

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 02-1140

September Term, 2002

El Paso Merchant Energy, L.P.,
Petitioner

Filed On: Sep 5, 2002

v.

Federal Energy Regulatory Commission,
Respondent

Salt River Project Agricultural Improvement and
Power District, et al.

Intervenors

Consolidated with 02-1142

BEFORE: Edwards, Sentelle, and Tatel, Circuit Judges

ORDER

Upon consideration of the motion to dismiss (which includes a request for an order to show cause why sanctions should not be imposed), and the joint response thereto, it is

ORDERED that the motion to dismiss be granted. Petitioners seek review of agency orders that are non-final: The first agency order on review directs a supplemental hearing before an administrative law judge ("ALJ") on an issue concerning market power abuse, and the second order denies rehearing. See Canadian Association of Petroleum Producers v. FERC, 254 F.3d 289, 296 (D.C. Cir 2001) (order not final where Federal Energy Regulatory Commission remanded matter to ALJ for hearing). The underlying administrative proceeding regarding whether petitioners improperly exercised market power and engaged in affiliate abuse and conduct in violation of Commission standards is still ongoing. Cf. Papago Tribal Util. Auth. v. FERC, 628 F.2d 235, 240 (D.C. Cir. 1980) (FERC decision to accept rate filing not reviewable, because "[a]cceptance of a filing,

coupled with scheduling of a hearing, is the initiation of an administrative proceeding; judicial review properly follows the conclusion of the proceeding:). The Commission had not yet issued a decision that disposes of all issues in the proceeding. It is

FURTHER ORDERED that sanctions be imposed. Counsel's claims of "unique procedural problems" created by the submission to the agency of comments by the Commission's Market Oversight and Enforcement Section of the Office of the General Counsel ("MOE") regarding the ALJ's initial decision appears to be "wholly without merit." Reliance Ins. Co. v. Sweeney Corp., 792 F.2d 1137 (D.C. Cir. 1986) (per curiam) (Rule 38 sanctions are appropriate when disposition of appeal is obvious and the legal arguments are wholly without merit); D.C. Cir. Rule 38. Counsel fails to explain not only the alleged procedural problems, but also the basis for its conclusion that the agency order remanding the proceeding to the ALJ was final and reviewable. Moreover, petitioners, who do not oppose dismissal of the instant petitions, have sought review of agency orders in this agency proceeding that set matters for investigation and hearing, which this court has dismissed on the government's motion. See El Paso Merchant v. FERC, No. 01-1443 (D.C. Cir. Dec. 26, 2001).

previously

Counsel for petitioners shall pay sanctions to respondent in the amount of respondent's reasonable costs and attorney fees incurred in filing the motion to dismiss. See D.C. Cir. Rule 38; South Star Communications, Inc. v. FCC, 949 F.2d 450, 452 (D.C. Cir. 1991) (per curiam) (directing attorney to pay sanctions to agency, pursuant to Rule 38, for frivolous appeal). Respondent is directed to submit documentation supporting its fees and costs within 30 days of the date of this order. Counsel for petitioners is directed to file any response within 14 days of the date respondent's documentation is filed.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam