UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

CAlifornians for Renewable Energy, Inc.

v. Docket No. EL07-37-000

California Public Utilities Commission,
Southern California Edison,
and Long Beach Generation, LLC,

CAlifornians for Renewable Energy, Inc.

v. Docket No. EL07-40-000

California Public Utilities Commission,
Pacific Gas and Electric Company,
Metcalf Energy Center, LLC,
and the Los Medanos Energy Center, LLC

(Not Consolidated)

ORDER DISMISSING COMPLAINTS

(Issued April 19, 2007)

1. In this order, we address two virtually identical complaints filed by CAlifornians for Renewable Energy, Inc. (CARE) seeking Commission review and rejection of certain wholesale contracts approved by the California Public Utilities Commission (CPUC). The contracts at issue are long-term, market-based rate contracts entered into by sellers in the California market. In this order, we find that CARE has mischaracterized the relevant case law[1] as invalidating the Commission's market-based rate program. We also find that the Ninth Circuit decisions do not require all market-based rate transactions to be pre-

[1] CARE refers to the following recent decisions by the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) *Pub. Util. Dist. No. 1 v. FERC*, 471 F.3d 1053 (9th Cir. 2006) *(Snohomish)*; and *Pub. Util. Com'n of the State of Cal. v. FERC*, 474 F.3d 587 (9th Cir. 2006) (*CPUC*); *Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004) (*Lockyer*).

filed at or approved by the Commission. CARE has also provided no factual support for the allegations that the challenged contracts are unjust and unreasonable. Accordingly, we dismiss the complaints.

CARE's Complaints

2. In the Docket No. EL07-37-000 complaint, CARE seeks to abrogate a CPUC-approved 10-year power purchase agreement between Southern California Edison Company (SoCal Edison) and Long Beach Generation, LLC (Long Beach). In the Docket No. EL07-40-000 complaint, CARE challenges another CPUC-approved power purchase agreement; this one is between Pacific Gas and Electric Company (PG&E) and subsidiaries of Calpine Corporation: the Metcalf Energy Center, LLC and the Los Medanos Energy Center, LLC (collectively, Metcalf/Los Medanos). Both complaints present identical arguments and raise identical issues. CARE alleges that the long-term contracts at issue were approved by the CPUC in early 2007 in order to ensure electric reliability for summers 2007 through 2009.

3. Specifically, CARE argues that a series of decisions by the court have "effectively gutted FERC's decade-old approach to bulk power markets, leaving market-based rate contracts with "no presumption of legality."[2] CARE argues that the court decisions in *Snohomish* and *CPUC* expanded an earlier court decision in *Lockyer* "to erode further the price certainty of market-based sales and make new and ineluctably fatal demands of FERC's market-based pricing program."[3] According to CARE, the court in *Snohomish* and *CPUC* held that a wholesale power purchase contract pursuant to the Commission's market-based rate program enjoys no *Mobile- Sierra*[4] price certainty unless the contract is presented in advance to the Commission for review and the Commission considers market conditions and determines that the rate is just and reasonable and was negotiated in a functional marketplace.

4. CARE therefore concludes that the contracts at issue (which were not filed with or reviewed by the Commission) violate the filed rate doctrine which, CARE argues, requires that rates must be filed and approved by the Commission and formally noticed 60 days in advance of commencement of services. CARE also states that only four bids were considered prior to execution of the contract between SoCal Edison and Long Beach.

[2] CARE Complaint, Docket No. EL07-37-000, at 4.

[3] *Id.* at 5.

[4] *See United Gas Pipe Line Co. v. Mobile Gas Serv. Corp*., 350 U.S. 332 (1956) (*Mobile*); *FPC v. Sierra Pacific Power*, 350 U.S. 348 (1956) (*Sierra*).

5. CARE further states that the contracts in question must be abrogated as unjust and unreasonable. CARE argues that in addition to unreasonable pricing, the non-price terms and conditions of the contracts are unjust and unreasonable, and warrant contract abrogation. CARE adds that the prices, terms, and conditions in the challenged contract are tainted with the exercise of market power. CARE also alleges that the contracts at issue impose a financial burden on ratepayers and pose a threat to reliability.

