

## ***Energy-Related Litigation in California***

(Updated August 2, 2001)

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### **U.S. Supreme Court Cases**

- [New York Public Services Commission v. Federal Energy Regulatory Commission \(Enron v. FERC\)](#) (Court Nos. 00-0568/00-0809) – A petition for writ of certiorari was filed on October 11, 2000, and granted on February 26, 2001. This case asks whether FERC's jurisdiction preempts state jurisdiction over intrastate retail transmission of electric energy. It will be heard during the Supreme Court term that begins in October 2001.

### **Federal Cases**

#### ***Circuit Courts Of Appeal***

- [City of San Diego v. FERC](#) (9<sup>th</sup> Cir., No. 00-7170) – The gravamen of San Diego's position is that while FERC has found that wholesale electricity rates in California were unlawful during 2000, FERC has unreasonably delayed performing its duty under the Federal Power Act to determine the lawful charges and order appropriate refunds. The city seeks an order requiring FERC to act.
- [In re California Power Exchange](#) (9<sup>th</sup> Cir., No. 01-70031) – The Power Exchange seeks a stay of certain aspects of FERC's December 15, 2000, order that shut down the Exchange as of April 30, 2001. A subsequent clarifying order by FERC indicates that the Exchange's forward markets survive. The Exchange seeks a stay of those aspects of the FERC orders requiring it to shut down its spot markets.
- [In re Southern California Edison Company](#) (D.C. Cir., No. 00-1543) – Edison attempted to require FERC to fix just and reasonable wholesale rates. Petition for writ of mandamus was denied January 5, 2001. Docket closed.
- [Burton, Hertzberg and City of Oakland v. FERC](#) (U.S. Court of Appeals, 9th Circuit) – In the underlying petition, Senate leader John Burton, Assembly Speaker Robert Hertzberg and Oakland sought a writ of mandamus from the court to compel FERC to immediately act to ensure "just and reasonable" rates for energy in California -- and all western states -- as mandated by 16 U.S.C. §§ 824d(a) & 824e. On May 29, 2001, the 9th Circuit denied a petition for writ of mandamus, and on June 8, 2001, the petitioners filed a request for a rehearing en banc and an emergency petition for writ of mandamus.

### ***U.S. District Courts***

- [Pacific Gas & Electric Company v. Lynch](#) (ND Cal., No. C 00-4128 SBA) – In this action against the California Public Utilities Commission (PUC), PG&E seeks a federal court order to lift the freeze on the rates PG&E can charge its customers, and to instead mandate a pass-through of PG&E's wholesale electricity costs. PG&E alleges that the PUC has violated the filed-rate doctrine and various constitutional provision by refusing to allow under-collections incurred prior to the end of the rate freeze to be collected after the rate freeze. On May 2, 2001, a judge dismissed the action without prejudice.

- Southern California Edison Company v. Lynch (CD Cal., No. CV 00-12056 RSWL [Mcx]) – This action, brought by Edison against the PUC, tracks the PG&E v. Lynch complaint summarized immediately above. Edison alleges that the PUC has violated the filed-rate doctrine and various constitutional provisions by refusing to allow under-collections incurred prior to the end of the rate to be collected after the rate freeze ends. In addition, Edison seeks a preliminary injunction allowing an immediate rate increase (subject to refund) to recover ongoing energy costs and to begin to recover past under-collections.

On April 9, 2001, Governor Davis announced that the state had reached agreement with Edison to address Edison's financial condition by purchasing its transmission lines. One item in the agreement was that Edison would dismiss this lawsuit once the agreement was implemented.

- ISO v. Reliant (U.S.D.C. -- Eastern District, Case No. CV-S-010238 FCD/JFM) – This suit attempted to compel power generators to perform under the Independent System Operator (ISO) tariff and deliver energy, regardless of the creditworthiness of the utilities, when the ISO issued emergency dispatch orders because of critical energy shortages. The generators were threatening not to perform. In a 36-page opinion, the court granted ISO a preliminary injunction against Reliant, ordering Reliant to continue to answer emergency dispatch orders. The court denied Reliant's motion to dismiss, finding that recent FERC orders did not impact the court's authority to enforce a tariff. A motion by the state Department of Water Resources (DWR's) to dismiss Reliant's third-party complaint was granted, thereby exempting use of state funds to pay for all energy sold by the generators in California. The court's order can be reviewed at [www.caed.uscourts.gov](http://www.caed.uscourts.gov). On April 25, 2001, the 9th Circuit Court of Appeals granted a jointly filed motion to dismiss the appeal.
- Duke Energy Trading and Marketing v. Governor Davis and California Power Exchange (U.S.D.C. -- Central District, Case No. CV-01-01252-WMB) – This complaint was filed by a major generator seeking declaratory and injunctive relief on grounds that the governor's commandeering of contracts held by the utilities for future delivery of electricity violated the federal supremacy clause, the Federal Power Act, and the constitutional bar against impairment of contractual obligations. Duke also alleges that its contractual obligations to provide electricity under these "block forward market contracts," which require delivery of electricity at relatively reasonable rates, had terminated as a result of contract-based defaults by the utilities and Power Exchange. Duke's purpose was to avoid having to deliver electricity through December 2001 under relatively low rates of the contracts. On April 30, 2001, the U.S. District Court granted the governor's motion to dismiss the plaintiff's complaint based on 11<sup>th</sup> Amendment immunity. Duke appealed to the 9th Circuit, and oral arguments were set for August 2001.
- Duke Energy Trading and Marketing v. California ISO and Director of DWR (U.S.D.C. -- Central District, Case No. CV-01-01390-SVW) – This case is essentially the same as ISO v. Reliant and ISO v. Williams. The complaint seeks declaratory and injunctive relief based on alleged violations of the ISO tariffs compelling Duke to continue to deliver power through the ISO to the utilities regardless of their creditworthiness (and likely future payment).
- The Regents of the University of California and the Board of Trustees of the California State University v. Enron Energy Services, Inc. (U.S.D.C. -- Northern District, Case No. C-01-1006-PJH) – UC and CSU contend Enron breached direct access contracts to provide the universities with electric power, causing a service default, with ultimate cost for electric power borne by DWR. The district court granted a preliminary injunction application to compel Enron to continue to deliver electric power to the universities. The parties reached an agreement under which Enron returned the universities to direct access status. Enron is dismissing its appeal, and the universities are dismissing their case without prejudice. It was learned that Enron has also restored at least some of its other customers to direct access.
- Qualifying-facilities cases (U.S.D.C., Los Angeles, and various county Superior Courts) – The state attorney general's office has been appearing on behalf of the governor and the attorney general in a number of cases in which qualifying facilities are seeking orders permitting them to suspend or terminate their contracts with Edison because Edison did not pay on the contracts for a period of four to five months between November 2000 and March 2001. With one very limited exception (Salton Sea), the coordination judge has stayed all proceedings in all these cases.

## **U.S. Bankruptcy Court**

- Pacific Gas and Electric Company (PG&E v. PUC) (U.S. Bankruptcy Court, Northern Dist., San Francisco Div., No. 0130923(DM) – The U.S. Bankruptcy Court dismissed an adversary proceeding by PG&E against the PUC that had sought an injunction to bar the PUC from amending the way PG&E accounted for payment of its "stranded costs." The Bankruptcy Court determined that there was no violation of federal law because the PUC's actions in issuing and enforcing its accounting order fell within the ambit of the police and regulatory powers of the PUC. The suit was dismissed. The full decision can be found at [www.canb.uscourts.gov](http://www.canb.uscourts.gov)

## **Federal Energy Regulatory Commission (FERC)**

- In re PG&E National Energy Group (FERC, No. EC01-49-000) – PG&E sought in this administrative proceeding to move holdings of its utilities to a limited liability corporation, possibly to shield PG&E assets from a potential bankruptcy, and FERC agreed. On January 12, 2001, FERC issued an order that allowed certain holdings of PG&E to be transferred to a new corporate entity.
- In re San Diego Gas & Electric Co., et al (FERC Docket No. EL00-95-000, et al.) – Originally, this was PUC's effort to get FERC to impose effective and reasonable rates and rules, such as mandatory regulated forward contracts, and load-differentiated price caps. On March 9, 2001, FERC issued an order finding about \$69 million in overcharges by private sellers in January 2001 alone, and directing those sellers to provide refunds or, alternatively, to provide further cost or other justification for these charges. An affirmative declaration from FERC would permit the state to obtain refunds from generators, retroactive to January 1, 1001.

