

JUL 08 2008

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

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**STATE WATER CONTRACTORS;
METROPOLITAN WATER
DISTRICT OF SOUTHERN
CALIFORNIA; CALIFORNIA
DEPARTMENT OF WATER
RESOURCES,**

Petitioners,

**CORAL POWER, L.L.C.;
DEPARTMENT OF WATER
RESOURCES; MSR PUBLIC POWER
AGENCY; PUBLIC UTILITIES
COMMISSION OF THE STATE OF
CALIFORNIA; THE CITY OF SANTA
CLARA, CALIFORNIA; THE CITY
OF REDDING, CALIFORNIA; THE
MODESTO IRRIGATION DISTRICT,**

Intervenors,

v.

**FEDERAL ENERGY REGULATORY
COMMISSION,**

Respondent,

No. 06-74506

FERC No. ER-02-1656

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

CITY OF VERNON; SOUTHERN CALIFORNIA EDISON COMPANY; PACIFIC GAS AND ELECTRIC COMPANY; CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION; CITY OF ANAHEIM; CITY OF AZUSA; CITY OF BANNING; CITY OF COLTON; CITY OF RIVERSIDE; CALIFORNIA ELECTRICITY OVERSIGHT BOARD; NORTHERN CALIFORNIA POWER AGENCY,

Respondents-Intervenors.

On Petition for Review of an Order of the
Federal Energy Regulatory Commission

Argued and Submitted June 5, 2008
Pasadena, California

Before: **KOZINSKI**, Chief Judge, **ALDISERT**** and **BEA**, Circuit Judges.

1. When a rate or an aspect of a rate that has been previously approved by FERC is later challenged, the complainant has the burden of showing that it is unlawful. See 16 U.S.C. § 824e(b), FPA § 206. The “flat” transmission rate challenged by petitioners was not a feature newly introduced by Amendment 27 to

** The Honorable Ruggero J. Aldisert, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

the ISO Tariff. Rather, the concept of the flat rate had already been approved by FERC. Pac. Gas & Elec. Co., 81 FERC ¶ 61,122 at 61,504 (1997); Cal. Indep. Sys. Operator Corp., 106 FERC ¶ 63,026 at 65,268-69 (2004), rev'd in part on other grounds, Cal. Indep. Sys. Operator Corp., 109 FERC ¶ 61,301 at 62,468 (2004). Therefore, FERC properly allocated to petitioners the burden of proving that the flat rate is unlawful.

2. FERC's approval of the flat transmission rate as just, reasonable and not unduly discriminatory and its rejection of petitioners' contention that time-dependent rates are required is supported by substantial evidence. See Port of Seattle v. FERC, 499 F.3d 1016, 1026 (9th Cir. 2007).

3. FERC's approval of the flat transmission rate and its rejection of petitioners' contention that time-dependent rates are required is not arbitrary and capricious. A time-dependent rate is not required under either federal caselaw or agency precedent. FERC's decision did not violate the agency's policy of requiring rates to convey price signals; FERC found that the ISO Tariff's flat-rate-plus-congestion-fee model sends the proper price signals, Cal. Indep. Sys. Operator Corp., 111 FERC ¶ 61,337 at 62,500 (2005), and this finding was supported by substantial evidence. See Port of Seattle, 499 F.3d at 1026. And although FERC

had previously recognized that the congestion management system was flawed, Cal. Indep. Sys. Operator Corp., 90 FERC ¶ 61,006 at 61,013 (2000), the agency was within its discretion to address such flaws in a separate proceeding. See Mobil Oil Exploration & Producing Se., Inc. v. United Distrib. Cos., 498 U.S. 211, 230 (1991).

PETITION DENIED.