

139 FERC ¶ 61,213  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

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

Docket No. EL02-71-000

v.

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,  
Sellers of Energy and Ancillary Services

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

State of California *ex rel.* Jerry Brown,  
Attorney General for the State of California  
Complainant

Docket No. EL09-56-000  
(Not Consolidated)

v.

Powerex Corp. (f/k/a British Columbia  
Power Exchange Corp.), *et al.*  
Respondents

ORDER DENYING MOTION OF MIECO INC.  
FOR ATTORNEYS' AND CONSULTANTS' FEES

(Issued June 13, 2012)

1. On September 27, 2011 Mico Inc. (Mico) filed a motion requesting that Commission order the California Parties<sup>1</sup> to reimburse Mico for attorneys' and consultants' fees based on its claim that the California Parties sought refunds from Mico in the above-captioned proceedings in bad faith. As discussed below, the Commission denies Mico's motion.

**I. Background**

2. Mico's Motion seeks an award of more than \$1 million attorneys' and consultants' fees<sup>2</sup> that it claims to have incurred to defend itself against what it considers claims made in "bad faith" for refunds in the *Lockyer* Proceeding<sup>3</sup> and the CERS Complaint.<sup>4</sup> The claims were related to sales by Mico during the 2000-2001 California energy crisis into the California Independent System Operator (CAISO) and California Power Exchange Corporation (CalPX) markets and bilaterally to the California Department of Water Resources' California Energy Resources Scheduling Division

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<sup>1</sup> The California Parties are the People of the State of California *ex rel.* Kamala D. Harris, Attorney General, the Public Utilities Commission of the State of California, Pacific Gas and Electric Company (PG&E) and Southern California Edison Company (SCE).

<sup>2</sup> Mico has not provided any exhibits to provide details of the "well over \$1 million" it seeks from the California Parties; instead Mico states that it will, with the Commission's assent, provide a compliance filing (subject to a protective order) providing detailed support for its attorneys' and consultants' fees.

<sup>3</sup> *Cal. ex rel. Lockyer v. B.C. Power Exch. Corp.*, 99 FERC ¶ 61,247, at 62,055 (May 2002 Complaint Order), *reh'g. denied*, 100 FERC ¶ 61,055 (2002) (July 2002 Rehearing Order), *rev'd*, *Lockyer v. FERC*, 383 F.3d 1006, 1015 (9th Cir. 2004), *cert. denied*, 127 S. Ct. 2972 (2007); *on remand, Cal., ex rel. Lockyer v. B.C. Power Exch. Corp.*, 122 FERC ¶ 61,260 (2008) (March 21 Remand Order), *order on clarification*, 123 FERC ¶ 61,042 (2008), *reh'g and clarification granted in part and denied in part*, 125 FERC ¶ 61,016 (2008) (October 6 Remand Rehearing Order), *order rejecting request for reh'g*, 129 FERC ¶ 61,276 (2009); Opinion No. 512, Order Affirming Initial Decision, 135 FERC ¶ 61,113 (2011), *reh'g denied*, 139 FERC ¶ 61,211 (2012).

<sup>4</sup> *Cal., ex rel. Brown v. B.C. Power Exch. Corp.*, 135 FERC ¶ 61,178 (2011) (CERS Complaint Order), *reh'g denied*, 139 FERC ¶ 61,210 (2012).

(CERS). In brief, the *Lockyer* proceeding centered on whether any seller's improper or untimely filing of its quarterly transaction reports masked an accumulation of market power. In the CERS Complaint, the California Attorney General sought refunds from various entities that made short-term bilateral sales to CERS during the period January 18, 2001 to June 20, 2001.<sup>5</sup> The Commission has affirmed the Initial Decision that granted summary disposition in the *Lockyer* proceeding<sup>6</sup> and has dismissed the CERS Complaint.<sup>7</sup>

