102 FERC ¶ 61, 268
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

City of Burbank, California

v. Docket No. EL02-117-000

Calpine Energy Services, L.P.
Duke Energy Trading and
Marketing, L.L.C.
El Paso Merchant Energy, L.P.

The Kroger Co.

v. Docket No. EL02-119-000

Dynegy Power Marketing, Inc.

ORDER SETTING COMPLAINTS FOR HEARING,
ESTABLISHING HEARING PROCEDURES,
AND HOLDING HEARING IN ABEYANCE

(Issued March 10, 2003)

1. This order addresses complaints filed by City of Burbank, California (Burbank) and The Kroger Co. (Kroger) seeking to modify forward bilateral contracts for delivery of energy entered into during the California energy crisis of 2000-2001. The complaints allege that dysfunctions in the California electricity spot markets caused these contracts to be unjust and unreasonable and, to the extent applicable, not in the public interest. To ensure that the complainants have a full and fair opportunity to present their cases and that the Commission, in turn, has a complete record on which to base its ultimate decision, we are setting these complaints for an evidentiary hearing. To aid the parties in settling their disputes without the burden and expenses of litigation, we will hold the hearing in abeyance pending the outcome of settlement judge procedures. In addition, we will hold the hearing in abeyance pending further Commission action. For each

20030310-3037 Issued by FERC OSEC 03/10/2003 in Docket#: EL02-117-000

complaint, we also establish a refund effective date pursuant to Section 206(b) of the Federal Power Act (FPA).[1]

Burbank's Complaint and Responsive Pleadings

A. Complaint

2. Burbank filed a complaint against three marketers of electric power: Calpine Energy Services, L.P. (Calpine), Duke Energy Trading and Marketing, L.L.C. (Duke), and El Paso Merchant Energy, L.P. (El Paso). Burbank's complaint challenges the justness and reasonableness of its five long-term, forward bilateral contracts with the respondents, executed pursuant to the Western System Power Pool (WSPP) Agreement. The contracts at issue were entered into between March and May, 2001 and contemplated deliveries of energy between January, 2002 and December, 2004.

3. In particular, Burbank argues that the rates in its contracts with the respondents are unjust and unreasonable because prices in forward bilateral markets were directly influenced by and highly correlated with prices charged in dysfunctional spot markets that the Commission determined to be unjust and unreasonable. Consequently, Burbank requests that the Commission abrogate the contracts in question or, in the alternative, modify the contract rates and order refunds, with interest, as soon as possible. In connection with this, Burbank asks the Commission to set its complaint for hearing and hold the hearing in abeyance pending the outcome of the Nevada Power proceeding, Docket No. EL02-28-000, et al.[2]

B. Answers to Burbank's Complaint

4. Duke, El Paso, and Calpine argue that Burbank has failed to establish a prima facie case sufficient to set the complaint for hearing. In the respondents' opinion, Burbank has not offered evidence demonstrating that the requested relief is in the public interest. The respondents explain that because their contracts with Burbank do not expressly reserve the parties' rights to unilaterally seek changes to the terms of the contracts, the contracts at issue are subject to the Mobile-Sierra "public interest" standard

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[1] 16 U.S.C. §824e(b) (2000).

[2] Nevada Power Co. and Sierra Pacific Power Co. v. Duke Energy Trading and Mktg, L.P., et al., 99 FERC ¶ 61,047, order on reh'g, 100 FERC ¶ 61,273 (2002), reh'g pending.

20030310-3037 Issued by FERC OSEC 03/10/2003 in Docket#: EL02-117-000

of review,[3] which Burbank's complaint has failed to meet. In support, these parties argue that while Section 6.1 of the WSPP Agreement[4] provides that the parties may make "joint application" to the Commission to change the rates agreed upon, it does not authorize either party to unilaterally seek review under Section 206 of the FPA.[5] Duke and Calpine add that even under the "just and reasonable" standard of review, Burbank's complaint should be denied.

5. Duke, Calpine, and El Paso also argue that for Burbank to prevail on the complaint, it should have presented evidence showing that the contracts in question were the result of market power or actual dysfunction in the forward markets. El Paso asserts that Burbank's complaint is based on a false assumption that the Commission has already found the nexus between the spot market dysfunctions and forward market prices. Calpine also states that Burbank, by its own admission, benefitted from the rates of challenged contracts, but when market prices fell below the contract prices, Burbank decided to bring this complaint.

