

Investigation of Anomalous Bidding Behavior and Practices in Western Markets	Docket No. IN03-10-081
Fact-Finding Investigation Into Possible Manipulation of Electric and Natural Gas Prices	Docket No. PA02-2-096
American Electric Power Service Corporation	Docket No. EL03-137-042
Enron Power Marketing, Inc. and Enron Energy Services Inc.	Docket No. EL03-180-071
California Independent System Operator Corporation	Docket No. ER03-746-047
Powerex Corp.	Docket Nos. EL03-166-010, EL03-199-010
Powerex Corp.	Docket No. EL03-50-003

v.

California Power Exchange Corporation

ORDER DENYING REHEARING

(Issued December 4, 2013)

1. In this order, the Commission denies a request for rehearing filed by Californians for Renewable Energy (CARE). CARE seeks rehearing of the Commission's October 4,

2013 order¹ approving a contested settlement (Settlement) between Powerex Corp. (Powerex) and the California Parties (collectively, the Parties).²

I. Background

2. The Settlement, which was filed on August 16, 2013, resolved claims arising from events, conduct, and transactions in the Western energy markets during the period January 1, 2000 through December 31, 2001, as they related to Powerex. Under the terms of the Settlement, the Settlement proceeds from Powerex to the California Parties totaled \$750,000,000 as of the execution date of the Settlement. The Settlement included a matrix that allocated the Settlement proceeds to certain entities.³ The Settlement also stated that the Commission's approval of the Settlement will authorize California Independent System Operator Corporation (CAISO) and the California Power Exchange Corporation (CalPX) to conform their books and records to reflect these distributions.⁴ The Settlement provided for certain releases between the California Parties and Powerex.

3. CARE filed initial comments contesting the Settlement. In its comments, CARE asserted that its members – which CARE stated are “end-use ratepayers and QF customer-generators of electricity” – were not afforded an opportunity to participate in the settlement discussions “even though the rate increases imposed on them will not be heard in a public hearing process because of the proposed agreement unless CARE takes

¹ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services*, 145 FERC ¶ 61,015 (2013) (Settlement Order). On March 11, 2011, then-Commissioner Cheryl A. LaFleur issued a memorandum to the file in sixty dockets, including Docket No. EL00-95-000, 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.

² The California Parties are Pacific Gas and Electric Company, San Diego Gas & Electric Company, Southern California Edison Company, the People of the State of California *ex rel.* Kamala D. Harris, Attorney General (California Attorney General), and the California Public Utilities Commission (CPUC). For purposes of the Settlement, the California Parties also include the California Department of Water Resources (acting solely under authority and powers created by California Assembly Bill 1 of the First Extraordinary Session of 2001-2002, codified in Sections 80000 through 80270 of the California Water Code).

³ Joint Explanatory Statement at 21; Settlement and Release of Claims Agreement at Ex. A.

⁴ Joint Explanatory Statement at 22; Settlement and Release of Claims Agreement at § 6.1.

this matter to the courts instead.”⁵ CARE further alleged that the Settlement “aids and abets the California Parties so as to deprive CARE of having or exercising any right under the Constitution.”⁶ CARE also claimed that its president, Mr. Michael Boyd, “was/is the victim of a civil conspiracy by California Parties to violate his civil rights, all actionable under 42 U.S.C. § 1983, to redress violations of federal laws committed by California Parties....”⁷ The Parties filed reply comments opposing CARE’s initial comments.

4. The Commission approved the Settlement. In rejecting CARE’s claims, the Settlement Order explained that the Commission may approve a contested settlement under one or more of the following four approaches: (1) the Commission may make a decision on the merits of each contested issue; (2) the Commission may determine that the settlement provides an overall just and reasonable result; (3) the Commission may determine that the benefits of the settlement outweigh the nature of the objections, and the contesting parties’ interests are too attenuated; or (4) the Commission may determine that the contesting parties can be severed.⁸ In this case, the Commission concluded that CARE’s arguments were without merit.⁹ Specifically, the Commission stated CARE’s arguments raised no genuine issues of material fact and that CARE failed to support any of its assertions. The Commission noted that it had previously found that the CPUC and the California Attorney General, two of the California Parties, represent ratepayers,¹⁰ and that CARE’s contention that ratepayers were not represented was in error. Moreover, the Commission found that CARE provided no basis for asserted rate impacts of the Settlement. Finally, the Commission stated that CARE failed to provide any support for its constitutional and civil conspiracy allegations, and fails to explain why such arguments are properly before this Commission.¹¹

⁵ CARE Comments on the Settlement, Docket No. EL00-95 at 2 (Aug. 26, 2013).

⁶ *Id.* at 3.

⁷ *Id.*

⁸ Settlement Order, 145 FERC ¶ 61,015 at P 23 (citing *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345, at 62,342-44 (1998), *order on reh’g*, 87 FERC ¶ 61,110, *reh’g denied*, 88 FERC ¶ 61,168 (1999) (*Trailblazer*)).

