

104 FERC ¶ 61,146
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Fact-Finding Investigation into Possible
Manipulation of Electric and Natural Gas
Prices

Docket No. PA02-2-009

ORDER DISMISSING REHEARING

Issued July 28, 2003

1. On January 31, 2003, the Commission issued an order approving a Stipulation and Consent Agreement (Agreement) between Commission Staff and Reliant Resources, Inc.; Reliant Energy Coolwater, Inc.; Reliant Energy Ellwood, Inc.; Reliant Energy Etiwanda, Inc.; Reliant Energy Mandalay, Inc. and Reliant Energy Ormond Beach, Inc. (Reliant).¹ Several parties, among them the California Public Utilities Commission (California Commission), the California Electricity Oversight Board (Oversight Board), Pacific Gas and Electric Company, Southern California Edison Company, and the People of the State of California *ex rel.* Bill Lockyer, Attorney General (collectively, California Parties), sought to intervene and to request rehearing of the January 31 Order. In an order issued April 9, 2003, the Commission denied the motions to intervene and dismissed the rehearing requests.² The California Parties renew their motions to intervene and seek further rehearing. This order dismisses the request for rehearing of the April 9 Order.

Background

2. The Agreement grew out of an investigation by Staff regarding whether any entity manipulated short-term prices for electric energy or natural gas, or otherwise exercised

¹Fact-Finding Investigation into Possible Manipulation of Electric and Natural Gas Prices, 102 FERC ¶ 61,108 (2003).

²Fact-Finding Investigation into Possible Manipulation of Electric and Natural Gas Prices, 103 FERC ¶ 61,019 (2003) (April 9 Order).

undue influence over wholesale electric prices, in the West.³ The investigation uncovered evidence that certain Reliant traders, in an effort to increase prices in the forward markets, reduced capacity offered on June 20 and 21, 2000 into the California Power Exchange Corporation (CalPX) day-ahead market for delivery days June 21 and 22, 2000.

Reliant entered into the Agreement to remedy any effects of this withholding on market participants.

3. The Agreement, approved by the Commission, resolved all disputes within the purview of the Commission arising from the traders' actions of June 20 and 21, 2000 with respect to sales that would have occurred in the CalPX day-ahead market. Under the Agreement, Reliant pledged: (1) to pay \$13,817,274 directly to customers of the CalPX that purchased energy in the CalPX's day-ahead market on June 21 and 22; (2) to abide by a must offer obligation to submit bids for all uncommitted, available capacity into a day-ahead market (once established) or the California Independent System Operator Corporation (CAISO) ancillary services and/or real-time markets for one additional year following termination of the existing must offer obligation or until December 31, 2006, whichever is later; and (3) for a period of twenty-four months, to retain an independent engineering company to perform semi-annual audits of outages at Reliant's generating plants in California to determine that any outages, and the duration thereof, are legitimate.

4. Subsequently, the California Parties, and other movants, sought to intervene in the investigation and requested rehearing and clarification. They conceded that the Commission's regulations do not provide for intervention as a matter of right in investigations,⁴ yet they requested that the Commission grant their intervention for good cause shown. The California Parties argued that they had demonstrated good cause because they had a substantial interest in the proceeding, that they could not have known the terms of the Agreement before issuance of the January 31 Order, that their interests were not represented by Reliant or Staff, and that intervention would not unduly burden any party or the Commission. They cited to an instance where the Commission granted intervention in an investigation and considered requests for rehearing after the approval

³See Fact-Finding Investigation into Possible Manipulation of Electric and Natural Gas Prices, 98 FERC ¶ 61,165 (2002) (directing Staff to conduct an investigation).

⁴See 18 C.F.R. § 1b.11 (2003).

of a settlement of an investigation.⁵ In addition, the California Parties stated that they had engaged in extensive discovery and actively participated in other Commission proceedings regarding market manipulation. Further, the California Commission cited its statutory responsibility to represent California electricity and gas customers and its ability to speak to their interests. Various parties also raised arguments regarding the reasonableness of the Agreement.

5. In the April 9 Order, the Commission held that the movants had no right to intervene in the non-public investigation. The Commission cited Section 1b.11 of the Commission's regulations, which provides that "[t]here are no parties, as that term is used in adjudicative proceedings, in an investigation under this part and no person may intervene or participate as a matter of right in any investigation under this part,"⁶ and Rule 101(b)(1) of the Commission's Rules of Practice and Procedure, providing that the Rules do not apply to Part 1b investigations.⁷ Thus, the Commission concluded, Rule 214,⁸ regarding interventions, does not apply to Part 1b investigations.

6. In addition, the Commission reasoned that allowing third parties to participate in and challenge its decisions in investigations could cripple its ability to prosecute and settle such investigations, and thus determined not to grant intervention as a matter of discretion. The Commission explained that, under the Federal Power Act (FPA), it has exclusive authority to enforce the FPA, and its decisions whether to pursue and resolve issues under investigation are solely within its non-reviewable discretion. Further, the Commission distinguished the instant case from Columbia Gas, noting that the Agreement arose out of very specific misconduct that was brought to light in the course of a Commission-initiated investigation. The Commission also noted that the Agreement resolved just a small part of the larger investigation, that the Commission would be considering additional grounds for remedial relief, and that the payment would be in addition to any potential refunds owed by Reliant in the refund proceeding in Docket No. EL00-95-045, et al.

⁵See Columbia Gas Transmission Corp., 85 FERC ¶ 61,437 (1998) (Columbia Gas).

⁶18 C.F.R. § 1b.11 (2003).

⁷18 C.F.R. § 385.101(b)(1) (2003).

⁸18 C.F.R. § 385.214 (2003).

7. Finally, the Commission dismissed the movants' requests for rehearing because they were not parties to the proceeding, and they lacked the requisite standing to seek rehearing. Nevertheless, the Commission provided a clarification of the earlier order on its own motion, specifying that the scope of the Agreement extended only to "the Reliant traders' actions of June 20 and 21, 2000 with respect to sales in the CalPX day-ahead market, as described in the Agreement, and is limited to the effects of those actions in the CalPX day-ahead market."⁹

Request for Rehearing

8. California Parties renew their motions to intervene and request that the Commission grant their requests for rehearing. They contend that due process does not allow the Commission to resolve claims raised by them without permitting their participation. They further assert that, as entities that have been aggrieved by the April 9 Order, they are entitled to seek rehearing under Section 313(a) of the FPA.

9. California Parties assert that the April 9 Order did not reflect reasoned decisionmaking because the Commission did not dispute that they had demonstrated good cause to justify intervention. They reason that they meet the standards for finding constitutional standing, *i.e.*, an injury-in-fact, a causal connection between the injury and the conduct complained of, and a likelihood that the injury will be redressed by a favorable decision.¹⁰ California Parties also repeat their argument that denying intervention is inconsistent with Commission precedent, asserting that the Commission must explain why Columbia Gas is inapposite, and also citing Tenneco Inc., et al.¹¹ and Williams Gas Pipelines as inconsistent precedent.¹²

10. Finally, California Parties distinguish the due process rights that should be accorded in different types of processes. According to California Parties, an investigation does not contain any "parties" and does not normally trigger due process rights, while an adjudication of legal rights requires a minimal degree of due process. They assert that the Agreement constituted an adjudication of their rights to the extent

⁹April 9 Order, 103 FERC ¶ 61,019 at P 19.

¹⁰Request at 6-9, citing Lujan v. Defenders of Wildlife, et al., 504 U.S. 555 (1992).

¹¹7 FERC ¶ 61,258 at 61,550 (1979).

¹²94 FERC ¶ 61,285 (2001) (Williams).

that it disposed of claims against Reliant on behalf of the victims of the withholding (which include the California Parties), as opposed to the Commission's own independent claims. California Parties quote Hannah v. Larche, which states in part: "when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process."¹³ According to California Parties, the consequences of the Agreement with Reliant "infuse the Commission's actions with an adjudicatory aspect that necessitates a minimum level of due process," including granting their interventions and permitting them to comment on the implementation of the Agreement.

11. California Parties posit that the FPA's grant of discretion to the Commission to institute, resolve and settle issues under investigation must be exercised within reasonable limits, and that investigations must remain a means of facilitating, and not substituting for, adjudications. The Commission's own precedent, they claim, argues for giving all interested persons an opportunity to intervene and comment.

12. The California Parties also challenge the substance of the Agreement, claiming that the April 9 Order ignores the argument that Reliant's actions had ramifications beyond the scope of the relief provided in the Agreement and that the Agreement covered only a fraction of the profits that Reliant gained from its actions.

Discussion

13. The April 9 Order explained that the Commission has exclusive authority under the FPA to decide how to resolve issues under investigation; decisions such as whether to settle a matter being investigated are solely within the Commission's discretion.¹⁴ While the Commission has occasionally chosen to allow interventions following approval of a stipulation and consent agreement, the court in BG&E held that it need not

¹³Rehearing at 18, quoting Hannah v. Larche, 363 U.S. 420, 442 (1960).

¹⁴See Baltimore Gas & Electric Co. v. FERC, 252 F.2d 456, 458-60 (D.C. Cir. 2001) (FERC's decision to settle its enforcement action was within its discretion) (BG&E); New York State Dept. of Law v. FCC, 984 F.2d 1209, 1213-16 (D.C. Cir. 1993) (finding the agency's decision to settle was a legitimate exercise of its enforcement discretion); Fort Sumter Tours, Inc. v. Babbitt, 202 F.3d 349, 354 (D.C. Cir. 2000) (decision whether to settle a case is within agency's discretion under the APA); cf. Heckler v. Chaney, 470 U.S. 821, 831-33 (1985) (agency decisions whether to exercise its prosecutory or enforcement authority are within its discretion).

do so. Thus, considering that there was in this case an opportunity to remedy discrete and specific misconduct discovered in a Commission investigation (and one involving extensive volumes of confidential data), and where the misconduct concerned a single actor on two particular days in a specific market, the Commission's determination to approve a settlement providing for close to \$14 million to be returned to customers (as well as other remedies) without entertaining challenges from third parties was proper. Other factors may weigh in favor of granting interventions in other cases, such as in Williams, where a state commission sought clarification of the implementation of a settlement and was not challenging the terms of that agreement. However, the Commission retains the ultimate authority to determine on a case-by-case basis whether to allow third parties to participate.¹⁵

14. We are not persuaded that Hannah V. Larche requires a different outcome. In that case, the court considered the rights accorded to the persons who were under investigation; the court did not contemplate comparable due process rights for third parties that wish to participate.¹⁶ In any event, the Commission's exercise of its enforcement authority is "committed to agency discretion by law."¹⁷

15. Moreover, the California Parties' claim to party status in an investigation is so broadly drawn that, if their logic were accepted, there would likely never be a case where the Commission could deny intervention. And the Commission, as a consequence, could never on its own settle any investigation; every investigation and every settlement would be subject to challenge and revision, and judicial review, at the behest of third parties. Such a reading is hardly consistent with the discretion that the statutes¹⁸ and the

¹⁵See generally State of California, et al. v. FERC, et al, Nos. 02-70336, et al. (9th Cir. May 15, 2003) (appropriate procedures vary case by case based on the total circumstances).

¹⁶The other cases cited by California Parties are similarly distinguishable. Aponte v. Calderon, 284 F.3d 184 (1st Cir. 2002), and Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. RTC, 5 F.3d 1508 (D.C. Cir. 1993), deal with the rights of the individuals under investigation. Cooper v. Salazar, 196 F.3d 809 (7th Cir. 1999), examines due process rights for the claimant before a state administrative agency. None of these cases provides that third parties, like the California Parties here, must have comparable rights.

¹⁷5 U.S.C. § 701(a)(2) (2000).

¹⁸See supra note 17.

precedent¹⁹ grant the Commission, and would undermine both the Commission's ability to settle investigations and its policies favoring settlement;²⁰ thus it must fail.

16. As discussed in the April 9 Order, because the California Parties are not parties to this proceeding, they lack standing to seek rehearing. Contrary to statements in the rehearing request that the FPA entitles those that are aggrieved by Commission actions to seek rehearing,²¹ such entities first must be parties in a proceeding to enjoy standing for purposes of rehearing.²² Accordingly, we will dismiss the request for rehearing.

17. We add that California Parties are concerned that the Agreement does not account for the effects of Reliant's behavior in other markets (e.g., ancillary services, forward contract, and real time markets) and that Reliant may have engaged in improper behavior in addition to withholding, and thus the Agreement may not cover all of the unjust profits Reliant may have gained. Consistent with the clarification provided in the April 9 Order,²³ the California Parties are not precluded by the Agreement from pursuing claims for behavior or effects in markets beyond those addressed in the Agreement.

The Commission orders:

California Parties' request for rehearing is hereby dismissed.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.

¹⁹See supra note 14.

²⁰See, e.g., Alabama Power Company, 75 FERC ¶ 61,233 at 61,769 (1996) (encouraging settlements).

²¹See Rehearing at 5 n.10, 6-9.

²²See 16 U.S.C. § 8251(a) (2000).

²³See April 9 Order, 103 FERC ¶ 61,019 at P 19.