

141 FERC ¶ 61,087  
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.

San Diego Gas & Electric Company

v.

Docket No. EL00-95-264

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

ORDER DENYING REQUESTS FOR REHEARING AND CLARIFICATION

(Issued November 2, 2012)

1. In this order, we deny requests for rehearing and clarification of an order on rehearing<sup>1</sup> that clarified the scope of the hearing established to address issues on remand from the United States Court of Appeals for the Ninth Circuit (Ninth Circuit).<sup>2</sup>

**Background**

2. In the *CPUC Decision*, the Ninth Circuit expanded the scope of the proceeding to include not only the existing matters subject to refund but also: (1) transactions entered into prior to October 2, 2000; (2) forward transactions;

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<sup>1</sup> *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 135 FERC ¶ 61,183 (2011) (Rehearing Order).

<sup>2</sup> *Pub. Util. Com'n of the State of Cal. v. FERC*, 462 F.3d 1027 (9<sup>th</sup> Cir. 2006) (*CPUC Decision*). On April 15, 2009, the Ninth Circuit issued its mandate for Commission action on this remand. See *Pub. Util. Com'n of the State of Cal. v. FERC*, slip op. No. 01-71051 (Apr. 15, 2009).

and (3) energy exchange transactions. The Commission order on remand<sup>3</sup> established an evidentiary, trial-type hearing before an Administrative Law Judge (ALJ) and instructed the ALJ to gather evidence on: (1) whether prior to October 2, 2000 any of the sellers named as respondents in this proceeding engaged in violations of the relevant tariffs, rules or regulations governing the organized markets operated by the California Independent System Operation Corporation (CAISO) and California Power Exchange Corporation (CalPX); and (2) whether any such violation(s) affected the market clearing price for a trading hour during which the violation occurred.<sup>4</sup> The Commission specified that participants may submit evidence with respect to violations of the then-current CAISO and CalPX tariffs, known as the Market Monitoring and Information Protocol (MMIP), that barred all participants in the CAISO and CalPX markets from engaging in gaming or anomalous behavior in those markets.<sup>5</sup> The Remand Order also defined which categories of the MMIP violations would be addressed in the hearing.<sup>6</sup>

3. The Commission also stated that when it receives the factual determinations of the ALJ with respect to each seller, the Commission will determine what further steps should be taken.<sup>7</sup> In the Remand Order, the Commission also expanded the scope of the hearing to include forward transactions and energy exchange transactions.<sup>8</sup>

4. The Commission received multiple requests for rehearing and clarification of the Remand Order raising issues pertaining to the scope of the hearing. Several parties also filed motions seeking to be dismissed from the instant proceeding, arguing that because they have settled either with the California Parties<sup>9</sup> or Trial Staff, they are no longer parties to the proceeding.

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<sup>3</sup> *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 129 FERC ¶ 61,147 (2009) (Remand Order).

<sup>4</sup> *Id.* P 19.

<sup>5</sup> *Id.* P 20.

<sup>6</sup> *Id.* PP 20-22.

<sup>7</sup> *Id.* P 2.

<sup>8</sup> *Id.* P 3.

<sup>9</sup> For the purpose of this proceeding, the California Parties are Pacific Gas and Electric Company, Southern California Edison Company, the State of

5. Subsequently, the Commission solicited supplemental comments on which violations and unlawful activities should be included in the scope of the instant proceeding.<sup>10</sup> Upon a thorough review of numerous filings submitted in response, the Commission issued the Rehearing Order expanding the scope of the hearing to include: (1) market practices that were previously excluded from the list and definitions of MMIP violation categories in the Show Cause Proceedings; (2) other CAISO and CalPX tariff violations; (3) violations of Commission orders; (4) violations of individual sellers' tariffs; (5) market practices, such as wash trading, gas market manipulation, false reporting to publications that compile price indices, and collusion to the extent such conduct violated a then-current tariff.<sup>11</sup> In the Rehearing Order, the Commission also clarified that the Presiding Judge is to address the following three issues: (1) which market practices and behaviors constitute a violation of the then-current CAISO, CalPX, and individual seller's tariffs and Commission orders; (2) whether any of the sellers named as respondents in this proceeding engaged in those tariff violations; and (3) whether any such tariff violations affected the market clearing price. The Commission specified that the Presiding Judge is to determine in which order to examine the above-listed issues.<sup>12</sup>

