

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. PA02-2-002

ORDER DENYING INTERVENTIONS

(Issued April 9, 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 Southern California Edison Company (SoCal Edison) and the City of Vernon, California (Vernon) have sought to intervene and to request rehearing of the January 31 Order. This order denies the motions to intervene and dismisses the rehearing requests.

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 undue influence over wholesale electric prices, in the West.² Staff sought discovery from market participants, including Reliant, and directed Reliant to review and submit for Staff analysis certain data. This review resulted in the discovery of actions by certain Reliant employees during two days in June 2000 to reduce the quantity of megawatts offered to the California Power Exchange Corporation (CalPX) below the amount that otherwise would have been offered to the CalPX. Specifically, these Reliant traders, in an effort to increase prices in the forward markets, reduced capacity offered on June 20 and 21, 2000 in the

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

²See Fact-Finding Investigation into Possible Manipulation of Electric and Natural Gas Prices, 98 FERC ¶ 61,165 (2002) (directing Staff to conduct an investigation).

CalPX day-ahead market for delivery days June 21 and 22, 2000. Once Reliant identified these misdeeds, it provided Staff with relevant data, and entered into an Agreement with Staff to remedy any effects of the withholding on market participants.

3. The Agreement, upon approval 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. As described in the January 31 Order, the payment:

reflects the worst case scenario of the effect of Reliant's withholding on the California market. Staff has based this payment on a calculation of the maximum possible difference in CalPX clearing prices between the actual case and the hypothetical case. For the hypothetical case, Staff calculated the average amount of MWs that Reliant bid into the CalPX for each weekday hour for the prior two weeks. The difference between the theoretical bid quantities and Reliant's actual MWs sold was used and assigned an offer price of zero. The payment amount, calculated in this manner, puts CalPX customers in the position they would have been in had Reliant bid in the additional MWs as a "price taker."³

The order also explained that the payment is in addition to any potential refunds owed by Reliant in the refund proceeding in Docket No. EL00-95-045, et al.

INTERVENTIONS AND REHEARINGS

5. SoCal Edison filed a motion to intervene and request for rehearing and clarification on February 10, 2003. Vernon moved to intervene and requested rehearing on February 21, 2003. On March 3, 2003, motions to intervene and requests for rehearing and clarification were filed by the California Public Utilities Commission (California Commission), the

³January 31 Order, 102 FERC ¶ 61,108 at P 6.

California Electricity Oversight Board (Oversight Board), and Pacific Gas and Electric Company and the People of the State of California *ex rel.* Bill Lockyer, Attorney General (PG&E and the Attorney General) (collectively, California Parties).

6. The movants concede that the Commission's regulations do not provide for intervention as a matter of right in investigations,⁴ however, they request that the Commission grant their intervention in this case for good cause shown. The movants urge that they have demonstrated good cause because they have 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 are not represented by Reliant or Staff, and that intervention at this time will not unduly burden any party or the Commission. They cite to another instance where the Commission granted interventions and considered requests for rehearing after the approval of a settlement of an enforcement investigation.⁵ In addition, the California Parties state that they have engaged in extensive discovery and actively participated in other Commission proceedings regarding market manipulation. Further, the California Commission cites its statutory responsibility to represent California electricity and gas consumers and its ability to speak to their interests.

7. SoCal Edison charges that the January 31 Order is unclear regarding which claims the Agreement resolves and contends that the remedy falls short of the stated goal of putting consumers back in the position that they would have been in had Reliant's traders not withheld capacity. SoCal Edison requests that the Commission, first, clarify that the January 31 Order does not purport to settle any claims that Edison has against Reliant and other sellers based on the actions of Reliant's employees⁶ and, second, find on rehearing that Reliant's actions caused harm to the market not addressed in the January 31 Order.

8. Vernon objects to the January 31 Order's method of allocating the \$13.8 million payment on the basis of gross hourly purchases and suggests instead netting purchases against sales; in this manner, Vernon contends that those market participants that bought more than they sold in a given hour will not have benefitted from Reliant's bad acts.

⁴See 18 C.F.R. § 1b.11 (2002).

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

⁶As we note below, the Agreement approved in the January 31 Order addresses only the traders' actions of June 20 and 21, 2000 with respect to sales that would have occurred in the CalPX day-ahead market.

9. PG&E and the Attorney General incorporate by reference the rehearing arguments of SoCal Edison. In addition, they object that the allocation of the payment allows Reliant to receive relief for its own misconduct.

10. The Oversight Board raises the same arguments as SoCal Edison, and also requests that the Commission grant rehearing to require contemporaneous physical review of units following a declaration of a forced outage (as opposed to the semi-annual retrospective audits required in the Agreement).

11. The California Commission argues on rehearing that the Commission should have revoked Reliant's market-based rate authority in light of purported misrepresentations the company has made, that the Commission should find that Reliant's actions caused harm to the market not addressed in the Agreement, and that the allocation should be revised to prevent the payment from going to generators who manipulated the market. The California Commission also seeks clarification that the Commission does not intend to limit the authority of any other entity to review plant outages and that the Commission does not intend to settle or compromise the claims of other parties with respect to the actions revealed in the January 31 Order. Finally, the California Commission contends that the January 31 Order violated the due process rights of others interested in market manipulation activities and seeks clarification that the January 31 Order did not impact any party's rights in any other Commission proceeding.

