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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA DEPT. OF WATER RESOURCES)	)	
Plaintiff,	)	2:05-cv-00518
v.	)	<u>ORDER</u>
POWEREX CORP.,	)	
Defendant.	)	

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On August 17, 2009, a hearing was held on Defendant Powerex Corp.'s ("Powerex") motion for a stay or dismissal of this action, based on the argument that the California Attorney General ("CAG") has recently caused all issues involved with Plaintiff California Department of Water Resources' ("CDWR") state claims in this federal district court case to be pending at the Federal Energy Regulatory Commission ("FERC"). Specifically, Powerex argues CDWR's three state claims in this federal court case all require a finding on "the predicate act" whether Powerex engaged in illegal market manipulation, which Powerex contends is the same issue squarely before FERC today. CDWR opposes the motion, arguing FERC will not reach the issues CDWR seeks to have determined in this federal district court case.

1 BACKGROUND

2 CDWR, "by and through its California Energy Resources  
3 Scheduling Division" ("CERS"), filed its Second Amended Complaint  
4 ("SAC") in this federal court case on September 22, 2008. (SAC  
5 Preface.) CDWR alleges in the SAC that the following occurred "during  
6 the California energy crisis of 2001":

7 [T]he California Energy market was subjected to  
8 artificial manipulation on a massive scale. (Calif.  
9 ex rel. Lockyer v. FERC, 383 F.3d 1006, 1015-1016  
10 (9th Cir. 2004)). [*Powerex*] was one of the market  
11 manipulators. As a result of this manipulation,  
12 California faced an unexpected and severe energy  
13 shortage in 2000 and 2001. Due to the state of  
14 emergency created by the energy crisis, the State  
15 of California, through [C]DWR, was compelled to  
16 enter into numerous energy transactions with  
17 Powerex. The majority of transactions between  
18 [C]DWR and Powerex were made on a real-time basis,  
19 with the energy needed to satisfy demand for  
20 electricity within less than an hour from when the  
21 transactions were finalized. During this crisis,  
22 [C]DWR had no reasonable alternative but to  
23 transact with Powerex to procure needed energy for  
24 California. *POWEREX* took an oppressive and unfair  
25 advantage of the distress created by the California  
26 energy crisis, the necessities which compelled  
27 [C]DWR to procure sufficient energy to avoid  
28 blackouts, and *POWEREX*'s own participation in and  
knowledge of energy market manipulation. [C]DWR's  
agreements to the terms of the transactions with  
Powerex were not real, mutual, or free. Moreover,  
the transactions are contrary to the public policy  
and public interest of the State of California.

Pursuant to Grays Harbor v. Idacorp, 379 F.3d 641  
(9th Cir. 2004), [C]DWR seeks a declaration that  
all of the contracts or transactions with Powerex  
from January 17, 2001, through December 31, 2001,  
are void and of no force and effect, and any  
determination as to the amount of monetary relief  
involving issues of just, reasonable or fair rates  
would be addressed to [FERC].

(SAC ¶¶ 1-3) (emphasis added). CDWR argues the contracts and  
transactions are void because CDWR entered them under "duress," "undue  
influence" and "contrary to [California] public policy and interest" as

1 a result of having been subjected to Powerex's "participation in . . .  
2 energy market manipulation." (SAC ¶¶ 2, 37-43.)

