

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**



FILED

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Rulemaking Regarding Whether, or Subject
to What Conditions, the Suspension of Direct
Access May Be Lifted Consistent with
Assembly Bill 1X and Decision 01-09-060.

Rulemaking 07-05-025
(Filed May 24, 2007)

CARE'S APPLICATION FOR REHEARING OF D.08-11-056

- 1) Californians for Renewable Energy, Inc. (CARE) requests rehearing of Decision (D.) 08-11-056 (“Decision”) that was issued on November 24, 2008. CARE was a party to the proceeding and so is eligible to file a rehearing request pursuant to the Commission’s Rules of Practice and Procedure. On June 26, 2008, the United States Supreme Court issued a relevant ruling in *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County et al.*, Case No. 06–1457. The court held that contract rates are presumptively reasonable only where Federal Energy Regulatory Commission (“FERC”) has had an initial opportunity to review the contracts.
- 2) There is an outstanding unresolved petition for review filed in the United States Court of Appeals, Ninth Circuit in Nos. 05-71761; et al., FERC No. EL00-95-098. These cases are stayed pending resolution of legal issues concerning the Western Energy Crisis of 2000-1.
- 3) FERC decision, 125 FERC ¶ 61,312, issued on December 18, 2008, initiates a proceeding to review some of the wholesale electric contracts signed during the western energy crisis of 2000-1. These contracts don’t include any of the contracts at issue in this proceeding.
- 4) The R.07-05-025 proceeding includes an assessment of the general feasibility of accelerating the removal of the California Department of Water Resources (“DWR”) from the role as power supplier and measures for addressing any perceived legal, economic, or operational impediments that may exist. Federal Energy Regulatory Commission (“FERC”) issued Rule 719

on October 17, 2008, addressing long-term wholesale electric contracting issues 18 CFR Part 35, 125 FERC ¶ 61,071. The FERC is not addressing this issue but allowing the states to make the decision.

5) The current law is that stated in the recent Supreme Court *Morgan-Stanley* decision¹. CARE believes that the Decision does not address the issue that the contracts may not be valid and so should not be ordering steps to finalize the removal of DWR from its role as supplier of power.

The FERC October 17, 2008, order does not address this issue because the issue is presently being considered by the federal courts and it is premature for any agency to act when the validity of the contracts is uncertain. The CPUC should follow the FERC's lead and also not issue a decision authorizing wholesale electric contracts subject to FERC review and approval until after a federal court decision is issued.

ANALYSIS

Rule 16.1² explains that an application for rehearing shall set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful

¹ *Public Utilities Commission of Cal. v. FERC*, 474 F.3d 587 (9th Cir. 2006) (“*CPUC v. FERC*”), vacated and remanded on June 27, 2008 by *Dynegy Power Marketing v. Public Utils. Comm.*, 2008 Lexis 5272 for consideration in light of the Supreme Court's opinion in *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County* and *American Electric Power Service Corp. et al. v. Public Utility District No. 1 of Snohomish County*, 554 U. S. ____ (2008); 128 S. Ct. 2733.

² 16.1. (Rule 16.1) Application for Rehearing

(a) Application for rehearing of a Commission order or decision shall be filed within 30 days after the date the Commission mails the order or decision, or within 10 days of mailing in the case of an order relating to (1) security transactions and the transfer or encumbrance of utility property as described in Public Utilities Code Section 1731(b), or (2) the Department of Water Resources as described in Public Utilities Code Section 1731(c). An original plus four exact copies shall be tendered to the Commission for filing.

(b) Filing of an application for rehearing shall not excuse compliance with an order or a decision. An application filed ten or more days before the effective date of an order suspends the order until the application is granted or denied. Absent further Commission order, this suspension will lapse after 60 days. The Commission may extend the suspension period.

or erroneous, and must make specific references to the record or law. The specific reference is the legal proceedings described above. While the issues described are unresolved, the United States Supreme Court has ruled that the DWR contracts have not been approved according to the law. These legal proceedings should be resolved before ordering steps to finalize the removal of DWR from its role as supplier of power and because the new contracts could have penalty clauses that could cause the ratepayers' additional monetary damages.

Citing the definition from the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2601, et seq., CARE asserts, as it has in other filings, that it “alone” represents electric consumers in proceedings before the Commission and the FERC, and that interests of ratepayers are not adequately represented due to procedural barriers to our participation. This claim has a basis in law under the *Energy Policy Act of 2005, Section 1287, Consumer Privacy and Unfair Trade Practices*.

The CPUC is a party to Settlements with other Parties in the California FERC Refund proceedings under FERC Docket EL00-95-000 *et al.* The CPUC is authorized under California law to represent the people of the State of California in matters affecting California utilities' rates. *See* Cal. Pub. Util. Code §§ 307(b), 365. The FERC has recognized that the CPUC has a statutory mandate to represent the interests of California natural gas and electric consumers in proceedings before the FERC. *See, e.g., El Paso Natural Gas Co.*, 79 FERC ¶ 61,028 at 61,129 (1997) *reverses and remanded on other grounds; Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy*, 96 FERC ¶ 63,044 at 65,353 n.201 (2001) but the Commission has to exercise

(c) Applications for rehearing shall set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous, and must make specific references to the record or law. The purpose of an application for rehearing is to alert the Commission to a legal error, so that the Commission may correct it expeditiously.

its discretion to carry out this mandate and has failed to do so in approving the Decision which does not serve the public's interest and prejudices CARE's right to a fair hearing before the FERC and the Court. Similarly, in cases where the CPUC has challenged FERC orders, courts have recognized that the CPUC is supposed to represent the interests of ratepayers. *See, e.g., Pub. Util. Comm'n of Cal. v. FERC*, 988 F.2d 154, 157 (D.C. Cir. 1993); *Pub. Util. Comm'n of Cal. v. FERC*, 900 F.2d 269, 273 (D.C. Cir. 1990).

CARE asserts that the Decision harms the prospect of refunds for ratepayers, because CARE has a petition for review pending before the United States Court of Appeals for the Ninth Circuit. CARE also references the fact that on November 17, 2008, the Ninth Circuit issued an order strongly discouraging motions to lift the stay imposed in consolidated appellate proceedings pending review before that court. The approval of the Decision violates CARE's due process rights as well appears to us to be solely motivated by the Commission's objective of silencing CARE's pending claims in behalf "of electric consumer(s)" before the FERC and Court since the Commission has "stepped into the shoes" of the buyer (as a Market Participant) under the DWR contracts at issue.

ALJ Pulsifer noted in an August 22, 2008 ruling denying CARE's motion to dismiss this proceeding the effect of *Morgan Stanley* is to require FERC to review certain long-term power contracts that Public Utility District No. 1 of Snohomish County entered into during the 2000-2001 energy crisis and later challenged as unjust and unreasonable. FERC will now be required to review those contracts and determine whether they are "just and reasonable absent serious harm to the public interest" as required by Section 206(a) of the Federal Power Act (FPA) and the *Mobile-Sierra* doctrine, as interpreted by the Court in its *Morgan Stanley* opinion.

The long-term power contracts that DWR entered into during the energy crisis were challenged by the California Commission in another proceeding, which eventually led to a decision by the United States Court of Appeals for the Ninth Circuit (*Public Utilities Commission of Cal. v. FERC*, 474 F.3d 587 (9th Cir. 2006) (“*CPUC v. FERC*”), vacated and remanded by *Dynegy Power Marketing v. Public Utils. Comm.*, 2008 Lexis 5272 (June 27, 2008)). As noted in comments filed by DRA in this proceeding, the contracts this Commission challenged in that litigation include DWR’s long-term contracts with Sempra, Coral, and PacifiCorp.³

In *CPUC v FERC*, the Court of Appeals granted the CPUC’s petition for review of FERC’s orders rejecting challenges to the DWR long-term contracts, and remanded the case to FERC to review the challenged contracts under standards outlined in the opinion. The Supreme Court granted certiorari, however, and the day after it issued its opinion in *Morgan Stanley*, the high court vacated the Court of Appeal’s opinion in *CPUC v. FERC* and remanded to the Ninth Circuit for consideration consistent with the *Morgan Stanley* opinion.

It will be some time, however, before the question of whether the DWR contracts are unjust and unreasonable is remanded to FERC. The CPUC had requested that the Court of Appeals first address an issue that was purportedly reserved and not addressed in the Court’s earlier opinion: whether the CPUC, as a non-party to the contracts, must meet the “public interest” standard,⁴ but on November 17, 2008, the Ninth Circuit issued an order strongly discouraging motions to lift the stay imposed in consolidated appellate proceedings pending

³ DWR’s contract with Dynegy is also at issue in this litigation, but it is not relevant to the Direct Access proceeding because it has already expired.

⁴ See Letter from CPUC General Counsel Frank Lindh to the Ninth Circuit Court of Appeals re CPUC v... FERC, dated July 29, 2008

review before that court.⁵ This issue should be decided by the Court of Appeals before it remands the case to FERC. In short, it could be a long time before the question of whether DWR's contracts with Sempra, Coral, and PacifiCorp are unjust and unreasonable, is sent back to FERC.

The Commission, meanwhile, continues to challenge those contracts in the *CPUC v. FERC* litigation. The Commission can not be expected to find the contracts that are the subject of this litigation just and reasonable just because novation or assignment of these contracts to the utilities would make it possible to accelerate the reopening of Direct Access. Negotiation of replacement contracts on just and reasonable terms would be required that included the ratepayers and then the contracts must be filed for the FERC's review 60 days prior to commencing services under the contracts.

The Commission is acting in behalf of the State of California as a Market Participant. Not in the "public interest" of electric consumers whose interests it is statutorily and constitutionally in trusted to protect to which we strenuously object. This is the Commission's "statutory mandate". Therefore, this is why, CARE "alone" represents electric consumers in proceedings before the Commission and the FERC because CARE alone is the only purely Non-Market Participant with standing and without any conflicts of interest.

CARE further objects to the Commission's failure to carry out its statutory mandate to represent the interests of California natural gas and electric consumers in this proceeding as an unlawful abuse of discretion. If the Commission determines it will continue to pursue this course of action despite knowing its actions are unlawful and cause actual monetary harm to electric

⁵ See Attachment A.

consumers CARE will be forced to seek relief from cramming by DWR (i.e., the sale of goods and services to an electric consumer not expressly authorized by law or the electric consumer [42 USC 16471]).⁶

In *Public Utils. Comm'n v. Sellers of Long Term Contracts*, 99 FERC ¶ 61,087 at 61,382-83 (2002)) the FERC found that CPUC had “stepped into the shoes” of the buyer under the contracts at issue for the DWR, therefore now as a matter of law the *Mobile-Sierra* doctrine applies to the CPUC regardless of whether it is a non-contracting third-party or not with respect to the contracts at issue. In light of the Ninth Circuit’s clear indication that this issue may not be raised anew by the CPUC either before the FERC or before the Ninth Circuit at a later time,⁷ unless and until the Ninth Circuit or the Supreme Court affirms a holding that the CPUC “stepped into the shoes” of CDWR as a Market Participant which demonstrates the Commission is clearly in conflict with the Commission's statutory mandate to represent the interests of California natural gas and electric consumers.

We, however, find that in the instant proceeding, CPUC and CEO act in the same capacity as CDWR. Based on the fact that in negotiating and executing the contacts at issue, CDWR represented the State of California, CPUC and CEOB, which are also State representatives, "stepped into the shoes" of CDWR by these complainants as would apply to a similar complaint filed by CDWR.

⁶ See <http://uscode.house.gov/download/pls/42C149.txt>

Energy Policy Act of 2005 Sec. 1287. CONSUMER PRIVACY AND UNFAIR TRADE PRACTICES.

(a) PRIVACY.—The Federal Trade Commission may issue rules protecting the privacy of electric consumers from the disclosure of consumer information obtained in connection with the sale or delivery of electric energy to electric consumers.

(b) SLAMMING.—The Federal Trade Commission may issue rules prohibiting the change of selection of an electric utility except with the informed consent of the electric consumer or if approved by the appropriate State regulatory authority.

(c) CRAMMING.—The Federal Trade Commission may issue rules prohibiting the sale of goods and services to an electric consumer unless expressly authorized by law or the electric consumer. 42 USC 16471.

⁷ *Pub. Utils. Comm'n of Cal. v. FERC*, Nos. 03-74207, *et al.* (9th Cir. Dec. 4, 2008) (“Ninth Circuit Remand Order”).

CARE objects to the Commission's statement on page 81 of the Decision that "[e]ven though it was required by AB1X to pass through the costs of those contracts to ratepayers in retail rates, [because] the Commission simultaneously challenged the wholesale contracts as unjust and unreasonable under the Federal Power Act," therefore "the Commission will not be making any findings as to the "just and reasonableness" of any existing DWR contracts as a result of the novation process." The PD [and Decision] explains that "[i]nstead, the contracts that will be subject to Commission review and approval under the 'just and reasonable' standards of Section 451 will be *new* replacement *contracts* entered into between an IOU and each of the counterparties to the existing DWR contracts." Clearly this finding in the Decision conflicts with the Commission's statutory mandate to represent the interests of California natural gas and electric consumers.

CARE objects to this as a violation of due process because under AB1X Chapter 5 Section 80260 the statute terminates the authority of DWR to enter in to new contracts stating that "after January 1, 2003, the department shall not contract under this division for the purchase of electrical power." There was no discussion of this issue during the proceedings leading to this decision so the Commission has no basis to make this finding or to adopt Ordering paragraphs 7 and 8.

On and after January 1, 2003, the department shall not contract under this division for the purchase of electrical power. This section does not affect the authority of the department to administer contracts entered into prior to that date or the department's authority to sell electricity.

CARE represents the poor and otherwise unrepresented people of color who will be adversely affected by the Decision should penalty clauses in contract terms be imposed.

CARE's membership resides in the areas that the power plants producing electricity under these

contracts are sited. Some of them live in public housing projects or receive governmental housing assistance based upon their ability to pay. This assistance is supposed to include a utility cost allowance, but the actual amount of assistance is left to the governmental institution providing the housing, see <http://www.hud.gov/offices/pih/programs/ph/phecc/allowances2.cfm> This circumstance of an unfunded federal mandate means that the poor people that CARE represents are responsible for paying for increases in their utility bills caused by fluctuating utility rates for all utility services including the electricity that would be provided should the removal of DWR from its role as supplier of power occur.

CONCLUSION

CARE requests that the decision ordering steps to finalize the removal of DWR from its role as supplier of power not be approved for the reasons discussed.

Respectfully submitted,



Lynne Brown Vice-President
CALifornians for Renewable Energy, Inc. (CARE)
24 Harbor Road
San Francisco, CA 94124



Michael E. Boyd President (CARE)
CALifornians for Renewable Energy, Inc.
5439 Soquel Drive
Soquel, CA 95073

Attachment A

FILED

UNITED STATES COURT OF APPEALS

NOV 17 2008

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA,

Petitioner,

v.

FEDERAL ENERGY REGULATORY
COMMISSION,

Respondent

Nos. 01-71934; et al.

PACIFIC GAS AND ELECTRIC
COMPANY,

Petitioner,

v.

FEDERAL ENERGY REGULATORY
COMMISSION,

Respondent.

Nos. 05-71761; et al.

FERC No. EL00-95-098

ATMOATT

TURLOCK IRRIGATION DISTRICT,

Petitioner,

v.

FEDERAL ENERGY REGULATORY
COMMISSION,

Respondent.

No. 05-72452

FERC No. EL00-95-120

TURLOCK IRRIGATION DISTRICT,

Petitioner,

v.

FEDERAL ENERGY REGULATORY
COMMISSION,

Respondent.

No. 05-70360

FERC Nos. EL00-95-087; et al.

ORDER

Before: THOMAS, McKEOWN and CLIFTON, Circuit Judges.

Turlock Irrigation District's motion to lift the stay of proceedings and vacate in part three orders of the Federal Energy Regulatory Commission is denied without prejudice.

ATM/GATT

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The parties to these consolidated and stayed petitions are admonished that similar motions to lift the stay with respect to individual parties and orders are strongly discouraged.

The stay of proceedings remains in place pending further court order.

Verification

I am an officer of the Intervening Corporation herein, and am authorized to make this verification on its behalf. The statements in the foregoing document are true of my own knowledge, except matters, which are therein stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 22nd day of December 2008, at San Francisco, California.



Lynne Brown Vice-President
CALifornians for Renewable Energy, Inc. (CARE)
24 Harbor Road
San Francisco, CA 94124
Phone: (415) 285-4628
E-mail: l_brown369@yahoo.com

Certificate of Service

To reduce the burden of service in this proceeding, the Commission will allow the use of electronic service, to the extent possible using the electronic service protocols provided in this proceeding. All individuals on the service list should provide electronic mail addresses. The Commission and other parties will assume a party consents to electronic service unless the party indicates otherwise.

I hereby certify that I have this day served the foregoing document "*CARE Application for Rehearing of Decision (D.) 08-11-056*" under CPUC Docket R.07-05-025. Each person designated on the official service list, has been served via e-mail, to all persons on the attached service list on December 22nd, 2008 for the proceeding, R.07-05-025.



Martin Homec
P. O. Box 4471
Davis, CA 95617
Tel.: (530) 867-1850
E-mail: martinhomec@gmail.com
Attorney for CALIFORNIANS FOR
RENEWABLE ENERGY
Renewable Energy, Inc. (CARE)

R.07-05-025 Service List

keith.mccrea@sablaw.com,
twertz@tyrenergy.com,
debra.gallo@swgas.com,
chilen@sppc.com,
tdillard@sppc.com,
nwhang@manatt.com,
douglass@energyattorney.com,
AdviceTariffManager@sce.com,
Deana.White@sce.com,
mike.montoya@sce.com,
rkmoore@gswater.com,
khassan@sempra.com,
kfoley@sempra.com,
liddell@energyattorney.com,
jeff.malone@calpeak.com,
rwinthrop@pilotpowergroup.com,
gdixon@semprautilities.com,
srahon@semprautilities.com,
ewdlaw@sbcglobal.net,
mdjoseph@adamsbroadwell.com,
jeanne.sole@sfgov.org,
mflorio@turn.org,
kpp@cpuc.ca.gov,
norman.furuta@navy.mil,
scarter@nrdc.org,
mrh2@pge.com,
sara.oneill@constellation.com,
michael.hindus@pillsburylaw.com,
lisazycherman@dwt.com,
mday@goodinmacbride.com,
stevegreenwald@dwt.com,
CRMD@pge.com,
l_brown369@yahoo.com,
bkc7@pge.com,
lex@consumercal.org,
wbooth@booth-law.com,
mbyron@gwfpower.com,
ds1957@att.com,
alexm@calpine.com,
phanschen@mof.com,
gmorris@emf.net,
michaelboyd@sbcglobal.net,
mike@alpinenaturalgas.com,
westgas@aol.com,
martinhomec@gmail.com,
wamer@kirkwood.com,
mary.lynch@constellation.com,
abb@eslawfirm.com,
ddavie@wellhead.com,
rliebert@cfbf.com,
californiadockets@pacificorp.com,
szaminski@starwood.com,
steven.huhman@morganstanley.com,

myuffee@mwe.com,
srantala@energymarketers.com,
joseph.donovan@constellation.com,
ralphdennis@insightbb.com,
jcasadont@bluestarenergy.com,
csandidge@reliant.com,
dcurrie@reliant.com,
sliu@bear.com,
julie.martin@bp.com,
ntreadway@defgllc.com,
HKingerski@mxenergy.com,
pucservice@manatt.com,
curtis.kebler@gs.com,
klatt@energyattorney.com,
gbawa@cityofpasadena.net,
case.admin@sce.com,
debeberger@cox.net,
jackson.isaacs@gmail.com,
wdsmith@sempra.com,
lurick@sempra.com,
snelson@sempra.com,
troberts@sempra.com,
tcorr@sempraglobal.com,
mshames@ucan.org,
Dcs4837@yahoo.com,
rob@teamryno.com,
tomdelmonte@gmail.com,
marcie.milner@shell.com,
wkeilani@semprautilities.com,
jleslie@luce.com,
kjuedes@urmggroup.com,
thunt@cecmail.org,
pk@utilitycostmanagement.com,
Diane_Fellman@fpl.com,
omv@cpuc.ca.gov,
mramirez@sfwater.org,
tburke@sfwater.org,
achang@nrdc.org,
dhuard@manatt.com,
yxg4@pge.com,
pvh1@pge.com,
RegRelCpucCases@pge.com,
bcragg@goodinmacbride.com,
Cassandra.sweet@dowjones.com,
gblack@cwelaw.com,
hgolub@nixonpeabody.com,
jscancarelli@flk.com,
jarmstrong@goodinmacbride.com,
joshdavidson@dwt.com,
todd.edmister@bingham.com,
judypau@dwt.com,
cem@newsdata.com,
cem@newsdata.com,
lisa_weinzimer@platts.com,

rfg2@pge.com,
jchamberlin@strategicenergy.com,
Service@spurr.org,
ralf1241a@cs.com,
sean.beatty@mirant.com,
Patricia.R.Thompson@gmail.com,
duggank@calpine.com,
sbeserra@sbcglobal.net,
george.waidelich@safeway.com,
pthompson@summitblue.com,
phil@auclairconsulting.com,
brbarkovich@earthlink.net,
mrw@mrwassoc.com,
lguliasi@reliant.com,
malcolm@ae2.com,
philm@scdenergy.com,
mary.tucker@sanjoseca.gov,
blairj@mid.org,
joyw@mid.org,
rogerv@mid.org,
david.oliver@navigantconsulting.com,
perdue@montaguederose.com,
kenneth.swain@navigantconsulting.com,
jgg@eslawfirm.com,
bernardo@braunlegal.com,
blaising@braunlegal.com,

steven@iepa.com,
karen@klindh.com,
atrowbridge@daycartermurphy.com,
atrowbridge@daycartermurphy.com,
sas@a-klaw.com,
michelle.mishoe@pacificorp.com,
gifford.jung@powerex.com,
ayk@cpuc.ca.gov,
am4@cpuc.ca.gov,
blm@cpuc.ca.gov,
bfs@cpuc.ca.gov,
los@cpuc.ca.gov,
crv@cpuc.ca.gov,
edd@cpuc.ca.gov,
jw2@cpuc.ca.gov,
kdw@cpuc.ca.gov,
mjd@cpuc.ca.gov,
wtr@cpuc.ca.gov,
rhh@cpuc.ca.gov,
sjp@cpuc.ca.gov,
scr@cpuc.ca.gov,
trp@cpuc.ca.gov,
kellie.smith@sen.ca.gov,
ikwasny@water.ca.gov,
jpacheco@water.ca.gov,