On July 12, 2001, the state Attorney General, along with other members of the California contingent (PUC, ISO, Edison, SDE&E, LA County), filed a motion before the FERC requesting it to order immediate refunds, with interest, of all unjust and unreasonable rates charged to California wholesale electricity customers from May 1, 2000, through June 19, 2001.

- Tucson Electric Power Company v. Governor Davis and California Power Exchange (FERC Docket No. EL01-40) – Tucson Electric sought to invalidate Governor Davis' commandeering of block forward market contracts on the basis that this action required FERC approval.
- ISO v. Generators – ISO is seeking recalculation and refunds from generators who violated soft price cap of \$150 under a FERC order.
- Mirant Delta, LLC and Mirant Potrero, LLC v. ISO (FERC Docket No. IL01-35) – Mirant challenges AB 5X (regarding ISO Board appointments by Governor Davis) on a basis that these appointments are not valid under FERC.
- PUC v. El Paso Natural Gas Company, et al (FERC Docket No.: RP00-241-000) –The PUC is asking FERC, based on provisions of the federal Natural Gas Act, to find that an El Paso contract is contrary to the public interest, unduly discriminatory, preferential, unjust, unreasonable and should be abrogated.
- Reliant Energy Power Generation, Inc. and Reliant Energy Services, Inc. v. California Independent System Operator Corp. (FERC No: EL01-\_\_\_\_-000) –Reliant is alleging that ISO is abusing the emergency provision of its tariff, wrongfully preventing maintenance by Reliant Energy on its generating units, and that the ISO's threatened exercise of export curtailment authority is unjust and unreasonable. Reliant also alleges that ISO's actions are causing injury to Reliant Energy, to other market participants in the West, and to energy consumers in the West, and are threatening the stability and reliability of the entire western grid.
- San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange (FERC No: EL00-95-000, et al.) – This filing by state Attorney General Bill Lockyer seeks an affirmative determination from FERC that energy transactions outside of the ISO and Power Exchange and, in particular, those where DWR has been the buyer, are subject to review and refund since sellers are charging unjust and unreasonable rates and exercising

market power. An affirmative declaration from FERC would allow the state to obtain refunds from generators retroactive to January 1, 2001.

- California Independent System Operator Corporation, California Power Exchange Corporation, San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services (FERC Docket No. ER01-889–002, et al.) – This filing by Attorney General Lockyer joins in an ISO request for clarification of a FERC order that required all energy transactions at the ISO to be backed by a creditworthy purchaser. Since neither PG&E nor Southern California Edison are creditworthy purchasers, the ISO was effectively precluded from securing energy for ratepayers via transactions with generators. The DWR has stepped in to be a creditworthy purchaser.
- Williams Energy Marketing & Trading Company (FERC Docket No. ER99-1722-004.) – In March 2001, FERC issued an order to show cause against Williams based on a non-public investigation conducted by FERC that raised questions about whether Williams exercised market power to drive rates up in California. Williams eventually settled certain items by agreeing to pay \$8 million in refunds. Independent studies have been submitted to FERC that conclude that there has been significant market power exercised in California.
- AES Huntington Beach, L.L.C. (FERC Docket No. ER98-2184-006); AES Alamosa, L.L.C., (FERC Docket No. ER98-2185-006) and AES Redondo Beach, L.L.C. (FERC Docket No. ER98-2186-006) – Attorney General Lockyer filed a motion for immediate suspension of market-based rate authority on May 29, 2001. AES is seeking renewal of authority to charge market-based rates. Lockyer’s motion asks FERC to reimpose cost-based rates.

