

UNITED STATES OF AMERICA 116 FERC ¶61,022
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

North Star Steel Company, LLC

Docket No. EL06-68-000

v.

Arizona Public Service Company

California Independent System Operator Corp.
Enron Power Marketing, Inc.
Nevada Power Company
PacifiCorp.
Powerex Corp.
Public Service Company of New Mexico
Tucson Electric Power Company

ORDER DISMISSING COMPLAINT

(Issued July 7, 2006)

1. On May 2, 2006, North Star Steel Company, LLC (North Star) filed a complaint against Arizona Public Service Company, California Independent System Operator Corp. (California ISO), Enron Power Marketing, Inc. (Enron), Nevada Power Company, PacifiCorp., Powerex Corp. (Powerex), Public Service Company of New Mexico, and Tucson Electric Power Company (Respondents), requesting that the Commission direct the Respondents to refund amounts paid them for electric energy at prices in excess of the market clearing price for electric energy sold during the California energy crisis of 2000 and 2001. As discussed below, we dismiss North Star's complaint.

Background

2. In August, 2000, the Commission initiated a formal investigation (California Refund Proceeding) to determine the justness and reasonableness of rates for sales into

the California ISO and California Power Exchange markets (PX).¹ This proceeding arose as a result of price spikes in the California ISO and PX markets during the summer of 2000. In November of 2000, the Commission adopted several reform measures. FERC found that the "California market structure provided the opportunity for sellers to exercise market power" in times of tight supply and that such market power could result in "unjust and unreasonable rates."² In addition to ordering structural and rule changes, the Commission ordered an evidentiary hearing to determine the appropriate refunds for transactions within the California ISO and PX spot market for transactions during the period from October 2, 2000 through June 20, 2001.

3. In April, 2001, the Commission imposed price caps in California, using the market clearing price as the upper limit to the zone of reasonableness.³ In June, 2001, the Commission reaffirmed previous findings that the region within the Western Electric Coordinating Council (WECC) comprised a single "inextricably interrelated" market,⁴ and that "deficient market mechanisms" in California had caused a "dysfunctional" marketplace through out the West,⁵ and extended price caps, at the same level as the market clearing price established in California, to transactions occurring through the WECC.⁶

¹ *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange*, 92 FERC ¶ 61,172 (2000).

² *See San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange*, 93 FERC ¶ 61,121 (2000).

³ *See San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange*, 95 FERC ¶ 61,115 at 61,359 (2001).

⁴ *See San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange*, 95 FERC ¶ 61,418 at 62,545 (2001).

⁵ *Id.* at 62,556.

⁶ *Id.* at 62,546-47, 62,568.

4. In July, 2001, the Commission ordered refunds based upon a mitigated market price.⁷ The Commission set forth a formula to use in calculating the mitigated market price and established an evidentiary hearing proceeding before an Administrative Law Judge (ALJ) to, among other things, compile the data needed for the formula which relied on heat rates of generating units and natural gas prices as published by indices. In December 2002, the ALJ issued an initial decision on the formula and found that power suppliers owed an estimated \$1.8 billion in refunds and that the California ISO and PX owed suppliers cash payments of \$3 billion.⁸ Three months later, in March 2003, the Commission issued an order largely adopting many of the ALJ's findings.⁹

5. North Star, as well as all the Respondents, were parties to the California Refund Proceeding.

Complaint

6. North Star states that as an end user of electricity, it purchased electricity from the Arizona Electric Power Cooperative (AEPSCO) during the period January 1, 2000 through June 20, 2001. North Star argues that this electricity was purchased by AEPSCO from Respondents at rates that exceeded the market clearing price and that these rates were unjust and unreasonable. Therefore, North Star argues that respondents (1) exercised market power in violation of Commission orders; (2) exceeded their market-based rate authority; and (3) "charged, demanded, and received a rate that was not a part of a tariff filed with and approved by the Commission." As to this third point North Star asserts that based on "information and belief," the sale transactions from Respondents to AEPSCO were not timely reported to the Commission as required and accordingly, such

⁷ *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange*, 96 FERC ¶ 61,120 (2001) (July 2001 Order).

⁸ *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange*, 101 FERC ¶ 63,026 (2002).

⁹ *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange*, 102 FERC ¶ 61,317 (2003).

transactions are void or voidable, and subject to refund and other remedies.¹⁰ North Star requests that "each Respondent be ordered and directed to refund to North Star" certain specified amounts.

