135 FERC ¶ 61,175
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

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

v. Docket No. EL02-71-010

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 DENYING MOTION FOR STAY

(Issued May 24, 2011)

1. On April 22, 2009, and November 13, 2009, the California Parties[1] filed motions, pursuant to Rules 212 and 504(b) of the Commission's Rules of Practice and Procedure,[2] for a stay of the hearing date and further hearing procedures in this proceeding pending a

[1] For purposes of this proceeding, the California Parties are the State of California, *ex rel.* Edmund G. Brown Jr., Attorney General, the California Public Utilities Commission, Pacific Gas and Electric Company, and Southern California Edison Company.

[2] 18 C.F.R. §§ 385.212, 385.504(b) (2010).

Commission ruling on their Motion to Consolidate[3] certain of the 2000 - 2001 California Energy Crisis proceedings.[4] For the reasons discussed below, we will deny the California Parties' motions for stay of the above-captioned proceeding.

I. Background

2. On March 21, 2008, the Commission issued an order[5] addressing the remand by the United States Court of Appeals for the Ninth Circuit (Ninth Circuit), *State of California ex rel. Lockyer v. FERC*.[6] 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 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.[7] In order to make such a determination, the Commission found that it would need to supplement the record and permit both buyers and sellers that made short-term purchases or sales to

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[3] *See* California Parties' May 22, 2009 Motion Requesting: (1) Consolidation and Severance of Specified Proceedings; and (2) Summary Disposition; or, in the Alternative, (3) Settlement Procedures and an Evidentiary Hearing in the Consolidated Proceedings, Docket Nos. EL00-95 *et al*., EL02-71 *et al.*, EL01-10 *et al.*, EL09-56-000 (Not Consolidated) (California Parties' Motion to Consolidate).

[4] The California Parties' Motion to Consolidate requests consolidation of the following proceedings: (1) the instant proceeding (Docket No. EL02-71); (2) Docket No. EL00-95, *et al*. (which is on remand from the Ninth Circuit's decision in *Pub. Util. Comm'n of Cal. v. FERC*, 462 F.3d 1027 (9th Cir. 2006) (*CPUC*)); (3) Docket No. EL01-10 (which is on remand from the Ninth Circuit's decision in *Port of Seattle v. FERC*, 499 F.3d 1016 (9th Cir. 2007) (*Port of Seattle*)); and (4) Docket No. EL09-56 (which the California Attorney General initiated on May 22, 2009 by filing a complaint against several named sellers of electricity (CERS Complaint)).

[5] *Cal., ex rel. Bill Lockyer v. B.C. Power Exch. Corp.*, 122 FERC ¶ 61,260 (2008) (March 21 Order), *order on clarification*, 123 FERC ¶ 61,042 (2008) (April 15 Order), *reh'g denied*, 125 FERC ¶ 61,016 (2008) (October 6 Order), *order rejecting request for reh'g*, 129 FERC ¶ 61,276 (2009) (December 28 Order).

[6] 383 F.3d 1006 (9th Cir. 2004), *cert. denied*, 551 U.S. 1140 (2007) (*Lockyer*). The *Lockyer* decision held, among other things, 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 requirements during the 2000 - 2001 period at issue in this proceeding and remanded the case for further refund proceedings. The court did not itself order any refunds, leaving it to the Commission to consider appropriate remedial options.

[7] March 21 Order, 122 FERC ¶ 61,260 at P 32.

the California Independent System Operator (CAISO), the California Power Exchange (CalPX) and the California Energy Resources Scheduling Division of the California Department of Water Resources (CERS) 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.[8]

3. As relevant here, the March 21 Order also denied the California Parties' December 10, 2007 motion to hold the *Lockyer* proceeding in abeyance pending issuance of the Ninth Circuit remands in *CPUC* and *Port of Seattle*, as well as their request for consolidation of all three proceedings.[9] The Commission found that "while [the proceedings at issue] involve many of the same parties and overlapping time periods, the nature and scope of the proceedings remain distinct," and, thus, the proceedings should progress separately.[10] The California Parties sought rehearing of that ruling, which the Commission denied on October 6, 2008.[11] In doing so, the Commission reiterated that "the focus of this proceeding is centered on the market-based rate program and the related quarterly reporting requirement and potential remedies for violations of this filing requirement," and that this is not a proceeding to address other potential tariff violations (such as gaming and anomalous bidding behavior).[12] The Commission clarified that the specific issues involved in *CPUC* and *Port of Seattle* are more appropriately addressed in those other proceedings.

