

141 FERC ¶ 61,088
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

Docket No. EL00-95-269

v.

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

ORDER AFFRIMING FINDINGS IN PARTIAL INITIAL DECISION AND
REJECTING REQUEST FOR MARKET-WIDE REMEDY

(Issued November 2, 2012)

1. This case is before the Commission on exceptions to a Partial Initial Decision issued on August 27, 2012.¹ In the Partial Initial Decision, the Presiding Judge granted motions for summary disposition submitted by Avista Corporation D/B/A/ Avista Utilities (Avista), Mico, Inc. (Mico) and Shell Martinez Refining Company (Shell Martinez) (collectively, Respondents) and terminated all claims against the Respondents on the ground that no issue of material fact remains against them with respect to any claims.²

2. In this order, the Commission affirms the Partial Initial Decision. Specifically, the Commission affirms the Presiding Judge's finding that complainants presented no allegations or facts demonstrating that Avista, Mico and Shell Martinez engaged in any tariff violations that impacted the market clearing price in any trading hours during the

¹ *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, Docket No. EL00-95-269 (Aug. 27, 2012) (*Partial Initial Decision*).

² *Id.* P 1.

relevant period.³ Accordingly, the Commission finds that the Respondents are not subject to any liability and therefore dismisses the Respondents from the proceeding, thereby terminating all claims against them.

I. Background

3. This case was remanded to the Commission in April 2009 by the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) decision which expanded the scope of the California refund proceeding to also include the following issues requiring further consideration by the Commission: (1) whether relief is warranted for possible tariff violations committed prior to October 2, 2000; and (2) whether relief is appropriate for forward market transactions and energy exchange transactions which were previously excluded from the scope of the remanded refund proceeding.⁴

4. On remand, the Commission established an evidentiary, trial-type hearing before an Administrative Law Judge and instructed the Presiding Judge to gather evidence on: (1) whether any of the sellers named as respondents in this proceeding engaged in violations of the relevant tariffs, rules or regulations governing the markets in effect prior to October 2, 2000 in 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.⁵

5. 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

³ May 1, 2000 through June 20, 2001.

⁴ *Pub. Util. Comm'n of the State of Cal. v. FERC*, 462 F.3d 1027 (9th Cir. 2006) (*CPUC Decision*). Ninth Circuit issued its mandate for Commission action on this remand on April 15, 2009. See *Pub. Util. Comm'n of the State of Cal. v. FERC. slip. op. No. 01-71051* (Apr. 15, 2009).

⁵ *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 129 FERC ¶ 61,147, at P 19 (2009) (*Remand Order*).

be taken.⁶ In the Remand Order, the Commission also expanded the scope of the hearing to include forward transactions and energy exchange transactions.⁷

6. Subsequently, in a rehearing order, the Commission expanded the scope of the hearing⁸ and 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.⁹

7. The hearing in this proceeding commenced on April 11, 2012. Complainants (California Parties)¹⁰ concluded their case-in-chief on June 4, 2012. On June 6, 2012, the Respondents filed a joint motion for summary disposition of all claims against them arguing that the complainants had neither alleged nor proven any facts against them, as required in the Remand Order and the Rehearing Order.

8. On June 12, 2012, the Presiding Judge suggested to the parties to enter into a stipulation. The Presiding Judge approved the parties' stipulations of fact in an order issued on June 19, 2012.¹¹ The Stipulation Order approved the following stipulations of fact:

1. Avista, Mieco, and Shell Martinez are not alleged to have violated the then-current CAISO, CalPX, or individual seller's tariffs or

⁶ *Id.* P 2.

⁷ *Id.* P 3.

⁸ *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 135 FERC ¶ 61,183, at PP 23-30 (2011) (*Rehearing Order*).

⁹ *Id.* P 31.

¹⁰ The California Parties are: The People of the State of California, *ex rel.* Kamala D. Harris, Attorney General of the State of California, the Public Utilities Commission of the State of California, Pacific Gas and Electric Company, and Southern California Edison Company.

¹¹ *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, Docket No. EL00-95-248, at 1 (June 19, 2012) (*Stipulation Order*).

Commission orders during the summer period of May 1, 2000 to October 1, 2000.

