

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suedeem G. Kelly.

ConocoPhillips Company, and  
Equilon Enterprises LLC dba  
Shell Oil Products US

Docket No. EL05-58-000

v.

Los Angeles Department of  
Water and Power

NOTICE OF INTENT NOT TO ACT

(Issued March 28, 2005)

1. In this notice we decline to initiate an enforcement action pursuant to the Public Utility Regulatory Policies Act of 1978 (PURPA).<sup>1</sup> As a result, ConocoPhillips Company and Equilon Enterprises LLC dba Shell Oil Products US (Petitioners) may bring an enforcement action directly in the appropriate court.

**Background**

2. On January 26, 2005, Petitioners filed a complaint against Los Angeles Department of Water and Power (LADWP).<sup>2</sup> According to their complaint, Petitioners are retail customers that own electric generation facilities that are certified as qualifying facilities (QFs) under PURPA and are interconnected with LADWP. Petitioners purchase standby service from LADWP. They allege that the rates for the standby service are unjust and unreasonable and unduly discriminatory under section 206 of the FPA because the rates in effect require them to pay LADWP when they are using their own generators

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<sup>1</sup> 16 U.S.C. § 824a-3 (2000).

<sup>2</sup> Petitioners claim that the complaint raises issues under both section 206 of the Federal Power Act (FPA), 16 U.S.C. § 824e (2000), and under PURPA.

to supply power to their refineries, and not taking power from LADWP's grid. They also assert that similarly situated customers only pay the rate when they actually take power off the LADWP grid. Finally, Petitioners assert that the rates do not comply with the Commission's regulations implementing PURPA. They request the Commission to set a refund effective date, declare the rate schedules to be unjust and unreasonable, and substitute just and reasonable rates.

### **Notice of Filing, Answer and Intervention**

3. Notice of Petitioners' complaint was published in the *Federal Register*, 70 Fed. Reg. 5,639 (2004), with the answer, comments, protests and motions to intervene due on or before February 22, 2005.<sup>3</sup>

4. LADWP filed a timely answer to Petitioners' complaint. LADWP asserts that the Commission should dismiss the complaint because the FPA does not confer rate jurisdiction over the retail rate transactions at issue. In addition, LADWP claims the Commission's policy is not to entertain complaints that state regulatory commissions or self-regulating electric utilities, like LADWP, have erroneously applied their regulations implementing section 210 of PURPA.

5. Ultramar, Inc. (Ultramar) filed a timely motion to intervene. It states that it is currently evaluating the economic viability of installing a cogeneration facility in the LADWP service territory and that LADWP's rates at issue in Petitioners' complaint will impose significant economic obstacles to the siting of such a facility. LADWP filed an answer opposing Ultramar's motion to intervene stating that under Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), and Commission precedent, Ultramar's stated interest is too speculative to support intervention.

### **Discussion**

#### **Procedural Matters**

6. Notwithstanding LADWP's opposition to Ultramar's intervention, we find good cause exists to grant Ultramar's motion to intervene. We are satisfied that Ultramar has expressed an interest in the outcome of this proceeding that is not represented by another party. Accordingly, we will grant Ultramar's motion to intervene in this proceeding.

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<sup>3</sup> On February 8, 2004, a notice was issued extending LADWP's time to answer Petitioners' complaint.

### **PURPA Claims**

7. Petitioners' filing is fundamentally a challenge to LADWP's implementation of the Commission's PURPA regulations.<sup>4</sup> Accordingly, we will treat the complaint as a petition for enforcement under section 210(h) of PURPA. Section 210(h)(2)(A) of PURPA provides that the Commission may undertake an enforcement action to require a nonregulated electric utility to implement the Commission's regulations under PURPA. The Commission's enforcement authority under section 210(h)(2)(A) of PURPA, 16 U.S.C. § 824a-3(h)(2)(A) (2000), is discretionary. As the Commission pointed out in its 1983 Policy Statement, "the Commission is not required to undertake enforcement action."<sup>5</sup> If the Commission chooses not to undertake enforcement action within 60 days

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<sup>4</sup> Although Petitioners assert that the Commission also has jurisdiction to act on this matter under section 206 of the FPA, we do not have authority to act under section 206 because in these circumstances Part II of the FPA would not apply to LADWP, as a political subdivision of or as an agency, authority, or instrumentality of any state. See section 201(f) of the FPA, 16 U.S.C. § 824(f) (2000); *but see, e.g., American Electric Power Service Corp.*, 103 FERC ¶ 61,345 at P 13-15 (2003), *reh'g denied*, 106 FERC ¶ 61,020 (2004) (addressing Commission right to act against governmental entities in other circumstances). LADWP is, however, subject to the requirements of PURPA.

<sup>5</sup> *Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978*, 23 FERC ¶ 61,304 at 61,545 (1983) (Policy Statement). We note that the Commission has granted petitions for enforcement of PURPA on only two occasions. The Commission later vacated one of those actions. In the more recent grant of a petition for enforcement of PURPA, in *Gregory Swecker v. Midland Power Cooperative*, 105 FERC ¶ 61,238 (2003), *order accepting settlement, terminating enforcement proceeding and dismissing request for rehearing as moot*, 108 FERC ¶ 61,268 (2004) (*Swecker*), the Commission found after years of litigation that Midland Power Cooperative had abused its role as a "nonregulated electric utility" to frustrate the rights under PURPA of a small wind-powered QF that is owned by a farmer and his wife. While Petitioners have alleged facts that, if true, indicate LADWP's implementation of PURPA is inconsistent with our regulations, and may constitute an abuse of its role as a "nonregulated utility," we are not presented here with the years of litigation nor the same disproportionate financial ability of the parties to litigate a PURPA case in Federal Court that we saw in *Swecker*. We therefore will follow our more usual course of not going to court to enforce PURPA on behalf of a petitioner. This leaves Petitioners free to pursue their PURPA rights in the appropriate court.

of the filing of the petition, the petitioner may then bring an enforcement action directly against the utility in the appropriate court.<sup>6</sup>

8. Notice is hereby given that the Commission declines to initiate an enforcement action under section 210(h)(2)(A) of PURPA.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.

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<sup>6</sup> *Id.*; 16 U.S.C. § 824a-3(h)(2) (2000). The Commission may intervene in such a proceeding as a matter of right.