

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

In re WESTERN STATES WHOLESALE  
NATURAL GAS ANTITRUST  
LITIGATION

2:03-cv-01431-RCJ-PAL  
MDL No. 1566  
**ORDER**

REORGANIZED FLI, INC. et al.,

Plaintiffs,

VS.

2:05-cv-01331-RCJ-PAL

WILLIAMS COMPANIES. et al.,

Defendants.

LEARJET, INC. et al.,

Plaintiffs,

VS.

2:06-cv-00233-RCJ-PAL

ONEOK, INC. et al.,

Defendants.

SINCLAIR OIL CORP.,

Plaintiff,

vs.

E PRIME INC. et al.,

Defendants.

2:06-cv-00267-RCJ-PAL

SINCLAIR OIL CORP.,

Plaintiff,

vs.

ONEOK ENERGY SERVICES CO., L.P.,

Defendant.

2:06-cv-00282-RCJ-PAL

BRECKENRIDGE BREWERY OF  
COLORADO, LLC et al.,

Plaintiffs,

vs.

ONEOK INC. et al.,

Defendants.

2:06-cv-01351-RCJ-PAL

HEARTLAND REGIONAL MEDICAL  
CENTER et al.,

Plaintiffs,

vs.

ONEOK, INC. et al.,

Defendants.

2:07-cv-00987-RCJ-PAL

ARANDELL CORP. et al.,	)
	)
Plaintiffs,	)
	)
vs.	)
	)
XCEL ENERGY INC. et al.,	)
	)
Defendants.	)
	)
<hr/>	
NEWPAGE WISCONSIN SYSTEM INC.,	)
	)
Plaintiff,	)
	)
vs.	)
	)
CMS ENERGY RESOURCE	)
MANAGEMENT CO. et al.,	)
	)
Defendants.	)
	)
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2:07-cv-01019-RCJ-PAL

2:09-cv-00915-RCJ-PAL

These consolidated cases arise out of the energy crisis of 2000–2002. Plaintiffs (retail buyers of natural gas) allege that Defendants (natural gas traders) manipulated the price of natural gas by reporting false information to price indices published by trade publications and by engaging in “wash sales.” Several motions are pending before the Court.

# **I. PROCEDURAL HISTORY**

In 2003, the Judicial Panel on Multidistrict Litigation (“JPML”) transferred seven class action cases from various districts in California to this District under 28 U.S.C. § 1407 as Multidistrict Litigation (“MDL”) Case No. 1566, assigning Judge Pro to preside. Since then, the JPML has transferred in several more actions from various districts throughout the United States. Between 2003 and 2015, Judge Pro ruled on many motions to remand, to dismiss, and for summary judgment. He also approved several class settlements. Several parties settled on their own. One or more of the cases have been to the Court of Appeals twice and to the Supreme

1 Court once. In 2007, the Court of Appeals reversed several dismissals under the filed rate  
2 doctrine and remanded for further proceedings. In 2013, the Court of Appeals reversed several  
3 summary judgment orders, ruling that the Natural Gas Act did not preempt state law anti-trust  
4 claims and that certain Wisconsin- and Missouri-based Defendants should not have been  
5 dismissed for lack of personal jurisdiction. The Supreme Court granted certiorari as to  
6 preemption under the Natural Gas Act and affirmed. The case was soon thereafter reassigned to  
7 this Court when Judge Pro retired. The Court has issued several dispositive orders and has  
8 denied class certification in applicable cases. The Court recently ruled on approximately forty  
9 motions, including the final group of dispositive motions. Two motions to reconsider and  
10 several other motions are pending before the Court.

