158 FERC ¶ 61,074
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Norman C. Bay, and Colette D. Honorable.

San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator Corporation and the California Power Exchange Corporation	Docket No. EL00-95-300
Investigation of Practices of the California Independent System Operator and the California Power Exchange	Docket No. EL00-98-272

ORDER DENYING MOTION

(Issued January 27, 2017)

1. In this order, the Commission denies the California Parties'[1] Motion to Preserve Remedies/Refunds (Motion). The California Parties filed the Motion in accordance with the terms of their proposed settlement with MPS Merchant Services, Inc., as successor to Aquila Merchant Services, Inc. and Aquila Power Corporation, (MPS) (together with the California Parties, the Parties).[2] The Settlement Agreement proposes to resolve claims arising from events and transactions in the western energy markets during the period of January 1, 2000 through June 20, 2001 as they relate to MPS. As relevant here, section 7.4.8 of the Settlement Agreement conditions the effectiveness of the Settlement Agreement on the Commission's approval of this Motion.

[1] The California Parties are 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, and Southern California Edison Company.

[2] *See* Settlement and Release of Claims Agreement, Docket No. EL00-95-297, § 7.4.8 (filed Dec. 8, 2016) (Settlement Agreement).

I. Background and the California Parties' Motion

2. In Opinion No. 536,[3] the Commission found that the remaining respondents in that proceeding had committed over 34,000 tariff violations from May 1, 2000 through October 1, 2000 (Summer Period), more than 20,000 of which increased market prices and, which, together, caused the excessive prices in California.[4] To remedy the excessive prices paid to sellers, the Commission ordered that the sellers disgorge payments made above the marginal cost-based proxy price, as based on the California Parties' methodology.[5]

3. On rehearing,[6] the Commission clarified that the respondents "found to have engaged in tariff violations impacting the market clearing price are directed to disgorge the amounts received above the marginal cost-based proxy price for *all* sales they made during the trading hours in which the market clearing price was affected by their tariff violations."[7] In so finding, the Commission reasoned:

> By committing a tariff violation that affected the market clearing price, the Respondents benefitted from the sales made at the inflated prices. These unjust overcharges must be disgorged. We agree with the California Parties that the filed rate doctrine prohibits the Respondents from profiting from rates impacted by their own wrongdoing. . . . However, we reiterate that the remedy ordered in this proceeding is seller-specific and applies only to those sellers that committed tariff violations affecting the market clearing prices.[8]

---

[3] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, Opinion No. 536, 149 FERC ¶ 61,116 (2014) (Opinion No. 536).

[4] *Id.* PP 13, 50.

[5] *Id.* PP 209-210.

[6] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 153 FERC ¶ 61,144 (2015) (Opinion No. 536-A).

[7] *Id.* P 1 (emphasis in original).

[8] *Id.* P 142 (citations omitted).

The Commission further noted that sellers complying with existing tariffs had no notice that the price they received may later be changed due to the activities of other market participants.[9]

4. In a subsequent order, the Commission further clarified that the remaining respondents "are liable to disgorge overcharges and excess payments they received for *all* sales during *all* hours of the Summer Period during which the market prices were inflated by tariff violations committed by *any* of the Respondents."[10] However, here, the Commission "reiterate[d] that this ruling does not apply to non-parties and entities that settled with the California Parties."[11]

5. On December 8, 2016, MPS and the California Parties filed with the Commission the executed Settlement Agreement, which seeks to resolve all disputes arising from the events in the western energy markets during the period of January 1, 2000 through June 20, 2001, including those of the Summer Period.[12] The California Parties filed the instant Motion concurrently with the Settlement Agreement, seeking to confirm that by settling with MPS, the California Parties are not reducing the amount of refunds or other relief owed by any of the non-settling respondents.[13] They further argue that if this Motion and the Settlement Agreement are not granted and approved, respectively, then future settlements will be impossible, as each settlement will reduce liability for the remaining respondents, thereby creating an incentive for the remaining respondents to wait for others to settle first, and creating a disincentive for the California Parties to settle with anyone.[14] Accordingly, Section 7.4.8 of the Settlement Agreement conditions the effectiveness of the Settlement Agreement on the Commission's approval of this Motion.[15]

---

[9] *Id.* P 142 n.329.

[10] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 154 FERC ¶ 61,063, at P 8 (2016) (Opinion No. 536-B) (emphasis in original).

[11] *Id.* P 8 n.13.

[12] Joint Explanatory Statement, Docket No. EL00-95-297, at 3 (filed Dec. 8, 2016); Settlement Agreement, Docket No. EL00-95-297, § 3.1.

[13] Motion at 5.

[14] *Id.* at 7.

[15] *Id.* at 6-7. *See also* Settlement Agreement, Docket No. EL00-95-297, § 7.4.8.

II. Notice and Responsive Pleadings

6. On December 14, 2016, the Commission issued a Notice Shortening the Answer Period, requiring answers to the Motion due on or before December 19, 2016.