## **II. Motions and Answers**

3. On September 27, 2011, Mico filed its Motion for Attorneys' and Consultants' Fees (Motion).
4. On October 12, 2011, the California Parties attempted to electronically file their Answer in Opposition to Mico's Motion.
5. On October 13, 2011, the California Parties received a notice of rejection from the Commission that stated the Commission could not process the electronic submission because it had only received the Certificate of Service and not the actual filing. Later the same day, the California Parties resubmitted its Answer in Opposition along with its Motion Requesting Leave to file One Day Out-of-Time. The California Parties state that good cause exists to accept the Answer in Opposition in that they made a good faith effort to file on time, but due to an inadvertent computer error, an incomplete filing was originally submitted to the Commission.<sup>8</sup>
6. On October 21, 2001, Mico filed an Answer and Motion for Leave to File an Answer to the California Parties Answer in Opposition.

## **III. Procedural Matters**

7. For good cause shown, we will grant California Parties' Motion Requesting Leave to file One Day Out-of-Time and accept their Answer in Opposition.

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<sup>5</sup> A detailed factual background for the underlying proceedings is included in the CERS Complaint Order.

<sup>6</sup> See note 3 *supra*.

<sup>7</sup> See note 4 *supra*.

<sup>8</sup> Mico did not object to the Motion Requesting Leave to File One Day Out-of-Time.

8. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Mico's answer and will, therefore, reject it.

#### IV. Discussion

##### A. Mico's Motion

9. Mico first moves that the Commission order the California Parties to reimburse Mico for its attorneys' and consultants' fees incurred in the above-captioned proceedings because refunds stemming from these proceedings were attributable to the alleged bad conduct of other parties, not Mico. Next, Mico states that the California Parties repeatedly failed to comply with the Commission's prior rulings eschewing market-wide remedies and requiring particularized showings of individual market power abuses. According to Mico the California Parties recognized and admitted that Mico did not have market power nor did it engage in any market manipulation. To the contrary, Mico states that, during the California energy crisis, in response to a specific request from the State of California, Mico helped the State, saved the California ratepayers millions of dollars, and after the crisis ended, even earned a letter of commendation from the State. Nevertheless, the California Parties filed these complaints against Mico seeking refunds.

10. Mico then points to the Commission's rejection of California Parties' claims, as evidenced by the Commission's granting summary disposition in the *Lockyer* proceeding and dismissing the CERS Complaint. According to Mico, the California Parties consciously refused to narrow and simplify the *Lockyer* litigation by excusing a party the California Parties knew to be innocent, like Mico, and multiplied this mistake by "unreasonably and vexatiously" naming Mico as a respondent in the CERS Complaint. Cast in this light, Mico describes the California Parties' claims against Mico as unfounded, factually unsupported, and wholly inequitable. Therefore, Mico alleges that the California Parties "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." That is to say that the California Parties unnecessarily engaged Mico in costly and lengthy litigation as part of a "thinly veiled shakedown attempt" to extract an undeserved settlement from an innocent party.

11. Mico states that although the general rule is that parties appearing before the Commission bear their own legal fees,<sup>9</sup> the Commission and other agencies,<sup>10</sup> like the courts, recognizes several exceptions:

First, attorney's fees may be awarded as a punitive response where the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. Second, the Court permits such an award from the beneficiaries of a common fund. Third, attorneys' fees may be awarded pursuant to explicit statutory provision.<sup>11</sup>

12. Further, Mico argues that the Commission, like the courts, may employ its inherent equitable powers to award attorneys' fees as punitive sanctions, in other words, as a remedy.<sup>12</sup> Mico states that the courts have recognized that the Commission has broad equitable powers particularly when imposing remedies:

[W]e observe that the breadth of agency authority is, if anything, at zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates that statute, or regulations, but rather to the fashioning of policies, remedies and sanctions, including enforcement and voluntary compliance programs in order to arrive at maximum effectuation of Congressional objectives.<sup>13</sup>

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<sup>9</sup> Mico Motion at 18 (citing *Columbia Gas Transmission Corp.*, 53 FERC ¶ 61,169, at 61,623 n.26 (1990)).

<sup>10</sup> *Id.* (citing *SEIU v. NLRB*, 68 F.3d 490, 496 (D.C. Cir. 1995) (upholding NLRB award of attorneys' fees)).

<sup>11</sup> *Id.* (citing *Louisiana Power & Light Co.*, 17 FERC ¶ 63,020, at 65,035 (1981) (internal citations omitted); also citing *Columbia Gas Transmission Corp., et al.*, Docket No. TA82-1-21-001, *et al.*, 53 FERC ¶ 61,169, at 61,623 (1990) ("The common fund theory is an equitable doctrine developed by the courts which permits a court to award fees to counsel where counsel has conferred a benefit on others through undertaking the costs and expenses of bringing suit or creating a fund in which others will share.")).

<sup>12</sup> Mico Motion at 19 (citing *Hall v. Cole*, 412 U.S. 1, 5 (1973)).

<sup>13</sup> *Id.* (citing *Niagara Mohawk Power Co. v. F.P.C.*, 379 F.2d 153, 159 (D.C. Cir. 1967); also citing FPA § 309, 16 U.S.C. § 825n (2006)).

And, according to Mico, the Commission has often recognized its equitable powers.<sup>14</sup>

13. Mico argues that the California Parties acted in bad faith, which can include the delay or disruption of litigation, and the “willful disobedience of a court order.”<sup>15</sup> Mico states that bad faith does not require that the case be totally frivolous.<sup>16</sup> Rather, if an improper purpose for the legal tactics exists, the conduct is sanctionable.<sup>17</sup> Moreover, according to Mico, using litigation tactics as an attempt to coerce or extract settlements is an improper purpose.<sup>18</sup>

14. Further, Mico argues that the California Parties ignored the policy that “it is the duty of the parties’ counsel to simplify and narrow the litigation as it progresses, as the Commission encourages and federal courts require.”<sup>19</sup> Indeed, according to Mico, under 28 U.S.C. §1927, federal courts can hold attorneys financially liable for the excessive costs, expenses and attorneys’ fees of their opponents when they “so multipl[y] the proceedings in any case unreasonably and vexatiously.”

15. Finally, Mico argues that it is only fair that it be allowed to seek recovery of its attorneys’ and consultants’ fees since since a utility can recover attorneys’ fees from bad actors.<sup>20</sup> Moreover, Mico cites the Equal Access to Justice Act that permits a

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<sup>14</sup> *Id.* (citing *Black Marlin Pipeline Co.*, 21 FERC ¶ 61,208, at 61,027 (1982) (“The Commission exercising its discretion, has the duty of exploring all equitable considerations.”) (internal citation omitted)).

<sup>15</sup> *Id.* (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-6 (1991); *Hutto v. Finney*, 437 U.S. 678, 689 n.14 (1979)).

<sup>16</sup> *Id.* (citing *Fink v. Gomez*, 239 F.3d 989, 992 (9th Cir. 2001) (finding an attempt to influence or manipulate proceedings in one case in order to gain a tactical advantage in another to be an improper purpose)).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 20 (citing *e.g., Molski v. Mandarin Touch Restaurant*, 347 F. Supp. 2d 860, 865 (C.D. Cal. 2004)).

<sup>19</sup> *Id.* (citing *e.g., Entergy Services, Inc.*, 134 FERC ¶ 63,025, P 28 (2011)).

<sup>20</sup> *Id.* at 20 (citing *e.g., Williston Basin Interstate Pipeline Co.*, 56 FERC ¶ 61,104, at 61,373 (1991) (Commission allows regulated entities to recover Commission related administrative litigation costs in their rates irrespective of whether the utility prevailed in the litigation)).

“prevailing party” to recover attorneys’ fees and expenses in administrative proceedings that are “adversary adjudications” initiated by the agency.<sup>21</sup>

**B. California Parties’ Answer**

16. California Parties state that Mieso’s Motion is meritless and should be denied. California Parties first point to Mieso’s concession that “the established practice” before the Commission is for “parties to bear their own legal fees.”<sup>22</sup> California Parties state that the Commission has never deviated from this established practice and certainly should not do so here. California Parties argue that even if the Commission had the power of the federal courts to award attorneys’ and consultants’ fees for bad faith litigation, Mieso has not come close to meeting the standard used by the courts to award such fees.