3 The CAG argues in his Complaint at FERC ("FERC Complaint"),  
4 filed on behalf of the People of the State of California, that he is  
5 giving FERC "in first instance an opportunity to enforce the [Federal  
6 Powers Act] and remedy [energy] sales to CERS," which is a division of  
7 CDWR. (FERC Compl. 2, 56; SAC Preface) (internal quotations omitted).  
8 The FERC Complaint is alleged against Powerex and 18 other "public  
9 utility sellers of short term bilateral energy to [CERS] during the  
10 period January 18, 2001 to June 20, 2001 that have not settled their  
11 refund liability with the [CAG]." (FERC Compl. 2.) The FERC Complaint  
12 states the following:

13 *The [CAG] seeks refunds for California ratepayers*  
14 *on sales to CERS because those sales were made at*  
15 *unreasonable and unjust prices. These unjust and*  
16 *unreasonable prices resulted from: (1) [FERC]'s*  
17 *regulatory failure to protect ratepayers; and (2)*  
18 *sellers' violation of applicable tariffs, exercise*  
19 *of undue market power in California's electricity*  
20 *markets, manipulation of those markets through*  
21 *withholding and other abusive market schemes, and*  
22 *failure to comply with market-based rate oversight*  
*requirements . . . [The CAG argues FERC] should*  
23 *order sellers [both tariff violators as well as*  
24 *situational beneficiaries] to pay refunds on all*  
25 *short-term bilateral sales to CERS that were priced*  
26 *at unjust and unreasonable levels as measured by*  
27 *application of the mitigated market clearing price*  
*("MMCP")<sup>1</sup> methodology that [FERC] has already*  
28 *adopted in the California Refund Proceeding.<sup>2</sup>*

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24 <sup>1</sup> MMCP is the "methodology established by FERC in its July 25, 2001  
25 Order, as subsequently modified, to calculate just and reasonable rates  
26 for all sales in the [California Independent System Operator Corporation  
27 ("ISO") and the California Power Exchange ("PX")] markets in place of  
unjust and unreasonable rates that were charged. Jurisdictional sellers  
are required to refund amounts collected above the MMCP." (FERC MTC  
vii.)

28 <sup>2</sup> "The California Refund Proceeding was established by FERC in a  
(continued...)

1 (FERC Compl. 2-3) (emphasis added.)

2 Powerex also explains in its motion:

3 [O]n May 22, 2009, the CAG, along with the Public  
4 Utilities Commission of California ("CPUC"),  
5 Pacific Gas and Electric Company ("PG&E"), and  
6 Southern California Edison Company ("SCE")  
7 (collectively the "California Parties") filed at  
8 FERC a motion to consolidate ["FERC MTC"] the  
9 concurrently-filed CAG [FERC] Complaint with three  
10 pre-existing "California Energy Crisis" proceedings  
now on remand at FERC from the Ninth Circuit "into  
one proceeding that will encompass all [claims for  
short-term sales] made by the California Parties  
for the Crisis Period and that will measure the  
total financial harm done to California  
ratepayers[.]"

11 (Def's Mot. 5:3-14) (internal citation omitted.) The California  
12 Parties request the following in the FERC MTC, in which they also  
13 request summary disposition, and urge the FERC to combine FERC  
14 proceedings and issue expeditious relief:

15 [T]hat [FERC] timely implement the mandates in the  
16 Remand Proceedings<sup>3</sup> and adjudicate the related [FERC  
17 Complaint] in a single, comprehensive proceeding,  
18 so as to provide full and expeditious relief to  
California consumers harmed by the Energy Crisis.  
Consolidation of these proceedings is necessary

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19 <sup>2</sup> (...continued)

20 previous FERC order, *San Diego Gas & Elec. Co. v. Sellers of Energy and*  
21 *Ancillary Serv. Into Markets Operated by the Cal. Indep. Sys. Operator*  
22 *Corp. and the Cal. Power Exch.*, 96 FERC ¶ 61,120 (2001)." (FERC Compl.  
23 3, n.7.) This order dealt with determination of reasonable rates and  
24 refunds related to transactions "in the spot markets operated by [ISO  
25 and PX] during the period October 2, 2000 through June 20, 2001." *Id.*  
This order also suggested exploration and investigation into whether  
there were "unjust and unreasonable charges for spot market sales in the  
Pacific Northwest from December 25, 2000 through June 20, 2001, and the  
calculation of any refunds associated with such charges."