6. In addition, in the Docket No. EL07-40-000 complaint, CARE states that it seeks Commission review of the CPUC's decisions approving the contract in question because the CPUC failed to properly address the Commission's regulatory authority over review of wholesale electricity contracts in violation of the Federal Power Act (FPA).[5]

Notice of Filings, Motions to Intervene, and Responsive Pleadings

7. Notice of CARE's complaint in Docket No. EL07-37-000 was published in the *Federal Register*, 72 Fed. Reg. 10,201 (2007), with interventions and protests due on or before March 26, 2007. The CPUC filed an answer, motion to dismiss, and conditional notice of intervention, and Long Beach filed an answer to the complaint. Timely motions to intervene and protests/comments were filed by SoCal Edison and Reliant Energy, Inc. (Reliant). The Electric Power Supply Association and California Independent Energy Producers Association (collectively, EPSA/IEP) filed a timely joint motion to intervene and comments. The California Electricity Oversight Board (CEOB) filed a timely motion to intervene.

8. Notice of CARE's complaint in Docket No. EL07-40-000 was published in the *Federal Register*, 72 Fed. Reg. 11,019 (2007), with interventions and protests due on or before March 22, 2007.[6] The CPUC filed an answer, motion to dismiss, and conditional notice of intervention. Metcalf/Los Medanos and PG&E filed answers to the complaint. Reliant and EPSA/IEP filed timely motions to intervene and comments. The CEOB and the NRG Companies[7] filed timely motions to intervene.

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), timely, unopposed motions to intervene serve to make the movants parties to these proceedings.

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[5] 16 U.S.C. §§ 796, *et seq*. (2004).

[6] This date was subsequently extended to March 26, 2007. *Notice of Extension of Time*, Docket No. EL07-40-000, March 13, 2007.

[7] NRG Companies include NRG Power Marketing, Inc., Cabrillo Power I LLC, Cabrillo Power II LLC, El Segundo Power LLC, and Long Beach.

Answers to the Complaints

10. The CPUC states that the Commission has no jurisdiction over the CPUC's decisions under section 201(f) of the FPA.[8] In support, the CPUC cites instances where the Commission has relied upon section 201(f) to dismiss complaints against state agencies.[9] According to the CPUC, CARE's complaints are also barred by the state sovereign immunity doctrine.[10]

11. Long Beach states that the Commission should reject CARE's invitation to second-guess the CPUC's Resource Procurement Division. While CARE may have preferred that the CPUC decline approval for SoCal Edison's purchase, it argues that this is an issue for CARE to raise on direct review of the CPUC's decision in the California state courts.

12. The CPUC, Long Beach, PG&E and Metcalf/LosMedanos all state that CARE's complaint fails to meet the filing requirements of a complaint under the Commission's Rules of Practice and Procedure 203 and 206,[11] which require, *inter alia*, that a complaint state the specific relief or remedy requested, the basis for that relief, and the relevant facts with supporting documents.

13. According to Long Beach, PG&E, SoCal Edison, and the CPUC, CARE is unclear what relief it seeks, presents no facts in support of its claims that the challenged contracts are unjust and unreasonable, never explains how the contracts are tainted with the exercise of market power or what market conditions have cause them to be tainted, requests different and inconsistent types of relief, does not allege the basis for abrogation, and contains no attached documents or affidavits supporting CARE's general factual allegations.

14. Furthermore, SoCal Edison states that CARE's complaint does not clearly identify the action or inaction alleged and how that action or inaction violates applicable statutory standards or requirements, does not set forth how the action or inaction affected CARE as complainant, and does not make a good faith effort to quantify the financial impact or burden created for CARE by the challenged contract. In addition, SoCal Edison states that CARE makes no attempt to show that SoCal Edison had other more cost-effective offers for power available within the timeframe needed to provide blackout insurance for

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[8] 16 U.S.C. § 824(f) (2004).

[9] CPUC cites to *Wis. Pub. Power, Inc. SYS. v. Wis. Pub. Serv. Corp*., 83 FERC ¶ 61,198, at 61,855 (1998); *Pac. Water & Power, Inc. v. State of Cal*., 51 FERC ¶ 61,080, at 61,179-80 (1990).

[10] CPUC cites to *Fed. Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 760 (2002).