17. The California Parties state that they alleged in the *Lockyer* Proceeding and the CERS Complaint, that all sellers, including Mieso, collected unlawful rates, and thus should pay refunds on their CAISO and CalPX sales during May-October 1, 2000 (Summer Period), and on their CERS sales during January - June 2001 (CERS Period), to restore a lawful, just, and reasonable rate level for those transactions. The California Parties alleged that the best proxy for the lawful rate is the mitigated market clearing price (MMCP) methodology that the Commission adopted for refunds in the CAISO and CalPX markets for October 2, 2000 - June 20, 2001 (the Refund Period).<sup>23</sup>

18. The California Parties maintain their position that Mieso made tens of millions of dollars of sales to CERS during the CERS Period and through the CAISO and CalPX markets during the Summer Period – and all of those sales were unlawful. The California Parties also maintain that Mieso failed to comply with the reporting requirements of its market rate tariff, and instead reported only aggregated information, omitting substantial data about its many transactions including the actual price of those transactions. For these sales that California Parties contend were not consistent with the Mieso tariff, the California Parties sought \$6.9 million that was collected by Mieso in excess of the MMCP on Summer 2000 sales in the CAISO and CalPX markets, and approximately \$72 million that was collected by Mieso in excess of the MMCP on CERS sales. The California Parties allege that Mieso is not entitled to a windfall at the expense of California ratepayers for unlawful sales that Mieso made in violation of Commission-

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<sup>21</sup> *Id.* (citing 5 U.S.C. §504(a)(1)).

<sup>22</sup> *See* note 9, *supra*.

<sup>23</sup> California Parties Answer at 3 (citing *San Diego Gas & Elec. Co.*, 96 FERC ¶ 61,120 (2001) (July 25 Order)).

filed tariffs, even if other sellers may have caused more economic harm or contributed more to the energy crisis than Mico did.

19. As to the legal basis for refunds, California Parties argue that there is nothing about the California Parties' legal theories or litigation conduct in either proceeding that approaches the extraordinarily high bar set by federal courts for imposing an award of attorneys' fees for bad faith conduct. California Parties state that Mico's argument that the California Parties' ability to achieve substantial settlements with a host of sellers other than Mico somehow proves that the filing and litigating of the *Lockyer* and CERS cases by the California Parties was designed to "extort" overreaching settlements is illogical. California Parties argue that the substantial value that almost fifty sellers have been willing to pay in settlements achieved to date, an amount that totals several billion dollars and far exceeds any conceivable estimate of the legal costs that they would have expended fighting the cases, suggests that those sellers placed very high values on their perceived liabilities to the California Parties.

### C. Commission's Decision

20. We will deny Mico's motion for attorneys' and consultant's fees. Although the federal courts are empowered to award attorneys' fees where a party has litigated in bad faith, as a limited exception to the general "American Rule" that parties to litigation pay their own attorneys' fees regardless of a lawsuit's outcome,<sup>24</sup> no statute confers such authority on the Commission, and the Commission has never claimed such authority.

21. Moreover, even if the Commission had the power to award attorneys' fees in such circumstances, we believe the California Parties' actions in pursuing refunds in the *Lockyer* and CERS Complaint Proceedings are appropriately characterized as vigorous litigation, not vexatious conduct.

22. Federal courts recognize three exceptions to the American Rule: (1) cases in which a statute or enforceable contract provides for an award of attorney's fees; (2) cases in which a prevailing plaintiff confers a common benefit upon a class or fund; and (3) cases in which a party willfully disobeys a court order or when the losing party has acted in bad faith, vexatious, wantonly or for oppressive reasons.<sup>25</sup> The award of fees pursuant to this exception is an exercise of a federal court's "inherent equitable powers."<sup>26</sup>

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<sup>24</sup> See *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

<sup>25</sup> *F.D. Rich Co., Inc. v. United States*, 417 U.S. 116 (1974).