26 <sup>3</sup> The Remand Proceedings are comprised of "three cases which [FERC]  
27 has before it on remand from the Ninth Circuit concerning the 2000-2001  
28 Energy Crisis." (FERC Compl. viii.) These cases are *California v.*  
*Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004), *Public Utilities*  
*Commission of California v. FERC*, 462 F.3d 1027 (9th Cir. 2006), and *Port*  
*of Seattle, Washington v. FERC*, 499 F.3d 1016 (9th Cir. 2007).

1 because these cases all involve the same issues,  
2 parties, related markets, and requested relief.  
3 Consolidating all of these cases is the only lawful  
4 way to ensure that the Ninth Circuit's mandates are  
5 enforced and that the interrelated issues are  
6 resolved based on a complete factual record.  
7 Litigating the claims separately would not allow a  
8 reasoned determination of the magnitude of  
9 financial harm that California ratepayers suffered  
10 during the Crisis. Piecemeal litigation also would  
11 squander the resources of [FERC] and the parties  
12 (and potentially the courts), would create  
13 potentially inconsistent results, and would make it  
14 more difficult for the parties to discuss global  
15 settlements as an alternative to this  
16 already-protracted litigation.

17 (FERC MTC 5) (emphasis added). The California Parties also  
18 request in the FERC MTC:

19 [that FERC] expand the already familiar MMCP remedy  
20 for sales during [October 2, 2000 through June 20,  
21 2001, for which FERC ordered refunds of certain  
22 transactions within the [California Independent  
23 System Operator Corporation ("ISO") and the  
24 California Power Exchange ("PX")] markets (the  
25 "Refund Period") to sales during the Summer Period  
26 [May 1, 2000 - October 1, 2000], to excluded Refund  
27 Period ISO/PX sales, and to short-term sales to  
28 CERS. Market-wide relief in these circumstances is  
supported by the law and necessary to ensure that  
consumers are placed in the position that they  
would have been in, had sellers' exercise of undue  
market power, pervasive market manipulation, and  
violations of tariff and market rules not destroyed  
competitive market conditions.

(FERC MTC 7) (emphasis added).

The California Parties also filed at FERC a Motion for  
Refunds ("FERC MFR") on June 9, 2009, which includes the following  
arguments:

[T]he California Parties file this motion to  
recover refunds for sales made to CERS at prices  
that exceeded the applicable cap during the  
Relevant Period, almost all of which were made by  
Powerex as energy exchanges.

During the Relevant Period, [Powerex] sold  
electricity to CERS at unjustified, and therefore  
illegal, above-the-cap prices, primarily in the

1 form of energy exchange transactions but also in  
2 the form of cash transactions. The California  
3 Parties seek refunds from [Powerex] and other  
4 sellers . . . .

5 Almost all of the unjustified and illegal above-  
6 the-cap sales to CERS were made by Powerex as  
7 exchange transactions. Powerex's exchange sales to  
8 CERS during the Relevant Period illegally exceed  
9 the June 19 Order's cap limit by a total of  
10 \$27,152,716. Powerex's traditional cash sales to  
11 CERS exceeded the legal cap limit by an additional  
12 \$318,972. Powerex's total above-the-cap sales to  
13 CERS thus amounted to \$27,471.688 . . . .

14 Accordingly, consistent with the Ninth Circuit's  
15 [Public Utilities Commission of California v. FERC]  
16 decision, [FERC] should enforce its prior orders  
17 and order [Powerex and other sellers] to refund the  
18 indicated above-the-cap overcharge principal  
19 amounts charged to and paid by CERS and direct the  
20 payment of interest at the FERC interest rate on  
21 all such above-the-cap charges . . . .

22 The June 19 Order imposed a \$91.87 price cap on all  
23 sales . . . during the Relevant Period, including  
24 all sales to CERS. Absent timely-filed cost  
25 justifications approved or deemed approved by  
26 [FERC], no generator or [loan-serving entities  
27 ("LSE")] could legally bill CERS an amount in  
28 excess of the cap price for electricity  
29 transactions, and no marketer was permitted to  
30 charge CERS a price above the cap under any  
31 circumstances.<sup>4</sup> In light of the fact that no  
32 generator or LSE that sold to CERS at a price above  
33 the cap had [FERC] permission to do so,<sup>5</sup> no sale to  
34 CERS at a price above-the-cap was lawful. [FERC]  
35 thus should direct the sellers identified in this  
36 Motion to refund all such above-the-cap amounts to  
37 CERS, plus interest at the applicable FERC rate . .  
38 . .

39 Powerex, a marketer prohibited by [FERC] from even  
40 seeking authority to sell at prices above-the-cap,  
41 made the vast majority of above-the-cap sales to  
42 CERS. Almost all of these sales were exchange  
43 transactions, which were either repaid by CERS in-  
44 kind or were "monetized" and ultimately paid for in  
45 cash . . . .

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46 <sup>4</sup> June 19 Order, 95 FERC at ¶ 62,563-64, ¶ 62,568.

47 <sup>5</sup> September 7 Order, 96 FERC at ¶ 62,002; October 5 Order, 97 FERC  
48 at ¶ 61,053.

1 During the Relevant Period, Powerex sold CERS  
2 140,041 MWh of electricity in transactions that  
3 began as in-kind energy exchanges but were later  
4 monetized. As CERS scheduler Susan Lee explains in  
5 her attached declaration, Powerex demanded  
6 repayment of these exchanges within a very short  
7 period of time (3-4 days), and when CERS was unable  
8 to acquire sufficient energy to repay Powerex in-  
9 kind within the time required, Powerex dictated a  
10 cash price that it charged CERS instead. Comparing  
11 the \$91.87 price cap to the monetized return  
12 payment demanded by Powerex, Dr. Berry calculates  
13 that Powerex's illegal monetized above-the-cap  
14 charges to CERS totaled \$21,267,843 . . . .

9 The refunds requested in this Motion for unlawful  
10 above-the-cap sales made to CERS by the above-  
11 specified sellers during the Relevant Period are in  
12 addition to, and unrelated to, refunds sought by  
13 the California Parties in other proceedings before  
14 [FERC] for sales made to CERS. The CERS refunds  
15 sought here relate to a different time period  
16 (post-June 19, 2001) and a different set of  
17 transactions than the pre-June 20, 2001  
18 transactions for which the California Parties seek  
19 CERS refunds in other proceedings before [FERC].  
20 The refunds sought here are owed to CERS no matter  
21 how [FERC] rules in those other proceedings. The  
22 refunds sought here are not connected with any  
23 issue regarding "who-owes-what-to-whom?" or amounts  
24 that are being held in those other proceedings.  
25 Because calculation of these refunds for sellers'  
26 unlawful above-the-cap sales during the Relevant  
27 Period can occur quickly and without reference to  
28 calculation of refunds due CERS for other sales,  
the California Parties request that [FERC] order  
the sellers to immediately pay these refunds to  
CERS, with interest at the FERC interest rate.

(FERC MFR 3-11) (emphasis added).

#### DISCUSSION

Powerex argues the FERC Complaint, the FERC MTC, and the  
FERC MFR (collectively, the "FERC filings") reveal the issues before  
this Court are now squarely before FERC, and therefore, this federal  
court case should be stayed. CDWR counters this argument is  
unavailing since it is not a Plaintiff in any of the FERC filings.  
The FERC filings do not support CDWR's position. Each FERC filing

1 seeks relief on behalf of CERS, and CDWR states its SAC is "by and  
2 through its [CERS] Division." (SAC Preface.) In the FERC Complaint,  
3 "the [CAG] seeks refunds for California ratepayers on sales to CERS  
4 because those sales were made at unreasonable and unjust prices."  
5 (FERC Compl. 2). The California Parties' FERC MTC asks FERC to  
6 "expand the already familiar MMCP remedy . . . to short-term sales to  
7 CERS." (FERC MTC 7.) The California Parties also seek in the FERC  
8 MFR "to recover refunds for sales made to CERS at prices that exceeded  
9 the applicable cap during the Relevant Period . . . ." (FERC MFR 3.)  
10 Thus CDWR is clearly involved with the FERC filings through its CERS  
11 division, since each filing indicates CERS would benefit from any  
12 refund awarded by FERC.