2. Avista, Mico, and Shell Martinez are not alleged to have affected the market clearing price in any hour during the summer period of May 1, 2000 to October 1, 2000.
3. Avista, Mico, and Shell Martinez are not alleged to have engaged in multi-day or exchange transactions during the Refund Period of October 2, 2000 to June 20, 2001.

9. On July 10, 2012, Avista and Shell filed another joint motion requesting dismissal of all claims. On August 27, 2012, in response to this joint motion and the earlier motion for summary disposition that included Mico, the Presiding Judge issued the Partial Initial Decision dismissing the Respondents from the proceeding on the ground that there remains no issue of material fact in regard to claims against the Respondents.

II. Partial Initial Decision

10. In the Partial Initial Decision, the Presiding Judge found that “[a]s stipulated, these three respondents committed no violations and therefore [the Presiding Judge] had no violations to report [to the Commission] which had affected the market clearing price.”¹² Upon consideration of whether the Presiding Judge has authority to grant a motion for summary disposition, he concluded that because the Remand Order was silent on actions regarding non-violators, the Presiding Judge has the authority to dismiss the Respondents from the proceeding.¹³

11. Furthermore, in response to the California Parties’ contention that the dismissal of non-violators would impact their ability to seek a market-wide refund or remedy, the Presiding Judge noted that:

Whether any such remedies will result and to whom they will be applied is a decision which the Commission has reserved for itself. Should the Commission adopt a market-wide refund, the Commission will determine which categories of market participants will be subject to the refund, i.e. present and former parties, non parties, or all categories.¹⁴

¹² *Partial Initial Decision* at P 10.

¹³ *Id.* P 11.

¹⁴ *Id.* P 13.

12. Further, the Presiding Judge rejected CALifornians for Renewable Energy, Inc. (CARE) request to include the complainants that are investor-owned utilities (IOUs) as respondents in this proceeding, as there were no formal claims filed against those IOUs.¹⁵

III. Briefs on Exception

A. The California Parties

13. The California Parties filed exceptions to the Partial Initial Decision. The California Parties argue that to the extent the Partial Initial Decision is construed as addressing the factual issue of whether tariff violations affected the market prices received by all sellers, or limited in any way the relief available to the California Parties against all respondents, the Partial Initial Decision erred by dismissing the Respondents without first assessing whether tariff violations by any seller affected the market clearing price received by all sellers. The California Parties assert that the *CPUC Decision* and the Remand Order require consideration of market-wide effects to properly adjudicate the California Parties' claims for market-wide relief.

14. Specifically, the California Parties argue that this matter was remanded to the Commission because the Ninth Circuit rejected piecemeal adjudication of the California energy crisis proceedings, finding that a seller-by-seller inquiry improperly foreclosed the ability of the California Parties to make their case for market-wide relief. California parties assert that determining whether any sellers violated any tariff provisions, and whether any such tariff violations affected the market clearing price received by all sellers requires factual findings regarding tariff violations by any single seller that affected the market-clearing price. They complain that the Partial Initial Decision focuses instead on the question of whether any of the three Respondents committed tariff violations that affected the market-clearing price. Thus, the California Parties argue that the Presiding Judge's findings in regard to the Respondents, like all the other sellers, should be addressed as part of the comprehensive record that the Commission will receive once the Presiding Judge issues the full Initial Decision in this proceeding.

¹⁵ *Id.* P 14.

B. CARE

15. In its brief on exception filed with the Presiding Judge, instead of the Commission, CARE requests that the Presiding Judge take official notice of the Partial Initial Decision, a Commission action¹⁶ and a court decision¹⁷ in two unrelated cases.¹⁸

16. In addition, CARE excepts to the Partial Initial Decision's rejection of its request to include the complainants that are also investor-owned utilities as respondents in this proceeding, because they also violated the rules and tariffs when they made sales into the California organized auction market.

IV. Reply Briefs on Exception

17. In its reply brief, Trial Staff states that it disagrees with the California Parties' interpretation of the *CPUC Decision* and the Remand Order. Specifically, Trial Staff argues that contrary to the California Parties' assertion, the Remand Order did not require the Presiding Judge to examine the impact of other sellers' acts on prices received by the Respondents. According to Trial Staff, the Commission charged the Presiding Judge with three responsibilities: (1) determining which market practices constituted violations; (2) identifying which suppliers had committed those violations; and (3) determining whether those violations affected market clearing prices.