6. In addition, Duke and Calpine argue that Burbank's complaint should be dismissed as untimely filed under the equitable doctrine of laches. Duke states that even at the time the challenged contracts were executed, Burbank was on notice that the Commission had identified operational defects in California spot markets and was considering additional measures.[6] In Calpine's opinion, because Burbank waited for over

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[3] See United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956) (Mobile); FPC v. Sierra Pacific Power, 350 U.S. 348 (1956) (Sierra); and United Gas Pipe Line Co. v. Memphis Light, Gas and Water Div., 358 U.S. 103 (1958).

[4] Section 6.1 of the WSPP Agreement provides in pertinent part as follows: "Nothing contained herein shall be construed as affecting in any way the rights of the Parties to jointly make application to FERC for a change in the rates and charges, classification, service, terms, or conditions affecting WSPP transactions under Section 205 of the Federal Power Act and pursuant to FERC rules and regulations promulgated thereunder . . ."

[5] 16 U.S.C. § 824e (2000).

[6] Duke refers to the following Commission orders: San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv., et al., 93 FERC ¶ 61,294 (2000); San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv., et al., 94 FERC ¶ 61,245 (2001): and San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv., et al.,

(continued...)

20030310-3037 Issued by FERC OSEC 03/10/2003 in Docket#: EL02-117-000

a year after issuance of the July 25, 2001 order[7] to file this complaint, Burbank has waived its right to bring a complaint altogether.

7. El Paso believes that there is no need for a trial-type evidentiary hearing in the event that the complaint is not dismissed. It suggests that the Commission could resolve this dispute summarily by means of Staff data requests solely on the basis of the relation of the contract rates at issue to the Commission advisory benchmark.[8] If the complaint is not dismissed and set for hearing, Duke and El Paso urge the Commission to proceed immediately to hearing and not to hold this complaint in abeyance pending the completion of the Nevada Power proceeding.

8. El Paso also argues that this complaint is premature because the parties have failed to follow the dispute resolution provisions of the WSPP Agreement.[9] El Paso states that the Commission has previously dismissed a complaint as premature for failure to first pursue alternative dispute resolution (ADR) remedies.[10] Duke, however, states that Burbank's complaint does not constitute a dispute for which meaningful mediation or other ADR procedure would be helpful.

C. Comments and Protests

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[6](...continued)
96 FERC ¶ 61,115 (2001).

[7] See San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv., et al., 96 FERC ¶ 61,120, at 61,515 (2001) (stating that "if ... any ... party ... believes any of its contracts are unjust and unreasonable, it may file a complaint under FPA Section 206 to seek modification of such contracts").

[8] See San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services, 93 FERC ¶ 61,294, at 61,994-95 (2000), reh'g denied, 97 FERC ¶ 61,275, at 62,229 (2001) (setting a benchmark for five-year contracts for supply around-the-clock at $74/MWh).

[9] El Paso cites to Section 34.1 of the WSPP Agreement, which provides that before "binding dispute resolution or any other form of litigation may proceed, any dispute between the Parties to a transaction under [the WSPP Agreement] first shall be referred to nonbinding mediation."

[10] El Paso cites to Strategic Energy LLC v. California Indep. Sys. Operator Corp., 95 FERC 61,312 (2001).

20030310-3037 Issued by FERC OSEC 03/10/2003 in Docket#: EL02-117-000

9. The Electric Power Supply Association (EPSA) argues that the modification or abrogation of the challenged contracts will result in regulatory uncertainty and contribute to financial deterioration. EPSA takes particular issue with Burbank's "placeholder" complaint and argues that Burbank should not be permitted to wait for the outcome of the Nevada Power proceeding, as this tactic undermines suppliers' due process rights. Finally, EPSA asserts that "the factual predicate of Burbank's complaint is simply incorrect" and cites many other factors besides the Commission-imposed mitigation plan that have resulted in the lower prices seen in California power markets today.

10. The California Electricity Oversight Board (CEOB) supports Burbank's allegation that their long-term contracts were tainted by dysfunctions in California's spot market. Thus, CEOB asserts, the Commission should grant Burbank's request for hearing and hold this hearing in abeyance to provide the parties time to come to an amicable agreement. Californians for Renewable Energy Inc. (CARE) also expresses support for Burbank's complaint, as well as Burbank's request that the complaint be held in abeyance pending the outcome of the Nevada Power proceeding.

Kroger's Complaint and Responsive Pleadings

A. Complaint

11. In its complaint, Kroger seeks a Commission order declaring as unjust and unreasonable the prices in four wholesale, forward bilateral contracts between Dynegy Power Marketing, Inc. (Dynegy) and AES NewEnergy, Inc. (AES), the costs of which are directly passed through to Kroger. Dynegy and AES executed the contracts at issue pursuant to the Electric Energy Institute Master Power Purchase and Sale Agreement. The contracts were entered into between March and May 2001 and contemplated deliveries of energy between April 2001 and December 2006.