Notice of Filing

7. Notice of North Star's complaint was published in the *Federal Register*, 71 Fed. Reg. 27,487 (2006), with the answer to the complaint and all comments, interventions or protests due on or before May 23, 2006. Respondents filed timely answers to the complaint. North Star filed an answer to Respondents' answers.

Answers

8. Respondents essentially argue that the complaint should be dismissed because: (1) they sold electricity to a third party, AEPCO, and not directly to North Star and therefore, North Star has no standing since there is no privity of contract with Respondents; (2) North Star purchased electricity at retail, not wholesale, and therefore such purchases fall outside of the Commission's jurisdiction; (3) under the doctrine of laches North Star should be estopped because the respondents would be substantially prejudiced were they required to address these matters with complainant now, five years after the rest of the parties in the Western power markets commenced addressing these matters with each other; (4) complaint is a collateral attack on prior Commission orders, in which the Commission has already soundly rejected claims for relief from pricing provisions of bilateral power sales agreements; and (5) the filed rate doctrine bars the complaint as once the Commission has accepted a blanket market-based rate tariff from an entity, this tariff satisfies all requirements under the filed rate doctrine and provides sufficient notice of the rates to be charged.

9. Enron further argues that since it filed a petition under Chapter 11 of the Bankruptcy Code, the complaint is barred by the automatic stay provisions of the Bankruptcy Code. PacifiCorp. argues that it did not sell electricity to AEPCO within the alleged time frame beyond the clearing price. APS states that the complaint is barred under the governing agreements which state that a billing or payment dispute must be noticed within two years from the date the bill was tendered. Powerex states that the amount North Star claims Powerex owes it is de minimis and should not serve as the basis for a valid complaint against Powerex. Powerex also argues that North Star's

¹⁰ Citing *State of California ex rel. Lockeyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004), *petition for panel reh'g and suggestion for reh'g en banc, pending* (9th Cir., filed Oct. 25, 2004).

complaint does not present any genuine issues of material fact for the Commission to resolve, and thus, must be dismissed because Powerex did not make any sales to AEPCO during the period in question. Nevada Power argues that any retroactive relief North Star seeks is barred by section 206 of the FPA. Further, Powerex argues that North Star has been denied its remedy once before in Docket Nos. EL00-95-000, *et al.* and has provided no evidence of any reporting deficiency to support its claim that the *Lockeyer v. FERC* decision is applicable in this proceeding.

Discussion

Procedural Matters

10. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2005), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept North Star's answer to Respondents' answers and will, therefore, reject it.

Dismissal

11. We will dismiss North Star's complaint requesting refunds. North Star states that as an end user of electricity, i.e., a purchaser at the retail level, it purchased electricity from AEPCO during the period January 1, 2000 through June 20, 2001, and that this electricity was purchased by AEPCO at the wholesale level from Respondents at rates that exceeded the market clearing price and that these rates were unjust and unreasonable. Although North Star notes that it has a retail service agreement with AEPCO, it does not identify any transaction or contract for the wholesale sale of electricity between Respondents and North Star. We agree with Respondents that there is no privity of contract between North Star and Respondents.

12. Furthermore, under the Western System Power Pool Agreement, a Commission filed rate schedule to which AEPCO is a party, North Star cannot step into the shoes of AEPCO. Section 20 of the WSPPA states that: "THIRD PARTY BENEFICIARIES: This Agreement shall not be construed to create rights, in, or to grant remedies to, any third party as a beneficiary of this Agreement or of any duty, obligation or undertaking established herein except as provided for in Section 14."

13. Since the relief sought here consists of refunds to a retail customer, the Commission does not have the ability to order the refunds North Star requests. The Commission is bound by the jurisdictional limitations of section 201 of the Federal

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Power Act (FPA).¹¹ Section 201 dictates that the Commission's rate and refund authority for sales of power under sections 205 and 206 shall be limited to wholesale transactions.¹² North Star requests that the Commission order Respondents to refund certain amounts to North Star. In other words, North Star requests that the Commission order retail refunds. Such retail refunds are beyond the scope of sections 205 and 206 of the FPA.

The Commission orders:

North Star's complaint is hereby denied as discussed herein.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹¹ See, e.g., *Bonneville Power Admin. v. FERC*, 422 F.3d 908, 911, 914-15 (9th Cir. 2005).

¹² 16 U.S.C. § 824(b)(1) (2000) ("The provisions of this subchapter shall apply to . . . the sale of electric energy at *wholesale* in interstate commerce, but except as provided in paragraph (2) *shall not apply to any other sale of electric energy . . .*") (emphasis added).