

144 FERC ¶ 61,029
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

Puget Sound Energy, Inc.

v.

Docket No. EL01-10-122

All Jurisdictional Sellers of Energy and/or
Capacity at Wholesale into Electric Energy
and/or Capacity Markets in the Pacific
Northwest, Including Parties to the Western
System Power Pool Agreement

ORDER DENYING REHEARING

(Issued July 18, 2013)

1. On May 3, 2013, California Parties¹ filed request for rehearing or clarification (Rehearing Request) of the Commission's April 3, 2013 order approving a contested settlement that resolved all issues in this proceeding between TransCanada Energy Ltd. (TransCanada) and the City of Seattle, Washington (Seattle).² For the reasons discussed below, the Commission denies rehearing.

I. Background

2. On October 15, 2012, in accordance with rule 602 of the Commission's Rules of Practice and Procedure,³ TransCanada and Seattle (together, the Settling Parties) filed an Offer of Settlement (Settlement) disposing of disputes between the Settling Parties in the

¹ For purposes of this proceeding, California Parties are the People of the State of California ex rel. Kamala D. Harris, Attorney General, the Public Utilities Commission of the State of California, and Southern California Edison Company.

² *Puget Sound Energy, Inc. v. All Jurisdictional Sellers, et al.*, 143 FERC ¶ 61,013 (2013) (Settlement Order).

³ 18 C.F.R. § 385.602 (2012).

above-referenced proceeding.⁴ On November 30, 2012, the Presiding Judge reported to the Commission that, while certain comments were filed in opposition to the Settlement, they did not raise any issues of material fact, and the Presiding Judge certified the Settlement as a contested settlement.⁵

3. Article II of the Settlement contains provisions (Withdrawal Provisions) requiring that evidence adverse to TransCanada be withdrawn from the record in this proceeding. Specifically, Article II states that a final order approving the Settlement constitutes a determination that any evidence submitted by Seattle in these proceedings that adversely affects TransCanada shall be withdrawn from the record solely as to TransCanada, and any allegation, statement, claim, pleading, exhibit, or the like submitted by Seattle in the underlying proceeding, including but not limited to, Docket No. EL01-10-085, that may be deemed to apply to TransCanada neither applies to, nor may be used against, TransCanada in any way. Article II also requires Seattle to file a conditional motion withdrawing any portion of its prefiled testimony, exhibits, or other pleadings referencing TransCanada and requesting that the Commission withdraw from the record any evidence it has submitted that may be deemed to adversely affect TransCanada.⁶

4. While California Parties have recognized that under the terms of the Settlement, Seattle “rightly withdraws evidence related specifically to its contracts with TransCanada,”⁷ California Parties nevertheless seek to rely upon Seattle’s “testimony on general market issues” in order to pursue their own claims against TransCanada.⁸ To that end, California Parties asked the Commission to clarify that the Withdrawal Provision phrase “that may be deemed to adversely impact TransCanada” should not be interpreted to mean that evidence submitted by Seattle that describes general market conditions

⁴ A more detailed background discussion can be found in the Settlement Order.

⁵ *Puget Sound Energy, Inc. v. All Jurisdictional Sellers, et al.*, Certification of Contested Settlement, Docket No. EL01-10-111 (Nov. 30, 2012).

⁶ Seattle filed the required conditional motion on November 5, 2012 (Seattle Motion). Seattle’s conditional motion expressly requests that withdrawal of its evidence and pleadings be limited to TransCanada only, and take effect only if the Commission approves the Settlement without condition or modification that is unacceptable to the Settling Parties. The Presiding Judge has not yet issued a ruling on Seattle’s unopposed conditional motion.

⁷ California Parties, Initial Comments, Docket No. EL01-10-111, at 3 (filed Nov. 5, 2012).

⁸ *Id.*

applicable to all market participants may be withdrawn as to TransCanada, even if TransCanada deems the evidence to be adverse to it.

5. In its Settlement Order, the Commission found there were no disputed issues of material fact related to the Settlement. Furthermore, the Commission found the concerns raised by the California Parties lacked merit. Accordingly, the Commission approved the Settlement as submitted, finding that the Settlement was just and reasonable and in the public interest.

II. California Parties' Request for Rehearing or Clarification

6. California Parties urge the Commission to clarify the Settlement Order so as “to condition approval of the settlement on removal of all restrictions on the use and interpretation of evidence submitted by Seattle in support of its claims against the non-settling Respondents that does not refer specifically to TransCanada, so that Seattle’s evidence that remains in the record and applies to general market conditions may be considered in evaluating California Parties’ claims against TransCanada.”⁹

7. California Parties argue that section 2.4.3 of the Settlement provides that the testimony and exhibits that Seattle has submitted and will introduce at the hearings in this proceeding that specifically refer to TransCanada shall be “withdrawn from the record *solely as to TransCanada*.”¹⁰ With respect to Seattle’s evidence that does not specifically reference TransCanada, Section 2.4.4 provides that such evidence “shall not be interpreted to apply to TransCanada or used against TransCanada in any way, shape or form.”¹¹ According to California Parties, the purpose of sections 2.4.3 and 2.4.4 (the Withdrawal Provisions) is to preserve Seattle’s “generic” – that is, non-seller-specific – evidence for use against other Respondents.¹² California Parties state that an additional reason for inclusion of the Withdrawal Provisions in the Settlement was to prevent the Commission from considering the same evidence, irrespective of its merits, when evaluating the California Parties’ claims against TransCanada.¹³

⁹ Rehearing Request at 3.

¹⁰ *Id.* at 2 (citing Settlement § 2.4.3 (emphasis added)).

¹¹ *Id.* (citing Settlement § 2.4.4).

¹² California Parties would prefer that these provisions be referred to as the “Evidentiary Provisions” rather than the “Withdrawal Provisions.” *Id.* at 2 & n.4. We will retain our original nomenclature for consistency.

¹³ *Id.* at 2 (citing TransCanada Reply Comments at 8-9).

8. California Parties express concern that the Settlement Order could be interpreted to permit the Commission to consider Seattle's "generic" evidence when deciding claims against Respondents other than TransCanada but, at the same time, to ignore that evidence when evaluating the California Parties' claims against TransCanada. To the extent this is the case, California Parties contend that the Settlement Order contravenes the Commission's fundamental responsibility to examine relevant data and support its decisions with substantial evidence.¹⁴

9. Further, California Parties argue that subsumed within the substantial evidence requirement is the expectation that the Commission will treat fully each of the pertinent factors and issues before it.¹⁵ California Parties posit that the evidence submitted by Seattle showing that Pacific Northwest energy prices were driven by market dysfunction and sellers' unlawful actions that produced unreasonably high rates in the California organized markets is pertinent to California Parties' claims against TransCanada and other Respondents. California Parties contend that if the Commission admits Seattle's evidence into the record, but neglects to consider that evidence when determining California Parties' claims against TransCanada, the Commission's decision on California Parties' claims will ignore pertinent evidence and thus be both unsupported by substantial evidence and arbitrary and capricious.¹⁶

10. Next, California Parties argue that the Commission was mistaken in relying on the *Enron Power* settlement order¹⁷ to support approving the Withdrawal Provisions. California Parties argue that *Enron Power* does not permit the Commission to decide California Parties' claims against TransCanada without considering all pertinent evidence of record. California Parties make three arguments concerning the Commission's reliance on *Enron Power*: (1) the settlement at issue in *Enron Power* contained "real withdrawal provisions," and did not require the Commission to ignore the full import of evidence that remained in the record, as the Withdrawal Provisions do here; (2) the *Enron*

¹⁴ *Id.* at 3, 9-10 (citing *Port of Seattle v. FERC*, 499 F.3d 1016, 1035 (9th Cir. 2007); *Electricity Consumers Resource Council v. FERC*, 747 F.2d 1511, 1513 (D.C. Cir. 1984)).

¹⁵ *Id.* at 3-4, 10-12 (citing *Tenneco Gas v. FERC*, 969 F.2d 1187, 1214 (D.C. Cir. 1992)).

¹⁶ *Id.* at 4, 11-12 (citing *Tenneco Gas v. FERC*, 969 F.2d at 1214; *Port of Seattle*, 499 F.3d at 1035).

¹⁷ *Id.* at 12 (citing Settlement Order, 143 FERC ¶ 61,013 at P 36 (citing *Enron Power Marketing, Inc. & Enron Energy Servs. Inc.*, 122 FERC ¶ 61,015, at P 65 (2008) (*Enron Power*))).

Power settlement resolved all remaining claims against Enron and resulted in Enron's dismissal,¹⁸ while the Settlement here does not resolve all claims against TransCanada, and TransCanada remains a Respondent in these proceedings; and (3) *Enron Power* does not overrule the substantial evidence and reasoned decisionmaking requirements of administrative law, as articulated by the courts in *Tenneco Gas* and *Port of Seattle*, which the Commission should apply in this case.

11. California Parties request that the Commission modify the Settlement by ordering the Settling Parties to: (1) revise Section 2.4.3 of the Settlement to limit the withdrawal of evidence to only "those portions of the evidence introduced by Seattle that specifically refer to TransCanada and are specifically identified in the motion contemplated by Section 2.4.5 [of the Settlement]," (2) delete Section 2.4.4 in its entirety; and (3) deem that all remaining (but unspecified) provisions of the Settlement "shall be . . . conforming to the foregoing modifications of Sections 2.4.3 and 2.4.4." Taken together, California Parties request that the Commission reverse its unconditional approval of the Settlement by modifying and eliminating the Withdrawal Provision from the Settlement. To the extent that the Commission does not grant this clarification, the California Parties seek rehearing.

III. TransCanada's Response

12. On May 17, 2013, TransCanada filed a motion to respond and response to California Parties' Rehearing Request (Response). In its Response, TransCanada argues that: (1) the Withdrawal Provisions were a critical component of the Settlement; (2) California Parties continue to seek a litigation benefit that they have not earned through their own discovery efforts and evidentiary preparation; and (3) the Settlement Order does not require the Commission to ignore relevant record evidence because the sponsor of prepared testimony generally establishes the purpose for which the material is offered and because the Presiding Judge has the authority to condition or limit the use of material offered by a litigant.

IV. Procedural Matters

13. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2012), prohibits an answer to a request for rehearing. We therefore reject TransCanada's Response.

¹⁸ *Id.* at 13 (citing *Enron Power*, 122 FERC ¶ 61,015 at P 41 ("This Settlement and Enron's prior settlements have resolved issues and claims brought in the above-captioned proceedings with respect to Enron.")). Upon approving the settlement, the Commission dismissed all proceedings against Enron. *Id.*

V. Discussion

14. The Commission generally supports settlements and encourages parties to engage in settlement discussions. The Settling Parties have conducted extensive good faith negotiations to settle the issues in this proceeding, and the outcome of their efforts will save the time and expense of unnecessary litigation. The Order on Remand in this case specifically encouraged parties to settle their disputes.¹⁹ The Commission still considers the Settlement, including the Withdrawal Provisions, to be a fair and reasonable resolution of issues relating to transactions between TransCanada and Seattle during the relevant period.

15. The Commission reaffirms its finding in the Settlement Order:

The Commission understands that the California Parties would like to continue to pursue their own claims against TransCanada by relying on evidence submitted by Seattle; however, to permit the California Parties to do so would undermine a key provision of the Settlement between Seattle and TransCanada while providing a potential litigation benefit to the California Parties, which they have not earned through their own discovery efforts. Even if that “testimony on general market issues” is relevant to the issues that the Commission has set for hearing in this proceeding, California Parties, in pursuing their claims against TransCanada, should not be permitted to dictate to Seattle how it must handle its sponsored witness and accompanying exhibits.²⁰

16. As we noted in the Settlement Order, California Parties have not shown that any of the evidence advanced by Seattle could not have been pursued independently by California Parties in their claim against TransCanada.²¹ California Parties failed to pursue this line of inquiry on their own; instead, they now seek to rely upon Seattle’s testimony and exhibits regarding seller misconduct in the California organized markets to support their own claims against TransCanada. California Parties had a full opportunity to submit their own study as part of their direct or rebuttal case, or even to amend their testimony and exhibits once it became clear that their testimony did not do everything

¹⁹ *Puget Sound Energy, Inc.*, 137 FERC ¶ 61,001, at P 30 (2011).

²⁰ Settlement Order, 143 FERC ¶ 61,013 at P 34 (footnote omitted).

²¹ *See id.* P 35 & n.31.

that, perhaps in retrospect, they would have desired it to do.²² Nothing raised by California Parties on rehearing persuades us to overturn an essential element of the Settlement – the Withdrawal Provisions – to allow the California Parties to evade the consequences of their litigation strategy.²³

17. We also find that California Parties' reliance on *Port of Seattle* and *Tenneco Gas* is misplaced for two reasons. First, the sponsor of prepared testimony normally establishes the purpose for which its evidentiary material is being offered.²⁴ Seattle, as the sponsor of exhibits *yet to be admitted into the record*, has the prerogative at the outset to identify the purpose for which it is proposing the exhibits. A sponsor of evidence may seek to have it admitted into the record without condition or limitation, which generally would make the material available for all the parties to use without condition or limitation. However, here, in accordance with the Settlement terms, Seattle filed a conditional motion to withdraw any portion of its pre-filed testimony, exhibits, or other pleadings referencing TransCanada and requesting that the Commission withdraw from the record any evidence Seattle has submitted that may be deemed to adversely affect

²² Cf. Powerex Corporation's Supplemental Answering Testimony of Edwin M. Norse, Docket No. EL01-10-085 (filed Jan. 18, 2013).

