

136 FERC ¶ 61,037
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services; Investigation of the Practices of the California Independent System Operator Corporation Docket Nos. EL00-95-261
EL00-98-243

ORDER DENYING REHEARING

(Issued July 15, 2011)

1. In this order, we deny the California Parties' (Cal Parties)¹ request for rehearing of an order issued on March 24, 2011 that rejected a filing that was submitted by Avista Energy, Inc. (Avista) in response to a prior Commission order in the cost offset phase of the California refund proceeding.²

¹ For the purposes of this rehearing request, Cal Parties are Pacific Gas and Electric Company; Southern California Edison Company; the State of California *ex rel.* Kamala D. Harris, Attorney General; and the Public Utilities Commission of California.

² *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 134 FERC ¶ 61,229 (2011) (March 24, 2011 Order). Avista submitted its filing in response to an order issued on June 18, 2009. *See San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 127 FERC ¶ 61,269 (2009) (June 18, 2009 Order).

I. Background

2. The evolution of the California refund proceeding, and the cost offset filings in particular, have previously been described at length.³ Thus, only the relevant background details are described briefly here.⁴

3. In the January 26, 2006 Order, the Commission determined which sellers had demonstrated that the refund methodology resulted in an overall revenue shortfall for their transactions in the California markets during the refund period⁵ and established the eligible amount of cost offsets. In that order, the Commission accepted the return on investments (ROI) claimed by Avista in its cost offset filing.⁶ Cal Parties requested rehearing of this determination, arguing that Avista failed to support its claimed ROI.⁷

4. In the June 18, 2009 Order, the Commission granted Cal Parties' request for rehearing on the Avista ROI issue, finding that Avista's demonstration failed the established requirements. The Commission explained that "Avista should only be allowed recovery on amounts of the funds that it actually used to fund operations or investment, not on the amount available in an open credit line."⁸ Accordingly, the Commission rejected Avista's claimed ROI and directed Avista to revise its approved offset submission with CAISO.⁹ The Commission denied Cal Parties' request for

³ See, e.g., *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 114 FERC ¶ 61,070 (2006) (January 26, 2006 Order); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.* 95 FERC ¶ 61,418 (2001) (June 19, 2001 Order).

⁴ On March 11, 2011, Commissioner Cheryl A. LaFleur issued a memorandum to the file in sixty dockets, including Docket No. EL00-95, 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.

⁵ The Commission established the refund period as the period from October 2, 2000 through June 20, 2001. June 19, 2001 Order, 95 FERC ¶ 61,418.

⁶ January 26, 2006 Order, 114 FERC ¶ 61,070 at P 119.

⁷ Cal Parties February 27, 2006 Request for Rehearing of January 26, 2006 Order, Docket Nos. EL00-95-000 and EL00-98-000, at 75-76.

⁸ June 18, 2009 Order, 127 FERC ¶ 61,269 at P 298.

⁹ *Id.*

rehearing as it pertained to all other issues related to Avista, including Cal Parties' request that the Commission reject Avista's cost offset filing in its entirety.¹⁰

5. On July 20, 2009, Avista filed with the Commission what it characterized as a compliance filing that eliminated amounts available in an open credit line from invested capital for purposes of determining a revised ROI.¹¹ Cal Parties protested the July 2009 Filing, arguing again that the Commission should reject Avista's entire cost offset filing because it violated the directives of the June 18, 2009 Order.¹² Cal Parties also argued that Avista's July 2009 Filing failed to comply with the terms of a settlement involving APX, Inc. (APX)¹³ that allegedly required Avista to reduce its cost offset filing by \$400,000 and to remove APX-related charges.¹⁴

6. In the March 24, 2011 Order, the Commission rejected the July 2009 Filing, explaining that Avista was not entitled to any cost offset related to ROI and clarifying that the Commission did not direct Avista to make a compliance filing in the June 18, 2009 Order.¹⁵ The Commission also rejected Cal Parties' request to reject Avista's entire cost offset, finding that this request constituted an impermissible collateral attack on prior Commission orders that approved the majority of Avista's claimed cost offsets.¹⁶ The Commission explained that it had "previously considered and rejected such arguments on multiple occasions," and concluded that "Avista's erroneous submission of a compliance filing in response to the June 18, 2009 Order does not open the door for Cal Parties to make another attempt to challenge Avista's entire cost offset."¹⁷ The Commission also

¹⁰ *Id.* P 278-279, 283-284, 288-289, 291, 295-296.

¹¹ Avista July 20, 2009 Filing, Docket Nos. EL00-95-229 and EL00-98-214 (July 2009 Filing).

¹² Cal Parties March 29, 2009 Protest, Docket Nos. EL00-95-000 and EL00-98-000, at 5-8) (Cal Parties Protest).

¹³ The Commission accepted the APX settlement and associated term sheet in *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 118 FERC ¶ 61,168 (2007) (APX Settlement Order).

¹⁴ Cal Parties' Protest at 8-9.

¹⁵ March 24, 2011 Order, 134 FERC ¶ 61,229 at P 13-14.