⁹ *Id.* P 24.

¹⁰ *Id.* (citing *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 129 FERC ¶ 61,258, at P 25 (2009)).

¹¹ *Id.*

5. In addition to rejecting CARE's arguments, the Settlement Order granted the requests of CAISO and CalPX that they be held harmless in implementing the Settlement, consistent with Commission orders on similar settlements between the California Parties and settling suppliers in these proceedings.¹²

6. CARE timely sought rehearing of the Settlement Order.

II. Request for Rehearing

7. In its request for rehearing, CARE poses five questions in response to the Settlement Order. Specifically, CARE asks the Commission to explain: (1) under which of the four approaches outlined in *Trailblazer* did the Commission approve the Settlement and why; (2) how Powerex and the California Parties can possibly represent end-use customers and the public interest as opposed to their own interests; (3) how the Commission could protect customers and the public interest by CARE's representatives being excluded from settlement negotiations; (4) why such exclusion does not deny CARE an opportunity to assess the rate impacts the Settlement might have on customers; and (5) why CAISO and CalPX should be held harmless instead of their wholesale energy sales transactions being subject to federal taxation.¹³

8. On November 7, 2013, the Parties filed an answer to CARE's request for rehearing. On November 21, 2013, CARE filed an answer to the Parties.

III. Commission Determination

A. Procedural Matters

9. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2013), prohibits answers to requests for rehearing. Thus, we reject the Parties' answer to CARE's request for rehearing, as well as CARE's answer to the Parties.

B. Substantive Matters

10. We deny rehearing. At the outset, we note that CARE has failed to include a separate Statement of Issues in its request for rehearing, as required by the Commission's Rules of Practice and Procedure.¹⁴ Order No. 663-A states that issues not itemized in a

¹² *Id.* P 25.

¹³ CARE Rehearing Request at 2-4.

¹⁴ 18 C.F.R. § 385.713(c)(2) (2013).

separate statement of issues are deemed waived.¹⁵ Thus, CARE has not properly requested rehearing. On this basis alone, we can and do deny rehearing. We note, in this regard, that we have reminded CARE on numerous occasions that it must adhere to the Commission's procedural requirements, and we once again remind CARE of its obligations to comply with these rules.¹⁶

11. It is also unclear precisely what errors in the underlying order that CARE is alleging. Rather, CARE simply asks questions that do not actually specify any errors in the underlying order. As explained in Rule 713(c)(1) of the Commission's Rules of Practice and Procedure, parties must concisely state the alleged error in the underlying order.¹⁷ Thus, even though the issues that CARE appears to raise have been waived, on their own merits none of the issues constitutes grounds for granting rehearing, and so could deny rehearing on this basis as well.

12. CARE first asks the Commission what *Trailblazer* prong it applied in rejecting CARE's arguments and why. The Settlement Order clearly stated that CARE's

¹⁵ *Revision of Rules of Practice and Procedure Regarding Issue Identification*, Order No. 663-A, FERC Stats. & Regs. ¶ 31,211, at PP 3-7 (2006) (cross-referenced at 114 FERC ¶ 61,284 (2006)).

¹⁶ *See Californians for Renewable Energy, Inc. v. Cal. Pub. Utils. Comm'n, et al.*, 145 FERC ¶ 61,002, at P 12 (2013) (explaining that CARE had failed to file a statement of issues); *San Diego Gas & Elec. Co.*, 130 FERC ¶ 61,183, at n.13 (2010) (noting that CARE had failed to file a statement of issues as part of its request for rehearing); *accord, e.g., Californians for Renewable Energy, Inc. v. Pacific Gas & Elec. Co., et al.*, 134 FERC ¶ 61,060, at P 56, *order denying reh'g*, 134 FERC ¶ 61,207 (2011) ("We find that CARE fails to provide sufficient information to satisfy the Commission rules applicable to complaints."); *San Diego Gas & Elec. Co.*, 131 FERC ¶ 61,082, at P 15 (2010) (rejecting CARE's untimely settlement comments); *San Diego Gas & Elec. Co.*, 131 FERC ¶ 61,083 at P 17 (2010) (same); *Californians for Renewable Energy, Inc. v. Cal. Pub. Utils. Comm'n, et al.*, 129 FERC ¶ 61,075, at P 13-14 (2009), *order denying reh'g*, 131 FERC ¶ 61,102, at P 7 (2010) (finding that CARE failed to satisfy rules governing Federal Power Act section 206 complaints); *Californians for Renewable Energy, Inc. v. Pacific Gas & Elec. Co., et al.*, 129 FERC ¶ 61,141, at PP 10-11 (2009) (same); *Duke Energy Trading and Marketing, L.L.C., et al.*, 126 FERC ¶ 61,234, at P 44 (2009) (denying rehearing request because CARE raised issues for the first time on rehearing).