4. Following the Ninth Circuit's remands of *CPUC* and *Port of Seattle* in April 2009, the California Parties filed their Motion to Consolidate requesting that the Commission grant summary disposition of most issues in *Lockyer*, *CPUC*, *Port of Seattle*, and the CERS Complaint and consolidation of those proceedings.[13] On November 19, 2009, the Commission issued an order on remand in the *CPUC* proceeding establishing a separate evidentiary, trial-type hearing before an ALJ to address the issues remanded by the Ninth Circuit, but held the hearing in abeyance to allow settlement discussions.[14]

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[8] *Id*. P 33.

[9] *Id.* P 23.

[10] *Id*.

[11] October 6 Order, 125 FERC ¶ 61,016 at P 41.

[12] *Id*. P 32 (citing March 21 Order, 122 FERC ¶ 61,260 at n.65).

[13] The California Parties' Motion to Consolidate is addressed in an order being issued concurrently with the instant order.

[14] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 129 FERC ¶ 61,147, at P 2, 15 (2009) (*CPUC* Remand Order).

5. The hearing in the instant proceeding commenced on May 1, 2009, the Presiding ALJ issued an Initial Decision on Motions for Summary Disposition on March 18, 2010 (Initial Decision),[15] and the Commission issued its Order Affirming Initial Decision on May, 4, 2011.[16] [17]

II. The California Parties' Motion for Stay

6. On April 22, 2009 and November 13, 2009, the California Parties filed motions for a stay of the hearing date and further hearing procedures in this matter. Specifically, the California Parties request that the Commission reexamine the implications of not consolidating the California Energy Crisis proceedings, and to stay the instant hearing until the Commission rules on the California Parties' Motion to Consolidate. Once the Commission addresses the consolidation request, the California Parties state that appropriate next steps can be determined after consultation with the parties.

7. In support of their motion, the California Parties state that because all of the California Energy Crisis proceedings are now before the Commission and the testimony produced in *Lockyer* has reaffirmed the interconnected nature of the proceedings, "the need for a stay is acute."[18] The California Parties argue that time and resources have been unnecessarily wasted in the *Lockyer* hearing process because testimony has been submitted in this proceeding that overlaps extensively with the issues raised in both their Motion to Consolidate and their CERS Complaint. They argue that these overlapping and disjointed efforts illustrate the injustice and inefficiency of going forward now with the *Lockyer* hearing procedures.[19] Thus, the California Parties insist that the multi-track procedures currently in place will delay rather than advance the ultimate resolution of this case.

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[15] *Cal., ex rel. Bill Lockyer v. B.C. Power Exch. Corp.,* 130 FERC ¶ 63,017 (2010).

[16] *Cal., ex rel. Bill Lockyer v. B.C. Power Exch. Corp.,* Opinion No. 512, 135 FERC ¶ 61,113 (2011).

[17] On March 11, 2011, Commissioner Cheryl A. LaFleur issued a memorandum to the file in sixty dockets, including Docket No. EL02-71, documenting her decision, based on a memorandum from the Office of General Counsel's General and Administrative Law section, dated February 18, 2011, not to recuse herself from considering matters in those dockets.

[18] California Parties' November 11 Motion at 2.

[19] *Id*. at 4-5.