## State Cases

- Berg v. Southern California Gas Co. (Los Angeles County Superior Court) – This caption encompasses two parallel cases brought by a private citizen claiming that the defendant gas companies conspired to drive up prices in the natural gas market and, indirectly, electricity prices as well.
- Continental Forge Company v. Southern California Gas Company, et al. (Los Angeles Superior Court, no. BC237336) – This class action against natural gas producers and marketers alleges restraint of trade and conspiracy under the Cartwright Act, and unfair competition and unlawful business under the Business and Professions Code.
- Gordon v. Reliance Energy, Inc., et al. (San Diego Superior Court) – This action contains the same general claims as set forth in the Hendricks v. Dynegy (see below).
- Hendricks v. Dynegy Power Marketing, Inc., et al. (San Diego County Superior Court) – This class action against various energy producers alleges a violation of state antitrust and unfair business practices on the same grounds as alleged in the San Francisco Renne action summarized below..
- Hendricks v. Hannigan (San Diego County Superior Court, No. GIC 761051) – This was a constitutional challenge to recently enacted SB 7X, which plaintiffs claim to be a gift of public funds. Defendant's demurrer was sustained and the case was dismissed on January 26, 2001. Notice of appeal was filed.
- Pacific Gas & Electric Company v. California Power Exchange (San Francisco Superior Court, Case #318308) – This is a parallel proceeding to Southern California Edison v. California Power Exchange, summarized below. This case now is moot for the state. A request for dismissal has been filed.
- People of the State of California ex rel. Renne v. Dynegy Power Marketing, Inc. (San Francisco County Superior Court) – This litigation, filed by the San Francisco city attorney, claims that energy producers have engaged in unfair business practices and state antitrust law violations by illegally withholding energy supplies and colluding to raise electricity prices.
- Southern California Edison v. California Department of Water Resources (Los Angeles County Superior Court, No. MS003036) – This petition requests the court to order DWR to arbitrate disputes arising under two long-

term energy exchange contracts that Edison modified using energy-industry restructuring as justification. *California Department of Water Resources v. Southern California Edison* (Sacramento Superior Court, no. 00AS04298) is a related case. The Los Angeles Superior Court ordered the disputes under both contracts to be arbitrated.

- *Southern California Edison v. California Power Exchange* (Los Angeles County Superior Court, No. BC243658) – This is a parallel proceeding to *Pacific Gas and Electric v. California Power Exchange* discussed above. As a result of the failure of Edison to meet its contractual obligations in the "day ahead" market, the Power Exchange declared Edison in default and initiated the liquidation of SCE's long-term energy supply contracts. In this action, Edison seeks to bar the Power Exchange from selling the latter contracts back to the power generators. At a February 2, 2001, hearing, the court recognized that the governor had power to commandeer block forward market contracts. Later that afternoon, the governor issued emergency order commandeering the block forward market contracts. The case is moot concerning the state; request for dismissal filed.
- *State of California ex rel. Lockyer v. Smutney-Jones, et al.* (Sacramento County Superior Court, Case No. 01AS00440) – On January 23, 2001, Attorney General Lockyer filed an action seeking to obtain removal of the outgoing, voting board members of ISO, following enactment of AB 5X. All board members submitted resignations. Action dismissed without prejudice.
- *CalEnergy v. Southern California Edison* (Imperial County Superior Court) – CalEnergy Operating Corporation filed this suit against Edison seeking \$45 million for electricity supplied in November and December of 2000. CalEnergy alleges that Edison's failure to pay has jeopardized its credit rating.
- **Lockyer v. Reliant, et al.** (San Francisco County Superior Court, No. 320614). On April 20, 2001, an order to show cause was issued to Reliant and affiliated companies to explain why they should not be compelled to produce all documents that were in their possession relevant to February 15 subpoena from the state attorney general. They had resisted production of certain confidential materials, claiming that the attorney general lacked authority to share data with other government agencies. On May 22, Reliant/Mirant/Dynegy agreed in a court-approved stipulation to comply with the subpoena to produce materials, including confidential documents in their possession, custody, or control. The attorney general, in turn, agreed not to disseminate that confidential information to other government agencies, pending a determination of the Attorney General's authority to do so in a separate action filed in Los Angeles. (*Reliant, et al. v. Lockyer*, Los Angeles County Superior Court).
- *Reliant Energy, et al. v. Lockyer* (Los Angeles County Superior Court, No. BC-24689) – Reliant filed a complaint claiming the attorney general could not share any confidential information obtained under the subpoenas with other governmental entities. Mirant joined the complaint before it was served. Dynegy filed a motion to intervene. On June 29, 2001, the Superior Court amended a protective order to allow the attorney general to share subpoenaed documents with the PUC and the Electricity Oversight Board. The court in July agreed to modify the protective order again to allow sharing with Washington and Oregon, if those states were assisting California in an investigation. Dynegy dropped out of the litigation and agreed to cooperate with the states on document production.
- *Luz Solar Partners, Ltd. v. Southern California Edison Company* (Sacramento County Superior Court, Case No. 01AS02788) – Luz Solar Partners, a qualifying facility (QF), is, like other QF's around the state, seeking to suspend or terminate its contract with Edison to supply electricity, thereby allowing Luz Solar to sell that power in the open market at substantially higher prices. The state attorney general argued in an amicus filing that any such suspension or termination of the QF contract will adversely affect the ratepayers and taxpayers, who would shoulder the substantial additional cost of the market-based electric wholesale prices.
- *Lockyer v. Enron Energy Services, Inc.* (San Francisco County Superior Court, Case No.) – Attorney General Lockyer filed papers on July 19, 2001, in San Francisco Superior Court to compel compliance with an investigative subpoena issued to Enron Energy Services (EES). The subpoena seeks documents related to EES's operations in or affecting the California electricity market. EES refused to produce any confidential