²³ See *Kentucky W. Va. Gas Co.*, 43 FERC ¶ 61,496, at 62,229 (1988) (“[i]f, in hindsight, this strategy proved inadequate, it is not a denial of due process or the right to a fair hearing.”).

²⁴ See, e.g., California Parties, Exh. No. CAT-041 (Taylor Direct Testimony), Docket No. EL01-10-085, at 8:8-9 (Sept. 21, 2012) (submitting Figure I-1 as an example of the summary report generated by the database for purposes of reviewing the data on each contract); *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, Transcript, Docket No. EL08-51-002, at 173:5- 175:9 (Mar. 17, 2009) (admitting deposition transcript into the record “for the limited purpose” of showing a witness mischaracterized the testimony of another witness despite counsel offering the deposition transcript for a broader purpose); *Entergy Servs., Inc.*, Transcript, Docket No. ER07-956-001, at 839:25-841:1 (June 20, 2008) (admitting exhibit into the record for the “limited purpose” of impeachment as the sponsor of the exhibit requested); *Pacific Gas & Elec. Co.*, Transcript, Docket No. ER01-1639-004, at 278:6-279:2 (Feb. 11, 2004) (admitting exhibit into the record for the “very limited purpose” of facilitating the exploration of a witness's memory and knowledge, but not “for the truth of the matters asserted herein, or drawing inferences from the information or the notations on [the exhibit].”); *Boston Edison Co.*, Transcript, Docket No. EL02-123-002, at 232:2-18 (Apr. 23, 2003) (admitting two exhibits containing sponsor's own discovery responses for the “limited purpose” of refuting cross-examination assertions that the witness never provided certain information in discovery).

TransCanada. California Parties now ask the Commission to ignore this evidentiary convention and to establish a broader purpose for that testimony – that California Parties be allowed to use Seattle’s pre-filed testimony and exhibits to pursue their own separate and distinct claims against TransCanada. We do not believe that such a departure is required or desirable here.

18. In its Motion, Seattle asserted that the Presiding Judge may lawfully admit such materials as evidence into the record and limit the use of such evidence so as not to adversely affect TransCanada. However, at this point in time, the Presiding Judge has not ruled on the Seattle Motion, and this material has not been admitted into evidence. California Parties argue that if the Commission does not grant rehearing in order to allow them to use exhibits submitted by Seattle, such action would constitute arbitrary and capricious decision-making. In support, California Parties rely upon precedent that discusses how the Commission must treat evidence that has been admitted into the record without condition or qualification for purposes of rendering a reasoned decision.²⁵ This precedent, however, is inapposite because, as noted, the Presiding Judge has not admitted Seattle’s material in to the record.

19. The material proffered by Seattle in the pre-hearing process is not equivalent to exhibits that have, after a trial-type hearing, been admitted (without relevant conditioning) into evidence by the Presiding Judge. Until the Presiding Judge rules on the admissibility of Seattle’s testimony and exhibits, Seattle’s testimonies and exhibits are not evidence in the record. The Commission may not even consider Seattle’s testimony and exhibits unless it has been admitted as evidence into the record by the Presiding Judge.²⁶ Thus, the California Parties’ reliance upon precedent discussing material that already has been admitted into the record is misplaced.

20. California Parties’ attempt to distinguish *Enron Power* is also unpersuasive. As we concluded in the Settlement Order, the fact that TransCanada remains a Respondent in this case is irrelevant “because like here, the evidence was withdrawn with respect to settling parties while still remaining on the record for other parties.”²⁷ Therefore, approval of the Settlement including, the Withdrawal Provisions, does not contravene the

²⁵ See *Port of Seattle*, 499 F.3d at 1035; *Tenneco Gas*, 969 F.2d at 1214.

²⁶ See, e.g., *Kern River Gas Transmission Co.*, Opinion No. 486-A, 123 FERC ¶ 61,056, at P 260 (2008) (holding materials that have “not been admitted as evidence and are not otherwise part of the record . . . cannot be considered.”); *Jack J. Grynberg*, 90 FERC ¶ 61,247 at 61,822 (2000) (“The Commission agrees that an unadmitted exhibit cannot be used to support a decision and the ALJ’s finding is, therefore, stricken.”).

²⁷ See Settlement Order, 143 FERC ¶ 61,013 at P 36.

standard of review set forth in *Tenneco Gas* and *Port of Seattle* because, if the Presiding Judge grants Seattle's Motion to limit the use of Seattle's materials, there is no "evidence in the record" to be considered.

The Commission orders:

The California Parties' request for rehearing or clarification of the Settlement Order in this proceeding is hereby denied, as discussed in the body of this order.

By the Commission. Chairman Wellinghoff is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.