6. In addition, the Commission dismissed from the proceeding parties that have settled with the California Parties<sup>13</sup> but denied requests to bar review of the same market practices by parties that settled with Trial Staff.<sup>14</sup>

7. On August 27, 2012, the Presiding Judge issued a partial initial decision granting motions for summary disposition filed by Avista Corporation doing business as Avista Utilities (Avista), Miecoco, Inc., and Shell Martinez Refining Company.<sup>15</sup> In the partial initial decision, the Presiding Judge found that no issue

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California *ex rel.* Edmund G. Brown, Attorney General, and the Public Utilities Commission of the State of California.

<sup>10</sup> *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 132 FERC ¶ 61,209 (2010).

<sup>11</sup> Rehearing Order, 135 FERC ¶ 61,183 at PP 23-30.

<sup>12</sup> *Id.* P 31.

<sup>13</sup> *Id.* PP 10-11.

<sup>14</sup> *Id.* PP 16-18.

<sup>15</sup> *San Diego Gas & Elec. Co.*, 140 FERC ¶ 63,015 (2012), Docket No. EL00-95-269 (Aug. 27, 2012).

of material fact remains against the aforementioned respondents with respect to any claims.<sup>16</sup> This partial initial decision is addressed in a Commission order issued concurrently with this order.<sup>17</sup>

## **Discussion**

### **A. Evidence of Market Conduct of Non-Parties and Settled Parties**

8. On rehearing, the California Parties argue that it is unclear whether they may present evidence of specific tariff violations by any seller, including those that have settled to the extent such evidence is relevant to the scope of the hearing. Accordingly, the California Parties seek clarification that evidence of the market behavior of settled parties is admissible to show violations included in the hearing pursuant to the Remand Order and the Rehearing Order. The California Parties also state that if the Commission will not make the requested clarification, they seek rehearing. The California Parties argue that excluding evidence of the conduct of settled parties would violate the California Parties' due process rights and the Ninth Circuit mandate.

9. The California Parties further explain that they seek the Commission's permission to introduce evidence on the state of the CAISO and CalPX markets during the relevant time to demonstrate that all sellers obtained an unjust and unreasonable price. The California Parties argue that this is necessary to comply with the Ninth Circuit mandate to the Commission to furnish market-wide relief.

10. On rehearing, Dynegy Power Marketing, Inc., Cabrillo Power I LLC, Cabrillo Power II LLC, El Segundo Power LLC, Long Beach Generation LLC, and West Coast Power, LLC (collectively, Dynegy) and Competitive Supplier Group (CSG)<sup>18</sup> argue that while the Rehearing Order explicitly excludes from the scope of the hearing market behavior by non-parties unless introduced to demonstrate specific unlawful practices by respondents,<sup>19</sup> it is not clear whether market behavior by settled parties that have been dismissed from the proceeding as respondents would also be inadmissible. Accordingly, Dynegy and CSG request clarification that market practices of non-parties and settled parties that have been

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<sup>16</sup> *Id.* P 1.

<sup>17</sup> *See San Diego Gas & Electric Co.*, 141 FERC ¶ 61,088 (2012).

<sup>18</sup> CSG includes Avista Energy, Inc. and Avista Corporation doing business as Avista Utilities; Powerex Corp, Shell Energy North America (US) L.P., and TransAlta Energy Marketing (US) Inc.

<sup>19</sup> Dynegy and CSG refer to P 37 of the Rehearing Order.

dismissed from the proceeding are inadmissible unless introduced to demonstrate specific unlawful practices by respondents.

11. In addition, CSG requests clarification that each respondent is potentially liable only in the specific instances in which its own tariff violations are shown to have adversely affected market-clearing prices in a specific hour and not vicariously liable in the event that other sellers' tariff violations affected the market clearing prices in a trading hour in which the said respondent transacted.