documents absent a confidentiality agreement with the attorney general, or any documents located outside the state.

- Lockyer v. Enron Corp. (San Francisco County Superior Court, Case No. 323176) – Lockyer also filed a petition to compel compliance with an investigative subpoena issued to Enron Corp. that seeks documents related to its operations in or affecting the California electricity market. Enron has asserted a variety of objections to the document requests.

### **Public Records Act Litigation**

- Judicial Watch v. Davis (Los Angeles Co. Superior Court, Case No. GC026589; Sacramento Co. Superior Court, Case No. GC026581) – Judicial Watch filed a Public Records Act request with the Governor's Office seeking all the governor's records related to his handling of the energy crisis. After the Governor's Office rejected the request on various grounds, including that it was an overly burdensome demand, Judicial Watch filed suit seeking disclosure of the documents.
- Copley Press v. Davis (San Diego County Superior Court, Case No. GIC 764413) – This Public Records Act lawsuit was filed by several newspapers on March 23, 2001. The lawsuit sought to compel Governor Gray Davis and the Department of Water Resources to disclose all of the energy contracts that the department had entered into since the beginning of this year. Petitioners argued that these documents were public contracts and therefore public records that must be immediately disclosed. On June 11, DWR sent a letter to all contracting parties to the long-term energy purchase contracts that it would be releasing the long-term energy purchase contracts with redactions of the following four technical terms: (1) gas indices; (2) heat rate; (3) delivery points; and (4) transmission costs.

At a hearing before Judge Linda Quinn, the attorney general agreed to turn over 38 slightly-redacted long-term energy purchase contracts for January through June 2001. Judge Quinn ordered that the redacted long-term contracts be provided to petitioners' counsel no later than noon on Friday, June 15. On June 27, Judge Quinn ordered the following documents to be produced: (1) un-redacted long-term energy contracts from January 1, 2001 to the present; (2) un-redacted spot market invoices, purchase orders and confirmation sheets to be produced from January 1, 2001 to the present.

- Strickland v. Davis (San Diego County Superior Court, Case No. GIC 764752) – This Public Records Act lawsuit was filed by several California Republican Assembly members on March 29, 2001. It sought to compel the governor, Controller Kathleen Connell, and DWR to disclose all of the energy contracts that DWR has entered into since the beginning of this year.
- **Emergency Application of Pacific Gas and Electric Company to Adopt a Rate Stabilization Plan** (Public Utilities Commission, 00-11-028, 038, 056) – PG&E filed an emergency request that the PUC bar communications by DWR in determining the methodology for a California procurement adjustment.

### **Other**

- Pacific Gas & Electric Company v. the State of California (San County Superior Court – Plaintiff seeks indeterminant amounts for just compensation on its respective competing claims to the block forward contracts and damages suffered as a result of the governor's commandeering.
- California Power Exchange Corp. v. State of California (Los Angeles County Superior Court) – Plaintiff seeks indeterminant amounts for just compensation on its respective competing claims to the block forward contracts and damages.
- Reliant Energy Services, Inc. v. The State of California (Los Angeles County Superior Court) – Plaintiff seeks indeterminant amounts for just compensation on its respective competing claims to the block forward contracts and damages.
- **California Power Exchange Corporation Claim** (Victim Compensation and Government Claims Board No.

G513305). – The California Power Exchange, Edison, PG&E and several Power Exchange market participants filed claims seeking compensation for commandeered block forward contracts in an amount over \$1 billion.

- Qualifying Facilities (Judicial Council Coordination # 4176) – These proceedings involve approximately 25 separate lawsuits by qualifying facilities, or QFs, primarily small and alternative energy producers. Their lawsuits seek to suspend or terminate PUC-approved contracts (with established rates) to provide electricity to Edison.