7. Pursuant to Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213 (2016), the Salt River Project Agricultural Improvement and Power District (Salt River Project), Shell Energy North America (US), L.P. (Shell), and Hafslund Energy Trading L.L.C. (Hafslund) filed timely answers in response to the California Parties' Motion. The California Parties filed an answer to Shell's and Hafslund's answers. And Shell, in turn, filed an answer to the California Parties' answer.

8. Salt River Project requests that the Motion's requested relief be equally applied to it, as an Additional Settling Participant opting into the Settlement Agreement. According to Salt River Project, it, like the investor-owned California utilities, was a net buyer in the markets operated by the California Independent System Operator Corporation and California Power Exchange Corporation during the Summer Period.[16] As such, it claims to face a similar dilemma to the California Parties in that, by settling with MPS, it releases claims against MPS's hours, thereby potentially reducing the number of hours during which violations occurred and, thus, the money that other remaining respondents must disgorge for their sales. As such, Salt River Project requests that the Commission confirm that if it also settles with the remaining respondents by joining in the settlements filed by the California Parties, it would not reduce the amount of refunds or other relief owed to it by any of the non-settling respondents.[17]

9. Hafslund and Shell separately oppose the California Parties' Motion and request the Commission deny it. Hafslund incorporates its September 8, 2016 answer filed in Docket Nos. EL00-95-299 and EL00-98-271 by reference.[18] Specifically, Hafslund argues that approving this Motion would treat MPS different from every other settlement in this proceeding, and thus, would be arbitrary and capricious. Moreover, Hafslund states that approving the relief requested would place it and others in the untenable position of having to defend against claims made against a different entity that will

---

[16] Salt River Project Answer at 3.

[17] *Id.* at 3-4.

[18] This answer was filed by "Indicated Respondents," which included Hafslund, Shell, and MPS, though MPS later withdrew its opposition. *See* Indicated Respondents Answer, Docket No. EL00-95-299 (filed Sept. 8, 2016); Joint Motion of MPS and California Parties to Suspend Opinion No. 536-B Compliance Process and Withdraw Opposition to August 24, 2016 Joint Offer of Settlement, Docket No. EL00-95-292 (filed Nov. 4, 2016).

unlikely be involved in any future proceedings given its settlement with the California Parties.[19]

10. Shell makes three arguments in opposition to the instant Motion. First, Shell argues that granting the requested relief would be unjust and unreasonable because it is contrary to the law of the case in Docket No. EL00-95.[20] Using the Powerex Corporation and Koch Energy Trading, Inc. settlements as examples, Shell explains that, prior to Opinion No. 536-B, the Commission routinely dismissed claims resulting from settling suppliers' violations to prevent them from accruing against remaining respondents. According to Shell, this is consistent with due process in that it protects remaining respondents from being forced to defend against tariff violations they did not commit and for which they were not on notice.[21] Shell asserts that deviating from this now would be arbitrary and capricious. Second, Shell argues that granting the Motion will create precedent by which complainants in this proceeding—or others—could use settlements with some respondents to prevent them from defending themselves to, in turn, pressure remaining respondents to settle so that they are not liable for acts they did not engage in and could not defend against.[22] Third, Shell argues that granting the Motion would engender litigation, not reduce it, and thereby conflict with Commission policy supporting settlements. Here, Shell asserts that, if approved, the MPS Settlement Agreement and this Motion will expand the reach of the MPS Settlement Agreement to non-settling parties, which will force affected respondents to take action to protect their rights.[23]

11. The California Parties argue that Shell's and Hafslund's objections are meritless, and they incorporate their arguments filed in the California Parties' Answer to Indicated Respondents submitted on September 23, 2016 in Docket No. EL00-95-299.[24] Specifically, the California Parties argue that rejecting this Motion will create a disincentive for the California Parties to settle with any respondent because doing so will reduce the amounts owed by non-settling parties. They further argue that section 7.4.8 of the Settlement Agreement does not adversely affect third parties that choose not to settle because, regardless of this settlement, remaining respondents will continue to be liable

---

[19] Hafslund Answer at 2.

[20] Shell Answer at 3-6.

[21] *Id.* at 5.

[22] *Id.* at 6.

[23] *Id.* at 6-7.

[24] California Parties Answer at 5-8.

for the refunds ordered in Opinion No. 536. Lastly, the California Parties argue that section 7.4.8 of the Settlement Agreement does not violate the law of the case or due process because settlements do not establish a precedent for the disposition of claims against non-settling market participants and are carefully tailored to leave non-settling participants unaffected. According to the California Parties, section 7.4.8 simply preserves the Commission-approved remedy for the California ratepayers' injuries; it does not deprive Shell of its due process.