[11] 18 C.F.R. §§385.203, 385.206 (2006).

the upcoming summer and gives the Commission no reason to think that SoCal Edison, the Independent Evaluator that reviewed SoCal Edison's procurement process, and the CPUC were all mistaken in concluding that the challenged contract was the best option for SoCal Edison's needs.

15. Long Beach submits that if the Commission merely dismisses CARE's complaint for failing to satisfy procedural requirements, which Long Beach deems is warranted, CARE can redraft and refile its complaint. Long Beach states that the better course is for the Commission to deny CARE's complaint on the merits, thus fully and finally disposing of CARE's arguments. Long Beach supports this course of action by claiming that: (1) CARE cannot offer any viable theory showing that defendants have violated any applicable regulatory requirement, especially the validity of Long Beach's market-based rate authorization; (2) there is abundant support for finding that the challenged contract is just and reasonable; and (3) this case presents unique and compelling circumstances with respect to contracts entered into under market-based rate authority.

16. Metcalf/Los Medanos and SoCal Edison state that CARE fails to state a claim upon which relief can be granted under FPA sections 205 and 206.[12] Metcalf/Los Medanos states that, because the Ninth Circuit has affirmed the validity and enforceability of contracts entered into under the market-based rate authority without prior approval by the Commission,[13] and because the contracts at issue in this proceeding have been approved by the CPUC in the context of state-mandated reliability requirements, those contracts are valid filed rates and do not require advance approval by the Commission. Metcalf/Los Medanos further state that CARE has failed to meet its burden of proof in demonstrating that rates under the challenged contract are unjust and unreasonable because CARE has neither met the Commission's pleading requirements nor adduced one fact or argument that provides any basis for the Commission to find that the challenged contract's terms or prices are unjust and unreasonable.

17. Metcalf/Los Medanos also argue that CARE's complaint is an unfounded assault on the legality of market-based rates. Metcalf/Los Medanos state that CARE's claims that the failure to submit the challenged contracts to the Commission for advance approval under section 205 of the FPA violates the filed rate doctrine is based on the mistaken view that *Snohomish* and *CPUC* have "effectively gutted FERC's decade-old approach to bulk power markets. . . ."[14]

18. Similarly, SoCal Edison also states that CARE misapprehends these recent Ninth Circuit opinions. SoCal Edison states that CARE is mistaken when it apparently claims

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[12] 16 U.S.C. §§ 824d, 824e (2004).

[13] Metcalf/Los Medanos cite to *Lockyer*, 383 F.3d 1006; and *Public Util. Dist. No. 1 of Grays Harbor County v. IDACORP*, 379 F.3d 641, 651 (9th Cir. 2004).

[14] Metcalf / Los Medanos' Answer to CARE's Complaint at 4 (*quoting* CARE's First Amended Complaint at 4).

that *Snohomish* renders the challenged contract unjust and unreasonable. According to SoCal Edison, *Snohomish* held that, under its section 206 review of market-based rates, the Commission may only apply the *Mobile-Sierra* presumption that parties have negotiated just and reasonable rates when three preconditions have been met.[15] SoCal Edison states that *Snohomish* held that the Commission must find another method of evaluating whether the challenged rates are just and reasonable in the event any of the preconditions were absent, not that the absence of a precondition renders the negotiated rates unjust and unreasonable; the court remanded the cases to the Commission to accomplish just that. Therefore, according to SoCal Edison, because the Commission has not yet had an opportunity to consider the court's instructions on remand, CARE's attempt to apply its own mistaken construction of the court's holding to cases beyond those remanded to the Commission is premature.

19. SoCal Edison also states that *Snohomish* provides no bases for assuming that the challenged contract should be abrogated merely because it was negotiated under Long Beach's market-based rate authority, contrary to CARE's contention that *Snohomish* dealt a fatal blow to market-based pricing. SoCal Edison states that *Snohomish* actually held that market-based rate authority can qualify to justify the *Mobile-Sierra* review if that authority is conducted along with oversight that permits timely reconsideration in the event of a change in market conditions.