12. In particular, Kroger argues that the contract prices at issue were the product of market conditions that the Commission found to be dysfunctional. Kroger also states that at the time the Dynegy/AES contracts were executed, it was clear that the Commission's initial measures to mitigate prices had not been effective, and there was no reason to expect more aggressive price mitigation actions by the Commission.

13. Consequently, Kroger requests that "for the applicable dysfunctional market period at issue," the Commission set the prices of the Dynegy/AES contracts at a level comporting with market prices that would have then existed, but for the market dysfunctions. For the remaining duration of the Dynegy/AES contracts, beyond the dysfunctional market period to the end of the terms of the challenged contracts, Kroger

20030310-3037 Issued by FERC OSEC 03/10/2003 in Docket#: EL02-117-000

seeks abrogation of the contracts. To this end, Kroger asks the Commission to set its complaint for hearing and establish a refund effective date 60 days after the filing date of its complaint.

B. Dynegy's Answer Kroger's Response

14. In its answer, Dynegy urges the Commission to reject Kroger's complaint on the grounds that: (1) Kroger has not met its burden of proving that the rates in the Dynegy/AES contracts were adversely affected by the dysfunctional spot markets, as required by Commission prior orders on similar complaints;[11] and (2) Kroger's complaint has failed to meet the "public interest" standard of review. Dynegy argues that the Commission should apply the "public interest" standard of review to Kroger's complaint because the challenged contracts do not contain contractual language expressly reserving the right of either party to unilaterally seek rate changes. Dynegy also contends that the same standard of review should apply to Kroger as would apply to AES because, consistent with the Commission precedent,[12] Kroger can be said to have "stepped into the shoes" of AES. Alternatively, Dynegy asserts that Kroger's complaint does not even meet a less demanding "just and reasonable" standard of review.

15. In response, Kroger argues that the Commission should review the challenged contracts under the "just and reasonable" standard of review. Kroger points out that in prior cases on similar complaints, the Commission set for hearing the issue of the applicable standard of review for contracts that, like the contracts at issue here, did not contain explicit Mobile-Sierra language.

16. Dynegy also states that Kroger benefitted from the challenged contracts because wholesale prices at the time were lower than retail tariff rates. It also argues that Kroger seeks abrogation of these contracts because it purchased too much electricity. Kroger counters that its complaint challenges the contract prices as excessive, not the quantities purchased under the contracts.

C. Comments

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[11] See, e.g., PacifiCorp v. Reliant Energy Services, Inc., et al., 99 FERC ¶ 61,381 (2002), reh'g pending.

[12] Pub. Utilities Com'n of the State of California, et al. v. Sellers of Long-Term Contracts to the California Dep't of Water Resources, 99 FERC ¶ 61,087, order on reh'g 100 FERC ¶ 61,098 (2002).

20030310-3037 Issued by FERC OSEC 03/10/2003 in Docket#: EL02-117-000

17. EPSA urges the Commission to reject Kroger's complaint. It argues that reliance on complaints for abrogation or renegotiation of contracts will result in the decimation of trust in the regulatory system and will undermine investor confidence in bulk power markets.

Procedural Matters

18. Notice of Burbank's complaint in Docket No. EL02-117-000 was published in the Federal Register, 67 Fed. Reg. 53,916 (2002), with comments, protests, or interventions due on or before September 18, 2002. Notice of Kroger's complaint in Docket No. EL02-119-000 was published in the Federal Register, 67 Fed. Reg. 54,178 (2002), with comments, protests, or interventions due on or before September 13, 2002. Timely motions to intervene were filed by the entities listed in Appendix B to this order. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,18 C.F.R. § 385.214 (2002), the filing of a timely motion to intervene that has not been opposed makes the movant a party to the proceeding.

19. CARE filed a motion to intervene out-of-time, which has been opposed by Calpine, Duke, and El Paso. Given CARE's interest in the proceeding and the early stage of the proceeding, we find good cause to grant CARE's late intervention pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2002).

20. Also, Kroger opposed the motions to intervene filed by EPSA; Public Utility District No. 1 of Snohomish County, Washington; Tractebel North America, Inc.; Pacific Gas and Electric Company; Strategic Energy L.L.C.; and PacifiCorp. Notwithstanding Kroger's opposition, we grant these motions to intervene, as we find that the movants have interests, which may be directly affected by the outcome of this proceeding, and the movants' participation in this proceeding is in the public interest.

