 at P 32.

¹³ *Pub. Util. Comm'n of Cal. v. FERC*, 462 F.3d 1027 (9th Cir. 2006) (*CPUC*).

¹⁴ California Parties' Rehearing Request at 2 (citing October 6 Order, 125 FERC ¶ 61,016 at P 32).

¹⁵ *CPUC*, 462 F.3d at 1062-64.

its existence in supplier conduct.¹⁶ The California Parties explain that necessary information in the transaction reports would have allowed the Commission to detect that sellers to CERS exercised market power by withholding day-ahead electricity and then selling it at higher prices in the real time market. They state that proper reports would have revealed manipulation games because such exercises of market power were masked by inadequate quarterly reports. Therefore, the California Parties argue that the Commission should grant rehearing and permit evidence of market manipulation and tariff violations with respect to CERS bilateral transactions.

B. Commission Determination

8. We will reject the California Parties' request for rehearing of our determination that this proceeding excludes evidence of market manipulation and tariff violations related to bilateral sales to CERS. In their prior request for rehearing in this proceeding, the California Parties argued that the March 21 Order erred to the extent that it excluded from the hearing evidence of "tariff violations" and "market manipulation."¹⁷ In the October 6 Order, we denied the California Parties' request for rehearing on that issue finding that the purpose of this proceeding, as made clear in the March 21 Order, is to focus exclusively on violations of our quarterly transaction reporting requirements as a basis for potential refund liability and "that this is not a proceeding to address other potential tariff violations (such as gaming and anomalous bidding behavior)."¹⁸ We also held that "[i]t would be inappropriate for the Commission, at this stage in the proceeding, to expand or drastically recast its scope to include tariff violations."¹⁹

9. Here, in their November 5, 2008 request for rehearing of the October 6 Order, the California Parties again seek rehearing of our determination that this proceeding excludes evidence of market manipulation and tariff violations – this time arguing that our determination should not apply to CERS bilateral transactions.²⁰ Thus, the California Parties seek rehearing of the same issue that they already raised in their April 21, 2008

¹⁶ California Parties' Rehearing Request at 5.

¹⁷ California Parties' April 21, 2008 Rehearing Request at 10 and 27.

¹⁸ October 6 Order, 125 FERC ¶ 61,016 at P 32 (citing March 21 Order, 122 FERC ¶ 61,260 at n.65).

¹⁹ *Id.*

²⁰ California Parties' November 5, 2008 Rehearing Request at 4.

request for rehearing, and that the Commission has already thoroughly considered and denied.

10. The Commission generally does not allow rehearing of an order denying rehearing.²¹ Our reasoning, we have explained, is that “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.”²² Litigation before the Commission cannot be allowed to drag on indefinitely - at some point it must end. As the District of Columbia Circuit has found, even an “improved rationale” would not justify allowing a request for rehearing of the subsequent order to contest the original order’s ruling.²³

11. 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.²⁴ Here, that is not the case. While in the October 6 Order we noted that tariff violations are the subject of the *CPUC* proceeding - that statement was not the sole basis for our rejection of the California Parties’ request that we now include such evidence in this proceeding. The Commission has consistently held that this proceeding is “centered on the market-based rate program and the related quarterly reporting requirement and

²¹ See *Entergy Services, Inc.*, 124 FERC ¶ 61,203, at P 10-12 (2008) (*Entergy*) (“The Commission does not allow parties to seek rehearing of an order denying rehearing.”); *New York Independent System Operator, Inc.*, 129 FERC ¶ 61,045, at P 10 (2009); *Entergy Services, Inc.*, 115 FERC ¶ 61,378, at P 5-6 (2006); *KeySpan-Ravenswood, LLC v. New York Independent System Operator, Inc.*, 112 FERC ¶ 61,153, at P 6 (2005); *Southern Company Services, Inc.*, 111 FERC ¶ 61,329 (2005); *AES Warrior Run, Inc.*, 106 FERC ¶ 61,181 (2004); *Southwestern Public Service Co.*, 65 FERC ¶ 61,088, at 61,533 (1993).

²² *Entergy*, 124 FERC ¶ 61,203 at P 10 (citing *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”)).

²³ 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. Cir. 1988)); see also *Londonderry Neighborhood Coalition v. FERC*, 273 F.3d 416, 423-24 (1st Cir. 2001) (*Londonderry*).

²⁴ See *Londonderry*, 273 F.3d at 423; *Entergy Services, Inc.*, 124 FERC ¶ 61,203 at P 10.

potential remedies for violations of this filing requirement.”²⁵ Further, while in the October 6 Order, we allowed limited inclusion of CERS transactions for sales made during January 18, 2001 – June 20, 2001 period, that determination does not warrant a possibility of a second rehearing on the scope of the issue present in this proceeding. In these circumstances, the second rehearing request was neither required nor appropriate, and so it will be rejected.

12. Even if we were to consider the merits of the California Parties’ arguments, we would deny rehearing. Since the inception of this proceeding, the focus has been on sellers’ improper or untimely filing of quarterly transaction reports, not possible tariff violations. The Ninth Circuit Opinion explicitly stated that “[t]his case presents the question, *inter alia*, of whether the [Commission] properly authorized and administered market-based energy tariffs.”²⁶ The court went on to characterize the narrow issues presented in the Attorney General’s initial March 20, 2002 complaint as “alleging that FERC’s market-based rate filing requirements violated the FPA and that, even if valid, the reports filed by electricity sellers did not contain the transaction-specific information the FPA requires.”²⁷ Specifically, we note, the Attorney General’s complaint in this proceeding expressly alleged that power marketers “failed to file their rates as required by Section 205(c) of the Federal Power Act (16 U.S.C. §824d(c)) and numerous Commission orders requiring them to file transaction-specific information about their

²⁵ In the March 21 Order, the Commission stated that:

In directing this hearing, we remind parties that this is not a proceeding to address any tariff violations (such as gaming and anomalous bidding behavior) raised in the *CPUC* remand case. This proceeding focuses solely on whether, based on the facts and circumstances associated with each individual seller, that seller’s improper or untimely filing of its quarterly transaction reports masked an accumulation of market power such that the market rates were unjust and unreasonable.

122 FERC ¶ 61,260 at n.65. *See also State of California, ex rel. Bill Lockyer v. British Columbia Power Exchange Corp.*, 100 FERC ¶ 61,295, at P 31 (2002).

²⁶ Ninth Circuit Decision, 383 F.3d at 1008.

²⁷ *Id.* at 1010.

sales and purchases at market-based rates.”²⁸ Nowhere in that complaint did the Attorney General contend that he was seeking relief based on power marketers’ potential market manipulation or tariff violations. Thus, power marketers were never on notice that such issues would be included in this proceeding.

13. Accordingly, consistent with the Attorney General’s March 20, 2002 complaint, the Commission’s prior rulings in this proceeding, and the Ninth Circuit’s interpretation of the scope of this proceeding, we find that “it would be inappropriate for the Commission, at this stage in the proceeding, to expand or drastically recast this proceeding to include tariff violations.”²⁹ Therefore, we will reject the California Parties’ request for rehearing.

The Commission orders:

The California Parties’ request for rehearing and clarification is hereby rejected, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

²⁸ Attorney General’s March 20, 2002 complaint at 2. *See also* March 21 Order, 122 FERC ¶ 61,260 at P 3 (citing *State of California, ex rel. Bill Lockyer v. British Columbia Power Exchange Corp.*, 99 FERC ¶ 61,247, at 62,055 (2002)).

²⁹ October 6 Order, 125 FERC ¶ 61,016 at P 32.