20. Long Beach states that CARE's reliance on the recent Ninth Circuit cases does not support CARE's theory that the Long Beach contract must be filed with the Commission to satisfy the filed rate doctrine. According to Long Beach, while the Ninth Circuit decisions discussed in detail whether or not market-based rate contracts could trigger application of the public interest standard of review, they did not hold that market-based rate contracts fall outside the filed rate doctrine, as CARE claims. To the contrary, Long Beach argues, the Ninth Circuit actually cited other cases rejecting CARE's logic and confirming that market-based rate transactions do fall within the filed rate doctrine.

21. Metcalf/Los Medanos and PG&E also argue that the complaint is an impermissible collateral attack on the Commission's prior order approving the settlement involving the challenged contract[16] and should not be allowed under Rule 602(f)(3) of the

[15] SoCal Edison describes the three preconditions as follows: (1) the contract by its own terms does not preclude *Mobile-Sierra* review; (2) the regulatory scheme of contract formation provides the Commission with an opportunity for timely and effective review of the contract rates; and (3) the review permits consideration of all factors relevant to the propriety of the contract's formation.

[16] *Los Esteros Critical Energy Facility, LLC*, 117 FERC ¶ 61,350 (2006).

Commission's Rules and Regulations.[17] Metcalf/Los Medanos points out that the Commission's order approving the settlement made the challenged contracts and the Settlement legally filed rates.

22. Similarly, the CPUC contends that the Settlement CARE addresses in its complaint in Docket No. EL07-40-000 was approved by the Commission as just and reasonable.[18] But, the CPUC contends that CARE has not alleged any facts which have occurred between the Commission's order approving the Settlement and CARE's complaint which have suddenly made the Settlement unreasonable.

Protests and Comments

23. Reliant states that CARE's view of the Commission's market-based program and the application of the *Mobile-Sierra* doctrine would undermine the long-standing contract-based program under the FPA and effectively would rob consumers of the very benefits CARE claims it supports. While EPSA/IEP agree that the Ninth Circuit cases are inapposite to the present matters, EPSA/IEP state that it is vitally important that the Commission either file a petition for certiorari itself or support the petitions filed by other parties. According to EPSA/IEP, the Commission must take this opportunity to reaffirm that: (i) the *Mobile- Sierra* doctrine continues to apply to market-based rate contracts, and (ii) the public interest test as applied to market-based rate contracts will be the same for high-rate and low-rate challenges and will provide for the "abrogation" of contracts only in extraordinary circumstances. EPSA/IEP states that reaffirmation of these points is necessary to provide sellers with the regulatory certainty required for them to continue to operate under the Commission's market-based rate program.

24. Reliant and EPSA/IEP further state that the filed rate doctrine has not been violated, as CARE alleges. Reliant states that none of the agreements at issue were required to be filed with the Commission for review. Reliant adds that CARE does not allege anywhere in its complaint that any of the sellers exercised market power in this case. Additionally, Reliant points out that each seller at issue has been found by the Commission to lack market power.

25. EPSA/IEP add that CARE's claim that market-based rate contracts must be presented in advance to the Commission to consider market conditions, reasonableness of rates, and the functionality of the marketplace before allowing such contracts to become effective is based on a broad and misguided interpretation of the filed rate doctrine. According to EPSA/IEP, both the Commission and the courts have found that market-based rates are not "violative of the filed rate doctrine." EPSA/IEP state that for market-

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[17] 18 C.F.R. § 385.602(f)(3) (2006) (stating that any failure to file a comment to the proposed offer of settlement constitutes a waiver of all objections to the offer of settlement).

[18] *Los Esteros Critical Energy Facility, LLC*, 117 FERC ¶ 61,350 (2006).

based rates the Commission has explicitly found that the filing requirements of section 205(c) are satisfied through the filing of umbrella market-based rate tariffs and the quarterly reports filed by sellers.[19]

Commission Determination

26. As discussed in detail below, in arguing that the Ninth Circuit "effectively gutted" the Commission's market-based rate program, CARE mischaracterizes the Ninth Circuit's decisions in *Snohomish*, *CPUC*, and *Lockyer*. We also disagree with CARE's contention that under *Snohomish* and *CPUC*, market-based rate contracts enjoy no *Mobile-Sierra* price certainty, unless the contract is submitted in advance for review by the Commission. CARE also fails to present any factual support for its allegations that the challenged contracts are unjust and unreasonable. We therefore dismiss CARE's complaints.

