



**Federal Energy Regulatory Commission**  
**April 19, 2007**  
**Open Commission Meeting**  
**Statement of**  
**Chairman Joseph T. Kelliher**

**Item E-6: Californians for Renewable Energy, Inc. v. California Public Utilities Commission, et al. (Docket Nos. EL07-37-000 and EL07-40-000)**

"In this order, we deny two complaints filed by Californians for Renewable Energy (CARE) seeking Commission review and rejection of certain wholesale power contracts approved by the California Public Utilities Commission (CPUC). In its complaints, CARE asks the Commission to abrogate two long term power purchase agreements approved by the California PUC. We reject the complaints because CARE has failed to provide any factual support for its allegations.

Our action today will provide greater regulatory certainty in the wake of the Ninth Circuit decisions in *Snohomish*, *California Public Utilities Commission (California PUC)*, and *Lockyer*. These decisions have caused confusion as to the state of federal electricity law, particularly with respect to contract certainty and application of the filed rate doctrine.

Our order provides greater clarity on how we interpret these decisions. We reject the interpretation of the Ninth Circuit decisions put forward by CARE, indeed, we find that their description of the court decisions is a mischaracterization.

CARE argues that a power sales contract is not valid until it is submitted in advance to the Commission and the Commission determines the market is functioning properly. CARE argues that without prior review and such a finding a power contract violates the filed rate doctrine and is unenforceable. This is precisely wrong. *Lockyer* specifically upheld the authority of the Commission to authorize market based rates, and found that contracts entered into under market-based rate authorization are consistent with the filed rate doctrine. Nothing in *Snohomish* or *California PUC* contravened that finding.

Under *Snohomish*, the Commission must consider whether severe market dysfunction tainted contract formation. Again, CARE failed to provide any factual support that showed any current market dysfunction in California and Western power markets that implicates the contracts at issue.

The Ninth Circuit was very critical of the Commission's market based rate program. It is worth noting that the market based rate program the court criticized was the program as it existed in 2000 and 2001. That program has been significantly reformed and, most importantly, the oversight of markets and market-based rates that we have in place today did not exist during the California energy crisis.

The Commission has steadily reformed its market based rate program in recent years, significantly strengthening the program. In particular, the Commission has changed the generation market power test, raising the threshold to establish the absence of market power. We strengthened the reporting requirements that were so important in *Lockyer*. We established the changes of status reporting requirement. We also began to enforce the conditions of market based rate authorization. Market based rates are a privilege, not a right. If regulated companies fail to comply with the conditions of their market based rate authorization, we now revoke their authorization and they lose the privilege. We also initiated a rulemaking proceeding designed to further reform our program.

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It is important to note that we took all these actions before the *Snohomish* and *California PUC* decisions. We did not wait for the court to tell us that the market based rate program needed to be strengthened. We came to that conclusion years ago, and took a series of actions designed to strengthen and reform the program.

The California and Western power crisis resulted from an unusual combination of factors. It has been described as "a perfect storm" that perhaps will not be repeated. However, we cannot assume the crisis will not recur, and must be ready to act. We are much better prepared than we were seven years ago. We have new legal tools that we did not possess in 2000-2001. In the Energy Policy Act of 2005, Congress established an express prohibition of market manipulation and granted the Commission discretion to define manipulation. I personally urged Congress to give us that authority, and thank Chairman Bingaman and the other Congressional leaders who fought for this language.

Congress also granted us significant civil penalty authority, turning the Commission into an enforcement agency. I personally asked Congress to give us this authority. I believed that changes in power and gas markets made it necessary that the Commission wield the same kinds of enforcement powers as other federal regulatory agencies. In particular, I saw no reason why manipulation of precious metals or pork bellies should be subject to greater civil penalties than manipulation of power and gas markets.

We also now perform effective market oversight, through the Commission's new Office of Enforcement.

We have taken significant steps to reduce the prospect of another power crisis. California is taking action to increase electricity supply in the state, so that it will rely less on imports from other western states. The Market Redesign and Technology Upgrade (MRTU) proposal is part of that process. The MRTU proposal will not only increase electricity supply in California, but also correct longstanding market rule flaws.

California has taken action to encourage state regulated utilities to enter into long term power purchase contracts. Long term contracts are a proven vehicle to finance the development of major electricity infrastructure projects. It is worth noting that the two contracts that are the subjects of the complaints we dispose of today were both approved by the California Public Utilities Commission.

CARE's complaint would only frustrate efforts by the State of California and California utilities to increase electricity supply. The CARE complaint would undermine long term contracting by state regulated utilities, and force them to rely to a greater extent on short term purchases. One of the lessons of the California and Western power crisis was that relying exclusively on short term markets presents major risks to both utilities and consumers. Ironically, granting CARE's complaint would actually increase the prospect of another California power crisis.

It is my hope our order today will provide greater regulatory certainty and reassure both buyers and sellers that the Commission recognizes the importance of contract certainty."