21. Kroger filed answers to Dynegy's answer to the complaint and EPSA's protest. Answers to answers and protests are prohibited under Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213 (2002), unless otherwise permitted. We will allow Kroger's answers only to the extent they assist the Commission's understanding of the issues raised.[13]

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[13] See, e.g., Atlantic City Electric Co., 90 FERC ¶ 61,268, at 61,898 (2000) and New York Independent System Operator, Inc., 91 FERC ¶ 61,128 (2000).

20030310-3037 Issued by FERC OSEC 03/10/2003 in Docket#: EL02-117-000

Discussion

22. In their complaints, Burbank and Kroger seek the extraordinary remedy of contract modification. The Commission's long-standing policy, consistent with a substantial body of Supreme Court and other judicial precedent, has been to recognize the sanctity of contracts. Rarely has the Commission deviated from that policy, and then only in extreme circumstances, such as the fundamental industry-wide restructuring under Order No. 888 and the reorganization of a bankrupt utility.[14] Preservation of contracts has, if anything, become even more critical since the policy was first adopted. Competitive power markets simply cannot attract the capital needed to build adequate generating infrastructure without regulatory certainty, including certainty that the Commission will not modify market-based contracts unless there are extraordinary circumstances. The Commission has determined that, based on the unusual circumstances presented, it is appropriate to set the contracts at issue for hearing.[15]

23. That being said, we strongly encourage all parties involved in disputes arising from the California crisis to seriously negotiate settlements. The uncertainty and expense of continued litigation over these disputes serve the interests of neither the parties to those disputes nor the public. For these reasons, we will hold the hearing in abeyance and direct settlement judge procedures pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.[16] The settlement judge procedures shall be considered to satisfy the mandatory mediation requirement of the WSPP Agreement. The Chief Judge shall appoint a settlement judge in this proceeding within 15 days of the date of issuance of this order. The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order concerning the status of settlement discussions.

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[14] Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540, at 31,664-65 (1996), FERC Stats. & Regs. ¶ 31,036 (1996), order on reh'g, Order No. 888-A, 62 Fed. Reg. 12,274 (1997), FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in relevant part, remanded in part on other grounds sub nom. Transmission Access Policy Study Group, et al. v. FERC, 225 F. 3d 667 (D.C. Cir.2000), aff'd, New York v. FERC, 122 S.Ct. 1012 (2002); and Northeast Util. Serv. Co., 66 FERC 61,332, reh'g denied, 68 FERC 61,041 (1994).

[15] See Appendix A for a list of contracts being set for hearing.

[16] 18 C.F.R. § 385.603 (2002).

20030310-3037 Issued by FERC OSEC 03/10/2003 in Docket#: EL02-117-000

Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge. In addition, we will hold the hearing in this case in abeyance pending further Commission action.

24. In cases where, as here, the Commission institutes an investigation on complaint under Section 206 of the FPA, Section 206(b) requires that the Commission establish a refund effective date that is no earlier than 60 days after the filing of the complaint, but no later than five months subsequent to the expiration of the 60-day period. Consistent with our general policy of providing maximum protection to customers,[17] we will set the refund effective date as of the date 60 days after the date of the filing of each complaint. For Burbank's complaint in Docket No. EL02-117-000, the refund effective date is set on October 11, 2002 and for Kroger's complaint in EL02-119-000 the refund effective date is set on October 13, 2002.

25. Section 206(b) also requires that, if no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to Section 206, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state the best estimate as to when it reasonably expects to make such a decision. Ordinarily, to implement that requirement, we would direct the presiding judge to provide a report to the Commission in advance of the refund effective date. Here, given that the refund effective date for the complaints has already passed, the Commission cannot follow its normal procedure.

26. Although we do not have the benefit of the presiding judge's report, based on our review of the record, we expect that, assuming the cases do not settle, the presiding judge should be able to render a decision within eight months of the commencement of hearing procedures. After the presiding judge renders an initial decision, assuming the cases do not settle, we estimate that we will be able to issue our decision within approximately three months of the filing of briefs on and opposing exceptions.

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[17] See, e.g., Seminole Electric Cooperative, Inc. v. Florida Power & Light Company, 65 FERC ¶ 61,413, at 63,139 (1993); Canal Electric Company, 46 FERC ¶ 61,153, at 61,539, reh'g denied, 47 FERC ¶ 61,275 (1989).