27. In *Lockyer*, contrary to CARE's assertion, the court upheld the Commission's market-based rate program, concluding that an *ex ante* finding of the absence of market power, coupled with ongoing reporting requirements, satisfies the notice and filing requirements of section 205 of the FPA.[20] Accordingly, the court did not require, as CARE claims, Commission review of market-based rate contracts prior to their effectiveness. Rather, the court disagreed with the Commission only with respect to the Commission's finding that refunds or disgorgement of profits could not be a remedy for the reporting requirement violations.[21]

28. In *Snohomish*, the court reaffirmed its conclusions in *Lockyer* and held that the grant of the "market-based rate authority *can* qualify as sufficient prior review to justify limited *Mobile-Sierra* review," provided that the Commission engage in "effective oversight permitting timely reconsideration of market based authorization if market conditions change."[22] The court in *Snohomish* reversed the Commission's findings because it found that the Commission failed to consider the effect of market dysfunction in determining whether the *Mobile-Sierra* presumption should apply to the contracts at issue in that proceeding, not because there was no prior review of the challenged contracts, [23] as CARE alleges.

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[19] EPSA/IEP cite to *Lockyer v. British Columbia Power Exch. Corp*., 99 FERC ¶ 61,247, at 62,062 (2002).

[20] *Lockye*r, 383 F.3d at 1013.

[21] *Id*. 1015 and 1017.

[22] *See Snohomish*, 471 F.3d at 1080 (*emphasis in the original*).

[23] *Id.* at 1086.

29. CARE misinterpreted *Lockyer* and *Snohomish*. Contrary to CARE's contention, the court decisions did not pronounce the Commission's market-based rate program invalid.[24] *Lockyer* and *Snohomish* addressed a unique set of facts and a market-based rate program that has undergone substantial improvements since 2001.

30. First, it is now well accepted that the 2000-2001 energy crisis in the West was the result of a confluence of factors. These factors included: flawed market rules; inadequate addition of generating facilities in the preceding years; a drop in available hydropower due to drought conditions; a rupture of a major pipeline supplying natural gas into California; strong growth in the economy and in electricity demand; unusually high temperatures; an increase in unplanned outages of extremely old generating facilities; and market manipulation.[25] This was not a situation in which one or a few factors stressed the market; rather, it was an unprecedented situation in which numerous adverse events occurred simultaneously to place California and the entire West in an electricity crisis that had never before been experienced.

31. Since 2001, however, the Commission has undertaken numerous measures to address market structure flaws and potential market manipulation in California markets and markets nationwide to ensure that there are appropriate market safeguards in place to prevent a repeat of the California 2000-2001 energy crisis. For example, in September 2006, the Commission approved the Market Redesign and Technology Upgrade (MRTU) for the California Independent System Operator's markets, which will introduce, among other things, a more effective congestion management system, a day-ahead market for trading and scheduling energy, system improvements to increase operational efficiency and enhance reliability, a more transparent pricing system, and improved market power mitigation measures.[26] The Commission's approval of the MRTU is just one of many measures the Commission has taken to improve the California energy market since 2001.[27]

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[24] Specifically, the court found in *Lockyer* that the reporting requirements were not followed and in *Snohomish* that the Commission's regulatory oversight was insufficient during the 2000-2001 energy crisis in the West. *See Lockyer*, 383 F.3d at 1014; and *Snohomish*, 471 F.3d at 1086.

[25] *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 93 FERC ¶ 61,121(2000); *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 102 FERC ¶ 61,317(2003).

[26] *Cal. Indep. Sys. Operator Corp.*, 116 FERC ¶ 61,274 (2006).

[27] *See, e.g., Cal. Indep. Sys. Operator Corp.*, 115 FERC ¶ 61,172 (2006) (accepting the CAISO tariff revisions to establish the Interim Reliability Requirements Program that will remain effective until implementation of the MRTU); *Investigation of Anomalous Bidding Behavior and Practices in the Western Markets*, 103 FERC ¶ 61,347 (2003) (defining and prohibiting anomalous bidding behavior); *Cal. Indep. Sys. Operator Corp*., 100 FERC ¶ 61,060 (2002) (establishing a bid cap of $250/MWh for the

(continued…)

32. The Commission's ability to respond to the instances of market manipulation during the 2000-2001 energy crisis was also limited by the minimal enforcement authority it possessed at the time. Following the crisis, the Commission initiated several investigations into potential market manipulation incidents.[28] To deter the recurrence of market manipulation in the future, the Commission adopted the Market Behavior Rules in November 2003.[29] These rules set guidelines for the conduct of sellers with market-based rate authority, and provided remedies for manipulative behavior and other market abuses by such sellers.

33. Further, the Commission sought from Congress additional regulatory tools to deter market power abuse, comparable to those possessed by other economic regulatory bodies, such as the Securities and Exchange Commission. As a result, in the Energy Policy Act of 2005 (EPAct 2005),[30] Congress provided enhanced authority over market manipulation and market transparency, and also gave the Commission civil penalty authority to deter market manipulation and other violations of law.

34. Specifically, EPAct 2005 added to the FPA an explicit prohibition on the use of manipulative or deceptive devices in connection with the purchase or sale of electric energy or transmission service subject to the jurisdiction of the Commission, in contravention of the Commission's rules and regulations,[31] expanded the Commission's

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California real-time energy and ancillary services markets, and also imposed a price cap of $250/MWh for all spot market sales in the Western Electricity Coordinating Council); S*an Diego Gas & Electric Co*., 95 FERC ¶ 61,115, at 61,355-57 (2001) (implementing a must-offer obligation, beginning July 20, 2001, pursuant to which most generators serving California markets are required to offer all of their capacity in real time during all hours if it is available and not already scheduled to run through bilateral agreements).

[28] *See, e.g., American Electric Power Serv. Corp.*, 103 FERC ¶ 61,345 (2003); *Enron Power Mktg, Inc*., 103 FERC ¶ 61,343 (2003); *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 98 FERC ¶ 61,165 (2002).

[29] *Investigation of Terms and Conditions of Pub. Util. Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003), *superseded in part by Compliance for Public Utility Market-Based Rate Authorization Holders*, Order No. 674, 71 FR 9695 (Feb. 27, 2006), FERC Stats. and Regs. ¶ 31,208 (2006).

[30] Pub. L. No. 109-58, 119 Stat. 594 (2005).

[31] *Id.* § 1283; *see also Id.* § 315.

ability to impose civil penalties, and increased criminal penalties for violations of Part II of the FPA or any rules or orders thereunder,[32] and expanded the Commission's authority to order refunds.[33]

35. To implement the newly granted anti-manipulation authority, the Commission promptly issued Order No. 670, which adopted a new rule prohibiting the employment of manipulative or deceptive devices or contrivances in wholesale electricity and natural gas markets.[34] In addition, the Commission issued an Enforcement Policy Statement[35] to provide guidance to the industry on how the Commission intends to determine remedies for violations, including applying its new and expanded civil penalty authority.

36. In addition, in 2003, the Commission issued its Policy Statement on Electric and Natural Gas Price Indices[36] that explained its expectations of natural gas and electricity price index developers and the companies that report transactions data to them. This effort has resulted in significant improvements in the amount and quality of both price reporting and the information available to market participants.[37]

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[32] 16 U.S.C. §§ 825o, 825o-1 (2004), as amended by Pub. L. No. 109-58, 119 Stat. 594, §§ 1284(d) and (e) (2005).

[33] *Id*. 824e(e), as amended by Pub. L. No. 109-58, 119 Stat. 594, §§ 1286 (2005).

[34] *Prohibition of Energy Market Manipulation*, Order No. 670, 71 FR 4244 (Jan. 26, 2006), FERC Stats. & Regs. ¶ 31,202 (2006), *reh'g denied*, 114 FERC ¶ 61,047 (2006).

[35] *Enforcement of Statutes, Orders, Rules, and Regulations*, 113 FERC ¶ 61,068 (2005).

[36] *Price Discovery in Natural Gas and Electric Markets*, 104 FERC ¶ 61,121 (2003) (Price Indices Policy Statement).

[37] Following the issuance of the Price Indices Policy Statement, the Commission held technical conferences and conducted two surveys of industry practice in price reporting. Afterwards, the Commission found that there had been an increase in the number of companies reporting data to index developers and improvements leading to increased confidence in price indices. *Order Regarding Future Monitoring of Voluntary Price Formation, Use of Price Indices in Jurisdictional Tariffs, and Closing Certain Tariff Dockets*, 109 FERC ¶ 61,184 (2004). *See, also*, General Accounting Office, Natural Gas and Electricity Markets: Federal Government Actions to Improve Private Price Indices and Stakeholder Reaction (December 2005) (corroborating the results of the Commission's survey).

37. The Commission has also strengthened its oversight of markets through the creation in 2001 of a separate Office of Enforcement (OE),[38] which protects customers by timely identifying market problems and recommending appropriate remedies to address market problems, assuring compliance with rules and regulations, and detecting and crafting penalties to address market manipulation. Among other duties, the OE ensures the timely and accurate filing of Electric Quarterly Reports (EQR)[39] required to be filed by all public utilities[40] and coordinates the work of the Market Monitoring Units (MMUs) associated with Independent System Operators and Regional Transmission Organizations.[41] The Commission's use of filed EQR data and the increased role of the MMUs in monitoring and reporting market performance are important tools the Commission uses to determine if there are indicia of the exercise of market power.[42]

38. Further, the Commission has a program for authorizing and overseeing market-based rates that has been strengthened since 2001. This program first requires a seller seeking a market-based rate authorization to demonstrate that neither it nor its affiliates have market power in generation or transmission (or that any such market power is sufficiently mitigated).[43] If such demonstration is made, the grant of the market-based rate authorization is conditional on adherence to a code of conduct, the quarterly filing of transaction information through the EQRs, and the filing of any change in status.

39. To clarify and improve further this program, in May 2006, the Commission issued a Notice of Proposed Rulemaking (MBR NOPR), in which the Commission proposed to amend its regulations governing market-based rate authorizations for wholesale sales of electric energy, capacity and ancillary services by public utilities.[44] The MBR NOPR

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[38] OE was previously named the Office of Market Oversight and Investigation.

[39] We note that the Commission has previously withdrawn market-based rate authorizations for failure to submit an EQR. *See, e.g.*, *Electric Quarterly Reports*, 105 FERC ¶ 61,219 (2003); *Electric Quarterly Reports*, 107 FERC ¶ 61,310 (2004); *Electric Quarterly Reports*,113 FERC ¶ 61,305 (2005); *Electric Quarterly Reports*, 114 FERC ¶ 61,171 (2006); *Electric Quarterly Reports*, 114 FERC ¶ 61,172 (2006); *Electric Quarterly Reports*, 115 FERC ¶ 61,073 (2006).

[40] 18 C.F.R. § 35.10b (2006).

[41] *See Market Monitoring Units in Regional Transmission Org. and Indep. Sys. Operators*, 111 FERC ¶ 61,267 (2005).

[42] *See Policy Statement on Market Monitoring Units*, 111 FERC ¶ 61,267 (2005) (and citations therein).

[43] The Commission also considers whether the seller or its affiliates can erect other barriers to entry in the relevant market and whether there is evidence of the affiliate abuse or reciprocal dealing.

[44] *Market-Based Rates for Wholesale Sales of Electric Energy Capacity, and Ancillary Serv. by Pub. Util.*, 115 FERC ¶ 61,210 (2006).

represents a significant step in the Commission's efforts to clarify and codify its market-based rate policy by providing a stringent up-front analysis of whether market-based rates should be granted, by including prophylactic conditions and ongoing filing requirements in all market-based rate authorizations, and by reinforcing its ongoing oversight of market-based rates.

40. All these measures taken by the Commission have strengthened the Commission's market-based rate program, its market oversight and enforcement capabilities, and its ability to impose meaningful remedies, as compared to the 2000-2001 energy crisis time period. The Commission's duty is to ensure that consumers pay just and reasonable rates, and these mechanisms achieve those goals. One way the Commission protects customers is by providing rate stability through the protection of sales contracts. The failure to protect parties' contractual expectations can harm customers by reducing the willingness of sellers and buyers to contract for rate certainty through fixed-rate contracts or by deterring sellers and buyers from making the investment needed to support the long-term contracts. The Commission's improved market-based rate program provides the foundation to ensure that sellers and buyers can continue to rely on market-based rate contracts to provide price certainty, flexibility in contract terms, and the contract stability necessary to support new investment.