8. The California Parties point to examples, which they state evince the "inappropriateness of the current fragmented procedural scheme."[20] First, the California Parties attach letters to their motion from Senators Dianne Feinstein and Barbara Boxer, expressing concern over the "waste of resources and delays that are occasioned by fragmenting California's refund claims."[21] The California Parties also point to TransAlta's *Lockyer* witness Hnatyshyn, who responds in his testimony to the California Parties' witness Fox-Penner, who did not submit testimony in the *Lockyer* proceeding, but rather in the other interrelated proceedings.[22] Thus, the California Parties explain, sellers see the evidence of gaming and manipulation as being interrelated with the issues set for hearing, and by addressing that evidence in a proceeding where it currently is excluded proves consolidation is necessary. For these reasons, the California Parties request that the Commission stay the *Lockyer* hearing date and associated hearing procedures and deadlines until the Commission has decided the issue of consolidation of California Energy Crisis proceedings.[23]

III. <u>Answers</u>

9. On May 6 2009, Transaction Finality Group (TFG)[24] filed an answer opposing the California Parties' April 22, 2009 motion for stay. On May 7, 2009, the City of Tacoma, Washington, the Port of Seattle, Washington, the Indicated Public Entities,[25] the Western Area Power Administration and the Bonneville Power Administration filed comments on the California Parties' April 22, 2009 motion but did not take a position on the California Parties' request for stay of the *Lockyer* hearing. On November 30, 2009, the Competitive Supplier Group (CSG),[26] NV Energy, and Allegheny Energy Supply Company, LLC

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[20] *Id*.

[21] *Id*. at 3 and Attachment A.

[22] *Id*. at 6.

[23] *Id*. at 8.

[24] For purpose of this pleading TFG includes: Avista Energy Inc., Avista Utilities, IDACORP Energy L.P., Idaho Power Co., MPS Merchant Services Inc., Portland General Electric Co., Powerex Corp., PPL EnergyPlus LLC., PPL Montana LLC, Puget Sound Energy Inc., Sempra Energy Trading LLC, Shell Energy North America (U.S.) L.P., TransAlta Energy Marketing (U.S.) Inc., and TransCanada Energy Ltd.

[25] The Indicated Public Entities are: Modesto Irrigation District, the City of Santa Clara, California, the Sacramento Municipal Utility District, the City of Burbank, California, the Turlock Irrigation District, and the Northern California Power Agency.

[26] For the purposes of this pleading, the CSG includes: American Electric Power Services Corp., Avista Corp., Commerce Energy, Inc., Koch Energy Trading, Inc., Merrill Lynch Capital Services, Inc., MPS Merchant Services, Inc., Powerex Corp.,

(continued…)

(Allegheny) filed answers in opposition to the California Parties' November 13, 2009 motion for stay.

10. TFG argues that the California Parties' April 22, 2009 motion for stay is little other than a rehash of arguments the Commission has already rejected.[27] TFG also states that the motion is improperly directed to the Commission when it should be directed to the Presiding ALJ. TFG concludes that the California Parties have presented no basis for a stay of the *Lockyer* hearing and their motion should be denied.[28]

11. CSG argues that the California Parties' November 13, 2009 motion is at least their fifth in a series of attempts to overturn the Commission's prior determinations that a stay is not appropriate in this proceeding.[29] Moreover, they assert, the California Parties make no attempt to justify a stay upon any of the grounds that the Commission uses when considering such a motion.[30] First, they state the motion makes no assertions as to any "irreparable harm" that the California Parties would suffer without the stay - because there would be none. Regarding the second factor, CSG asserts that a stay will substantially harm all of the parties in this proceeding by further delaying the resolution of this eight-year-old proceeding. As to the third factor, CSG asserts that the California Parties' motion makes no reference to the "public interest."[31]

12. CSG states that the California Parties' motion amounts to an improper renewed request for consolidation.[32] Notwithstanding the fact that there are distinct legal and factual issues involved, and despite the fact that there is only a partial overlap of parties stemming from separately filed complaints, the California Parties nevertheless continue to argue that Commission should consolidate these disparate matters into one omnibus proceeding. Thus, CSG argues, the *Lockyer* proceeding should continue under the current procedural schedule adopted by the ALJ.

13. NV Energy asserts that California Parties' motion for stay should be denied

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Public Service Company of New Mexico, Sempra Energy Trading LLC and Sempra Energy Solutions LLC, Shell Energy North America (U.S.) L.P., TransAlta Energy Marketing (U.S.) Inc., TransCanada Energy Ltd., and Tucson Electric Power Company.

[27] TFG Answer at 3.

[28] *Id.* at 11.

[29] CSG Answer at 2.

[30] *Id*. at 4-5 (citing *City of Vernon, California*, 116 FERC ¶ 61,091, at P 12 (2006)).

[31] *Id.*

[32] *Id*.

because it is merely an attempt to delay a hearing. NV Energy states that the motion restates the California Parties' numerous previous requests for a stay in this proceeding, which the Commission has repeatedly denied, and relies on circular logic where the California Parties cite their own attempts to muddy the record as justification for a stay.[33] NV Energy argues that the so-called "overlapping evidence" in *Lockyer* that the California Parties cite is not relevant to *Lockyer*, but has been improperly shoehorned by the California Parties into the record.[34] NV Energy asserts that the Commission's *CPUC* Remand Order makes the case for a stay and consolidation even less persuasive.

14. Allegheny argues that the California Parties' motion presents no viable reason for a stay in this proceeding. Allegheny asserts that the California Parties' request is merely an attempt to delay a ruling on Allegheny's motion for summary disposition, due to the fact that the California Parties' case-in-chief presented no case as to Allegheny.[35] Allegheny explains that it is presently only a party to two of the four proceedings (*Lockyer* and the CERS Complaint) and that consolidation would force Allegheny (and other parties) to waste significant time and money participating in massive proceedings to which they are not a party and litigating issues in which they have no stake.

15. Moreover, Allegheny states that the two Senators' letters the California Parties attach to their motion indicate that the California Parties' principal concern is not efficiency, but rather escaping the evidentiary burden the Commission has imposed on them. Alleghany states that Senator Feinstein's letter demands that the Commission order sellers innocent of any wrongdoing to make refunds if they "simply benefited from the illegal actions of others."[36] However, Allegheny asserts, the Commission already rejected the California Parties' contention that the alleged market misconduct of some sellers should result in market-wide remedies against all sellers in this proceeding.[37] Thus, Allegheny argues, the Commission should reject the political pressure being applied and allow the *Lockyer* case to proceed, with the evidentiary standards the Commission articulated left intact.

IV. <u>Commission Determination</u>

16. We will deny the California Parties' motions for stay. As noted above, the California Parties have previously requested a stay of this proceeding, which the

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[33] NV Energy Answer at 3.

[34] *Id.* at 5.

[35] Allegheny Answer at 3.

[36] *Id.* at 4.

[37] *Id.* (citing October 6 Order, 125 FERC ¶ 61,016 at P 37-39).

Commission has twice thoroughly considered and denied.[38] Here, in their most recent attempt, the California Parties seek a stay of this proceeding (pending Commission action on their consolidation request) - this time basing their request on the argument that all three of the orders on remand from the Ninth Circuit are now before the Commission and that the testimony produced in *Lockyer* interconnects with those other proceedings. However, this latest rationale presented by the California Parties does not change our view that "the nature and scope of the proceedings remain distinct," and that "it would be inappropriate for the Commission, at this stage in the proceeding, to expand or drastically recast this proceeding."[39] Thus, we find that the California Parties' motions for stay present no new circumstances or evidence justifying their request.

17. We also deny the California Parties' requests for stay of the *Lockyer* proceeding because they are now moot. First, they are premised on the notion that the Commission has not yet ruled on their request for consolidation of the California Energy Crisis proceedings, as discussed in the California Parties Motion to Consolidate. However, the Commission is denying their request for consolidation, in an order being issued concurrently with this order. In addition, the California Parties' motions for stay are moot because the Presiding ALJ has already issued her Initial Decision and the Commission has now affirmed that Initial Decision.

The Commission orders:

The California Parties' requests for stay are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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[38] March 21 Order, 122 FERC ¶ 61,260 at P 23; October 6 Order, 125 FERC ¶ 61,016 at P 32, 41.

[39] October 6 Order, 125 FERC ¶ 61,016 at P 32, 41.