### **Commission Determination**

12. In the Rehearing Order, the Commission barred relitigation of the claims that the California Parties may have against the parties with which they have settled, and dismissed the settled parties from the proceeding as respondents.<sup>20</sup> The Commission, however, clarified that:

the settled parties may be subpoenaed to testify as witnesses and may be subject to evidence production and data requests as any other entity that has first-hand knowledge of the events during the relevant period. *Each such request will be subject to the rules of discovery and evidence applicable to the ALJ proceedings.* In addition, the California Parties and other parties are not precluded from offering evidence involving the settled parties' market behavior, *provided such evidence submissions are relevant to the scope of the hearing and meet other applicable rules of evidence.*<sup>21</sup> (Emphasis added).

The Commission further clarified that “[t]he California Parties may introduce evidence pertaining to conduct by non-parties but only for the purpose of demonstrating specific unlawful practices by the respondents in the proceeding.”<sup>22</sup>

13. First, we reiterate that the sellers that have settled with the California Parties were dismissed from the instant proceeding as respondents and thus are no longer considered parties to the proceeding. They, however, may choose to remain in the proceeding as intervenors. Their conduct, as well as non-parties' conduct, may be examined *solely* for the purpose of demonstrating specific unlawful practices by the remaining respondents in the proceeding. Allegations of

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<sup>20</sup> Rehearing Order, 135 FERC ¶ 61,183 at P 10.

<sup>21</sup> *Id.* P 11.

<sup>22</sup> *Id.* P 37.

a stand-alone activity by non-parties and intervenors dismissed as respondents shall not be entertained in the instant proceeding. We find that the above quoted language from the Rehearing Order made this clear and we, therefore, deny Dynegy's and CSG's requests for clarification.

14. Accordingly, we deny the California Parties' request for clarification and rehearing. Allowing submission and examination of the settled parties' conduct without regard to whether such evidence is relevant to showing specific tariff violations by the remaining respondents would amount to subjecting the settled parties to further participation in the proceeding as respondents. We find that would be inappropriate. The Commission has honored the California Parties' due process rights by allowing them to call the settled parties as witnesses and to use evidence of their conduct to prove unlawful market behavior of the remaining respondents. Anything more than that would constitute an infringement upon the settled parties' due process rights.

15. We also disagree with the California Parties that the *CPUC Decision* required a market-wide remedy. In the *CPUC Decision*, the Ninth Circuit stated that "[it does] not prejudge how [the Commission] should address the merits or fashion a remedy if appropriate."<sup>23</sup> Consistent with this directive, the Commission established a trial-type hearing to examine whether specific actions of individual respondents constituted specific tariff violations and if those violations impacted market clearing prices.<sup>24</sup> The Commission left the issue of a specific remedy to be determined at a later stage.<sup>25</sup> We reiterate that this approach is consistent with the Ninth Circuit's mandate and, therefore, deny the California Parties' request for rehearing on this issue.

16. Further, we address CSG's request for clarification that each respondent is potentially liable only in specific instances in which its own tariff violations are shown to have adversely affected market-clearing prices in a specific hour and not vicariously liable in the event that other sellers' tariff violations affected the market clearing prices in trading hours in which the said respondent transacted. We find CSG's request to be outside the scope of this rehearing proceeding. The Remand Order and the Rehearing Order specifically addressed the scope of the hearing, while CSG seeks clarification pertaining to the issue of remedy, which the

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<sup>23</sup> *CPUC Decision* at 1051.

<sup>24</sup> Remand Order, 129 FERC ¶ 61,147 at P 19; and Rehearing Order, 135 FERC ¶ 61,183 at P 31.

<sup>25</sup> Remand Order, 129 FERC ¶ 61,147 at P 2.

Commission reserved for a later stage of the proceeding. This remedy issue, however, is addressed in the concurrently issued order on the partial initial decision.<sup>26</sup> Accordingly, CSG's request for clarification is hereby denied.

**B. Scope of the Hearing**

**1. Quarterly Reporting Violations**

17. The California Parties argue that the Commission erred in excluding sellers' violations of the Commissions' quarterly reporting requirement. The California Parties state that the *Lockyer* proceeding<sup>27</sup> addressed only the market power issues and the Commission specifically excluded from consideration in that proceeding market manipulation issues, stating that they would be addressed in the instant proceeding.<sup>28</sup> According to the California Parties, by excluding the quarterly reporting violations from the scope of the instant proceeding, the Commission deprives the California Parties of the opportunity to show that misreporting was a crucial component of market manipulation schemes. The California Parties argue that excluding such evidence from the instant proceeding and the *Lockyer* proceeding would violate their due process rights.

**Commission Determination**

18. Contrary to the California Parties' assertions, the Rehearing Order did not preclude the California Parties from using the quarterly reporting violations along with other evidence to show manipulative practices that amounted to tariff violations. As stated in *Lockyer* and reiterated in the Rehearing Order,

[w]hile the quarterly data could be used to identify price and trading anomalies, one would need additional evidence to conclude that a market participant had manipulated the market or violated its tariff. To succeed on the merits, the California Parties are thus required to demonstrate that a specific trading practice violated a specific provision in the seller's own tariffs.<sup>29</sup> (Footnote omitted).

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<sup>26</sup> *San Diego Gas & Electric Co.*, 141 FERC ¶ 61,088 (2012).

<sup>27</sup> Docket No. EL02-71, *et al.*

<sup>28</sup> The California Parties cite to *State of Cal., ex rel. Bill Lockyer, Att. Gen. of the State of Cal.*, 125 FERC ¶ 61,016 n.53. (2008).

<sup>29</sup> Rehearing Order, 135 FERC ¶ 61,183 at P 27 (citing *State of Cal., ex rel. Bill Lockyer, Att. Gen. of the State of Cal.*, 125 FERC ¶ 61,016 n.53 (2008)).

19. We reiterate here that a misrepresentation or omission of the trading data in the quarterly reports alone cannot serve as proof that a respondent engaged in a tariff violation.<sup>30</sup> The California Parties must also provide supporting evidence and explain how such omission or misrepresentation along with other activities amounted to a violation of the then-current tariffs. We, therefore, deny the California Parties' request for rehearing on this matter.

2. **Violations of Western System Coordinating Council Reliability Rules**

20. The California Parties challenge the Commission's decision to exclude alleged violations of the Western System Coordinating Council (WSCC) reliability rules. The California Parties argue that the WSCC reliability standards were incorporated by reference into the then-current CAISO tariff and thus a violation of the WSCC reliability standard constitutes a CAISO tariff violation. The California Parties request clarification that the violations of the WSCC reliability rules may be raised to the extent that those violations resulted in a violation of the CAISO or CalPX tariffs and affected the CAISO and CalPX market prices.

**Commission Determination**

21. In the Rehearing Order, the Commission expanded the scope of the hearing beyond the MMIP categories to include all other CAISO and CalPX tariff violations.<sup>31</sup> This allows the California Parties to introduce evidence of any unlawful conduct as long as they can show that such conduct violated a *specific* provision of the then-current CAISO or PX tariff. The Commission, however, did not allow alleged violations of the WSCC reliability rules to be addressed in the hearing. The Commission explained that:

The WSCC reliability rules were only enforceable against entities that had voluntarily entered into an agreement with the WSCC. Parties were also free to withdraw from the WSCC agreement.

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<sup>30</sup> See *State of Cal., ex rel. Bill Lockyer, Att. Gen. of the State of Cal.*, 125 FERC ¶ 61,016 n.53 (2008) (finding that “[a]ny ... manipulative conduct would not likely be revealed solely via the quarterly reports. While the quarterly data could be used to identify price and trading anomalies, one would need additional corroborating evidence to conclude that a market participant had manipulated the market.”)

<sup>31</sup> *Id.* P 26.

Except for violations of the disturbance control standard which triggered an automatic requirement to increase operating reserves, the sole remedy for all other reliability criteria violations was a monetary penalty. In addition, it was up to WSCC to determine whether a violation occurred and pursue sanctions for such violation.<sup>32</sup> (Footnotes omitted).

22. We find that the California Parties did not present any new arguments to support the proposed inclusion of WSCC reliability rules violations in the scope of the hearing. We, therefore, deny the California Parties' request for clarification.

**3. The Exclusion of the Good Faith Obligation under California Law**

23. The California Parties challenge the Commission's decision to exclude the good faith obligation under California law, from the scope of the hearing. The California Parties argue that in prior orders, the Commission applied state law to wholesale power transactions similar to the transactions at issue in the instant proceeding.<sup>33</sup>

**Commission Determination**

24. As explained in the Rehearing Order, considering a state law violation would be beyond the scope of the Ninth Circuit's mandate that the Commission consider "evidence that *tariffs* have been violated."<sup>34</sup> Moreover, it has been the Commission's general policy to encourage parties to continue to resolve most contract disputes, including those based on claims of fraud in the inducement, without the involvement of the Commission, relying on state and federal courts to apply contract law as appropriate.<sup>35</sup> We are not persuaded that the instant

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<sup>32</sup> *Id.* P 29.

<sup>33</sup> The California Parties cite to *Puget Sound Energy, Inc. v. Pac. Gas & Elec. Co.*, 271 B.R. 626, 640 (Bankr. N.D. Cal. 2002); *Minnesota Power & Light Co.*, 52 FPC 617 (1974); *Golden Spread Electric Coop., Inc., v. Southwestern Public Serv. Co.*, 123 FERC ¶ 61,047, at n.273 (2008).

<sup>34</sup> Rehearing Order, 135 FERC ¶ 61,183 at P 30 (citing *CPUC Decision*, 462 F.3d at 1051).

<sup>35</sup> See *Prohibition of Energy Market Manipulation*, 114 FERC ¶ 61,047, at P 37 (2006).

proceeding is the appropriate forum to examine alleged violations of state law. The California Parties' request for rehearing is hereby denied.

**C. Avista**

25. Avista argues that it should have been dismissed from this proceeding as a respondent because in the Rehearing Order, the Commission erred in not recognizing that unlike the Show Cause Proceedings, the proceeding resolved by Avista's settlement with Trial Staff was not an enforcement proceeding under 18 C.F.R. Part 1 but a contested proceeding initiated by the Commission pursuant to Federal Power Act (FPA) section 206.<sup>36</sup> According to Avista, the Ninth Circuit made a distinction between enforcement and adjudicatory proceedings, finding that that "[t]he two types of proceedings are quite distinct. One is investigative and prosecutorial; the other is a contested proceeding."<sup>37</sup> Avista further explains that its FPA section 206 investigation was an open, contested proceeding with all interested parties having ample opportunity to participate. Avista further argues that its market practices should not be reexamined in the instant proceeding because its settlement agreement with Trial Staff found that Avista did not participate in unlawful activities at issue in that proceeding.<sup>38</sup>

**Commission Determination**

26. In the partial initial decision, the Presiding Judge dismissed Avista and two other respondents from the proceeding. In a concurrently issued order, we affirm the partial initial decision.<sup>39</sup> Accordingly, we dismiss Avista's request for rehearing as moot.

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<sup>36</sup> 16 U.S.C. § 824e.

<sup>37</sup> Avista cites to *CPUC Decision*, 462 F.3d 1050.

<sup>38</sup> *Avista Corp.*, 107 FERC ¶ 61,055 (2004).

<sup>39</sup> *San Diego Gas and Electric Co.*, 141 FERC ¶ 61,088 (2012).

**D. Miscellaneous**

**California Parties' Challenge of Commission Response to Bonneville Power Administration's Request for Clarification**

27. The California Parties argue that the clarification provided in paragraph 39 of the Rehearing Order in response to Bonneville Power Administration's (BPA) request for rehearing may be interpreted as suggesting that the original complaint filed by San Diego Gas and Electric Company (SDG&E) did not provide sufficient notice to non-public utilities. According to the California Parties, this would interfere with the market-wide scope of the instant proceeding and thus would violate the California Parties' due process rights.

**Commission Determination**

28. In the Rehearing Order, we were not addressing the issue of sufficiency of notice, as it was not before us.<sup>40</sup> BPA asked the Commission to "clarify the description of SDG&E's complaint included in the Remand Order by specifying that SDG&E's complaint named as respondents only the sellers subject to the Commission's jurisdiction."<sup>41</sup> BPA also asked the Commission to "clarify that the hearing in the instant proceeding was established to investigate the justness and reasonableness of the rates and charges of public utilities that sold energy and ancillary services to or through the CAISO and CalPX."<sup>42</sup>

29. In paragraph 39 of the Rehearing Order, the Commission stated that:

Upon review of specific language in SDG&E's complaint, we agree with BPA that SDG&E's complaint sought "an emergency order capping at \$250 per MWh the prices at which *sellers subject to its jurisdiction* may bid energy or ancillary services" into CAISO and CalPX markets. Further, we agree with BPA that in the August 2000 Order, the Commission instituted a hearing proceeding "to

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<sup>40</sup> We believe that the issue of sufficiency of notice has been settled in the *CPUC Decision* where the Ninth Circuit concluded that "SDG&E's filing of its complaint provided sufficient notice to the market to satisfy [FPA section] 206." *See CPUC Decision*, 462 F.3d at 1046.

<sup>41</sup> Rehearing Order, 135 FERC ¶ 61,183 at P 33.

<sup>42</sup> *Id.*

investigate the justness and reasonableness of the rates and charges *of public utilities* that sell energy and ancillary services to or through” the CAISO and CalPX markets. For these reasons, we grant BPA’s request for clarification. (Footnote omitted).

We find that the language in paragraph 39 of the Rehearing Order provided a sufficient response to BPA’s concerns raised on rehearing; it is sufficiently clear and does not require further clarification. Therefore, we deny the California Parties’ request for clarification on this matter.

### **E. Forward Market Transactions**

30. Constellation NewEnergy, Inc. (NewEnergy) requests clarification that when the Commission clarified in the Rehearing Order that it meant to include in the scope of the hearing forward transactions not block forward transactions, the Commission did not prejudge the issue of whether these transactions should automatically be subject to mitigation. NewEnergy explains that this concern arose from discussions with other participants in the proceeding.

### **Commission Determination**

31. In the Remand Order, the Commission reopened the record to allow participants to supplement the existing record with additional evidence on forward transactions entered into during the refund period (October 2, 2000 – June 20, 2001).<sup>43</sup> The Commission also stated that

If any party wishes to rely on evidence previously submitted to the Commission, it must resubmit that evidence. *The ALJ will then determine which of those transactions, if any, are subject to mitigation and calculate appropriate refunds.*<sup>44</sup> (Emphasis added)

32. The Commission action in the Rehearing Order in regard to forward transactions was limited to correcting the inadvertent error of mislabeling forward transactions in the Remand Order.<sup>45</sup> It is clear from the above quoted language that clarification was not intended to change instructions to the ALJ to first determine which of the forward transactions in question, if any, should be

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<sup>43</sup> Remand Order, 129 FERC ¶ 61,147 at P 4.

<sup>44</sup> *Id.* PP 4 and 28.

<sup>45</sup> Rehearing Order, 135 FERC ¶ 61,183 at P 40.

mitigated, and then propose the methodology for calculating refunds. NewEnergy's request for clarification is therefore denied.

The Commission orders:

(A) The California Parties' request for rehearing and clarification is hereby denied, as discussed in the body of this order

(B) Dynegy's request for clarification is hereby denied, as discussed in the body of this order.

(C) CSG's request for clarification is hereby denied, as discussed in the body of this order.

(D) NewEnergy's request for clarification is hereby denied, as discussed in the body of this order.

(E) Avista's request for rehearing is hereby dismissed as moot, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.