13 Powerex also argues the same remedies and monetary relief  
14 sought in the SAC are sought at FERC. Further, Powerex argues the  
15 "monetary remedies available under the [Federal Powers Act]"  
16 concerning "'just and reasonable rates'" or "disgorgement of profits  
17 for violations of statute or [FERC]-approved tariffs" remain the same  
18 regardless of where relief is sought. (Def's Reply 13:9-14:6.) CDWR  
19 counters that the amount of monetary recovery it could seek from FERC  
20 will be greater if the challenged transactions or contracts in the SAC  
21 are declared invalid. (Pl.'s Opp'n 1:24-27.) CDWR acknowledges,  
22 however, in its SAC that "any determination as to the amount of  
23 monetary relief involving issues of just, reasonable or fair rates  
24 would be addressed to [FERC]". (SAC ¶ 3.)

25 Powerex and CDWR also clash on whether the FERC filings  
26 involve the same market manipulation allegations which are the basis  
27 of CDWR's contract formation claims before this Court. CDWR argued at  
28 the hearing that each of its claims in this federal court case is



1 based on California public policy. (Transcript of Hearing at 5-13.)  
2 Each claim in the SAC, however, incorporates by reference "market  
3 manipulation" allegations, which CDWR virtually conceded at the  
4 hearing are identical to the "market manipulation" claims in the FERC  
5 filings, although it did argue some of their market manipulation  
6 claims are different from what is at FERC. Powerex rejoined that the  
7 same market manipulation allegations are before FERC. The CAG's FERC  
8 Complaint seeks refunds from sellers based on "sellers' violation of  
9 applicable tariffs, exercise of undue market power in California's  
10 electricity markets, [and the sellers'] manipulation of those markets  
11 through withholding and other abusive market schemes . . . ." (FERC  
12 Compl. 2-3.) The California Parties also argue in the FERC MTC that  
13 their request for "[m]arket-wide relief . . . is . . . necessary to  
14 ensure that consumers are placed in the position that they had been  
15 in, had sellers' exercise of undue market power, pervasive market  
16 manipulation, and violations of tariff and market rules not destroyed  
17 competitive market conditions." (FERC MTC 7) (emphasis added).  
18 Likewise, the California Parties argue in the FERC MFR that the relief  
19 they seek is based on "[Powerex's] [sales of] electricity to CERS at  
20 unjustified, and therefore illegal, above-the-cap prices . . . ."  
21 (FERC MFR 3.)

22 CDWR failed to controvert Powerex's position that CDWR's  
23 "market manipulation" allegations in its SAC are intertwined with the  
24 "market manipulation" allegations against Powerex in the FERC filings.

25 Thus, based on these allegations, whether Powerex manipulated the  
26 electricity energy market to artificially create the appearance of a  
27 shortage of electric power is an issue germane to resolution of the  
28 claims in the SAC and those pending at FERC. CDWR seeks a judicial

1 declaration from this Court that the transactions entered into are  
2 void, or in other words, unreasonable because of market manipulation,  
3 which appears to be the same issue FERC must analyze when adjudicating  
4 each FERC filing.

5 Further, Powerex argues the reasonableness of the rates  
6 charged is also a gravamen of the state claims alleged in the SAC and  
7 the claims pending at FERC. Powerex indicates the district court  
8 should wait until FERC itself has spoken about market manipulation,  
9 the reasonableness of the rates, and refunds, which are intrinsically  
10 involved with the state claims in the SAC. CDWR failed to address  
11 whether a judicial decision on CDWR's claims premised on state public  
12 policy could conflict with FERC's findings involving any of the FERC  
13 filings.

#### 14 STANDARD

15 A trial court may . . . find it is efficient for  
16 its own docket and the fairest course for the  
17 parties to enter a stay of an action before it,  
18 pending resolution of independent proceedings which  
19 bear upon the case. This rule applies whether the  
20 separate proceedings are judicial, administrative,  
21 or arbitral in character, and [it] does not require  
22 that the issues in such proceedings are necessarily  
23 controlling of the action before the court.

24 Leyva v. Certified Grocers of Cal. Ltd., 593 F.2d 857, 863-64 (9th  
25 Cir. 1979) (internal citations omitted).

26 Powerex argued at the hearing that it seeks a stay under the  
27 rationale of the Supreme Court decision in Landis v. North American  
28 Co., in which the Supreme Court stated:

[A party seeking a stay must] make out a clear case  
of hardship or inequity in being required to go  
forward, if there is even a fair possibility that  
the stay for which he prays will work damage to  
some one else.

299 U.S. 248, 254 (1936).

1 The Ninth Circuit "set out the following framework" for  
2 evaluating the propriety of a Landis stay decision and its  
3 requirements for a stay in Lockyer v. Mirant Corp.:

4 Where it is proposed that a pending proceeding be  
5 stayed, the competing interests which will be  
6 affected by the granting or refusal to grant a stay  
7 must be weighed. Among those competing interests  
8 are the possible damage which may result from the  
9 granting of a stay, the hardship or inequity which  
10 a party may suffer in being required to go forward,  
11 and the orderly course of justice measured in terms  
12 of the simplifying or complicating of issues,  
13 proof, and questions of law which could be expected  
14 to result from a stay.

15 398 F.3d 1098, 1110 (9th Cir. 2005) (internal citation omitted).

16 In Leyva, the Ninth Circuit also stated "[a] stay should not  
17 be granted unless it appears likely the other proceeding will be  
18 concluded within a reasonable time in relation to the urgency of the  
19 claims presented to the court." 593 F.2d at 864. Leyva explains when  
20 deciding a stay motion, the court should be "cognizant" of whether  
21 "[i]t would waste judicial resources and be burdensome upon the  
22 parties if . . . discovery [is permitted], . . . pretrial proceedings  
23 [completed], and evidence . . . determine[d] [on] the merits of the  
24 case at the same time as [a concurrent proceeding] is going through a  
25 substantially parallel process." Id.

26 CDWR argues under the first Landis factor, if a stay is  
27 imposed it will suffer "damage" because "a stay in this case would  
28 unfairly and unnecessarily disrupt [C]DWR's ongoing discovery efforts  
in proceedings that have a definite and reasonable timetable . . . ."  
(Pl.'s Opp'n 33:8-10.) CDWR states discovery in this case has  
involved "thousands of hours and dollars," "lawyers and witnesses from  
at least two countries, four states, and the District of Columbia,"  
"twenty-five depositions in two different countries," and a "million

1 of pages of documents," and now finally, "non-expert discovery has  
2 essentially been completed." (Pl.'s Opp'n 34:5-13, 3:11-13.)

3 It has not been shown, however, that the parties would have  
4 a problem preserving evidence. The record reveals that virtually the  
5 same evidence is involved in the FERC and district court proceedings.  
6 Further, as the Ninth Circuit stated in CMAX, Inc. v. Hall:

7 [i]f there [is a discovery] problem [created by a  
8 stay, an] application could be made in the district  
9 court to permit further discovery proceedings. It  
10 may be that [CDWR] will be prejudiced by the delay  
11 in the sense that evidence will be obtained, or  
12 rulings made, as a result of the [FERC]  
13 proceedings, which [could] adversely affect the  
14 claims which [CDWR] asserts in the district court.  
15 But this is not the kind of prejudice which should  
16 move a court to deny a requested postponement. If  
17 [CDWR] is prejudiced by such an eventuality it will  
18 be because the [FERC] proceedings demonstrate a  
19 weakness in its case. And if its case is weak,  
20 justice will be served by having that fact revealed  
21 prior to the district court trial.

22 300 F.2d 265, 269 (9th Cir. 1962). If FERC reaches the issue whether  
23 Powerex subjected the California Energy market to artificial  
24 manipulation on a massive scale and feigned energy crisis in the years  
25 2000-2001, which is pending at FERC and in this district court, FERC's  
26 finding could be "helpful in deciding the district court case." Id.

27 CDWR also argues that a stay would be harmful because it  
28 would cause this district court case to be pending for an unreasonable  
time since "there is no definite end point for the adjudication of the  
[Federal Powers Act]-based claims currently before FERC . . . ."  
(Pl.'s Opp'n 32:8-11.) The FERC MFR, however, indicates if the  
California Parties prevail at FERC on their request to have the  
"calculation of th[e] refunds for sellers' unlawful above-the-cap  
sales. . . occur quickly[,] . . . [FERC would] order the sellers to  
immediately pay these refunds to CERS, with interest at the FERC

1 interest rate." (FERC MFR 11.) Further, regardless of how long FERC  
2 may take to adjudicate the FERC filings now before it, the proceedings  
3 before this Court, FERC, and the Ninth Circuit have already lasted  
4 over eight years. "[T]he subject matter of the [proceedings at FERC  
5 and in this district court are] highly complex and it is the avoidance  
6 of a duplication of that very complexity that serves in part to  
7 justify the stay." Chronicle Publishing Co. v. National Broadcasting  
8 Company, 294 F.2d 744, 749 (9th Cir. 1961). The complex nature of the  
9 proceedings is not disputed. Each proceeding involves numerous energy  
10 transactions and highly complicated issues of energy market  
11 manipulation. "In the case before us, the stay relates only to the  
12 proceedings before [FERC]. If the stay, even so limited, be a  
13 protracted one, it is only because the subject matter of the  
14 proceedings is highly complex." Id. These considerations favor a  
15 stay.

16 Moreover, "the known facts speak for themselves in respect  
17 [to the second factor of the Landis stay,] hardship [or inequity which  
18 a party may suffer in being required to go forward]." Chronicle, 294  
19 F.2d at 747.

20 [When] the facts material to each examination may  
21 in large part be the same[,] [w]e are then  
22 confronted with the prospect of two tremendously  
23 complex proceedings simultaneously assembling the  
24 same factual data in painstaking detail for the  
25 purpose of considering these facts from different  
26 points of view. The situation is one which cries  
27 out for the elimination of wasteful duplication of  
28 efforts . . . . The elimination of unnecessary  
duplications does not appear unreasonable in these  
circumstances. To hold otherwise might well, as a  
practical manner, defeat the very end sought . . .  
The burden of duplication of effort is not, of  
course, borne by the courts alone. It is borne as  
well by the litigants and their counsel.

1 Id. at 749. CDWR essentially asks this Court in its SAC, and asks  
2 FERC through the FERC filings, to review and interpret the same  
3 voluminous documents, as well as decide the same issue whether there  
4 was market manipulation and artificial energy scarcity in the years  
5 2000 and 2001. Even the CAG, along with the other California Parties,  
6 has indicated a stay is appropriate by arguing at FERC:

7 [l]itigating the claims separately would not allow  
8 a reasoned determination of the magnitude of  
9 financial harm that California ratepayers suffered  
10 during the Crisis. Piecemeal litigation also would  
11 squander the resources of [FERC] and the parties  
(and potentially the courts), would create  
potentially inconsistent results, and would make it  
more difficult for the parties to discuss global  
settlements as an alternative to this  
already-protracted litigation.

12 (FERC MTC 5) (emphasis added). The California Parties' argument that  
13 "[p]iecemeal litigation . . . would squander the resources of [FERC]  
14 and the parties (and potentially the courts), would create potentially  
15 inconsistent results, and would make it more difficult for the parties  
16 to discuss global settlements as an alternative to this  
17 already-protracted litigation themselves," is persuasive and is  
18 contrary to CDWR's position against a stay. This argument indicates  
19 CDWR will not suffer hardship or inequity if a stay is imposed.

20 Powerex argues it will suffer a hardship in the absence of a  
21 stay, because it will be engaged in dual litigation before this court  
22 and at FERC, and will soon try the state claims in the SAC in a trial  
23 expected to last a month. (Def's Mot. 13:3-4.) Powerex also argues a  
24 stay would "prevent concurrent adjudication of the same issue in  
25 federal court and at FERC . . . [and] reduce the potential for  
26 inconsistent determinations concerning market manipulation or market  
27 power exercised by Powerex or other suppliers in the California  
28 wholesale energy markets." (Def's Mot. 13:18-14:6.) Powerex and the

1 California Parties appear to agree that a stay is appropriate to avoid  
2 "hardship" that would be experienced if dual litigation were to go  
3 forward.

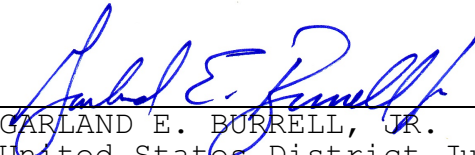
4           The third Landis factor is whether a stay would serve the  
5 "orderly course of justice measured in terms of the simplifying or  
6 complicating of issues, proof, and questions of law which could be  
7 expected to result from a stay." Lockyer, 398 F.3d at 1110. Powerex  
8 argues a stay would "simplify or narrow the issues, evidence, and  
9 questions of law present in this case" because there is "a high  
10 likelihood that ongoing FERC proceedings will . . . grant 'make whole'  
11 monetary relief[; and if] FERC denies relief - in whole or part -  
12 . . . the scope of the transactions and the range of the issues for  
13 the Court to address will be radically narrowed, if not eliminated  
14 entirely." (Def's Reply 18:9-10, 21:13-25:13; Def's Mot. 16:6-10.)  
15 Powerex is correct. In terms of "simplifying . . . the issues or  
16 questions of law," a stay is warranted. The district court could  
17 benefit from deferring to FERC's review and findings on the  
18 reasonableness of the rates charged. Such findings could crystalize  
19 the state questions in the SAC and allow the judicial decision to be  
20 made on a more distilled record; especially since the issues involved  
21 in both proceedings appear fraught with federal policy considerations.  
22 "[A]t the very least, the [FERC] proceeding will provide a means of  
23 developing comprehensive evidence bearing upon the highly technical  
24 [question whether Powerex subjected the California Energy market to  
25 artificial manipulation on a massive scale and feigned an energy  
26 crisis in the years 2000-2001, which is also at issue in the district  
27 court case]. CMAX, 300 F.2d at 269. The Ninth Circuit has stated  
28 "even under the assumption that the court is not bound and controlled

1 by the [concurrent proceeding's] conclusions," "findings, as well as  
2 the documents and testimony produced during the [concurrent  
3 proceeding] may be of valuable assistance to the court in resolving  
4 the . . . claims presented . . . ." Leyva, 593 F.2d at 863.  
5 Therefore, consideration of the Landis factors reveals a stay should  
6 be issued.

7 CONCLUSION

8 Accordingly, Powerex's motion for a stay is granted.  
9 This case is stayed during FERC's adjudication of the above  
10 referenced FERC filings.

11 Dated: September 4, 2009

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14 GARLAND E. BURRELL, JR.  
15 United States District Judge  
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