20030310-3037 Issued by FERC OSEC 03/10/2003 in Docket#: EL02-117-000

27. In addition, we will leave it to the discretion of the Chief Administrative Law Judge to determine whether, when and to what extent consolidation of the complaints in Docket Nos. EL02-117-000 and EL02-119-000 may be appropriate.[18]

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly Section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter 1), a public hearing shall be held concerning the complaints in this proceeding. As discussed in the body of this order, we will hold the hearing in abeyance pending further Commission action and the settlement judge negotiations, as discussed in Paragraphs (B) and (C).

(B) Pursuant to Rule 603 of the Commission's Rule of Practice and Procedure, 18 C.F.R. § 385.603 (2002), the Chief Administrative Law Judge is hereby directed and authorized to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge.

(C) Within sixty (60) days of the date of this order, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(D) If the settlement judge procedures fail, and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall convene a conference in this proceeding to be held within approximately fifteen (15) days of the date the Chief Judge designates the presiding judge, in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The

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[18] 18 C.F.R. § 385.503 (2002).

20030310-3037 Issued by FERC OSEC 03/10/2003 in Docket#: EL02-117-000

presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss), as provided in the Commission's Rules of Practice and Procedure.

(E) The refund effective date in Docket EL02-117-000 established pursuant to Section 206(b) of the Federal Power Act is October 11, 2002. The refund effective date in Docket EL02-119-000 is October 13, 2002.

By the Commission. Chairman Wood dissenting in part with a separate statement attached.

(S E A L) Commissioner Brownell concurring with a separate statement attached.

Magalie R. Salas,
Secretary.

Appendix A

LIST OF CONTRACTS SET FOR HEARING

City of Burbank, California v. Calpine Energy Services, L.P., Duke Energy Trading and Marketing, L.L.C., and El Paso Merchant Energy, L.P.
Docket No. EL02-117-000

Buyer/Seller	**Transaction Date**	**Identification Code**
City of Burbank/Calpine Energy Services	May 1, 2001	E108556B
City of Burbank/Duke Energy Trading and Marketing	March 26, 2001	E106258B
City of Burbank/Duke Energy Trading and Marketing	March 27, 2001	E106392B
City of Burbank/El Paso Merchant Energy	April 19, 2001	E107776B
City of Burbank/El Paso Merchant Energy	May 15, 2001	E109505B

The Kroger Company v. Dynegy Power Marketing, Inc.
Docket No. EL02-119-000

Buyer/Seller Wholesale Confirms	**Transaction Date**	**Identification Code**
AES/Dynegy	March 12, 2001	N/A
AES/Dynegy	March 29, 2001	N/A
AES/Dynegy	April 6, 2001	N/A
AES/Dynegy	May 24, 2001	N/A

Appendix B

INTERVENORS

City of Burbank, California v. Calpine Energy Services, L.P., Duke Energy Trading and Marketing, L.L.C., and El Paso Merchant Energy, L.P.
Docket No. EL02-117-000

California Electricity Oversight Board*
Californians for Renewable Energy, Inc.*
Electric Power Supply Association*
Pacific Gas and Electric Company
PacifiCorp
Public Utility District No. 1 of Snohomish County, Washington

The Kroger Company v. Dynegy Power Marketing, Inc.
Docket No. EL02-119-000

California Electricity Oversight Board
Constellation NewEnergy, Inc.
Electric Power Supply Association*
Pacific Gas and Electric Company
PacifiCorp
Public Utility District No. 1 of Snohomish County, Washington
Strategic Energy L.L.C.
Tractebel North America, Inc.

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* comments and/or protests

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Dynegy Power Marketing, Inc.

(Issued March 10, 2003)

Wood, Chairman, dissenting in part:

I would not have held the hearing in abeyance pending further action in light of the respondents' opposition. In the Nevada Power proceeding, and in later cases with similar factual backgrounds, we have afforded parties an opportunity to have a full scale trial-type evidentiary hearing and established procedures to reach an expeditious resolution of the complaint. The parties here should receive no less. That said, I join my colleagues in strongly encouraging the parties to seriously negotiate settlements.

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Pat Wood, III
Chairman

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The Kroger Company

v.

Dynegy Power Marketing, Inc. — Docket No. EL02-119-000

(Issued March 10, 2003)

BROWNELL, Commissioner, concurring

28. These cases share a number of issues of law and fact with the Nevada Power cases. Within a few short weeks, the Commission will be issuing decisions in the Nevada Power cases that will likely resolve some of these common issues and focus the factual inquiry related to others. Therefore, I believe that by holding these cases in abeyance pending the issuance of those decisions, the parties will be spared the time and expense of duplicative, unnecessary litigation while still receiving a full opportunity to address at hearing the truly case-specific, factual issues that remain.

Nora Mead Brownell