41. Now that we have addressed CARE's more sweeping characterizations of the Ninth Circuit's decisions, we turn to the more specific allegations that purportedly justify abrogation of the contracts at issue. Initially, CARE contends that the contracts at issue must be abrogated as unlawful due to the lack of prior review by the Commission. As explained above, however, an *ex ante* finding of the absence of market power, coupled with the EQR filing and effective regulatory oversight, qualifies as sufficient prior review for market-based rate contracts to satisfy the notice and filing requirements of FPA section 205. *Lockyer* specifically upheld our general approach to approval of market-based rates. We therefore find that there was no need to submit the challenged contracts for prior review.

42. CARE also alleges that the challenged contracts are unjust and unreasonable, but offers no specific evidence in support of this allegation. As discussed above, the Commission's current market-based rate program is accompanied by effective market oversight and other controls permitting timely reconsideration of market-based authorization if market conditions change. Because the sellers under the contracts in question have been granted market-based rate authority, the wholesale contracts that they have entered into are presumed to be just and reasonable. CARE offers no evidence to overcome this presumption.

43. CARE alleges that the contracts will impose a financial burden on ratepayers. We note that every contract imposes financial obligations on both parties to the contract; indeed, there would be no contract absent such obligations. A problem with CARE's complaint is that it fails to provide any quantifiable evidence to support the allegation that the rates are unjust and unreasonable. Nor does CARE provide any factual support for its

allegation that the contracts pose a reliability threat. Quite to the contrary, the CPUC approved the challenged contracts to, among other things, improve reliability for summer 2007 through 2009.[45] Moreover, to perform under these contracts, the sellers are required to make new investments (*e.g.*, to repower the units).[46] In addition, the buyers and sellers under these contracts continue to support them. To ensure reliable and adequate service, buyers and sellers alike must be able to rely on stable long-term contracts.

44. CARE also alleges that the contracts at issue were tainted by the exercise of market power but provides no evidence other than a reference to four alternative bids received by SoCal Edison. The fact that the purchasers had options to evaluate and did so under the auspices of the CPUC and, with respect to the contracts in Docket No. EL07-37-000, an independent, neutral third-party evaluator is contrary to the notion that the contracts are the result of market power.[47] We therefore reject CARE's contention.

45. Accordingly, we find that CARE has mischaracterized the Ninth Circuit's decisions in *Snohomish*, *CPUC*, and *Lockyer* as invalidating the Commission's market based rate program. CARE has also failed to present sufficient evidence to demonstrate that either contract is unjust and unreasonable or should otherwise be abrogated. CARE's complaints are therefore hereby dismissed.[48] Accordingly, we also grant CPUC's motions to dismiss.

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[45] *See, e.g.*, CPUC's Opinion on SoCal Edison's Application for Authorization to Enter into a Power Purchase agreement for Energy from Long Beach, Attachment to CARE's Complaint, Docket No. EL07-37-000.

[46] *Id.*

[47] *See generally Boston Edison Company Re; Edgar Electric Energy Co.*, 55 FERC ¶ 61,382 (1991); *Allegheny Energy Supply Co., LLC*, 108 FERC ¶ 61,082 (2004).

[48] We also note that in the Docket No. EL07-40-000, CARE states that it seeks review of the CPUC decision. This proceeding is not an appropriate forum to seek a review of a state agency decision. Moreover, in the Docket No. EL07-40-000 complaint, CARE challenges the Commission's final order in *Los Esteros Critical Energy Facility, LLC*, 117 FERC ¶ 61,350 (2006), approving a settlement involving contracts at issue. CARE's complaint constitutes a collateral attack on the Commission's prior order and thus is inappropriate.

The Commission orders:

(A) CARE's complaints are hereby dismissed for the reasons discussed in the body of this order.

(B) CPUC's motions to dismiss in Docket Nos. EL07-37-000 and EL07-40-000 are hereby granted.

By the Commission.

(S E A L)

Philis J. Posey,
Deputy Secretary.