¹⁷ 18 C.F.R. § 385.713(c)(1) (2013); *see also Union Elec. Co. dba AmerenUE*, 120 FERC ¶ 61,015, at P 5 (2007) ("[P]arties filing requests for rehearing are obligated to set forth in those documents the grounds on which they are based A request for rehearing ... must independently set forth grounds of alleged error in the order at hand").

arguments were without merit and “dispose[d] of them under *Trailblazer’s* first prong.”¹⁸ The Settlement Order also explained why CARE’s arguments were without merit.¹⁹ For example, the Settlement Order stated that CARE failed to raise any genuine issue of material fact. The Settlement Order then addressed each of the arguments that CARE raised in its comments and found that CARE failed to support any of them. Thus, while CARE on rehearing asks what approach the Commission applied and why, we find that the Settlement Order already expressly addressed this question. Therefore, it is unclear what CARE is asking for in its request for rehearing on this issue, or why the Settlement Order was in error in making this finding.

13. CARE then asks the Commission to explain how the California Parties and Powerex represent end-use customers and not their own interests. Again, it is unclear what error in the Settlement Order that CARE is alleging in asking this question. To the extent CARE is questioning the Settlement Order’s conclusion that the CPUC and the California Attorney General have been found by the Commission to represent ratepayers,²⁰ CARE again fails to present any argument as to why this finding, which the Commission has made in a number of cases, was in error.²¹

14. Next, CARE asks how the Commission can ensure that customers and the public interest would be protected by the exclusion of CARE from the settlement negotiations. Again, this is not a specification of error in the Settlement Order. In any event, CARE had an opportunity to review the Settlement and provide comments in response to it once the Settlement was filed with the Commission. Indeed, CARE did file initial comments on the Settlement; however, as the Settlement Order found, the arguments raised in those

¹⁸ Settlement Order, 145 FERC ¶ 61,015 at P 24.

¹⁹ *Id.*

²⁰ To the extent CARE is suggesting that it represents California ratepayers, we see no reason on this record to conclude that that is, in fact, the case, and we have no basis to find that CARE has any statutory or other similar authorization or obligation to represent California ratepayers or to find that CARE is better-positioned than the CPUC or the California Attorney General to represent California ratepayers.

²¹ Settlement Order, 145 FERC ¶ 61,015 at P 24 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 129 FERC ¶ 61,258, at P 25 (2009)). See also *Pub. Utils. Comm’n of the State of Cal. v. FERC*, 988 F.2d 154, 157 (D.C. Cir. 1993) (noting that the CPUC represents the interests of Southern California Edison Company’s ratepayers).

comments were without merit. Moreover, the Commission reviewed the terms of the Settlement and determined that the Settlement was just and reasonable.²²

15. CARE's fourth question is "[w]hy doesn't settlement exclusion deny CARE an opportunity to assess rate impacts [the Settlement] might have on customers?"²³ While not clear, this question appears to simply reiterate the argument CARE made in its initial comments on the Settlement related to rate impacts. We, again, note that the Settlement Order concluded that CARE's arguments were without merit, and CARE does not specify any error in the Settlement Order. To the extent that CARE is taking issue with the Settlement Order's conclusion that CARE did not provide any basis for the Settlement's alleged rate impacts,²⁴ we reject this argument. CARE, which had an opportunity to review the Settlement and file comments on it, provided no support for its assertions regarding alleged rate impacts. Indeed, CARE failed to include any explanation in either its initial comments or its request for rehearing of why it believed that there would be such rate impacts.

16. In its final question, CARE asks how the Commission could hold CAISO and CalPX harmless "rather than having their wholesale energy sales transactions subject to federal taxation?"²⁵ CAISO and CalPX included this request in their initial comments on the Settlement. CARE had the opportunity to respond to this request and failed to take advantage of it.²⁶ Even if we were to address CARE's argument on this issue on the merits, it is not clear what point CARE is trying to make. CARE does not explain how the decision to provide CAISO and CalPX with hold harmless protection in implementing the requirements of the Settlement is at all related to tax treatment or specify how the Settlement Order was in error on this issue.

17. For the reasons discussed above, the Commission denies CARE's request for rehearing. In addition to failing to include a separate Statement of Issues, as required by the Commission's Rules of Practice and Procedure, the questions CARE poses in its request for rehearing do not clearly specify errors in the underlying order and are otherwise without merit.

²² Settlement Order, 145 FERC ¶ 61,015 at PP 24, 26.

²³ CARE Rehearing Request at 4.

²⁴ Settlement Order, 145 FERC ¶ 61,015 at P 24.

²⁵ CARE Rehearing Request at 4.

²⁶ *Cf.* 18 C.F.R. § 385.602(f)(3) (2013) (failure to file comment "constitutes a waiver of all objections . . .").

The Commission orders:

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.