12. Reliant filed answers to the motions to intervene, charging that they are procedurally improper, as the Commission's regulations do not provide third parties with the right to intervene in a non-public investigation. Reliant further argues that the Commission should not permit any of the movants to intervene as a matter of discretion.

DISCUSSION

Procedural Matters

13. We will permit Reliant's answers to the extent that they respond to the movants' motions to intervene.

Motions to Intervene

14. The movants correctly acknowledge that they have no right to intervene in this non-public investigation. The Commission's regulations clearly distinguish investigations from

other proceedings. Section 1b.11 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."⁷ Moreover, Rule 101(b)(1) of the Commission Rules of Practice and Procedure provides that the Commission's Rules of Practice and Procedure do not apply to investigations under Part 1b of the Commission's regulations.⁸ Accordingly, Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2002), regarding interventions, does not apply to investigations under Part 1b.

15. The Commission is not persuaded to grant intervention as a matter of discretion, as suggested by the movants. Under the Federal Power Act, the Commission has exclusive authority to enforce the Act, and decisions to pursue and resolve issues under investigation are solely within the Commission's non-reviewable discretion.⁹ To allow third parties to participate in and second guess the Commission's decisions in investigations could also cripple its ability to prosecute and settle such investigations, because the subjects of the investigations would be very reluctant to enter into settlements for fear that they could be reopened.¹⁰

16. This case differs from Columbia Gas, cited by the movants, where the Commission permitted interventions following approval of a stipulation and consent agreement. Unlike in Columbia Gas, the January 31 Order approved a settlement of an investigation that provided remedies to the marketplace for very specific misconduct that was brought to light in the course of a Commission-initiated investigation. The Commission also, we note, expressly considered the Agreement to be fair and reasonable and in the public interest (indeed, the refund was described as reflecting the "worst case scenario of the effect of

⁷18 C.F.R. § 1b.11 (2002).

⁸18 C.F.R. § 385.101(b)(1) (2002).

⁹See Baltimore Gas & Electric Co. v. FERC, 252 F.3d 456, 458-60 (D.C. Cir. 2001) (FERC's decision to settle its enforcement action was within its nonreviewable discretion); 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 and thus unreviewable); Fort Sumter Tours, Inc. v. Babbitt, 202 F.3d 349, 354 (D.C. Cir. 2000) (decision whether to settle a case is not reviewable under the APA); cf. Heckler v. Chaney, 470 U.S. 821, 831-33 (1985) (agency decisions not to exercise its prosecutorial or enforcement authority are not judicially reviewable).

¹⁰Cf. City of Las Cruces, New Mexico, 91 FERC ¶ 61,277 (2000) (holding that a third party may not force others who have reached a settlement to continue to litigate).

Reliant's withholding," and the payment was based on a calculation that assumed Reliant had bid the withheld megawatts at an offer price of zero).¹¹

17. Allowing the movants to intervene to seek rehearing of the January 31 Order (and to overturn the settlement) would, in short, undermine the Commission's ability to investigate and, in particular, resolve matters within its jurisdiction.

Requests for Clarification and Rehearing

18. Because the movants are not parties to this proceeding, they lack standing to seek rehearing of the January 31 Order. The Federal Power Act requires that an entity seeking rehearing be a party to a proceeding.¹² Accordingly, we will dismiss the requests for rehearing.

19. Although we have denied the motions to intervene and thus dismissed the requests for rehearing, we nevertheless provide the following clarification upon our own motion. Our January 31 Order states that the Agreement is an effort to resolve "any possibility that Reliant's actions may have resulted in rates that harmed customers in the CalPX,"¹³ that the payment "puts CalPX customers in the position they would have been in had Reliant bid in the additional MWs as a 'price taker,'"¹⁴ and that "Reliant has agreed to pay the CalPX customers who suffered financially . . .".¹⁵ We clarify that the Agreement approved in the January 31 Order addresses only the Reliant traders' actions of June 20 and 21, 2000 with

¹¹102 FERC ¶ 61,108 at P 6, 11, 13.

¹²See 16 U.S.C. § 825l(a) (2000). See also 18 C.F.R. § 385.713(b) (2002); PG&E National Energy Group, LLC, et al., 94 FERC ¶ 61,154 at 61,577 (2001), order on reh'g, 98 FERC ¶ 61,073 at 61,206-07 (2002), affirmed State of California, et al. v. FERC, Nos. 02-70336, et al. (9th Cir. Feb. 21, 2003); Southern Company Services, Inc., 92 FERC ¶ 61,167 at 61,566 (2000); Consolidated Edison, Inc. and Northeast Utilities, 92 FERC ¶ 61,014 at 61,031 (2000).

¹³102 FERC ¶ 61,108 at P 9.

¹⁴Id. at P 6.

¹⁵Id. at P 13.

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.¹⁶

20. Finally, we note that the settlement at issue resolved but a small piece of the entire investigation conducted by staff. The Commission has acted on other aspects of the investigation and will continue to consider remedies for inappropriate behavior by market participants and additional grounds for remedial relief.¹⁷

The Commission orders:

(A) The movants' motions to intervene are hereby denied, as discussed in the body of this order.

(B) The requests for rehearing of the movants are hereby dismissed, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹⁶See id.

¹⁷See, e.g., Reliant Energy Services, Inc., and BP Energy Company, 102 FERC ¶ 61,315 (2003); Enron Power Marketing, Inc., et al., 102 FERC ¶ 61,316 (2003); Final Report on Price Manipulation in Western Markets (Docket No. PA02-2-000 March 2003).