18. In addition, Trial Staff argues that the Commission is under no mandate from the Ninth Circuit to do anything more than allow the California Parties to advance the concept of a market-wide remedy and provide a "reasoned response" to that contention. Trial Staff also states that as explained in the Commission's prior order, "[t]o require

¹⁶ In *CARE v. Cal. Pub. Util. Comm'n*, 140 FERC ¶ 61,154 (2012), the Commission declined to initiate an enforcement action under section 210(h)(2)(A) of the Public Utility Regulatory Policies Act of 1978 (PURPA) against Pacific Gas and Electric Company, Southern California Edison Company, Mountain View Power Partners, California Department of Water Resources, and the California Public Utilities Commission. (*Notice of Intent Not to Act*).

¹⁷ CARE refers to *City of Redding v. FERC*, Case No. 09-72775 (9th Cir. 2012) (*Redding*).

¹⁸ On September 14, 2012, the Presiding Judge issued an order denying CARE's request to take official notice and rejecting its brief on exception. See *San Diego Gas and Electric Co. v. Seller of Energy and Ancillary Serv.*, Docket No. EL00-96-269 (Sept. 14, 2012).

refunds of a seller that obeyed the orders, rules and regulations and had no notice that sales would be subject to refunds runs counter to fundamental notice provisions of the Federal Power Act,”¹⁹ and sellers who did not commit violations and had no notice that the rates they charged were under scrutiny should not be subject to disgorgement under section 309 of the Federal Power Act (FPA).

19. In its reply brief, the Respondents state that since the California Parties do not allege or prove that the Respondents committed any tariff violations, no retroactive remedy is available to them against the Respondents, and claims against the Respondents should therefore now be dismissed. In support, the Respondents argue that while the *CPUC Decision* did not provide direction on a specific remedy the Commission may fashion, the Ninth Circuit made it clear that the FPA vests the Commission with authority “to require that entities *violating* the [FPA] pay restitution for profits gained as a result of a statutory or tariff violation.”²⁰ According to Respondents, this language indicates that the Ninth Circuit did not intend to subject non-violators to restitution or other liability.

20. Respondents further argue that just because this proceeding has been conducted under FPA section 309, the Commission does not have the authority to impose a vicarious liability on non-violators. Respondents explain that section 309 was designed to augment, not override the Commission’s authority under section 206 that does not allow retroactive refunds.²¹ Respondents thus conclude that restitution is the only remedy available in this case and it requires a showing of wrongdoing by a specific seller.

21. Respondents also argue that retroactive vicarious liability will increase price uncertainty, be detrimental to the efficiency of organized markets, and would weaken the price-setting function of single-price auctions. In conclusion, Respondents request that the Commission dismiss them from the proceeding without further delay.

¹⁹ Trial Staff cites to *State of Cal. ex rel. Bill Lockyer v. British Columbia Power Exchange Corp.* 125 FERC ¶ 61,016, at P 38 (2008).

²⁰ Respondents cite to *CPUC Decision* at 1048 (*emphasis added by Respondents*).

²¹ Respondents cite to *Albany Engineering Corp. v. Hudson River-Black River Regulating Dist.*, 127 FERC ¶ 61,174, at P 33 (2009) (*citing Pub. Serv. Comm’n of State of New York v. FPC*, 327 F. 2d 893, 896-97 (D.C. Cir. 1964), *Niagara Mohawk Power Corp. v. FERC*, 379 F. 2d 153 at 158 (D.C. Cir. 1967), and *New England Power Co. v. FERC*, 467 F. 2d 425 at 430-31 (D.C. Cir. 1972)).

22. In their reply brief, the California Parties respond to CARE by arguing that CARE does not have claims against the California Parties in this proceeding. The California Parties state that this proceeding is a complaint proceeding brought by the victims of the California energy crisis and is not a forum for CARE's claims under PURPA²² against the California regulators and investor-owned utilities. In addition, the California Parties contend that the *Redding* case and the Commission-issued Notice of Intent Not to Act that CARE wants the Commission to take official notice of are irrelevant to the matters being addressed in the instant proceeding.

V. Commission Determination

23. We affirm the Presiding Judge's Partial Initial Decision terminating the claims against the Respondents, as no issue of material fact remains against them with respect to any claims. We also address California Parties' brief on exceptions, as discussed below.

24. While the California Parties do not dispute the Presiding Judge's factual findings that the California Parties have not alleged or proven any claims against the Respondents, the California Parties are seeking assurance from the Commission that the dismissal of the Respondents from the proceeding will not preclude the California Parties' ability to receive a market-wide relief. The California Parties argue that the market-wide remedy was mandated in the *CPUC Decision*. We disagree. 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*."²³ It is clear that the Ninth Circuit did not mandate a specific remedy in this proceeding and left it to the Commission's discretion to determine which remedy would be appropriate within the confines of the Commission's statutory authority.

25. Now we turn to the question of whether the market-wide remedy would be appropriate in this proceeding. We find that the market-wide remedy will not be appropriate in this proceeding because it would be inconsistent with the notice requirement under the FPA. Section 206 of the FPA precludes retroactive refunds by requiring that market participants receive notice before their transactions may be subject to refund. The fact that alleged tariff violations committed prior to the October 1, 2000 refund effective date established in this proceeding are being examined pursuant to section 309 does not eliminate the section 206 notice requirement. Sellers that engaged in tariff violations were on notice that their transactions may be subject to refund,

²² Public Utilities Regulatory Policies Act of 1978, Pub. Law 95-617.

²³ *CPUC Decision*, 462 F.3d at 1051 (*emphasis added*).

restitution, disgorgement of profits or other remedy. Sellers that complied with existing tariffs had no notice that the price at which they transacted may be later changed due to uncovered tariff violations by other market participants. Therefore, imposing refund liability on sellers that were in compliance with the existing tariffs would be inconsistent with the section 206 notice requirement.²⁴ For these reasons, we reject the California Parties' brief on exceptions and deny its request for the market-wide remedy to be imposed on the Respondents in the event that the Presiding Judge finds that other respondents in this proceeding engaged in tariff violations affecting market prices.

26. Accordingly, we deny the California Parties' request to delay action on findings in the Partial Initial Decision until the Presiding Judge makes a determination on the remaining claims. Because we are not directing market-wide refunds, we see no reason to require the Respondents' continued participation in the instant proceeding. We, therefore, dismiss the Respondents from the proceeding thereby terminating all claims against them.

27. In addition, we reject the California Parties' argument that the Presiding Judge was directed by the Commission to examine whether the prices received by the Respondents were affected by tariff violations by other sellers. We find that this interpretation is inconsistent with the instructions provided by the Commission to the Presiding Judge in the Rehearing Order.²⁵

28. Although CARE mistakenly submitted its brief on exceptions to the Presiding Judge, instead of the Commission, and as a result, the Presiding Judge dismissed it,²⁶ we will address CARE's brief in this order. We reject CARE's request to designate the complainants that are IOUs as respondents in this proceeding, as no formal claims were

²⁴ *State of Cal. ex rel. Bill Lockyer v. British Columbia Power Exchange Corp.*, 125 FERC ¶ 61,016, at P 38 (2008).

²⁵ Specifically, the Rehearing Order instructed the Presiding Judge 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. *See Rehearing Order*, 135 FERC ¶ 61,183 at P 31.

²⁶ *See San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services*, Docket No. EL00-95-269 (Sept. 14, 2012) (Order Denying Motion For Official Notice Of Fact And Exceptions).

made against them in this proceeding. We also note that this proceeding has stretched over a decade and CARE's attempt to now add respondents to the proceeding is beyond untimely. We also reject CARE's request for taking official notice of the Ninth Circuit decision in *Redding* and the Commission-issued Notice of Intent Not to Act in Docket No. EL12-82-000. These two precedents can be considered by the Commission without taking official notice of them; however, CARE has failed to explain how the court decision and Commission notice are relevant to the issues addressed in the Partial Initial Decision.

The Commission orders:

(A) The Partial Initial Decision is therefore affirmed, as discussed in the body of this order.

(B) Avista, Mieco, and Shell Martinez are hereby dismissed from this proceeding and all claims against these three respondents are hereby terminated, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.