<sup>26</sup> *Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 253 (2d Cir. 1985).

23. While Mieco asserts that the Commission has adopted these same exceptions to the general rule that parties bear their own legal fees, it cites no case in which the Commission actually did so or awarded attorneys' fees or consultants' fees on any of these bases. Mieco relies on *Columbia Gas Transmission Corp.*, 53 FERC ¶ 61,169 (1990), and two ALJ decisions, *Louisiana Power & Light Company*, 17 FERC ¶ 63,020 (1981) and *Entergy Services, Inc.*, 134 FERC ¶ 63,025 (2011), but we find them inapposite. In *Columbia Gas*, the Commission noted that *courts* are authorized to award attorneys' fees in exceptional circumstances under the common fund theory, but that "the established practice" before the Commission is for parties "to bear their own legal fees" and that there is generally no need for a common fund mechanism in Commission cases, where the public interests are represented by Commission staff and state agencies. *Id.* at 61,623. In *Louisiana Power*, the ALJ quoted the movant's assertion that courts may award counsel fees for bad faith. *Id.* at 65,035. According to Mieco, this demonstrates the ALJ's acknowledgement that the Commission has similar power. However, the ALJ did not actually say this; instead, she analyzed the issue in her discussion on different grounds, and did not award fees. In *Entergy*, an ALJ observed that courts have the power to award attorneys' fees for bad faith or vexatious conduct, *id.* at n. 63, but said nothing about the Commission's own power and made no award of fees.

24. The Commission is aware of no case in which it has adopted these exceptions to the American Rule. To the contrary, in *Greene County Planning Bd. v. Federal Power Com'n*, 455 F.2d 412 (2nd Cir. 1972), the court upheld the Commission's determination that the Commission lacks clear statutory power under the FPA to award attorneys' fees or consultants' fees, and further declined to award fees under equitable powers.

25. Nor are we persuaded by Mieco's assertions that it should be permitted to recover counsel fees here because the Commission awards fees where a jurisdictional tariff "provides for recovery of attorneys' fees" and because "the utility members of the California Parties" can recover legal and consultant fees from their ratepayers. Motion at 21. The fact that a tariff provision provides for attorneys' fees in limited situations or that a utility may recover expenses in rates does not imply that this Commission may award counsel fees under the common law or a statute applicable only to courts.

26. Assuming, *arguendo*, the Commission had the power to grant attorneys' and consultants' fees, the award of such fees under the bad faith exception is appropriate "only when extraordinary circumstances or dominating reasons of fairness so demand."<sup>27</sup> When considering an award of attorneys' fees "[t]he standards for bad faith are

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<sup>27</sup> *Nepera Chemical, Inc. v. Sea-Land Service, Inc.*, 794 F.2d 688, 702 (D.C.Cir.1986).

necessarily stringent.”<sup>28</sup> “Vigorous litigation in an [unsettled area of law] should not be equated with obduracy, wantonness, vexatiousness, or oppression.”<sup>29</sup>

27. We disagree with Mico’s assertion that the Commission’s grant of summary disposition in favor of respondents in the *Lockyer* Proceeding and dismissal of the CERS Complaint equates with a Commission finding that the California Parties’ legal theories were “frivolous, groundless and in wanton disregard for the facts and law” or “harassing attempts to coerce a settlement.”<sup>30</sup>

28. In the Orders disposing of the *Lockyer* proceeding and the CERS Complaint, the Commission did not, and we do not now, consider the California Parties’ legal theories as being “frivolous” or “groundless.” The Commission does not view the rigorous pursuit of a legal claim, based on a theory with which the Commission disagrees, necessarily rises to the level of “bad faith.”

29. Based on this analysis, we consider the California Parties’ settlements with other parties as irrelevant to our decision here.

The Commission orders:

Mico’s motion is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>28</sup> *Adams v. Carlson*, 521 F.2d 168, 170 (7th Cir. 1975).

<sup>29</sup> *Id.* at 170.

<sup>30</sup> Mico Motion at 22.