12. Shell retorts that the California Parties' fail to respond to the substance of its arguments relating to the law of the case and due process. It further alleges that the California Parties' failure to reconcile the treatment of previous settlements with section 7.4.8 of the MPS Settlement Agreement speaks volumes regarding the impropriety of the section and this Motion. Shell thus concludes that the Commission must reject this Motion.[25]

III. Discussion

A. Procedural Matters

13. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2016), prohibits answers to answers unless otherwise accepted by the decisional authority. We accept the California Parties' answer and Shell's answer because they helped us in our decision-making process.[26]

B. Substantive Matters

14. We deny the California Parties' motion. While the Commission has long encouraged the settlement of disputes in this proceeding, it has done so in a manner that is consistent with Commission precedent and governing case law. Here, however, the Motion would require us to treat MPS differently from other settled suppliers, which is contrary to relevant precedent. Specifically, in an order defining the scope of the instant proceeding, the Commission explicitly clarified that "parties who have settled with the California Parties [were] . . . dismissed as respondents from the instant proceeding by virtue of their settlements with the California Parties" and "[n]o remedies will be available against the parties who settled with the California Parties."[27] The Commission

---

[25] Shell Dec. 28 Answer at 3-4.

[26] *See* 18 C.F.R. § 385.213(a)(2) (2016).

[27] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 135 FERC ¶ 61,183, at P 10 (2011), *reh'g denied*, 141 FERC ¶ 61,087 (2012) (Scope of the Hearing Order).

reasoned that remaining respondents in the instant proceeding should not be "placed in the undesirable position of having to explain or defend the actions of non-parties."[28] Subsequently, the Commission reaffirmed this approach when it dismissed additional parties that settled with the California Parties in Opinion No. 536 and Opinion No. 536-A establishing a seller-specific remedy for the respondents remaining in the proceeding,[29] while denying the California Parties' request for market-wide remedy.[30] In clarifying the remedy in this proceeding, the Commission was clear that the respondents would not be responsible for tariff violations committed by other sellers that have settled with the California Parties.[31]

15. In a decision that remanded the Docket No. EL00-95 proceeding to the Commission, the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) stated that "[it does] not prejudge how [the Commission] should address the merits and fashion a remedy if appropriate."[32] Consistent with this directive, the Commission has dismissed from the proceeding parties that settled with the California Parties before and during the instant proceeding, excluded the conduct of non-parties from the scope of the proceeding, and emphasized that the trading hours impacted by the settled parties' tariff violations will not be included in disgorgement amounts due from the remaining respondents. The California Parties now propose that the Commission reverse this long-standing approach to application of the remedy in this proceeding without providing a compelling reason for such a reversal. We find no reason to treat MPS, a settling respondent, differently from the dozens of other settling respondents in this proceeding. Accordingly, we deny the California Parties' Motion as inconsistent with the Commission's long-standing approach of excluding the settled parties and their conduct from the scope of this proceeding, including the remedy.

---

[28] Scope of the Hearing Order, 135 FERC ¶ 61,183 at P 37, *reh'g denied*, 141 FERC ¶ 61,087 at PP 13-14.

[29] Opinion No. 536, 149 FERC ¶ 61,116 at P 18 (dismissing as respondents from the instant proceeding settled parties California Polar Power Brokers, LLC, Avista Energy, Inc., Powerex Corporation, TransAlta Energy Marketing, and the California Department Water Resources State Water Project); Opinion No. 536-A, 153 FERC ¶ 61,144 at n.8 (dismissing as a respondent Koch Energy Trading, Inc.).

[30] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 141 FERC ¶ 61,088, at P 25 (2012); Opinion No. 536-A, 153 FERC ¶ 61,144 at PP 195-196.

[31] *See* Opinion No. 536-B, 154 FERC ¶ 61,063 at P 8 n.13.

[32] *Pub. Utils. Comm'n of Cal. v. FERC*, 462 F.3d 1027, 1051 (9th Cir. 2006).

16. We further reject the California Parties' argument that the net result of granting the Motion has no effect on Shell's or Hafslund's rights. Contrary to the California Parties' position that Shell or Hafslund will be in the same position regardless of whether we grant this Motion, the effect of granting the Motion will result in a settled respondent's tariff violations being included in the remedy applicable to the remaining respondents, such as Shell and Hafslund. As discussed above, this is inconsistent with the Commission's previous findings that the remedy, as clarified in Opinion No. 536-B, does not extend to tariff violations committed by respondents who have settled with the California Parties.[33]

17. Because we are denying the Motion, we dismiss Salt River Project's argument that the relief sought in the Motion be equally applied to it as an Additional Settling Participant to the Settlement Agreement.

18. Finally, we recognize that section 7.4.8 of the Settlement Agreement provides that the effectiveness of the Settlement Agreement is contingent on the Commission's granting this Motion. While we are denying the Motion, we are not at this time ruling on the Settlement Agreement itself and note that the California Parties and MPS may withdraw and revise the Settlement Agreement. Accordingly, before the Commission issues an order on the filed Settlement Agreement, we will give the California Parties 30 days from the date of this order to notify the Commission whether the Parties intend to revise the Settlement Agreement to address the concerns noted herein, or whether they intend to withdraw it entirely from Commission consideration.

The Commission orders:

(A) The California Parties' Motion to Preserve Remedies/Refunds is hereby denied, as discussed in the body of this order.

[33] We also find the California Parties' argument that denying the Motion will make future settlements impossible to be speculative.

(B) The California Parties are hereby directed, within 30 days of the date of this order, to notify the Commission whether the Parties intend to revise the Settlement Agreement or withdraw it from Commission consideration.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary