

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

State of California, *ex rel.* Bill Lockyer,)
Attorney General of the State of)
California)

v.)

British Columbia Power Exchange)
Corporation, Coral Power, LLC, Dynegy)
Power Marketing, Inc., Enron Power)
Marketing, Inc., Mirant Americas Energy)
Marketing, LP, Reliant Energy Services,)
Inc., Williams Energy Marketing &)
Trading Company,)

All Other Public Utility Sellers of Energy)
and Ancillary Services to the California)
Energy Resources Scheduling Division)
of the California Department of Water)
Resources, and)

All Other Public Utility Sellers of Energy)
and Ancillary Services into Markets)
Operated by the California Power)
Exchange and California Independent)
System Operator)

Docket No. EL02-71-057

**COMMENTS OF THE CALIFORNIA ISO ON THE MOTION OF
SHELL ENERGY NORTH AMERICA (US), L.P.
TO QUASH SUBPOENA AD TESTIFICANDUM**

To: The Honorable Andrea McBarnette
Presiding Administrative Law Judge

Pursuant to Rule 213 of the Rules of Practice and Procedure of the
Federal Energy Regulatory Commission (“Commission”), the California
Independent System Operator Corporation (“ISO”) submits these Comments on
the Motion of Shell Energy North America (US), L.P. (“Shell”) to Quash and Stay

Subpoena *Ad Testificandum*, Conditional Motion to Modify Procedural Schedule, Or, In the Alternative, Motion for Reconsideration (“Motion”).

The ISO takes no position on the procedural arguments advanced in the Motion or in TransCanada’s motion to quash. The purpose of these Comments is only to address Shell’s arguments that Dr. Hildebrandt should not be permitted to testify in this proceeding because that would “call[] into question the impartiality of the CAISO market monitor,” and Shell’s suggestion that Dr. Hildebrandt may have acted improperly by communicating with parties to the litigation. Motion at 7, *see also id.* at 11-12.

Shell’s arguments are incorrect and the ISO asks the Presiding Judge to expressly reject them.

I. Commission Policy and Commission-Approved Ethical Rules Contemplate that Employees in the ISO’s Market Monitoring Unit May Testify in Regulatory Proceedings

Since 2009, Dr. Eric Hildebrandt has served as the leader of the ISO’s market monitoring unit, with the title Director of Market Monitoring. In 2000 and 2001, during the events in issue, Dr. Hildebrandt served as Manager of Market Monitoring with responsibility for identifying, analyzing and reporting on potential market manipulation and market power issues. Because of that work, he has direct factual knowledge concerning a contested issue relevant to this proceeding – namely, the information that was available to the ISO’s market monitoring unit in 2000 and 2001 to identify market manipulation or accumulation of market power.

Shell contends that it would be “highly irregular” for Dr. Hildebrandt to testify in this proceeding, and would undermine the independence and impartiality of the ISO’s market monitoring unit. Motion at 6-7. This argument is without merit.

As a threshold matter, it would be extraordinary for the Commission to bar factual testimony by percipient witnesses. *See generally Branzburg v. Hayes*, 408 U.S. 665, 689 (1972) (the judicial system “is entitled to every man’s evidence”). There is no policy barring market monitors from testifying about matters of fact or opinion. The absence of such a policy is a strong indication that the Commission does not believe that providing such testimony is improper. Indeed, Dr. Hildebrandt provided testimony in a 2012 hearing in Docket No. EL00-95, which involved similar issues of market behavior in the California marketplace during the energy crisis period. Neither the Presiding Judge nor the Commission took exception to his participation on the basis that he serves as the independent market monitor, or suggested that it threatened his independence.

The only support Shell cites for its position are general statements in Order No. 719 and 719-A about the need for market monitors to maintain independence. Motion at 7 n.9. But Shell is conflating the requirement of “independence” with the erroneous notion that a market monitor may not provide information about contested matters. None of these statements so much as mention a market monitor’s potential participation as a witness in a contested proceeding, or any related issue. And other statements in Order No. 719 expressly contradict Shell’s position. In its discussion of market monitor ethics,

the Commission requires ISOs to have codes of ethics that prohibit market monitoring employees from being “compensated, other than by the RTO or ISO, for any expert witness testimony or other commercial services to the RTO or ISO *or to any other party in connection with any legal or regulatory proceeding or commercial transaction relating to the RTO or ISO or to the RTO or ISO markets.*” See Order No. 719, PP 380, 384 (emphasis added).¹ This clearly contemplates that employees in an ISO’s market monitoring unit, such as Dr. Hildebrandt, may provide factual or opinion testimony in regulatory proceedings, provided only that they do not receive compensation from market participants.

The ISO’s code of ethics for employees in its Department of Market Monitoring (“DMM”) is drawn straight from the Commission rule. Section 9.5 states:

DMM employees shall not be compensated, other than by CAISO, for any expert witness testimony or other commercial services in connection with any legal or regulatory proceeding or commercial transaction relating to the CAISO.

Shell was aware of this rule, because the ISO directed Shell’s attention to it in a discovery response provided on March 8, five days before Shell filed this motion. See ISO’s response to SHELL-CAISO-14 (Attachment A). At Shell’s request, the ISO went to extra efforts to provide these discovery responses early – before the due date – so that Shell would have this information to use in its Motion. Shell, however, did not address this rule in its Motion.

¹ Wholesale Competition in Regions with Organized Electric Markets, Order No. 719, FERC Stats. & Regs. ¶¶31,281 (2008) (“Order No. 719”), order on reh’g, Order No. 719-A, FERC Stats. & Regs. ¶¶31,292 (2009), reh’g denied, Order No. 719-B, 129 FERC ¶¶ 61,252 (2009).

For these reasons, the ISO asks the Presiding Judge to explicitly reject Shell's contention that any testimony by Dr. Hildebrandt in this matter "calls into question the impartiality of the CAISO market monitor."

II. Dr. Hildebrandt Has Acted Fairly and Appropriately

Shell also suggests that Dr. Hildebrandt has somehow acted improperly, citing the fact that he communicated with counsel for the California Parties before he testified in the 2012 hearing in Docket No. EL00-95, and asserting that he "coordinated" in this proceeding with the California Parties prior to their filing of a request for subpoena. Motion at 11-12.

There is nothing untoward with respect to Dr. Hildebrandt's communications with the California Parties. Market monitoring employees are expected to communicate with market participants. Moreover, market monitors could not provide testimony in regulatory proceedings, as contemplated by the Commission, without some communications with the parties involved.

Shell's suggestion that such communications have been one-sided is inaccurate. Dr. Hildebrandt discussed the issues in the Docket No. EL00-95 hearing with both sides before he testified. Prior to his deposition in that proceeding, he had a telephone conference with the Cliff Gunter and Shelby Kelley of the Bracewell law firm, who were counsel for a supplier, to answer their questions related to issues in that hearing. He did the same for FERC Staff,

which was aligned with the suppliers in that hearing. Dr. Hildebrandt explained this in the same testimony that Shell excerpts with its Motion:²

Q: Did you have discussion with counsel for the California Parties about your testimony here today.

A: We met.

Q: Okay.

A: I met with ... counselors from them. We had a call with FERC legal Staff. So anybody who wanted to talk with us.

Q: Counselors from who? You said "from them.

A: Well, we talked to Mr. Gunter and, I believe, his associate.

Q: Okay. And you talked to FERC Staff?

A: At one point, we had a call with FERC Staff as well.

The colloquy continued two pages later:³

A: I've been willing to talk with anybody. If anybody wanted to give me an idea about what I'm going to get asked about today, that's absolutely fine. In the limited time that I had to prepare for this, I thought it was way more efficient if I could read documents that I may be asked about. And I would have done the same for any party that wanted to do that. I tried to go back after the deposition and look more at the specific documents that I got asked about by you in the deposition, because that gave me an idea what you might want to discuss here at the trial.

Q: Hey, don't get me wrong, Doctor, I'm not casting dispersions [sic] on the fact that you met with the California Parties. I just didn't know it.

In the current proceeding, Bracewell and Shell have not asked to speak with Dr. Hildebrandt, which they could have done.

² See Attachment B, Excerpts from Tr. Of Cross-Examination of Eric Hildebrandt, Docket No. EL00-95 (May 10, 2012) at 3834.

³ See *id.* at 3836-3837.

III. Conclusion

Regardless how the Presiding Judge rules on the motions to quash, she should reject the erroneous and misleading arguments that Shell has made about the independence and propriety of Dr. Hildebrandt and the ISO's market monitoring unit.

Respectfully submitted,

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Date: March 20, 2017

Attachment A

SHELL-CAISO-14

Does the CAISO have a policy regarding its employees acting as witnesses or to otherwise assist litigants regarding matters related to their employment at CAISO? If so, produce a copy of any such policy in effect from January 1, 2011 through the present.

Response: CAISO repeats its General Objections and its Specific Objections as to Definitions, as if fully set forth herein. CAISO objects that the question “Does the CAISO have a policy regarding its employees acting as witnesses or to otherwise assist litigants regarding matters related to their employment at CAISO?” is vague, ambiguous and subject to varying interpretations. CAISO further objects to this request to the extent it seeks information that is confidential or proprietary. Subject to and without waiving the foregoing objections, CAISO responds as follows:

CAISO’s Employee Handbook contains the following provision:

D. Non-Retaliation

The ISO prohibits retaliation against any employee, contractor or applicant who in good faith and with reasonable suspicion reports an alleged violation of law or the Code of Conduct and Ethical Principles. The ISO also prohibits retaliation against any employee, contractor or applicant who testifies, participates in, or otherwise assists in any investigation or proceeding relating to an alleged violation of the law or the Code of Conduct and Ethical Principles. Any employee who retaliates against another in violation of this Policy will be subject to discipline, up to and including termination of employment. Individuals who believe they have experienced retaliation should notify the ISO via your manager, HR or Legal. If you are not comfortable reporting your concern directly, the employee Hotline is available 24x7. Concerns may be reported via phone at [redacted], via the Code of Conduct Reporting link located on eCurrent, or at [redacted].

The complete version of CAISO’s Employee Handbook is confidential and proprietary. CAISO will not produce it without appropriate protections.

CAISO’s Code of Conduct and Ethical Principles, which applies to all employees including those in the CAISO’s Market Monitoring unit, may be responsive. It is available here: <http://www.caiso.com/Documents/CodeConduct.pdf>.

Appendix P of the CAISO Tariff, Section 9, includes additional ethical requirements for employees in the CAISO’s Market Monitoring unit. It is available here: http://www.caiso.com/Documents/AppendixP_CaliforniaSODepartmentOfMarketMonitoring_asof_Jun12_2013.pdf.

Person Responsible: Counsel
March 8, 2017

Attachment B

1 P R O C E E D I N G S

2 PRESIDING JUDGE: All right. We can resume on
3 the record. Today is May the 10th, 2012. We are in the
4 case of San Diego Gas & Electric Company, Docket Number
5 EL00-95-248.

6 Any preliminary matters before we begin?

7 All right, Mr. Watkiss.

8 MR. WATKISS: Thank you, your Honor.

9 Whereupon,

10 ERIC HILDEBRANDT

11 resumed the stand and, having been previously duly sworn,
12 was examined and testified further as follows:

13 CROSS-EXAMINATION

14 BY MR. WATKISS:

15 Q Dr. Hildebrandt, I am Dan Watkiss, counsel for
16 Shell Energy North America U.S., LP, and Shell Martinez
17 Refinery in this case.

18 Do you understand that Shell Energy did business
19 in the California electricity market as Coral Power, LLC,
20 during the relevant May 1st to October 1st time period?

21 A Yes.

22 Q And you are aware, are you not, that Coral Power
23 operated as a marketer in those markets? Is that your
24 understanding?

25 A That would be my understanding.

1 29.

2 (Exhibits SNA-29 and SNA-30 identified.)

3 MR. WATKISS: We will have copies made for
4 distribution after the noon hour, your Honor.

5 PRESIDING JUDGE: All right, Mr. Estes.

6 MR. ESTES: Thank you, your Honor.

7 CROSS-EXAMINATION

8 BY MR. ESTES:

9 Q Good day, Dr. Hildebrandt.

10 A Mr. Estes.

11 Q I wanted to talk a little bit, and maybe we can
12 wrap this up before the lunch break and make some progress,
13 about what sometimes is called false load. I've been
14 confused at various points in time, and maybe yesterday
15 after the trial ended I might have been had a little bit of
16 a breakthrough in my own understanding.

17 You've been in the CAISO control room, I
18 imagine, very frequently; is that fair?

19 A On occasions.

20 Q I've never been to that one. I've been in the
21 utility control room of two, and there's actually a picture
22 of the MISO control room right outside. You've, perhaps,
23 seen that on the way to --

24 A I have not seen that.

25 Q When it opened up. What it looks like,

1 A Uh-huh.

2 Q In fact, some of the Qs and As that you were
3 asked about in your prior testimony by Mr. Berman were
4 dealing with some of the things they said.

5 A Correct.

6 Q Did you notice any new material in what you
7 glanced at this time?

8 A I didn't go back to compare against the other
9 stuff. So --

10 Q Okay. You didn't read my other witness,
11 Professor Kalt? He's Kennedy School.

12 A Yeah, I don't recall that one. I recall Pirrong
13 or something like that.

14 Q You read Pirrong --

15 A When I say I read, I glanced through them.

16 Q How about Professor Sweeney?

17 A I looked at that to see what kind of things
18 might be in it.

19 Q But am I to understand you spent -- you did more
20 than glance at Dr. Berry's testimony here, didn't you?

21 A No. I would say I reviewed it in similar level.

22 Q Oh, okay. How about the rest of the California
23 Parties' witnesses?

24 A Similar level.

25 Q Okay. How about the fact witnesses on our side

1 of the case? There are some of them; are you aware of
2 that?

3 A Similar level to the rebuttal. I glanced at
4 everything.

5 Q Did you do that before or after you got your
6 subpoena in this case?

7 A Oh, it would have been after.

8 Q Did you ever have discussion with counsel for
9 the California Parties about your testimony here today?

10 A We met.

11 Q Okay.

12 A I met with -- I was -- we talked with counselors
13 from them. We had a call with FERC legal Staff. So
14 anybody who wanted to talk to us.

15 Q Counselors from who? You said "from them."

16 A Well, we talked to Mr. Gunter and, I believe,
17 his associate.

18 Q Okay. And you talked to FERC Staff?

19 A At one point, we had a call with FERC Staff as
20 well.

21 Q And then you say you met with the California
22 Parties' counsel? Did I get that right?

23 A Yeah, with my lawyer.

24 Q Was that in person?

25 A Yeah. I thought -- yes.

1 Q How long was the meeting?

2 A About an hour.

3 Q Okay. Did you have Mr. Berman's questions at
4 that point in time or not?

5 A Yeah, I had gotten those, had a chance to look
6 at them and scratch some notes.

7 Q And did you go over your potential answers?

8 A Not really.

9 Q What did you talk about?

10 A I guess in some cases that I had a chance to
11 review the documents that might give me a better idea what
12 I might focus on more. So I reviewed probably -- I may
13 have pointed to particular exhibits that I felt I might
14 point to in response.

15 Q So you talked about prior work you had done that
16 might be responsive to the questions Mr. Berman --

17 A Well, I mean, it appeared -- from the questions,
18 I got a better idea out of the voluminous amount of
19 information that I did personally versus what might be
20 involved in the case. It gave me an idea of what I might
21 want to try to read in the limited amount of time I had.

22 Q It gave you an idea. See, this is where I'm not
23 fully understanding you. The hour conversation or
24 something else?

25 A Oh, no, the potential questions.

1 Q Okay. But you're telling me what you looked at
2 and what you thought about. I want to know what you talked
3 about. By the way, who did you meet with from the
4 California Parties? Who was there?

5 A I believe most of the people here.

6 Q All right. I don't want to take an hour, but
7 tell me more about what the discussion was.

8 A We explained -- exchanged pleasantries. They
9 talked about how the trial was going, taking a long time.
10 And then I think as I said I went through here. This had
11 given me a chance, I could see oh, okay, they're interested
12 in particular documents that I had done. So as I
13 mentioned, I think I went through and said okay, on here,
14 this might be a good chart or part of this report that
15 seemed responsive to your question.

16 Q Did they ask whether you agreed with Dr. Berry's
17 testimony?

18 A No.

19 Q Did you discuss whether you agreed with
20 Dr. Berry's testimony?

21 A No.

22 Q I guess maybe there was no need to talk about
23 that, actually. Well, we may come back to that. I'm glad
24 I asked. I hadn't understood all of this.

25 A I've been willing to talk with anybody. If

1 anybody wanted to give me an idea what I'm going to get
2 asked about today, that's absolutely fine. In the limited
3 time that I had to prepare for this, I thought it was way
4 more efficient if I could read documents that I may be
5 asked about. And I would have done the same for any party
6 that wanted to do that. I tried to go back after the
7 deposition and look more at the specific documents that I
8 got asked about by you in the deposition, because that gave
9 me an idea what you might want to discuss here at the
10 trial.

11 Q Hey, don't get me wrong, Doctor. I'm not casting
12 dispersions on the fact that you met with the California
13 Parties. I just didn't know it.

14 A I'm here giving my own opinions, and none of
15 this changed what I said up here today. So --

16 Q I'm not suggesting otherwise.

17 A Okay. I hope not.

18 Q And you know one reason I'm not suggesting
19 otherwise, Dr. Hildebrandt, is I know what you said in
20 2003, and I know it's pretty much the same thing you're
21 saying now; right?

22 A Correct.

23 Q So we understand each other. No impugning your
24 integrity.

25 A I hope so. I hope I cleared that up.

1 Q I just didn't know. Maybe in the few minutes
2 before lunch I can just learn another tidbit. There was a
3 point in time -- we were talking about this. I didn't
4 really remember when it was, when the California ISO
5 stopped being as active in the refund case as a litigant.

6 Does that comport with your recollection, too?

7 A Yeah, I think at some point after the refund
8 portion of it.

9 Q Right. We had those two trials. There's a
10 bunch of settlement reruns that happened. I kept getting
11 CDs from them, but you weren't active as these folks;
12 right?

13 A Correct. So a lot of this, yeah, I hadn't
14 reviewed in a long time.

15 Q That's kind of what I was curious about. You
16 told me you were on the LISTSERV, and I'm not sure -- for
17 the record, I will explain, most people know, that there's
18 this e-mail list that spews out and sometimes sends e-mails
19 to everybody. I remained on it for years, and I didn't
20 really read them because frankly I get too many e-mails as
21 it is anyway. I guess I'm wondering, Dr. Hildebrandt, did
22 you keep reading that stuff over the intervening, I don't
23 know, 6 or 8 years, however long it's been?

24 A No. I just don't know how to get myself off.
25 Some of it is interesting, how it goes on. I've seen some

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of this document upon the email listserv established by the Commission for this proceeding.

Dated this 20th day of March, 2017 in Washington, DC.

/s/ Michael Kunselman

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