¹⁶ *Id.* P 15-16.

¹⁷ *Id.* P 16.

rejected Cal Parties' argument regarding the \$400,000 adjustment related to the APX settlement as an impermissible collateral attack on the June 18, 2009 Order.¹⁸

7. Cal Parties filed a request for rehearing. Avista filed a motion to reject Cal Parties' request for rehearing or, in the alternative, an answer. Cal Parties filed an answer to Avista's motion.

II. Request for Rehearing

8. Cal Parties again argue that the Commission should reject Avista's entire cost offset. Cal Parties claim that Avista has failed to meet the Commission's requirements for the cost offset filings. Cal Parties also contend that the Commission, despite the alleged deficiencies in Avista's cost offset filings, has granted Avista multiple opportunities to re-do its cost offset filing without affording other parties a meaningful opportunity for review and comment. Cal Parties assert that Avista's cost offset filing has been a "moving target," despite prior Commission statements that Cal Parties "should not have to address moving targets."¹⁹

9. Cal Parties also repeat their previous argument that the Commission should require Avista to remove the \$400,000 related to the APX settlement. Cal Parties assert that, after the Commission initially approved Avista's cost offset filing in the January 26, 2006 Order, Avista agreed to reduce its cost offsets by \$400,000 as part of the APX settlement.²⁰ Cal Parties claim, therefore, that the March 24, 2011 Order errs by allowing Avista to retain the \$400,000 in its cost offset filing. Cal Parties also argue that the Commission mischaracterized this issue as a collateral attack in the March 24, 2011 Order because the prior orders cited by the Commission addressed issues that pre-dated the APX settlement, which was accepted by the Commission in 2007. According to Cal Parties, because Avista agreed in the term sheet accompanying the APX settlement to reduce its cost offset by \$400,000, it is Avista's continued claim of the \$400,000 offset, and not Cal Parties objection thereto, that constitutes a collateral attack on a prior Commission order.²¹

¹⁸ *Id.* P 17.

¹⁹ Cal Parties April 25, 2011 Request for Rehearing, Docket Nos. EL00-95-261 and EL00-98-243, at 7 (Cal Parties' Rehearing Request).

²⁰ APX Settlement Order, 118 FERC ¶ 61,168.

²¹ *Id.* at 8-9.

III. Procedural Matters

10. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2011), prohibits an answer to a request for rehearing. We will therefore reject the answers filed by Avista and Cal Parties.

IV. Discussion

11. We deny Cal Parties' request for rehearing. Regarding Cal Parties' request that the Commission reject Avista's entire cost offset, we find that Cal Parties have not presented arguments or evidence that have not already been considered and rejected by the Commission. The Commission has, on multiple occasions, rejected Cal Parties' objections and affirmed its acceptance of Avista's cost offset filing.²² As the Commission explained in the March 24, 2011 Order, "Avista's erroneous submission of a compliance filing in response to the June 18, 2009 Order does not open the door for Cal Parties to make another attempt to challenge Avista's entire cost offset."²³

12. With respect to the APX settlement issue, we find that Cal Parties' arguments are without merit. Contrary to Cal Parties' assertion in the March 24, 2011 Order, the Commission did not find that Cal Parties' protest was a collateral attack on Commission orders that pre-dated the APX settlement, which was approved by the Commission on March 1, 2007.²⁴ Rather, the Commission expressly rejected Cal Parties' argument as "an impermissible collateral attack on the June 18, 2009 Order."²⁵ In the June 18, 2009 Order, the Commission found that, because it had directed sellers to utilize the final APX revenue data provided by APX, Avista's final revenue data would conform to APX settlement data upon final submittal to the CAISO.²⁶ On rehearing of the June 18, 2009 Order, the Commission clarified that Avista's cost offset had been reconciled with the final APX settlement data and found that no further adjustments to Avista's cost offset

²² March 24, 2011 Order, 134 FERC ¶ 61,229 at P 15-16; June 18, 2009 Order, 127 FERC ¶ 61,269 at P 278-279, 283-284, 288-289, 291, 295-296, 298; *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 117 FERC ¶ 61,151, at P 12-14 (2006).

²³ March 24, 2011 Order, 134 FERC ¶ 61,229 at P 16.

²⁴ See APX Settlement Order, 118 FERC ¶ 61,168.

²⁵ March 24, 2011 Order, 134 FERC ¶ 61,229 at P 17.

²⁶ June 18, 2009 Order, 127 FERC ¶ 61,269 at P 283-284 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 58).

related to the APX settlement were necessary.²⁷ These findings relate specifically to the affect of the APX settlement on Avista's cost offset; Cal Parties' have not presented any new or independent reason to reconsider the Commission's prior findings. Therefore, we continue to find that Cal Parties' attempt to raise this issue constitutes an impermissible collateral attack on the June 18, 2009 Order.

The Commission orders:

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

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

²⁷ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 131 FERC ¶ 61,144, at P 10 (2010). We note that the Commission made this clarification in response to a joint rehearing request submitted by APX and Avista; Cal Parties did not request rehearing of this issue.