## 11 **II. MOTIONS TO RECONSIDER**

### 12 **A. Motion No. 2959**

13 Defendants Xcel Energy Inc. (“Xcel”), Northern States Power Co. (“N. States”), Dynegy  
14 Illinois, Inc. (“DII”), DMT GP, LLC (“DMT”), Dynegy GP, Inc. (“DGI”), El Paso Corp. (“El  
15 Paso”), and Williams Merchant Services Co. (“Williams”) ask the Court to reconsider denial of  
16 their motion for summary judgment in the ‘1019 and ‘915 Cases based on release and/or res  
17 judicata via the settlements in a consolidated class action brought in the Southern District of New  
18 York, No. 03-cv-6186 (“the NYMEX Case”). The Court granted the motion as to several  
19 Defendants but denied the motion as to movants because the Court was not satisfied that  
20 movants were parties to the NYMEX Case or parents, subsidiaries, successors, etc. of parties to  
21 the NYMEX Case covered by the release. The Court invited the present motions to reconsider if  
22 movants could provide such evidence or point out to the Court such evidence already in the  
23 record.

1 Movants note that the Court reconsidered the release arguments of Xcel, El Paso, and  
2 Williams after a previous round of summary judgment motions under similar circumstances. (*See*  
3 Order 2–3, Nov. 16, 2016, ECF No. 2671 (noting that the relevant Plaintiff had affirmatively  
4 alleged the corporate relationships at issue in the relevant pleading)). Movants are correct that  
5 Plaintiffs in the ‘1019 and ‘915 Cases have also judicially admitted several corporate  
6 relationships via their respective pleadings. (*See* Third Am. Compl. ¶ 25 (Williams), ¶ 45 (El  
7 Paso), ¶ 67 (Xcel), ¶ 68 (N. States), ECF No. 1846, attached as Ex. 1 to Mot. Recon., ECF No.  
8 2959; Am. Class Action Compl. ¶ 21 (Williams), ¶ 41 (El Paso), ¶ 68 (Xcel), ¶ 69 (N. States),  
9 ECF No. 1953, attached as Ex. 2 to Mot. Recon., ECF No. 2959). The Court therefore finds that  
10 Williams, El Paso, Xcel, and N. States were released.

11 Movants also adduce the testimony of DII’s Rule 30(b)(6) deponent that DII, DMT, and  
12 DGI were related to Dynegy Marketing & Trade, which was a “Settling Defendant” in the  
13 NYMEX Case. (*See* Jolley Dep. 49, ECF No. 2959-7 (attesting that DII is the parent of Dynegy  
14 Holdings, Inc., which in turn is the parent of DGI, a general partner in Dynegy Marketing &  
15 Trade, and that Dynegy Holdings, Inc. also owns DMT)). In other words, DGI was a general  
16 partner of a Settling Defendant (Dynegy Marketing & Trade), DII was DGI’s “grandparent,” and  
17 DMT shared a parent with DGI. The Court must examine whether these entities are released  
18 based on their relationships to Dynegy Marketing & Trade. The relevant language of the release  
19 is:

20 “Released Parties” shall mean the Settling Defendants, the Settling  
21 Defendants’ predecessors, the Settling Defendants’ successors, and the present or  
22 former members, principals, officers, directors, employees, agents, assigns,  
23 attorneys, insurers, shareholders, advisors, parents, subsidiaries, affiliates, joint  
24 ventures, partnerships, and associates (as defined in SEC Rule 12b-2 . . . ) of the  
Settling Defendants, the Settling Defendants’ predecessors, and/or the Settling  
Defendants’ successors, in any capacity related to the Settling Defendants and their  
predecessors and successors, but not in any capacity related to any of the non-  
settling defendants; and each of their assigns, representatives, heirs, executors, and

1 administrators (and present or former members, principals, officers, directors,  
2 employees, agents, assigns, attorneys, insurers, shareholders, advisors, parents,  
3 subsidiaries, affiliates, joint ventures, partnerships, or associates of all such parents,  
4 subsidiaries, affiliates, joint ventures, partnerships, or associates in any capacity  
5 related to the Settling Defendants and their predecessors and successors, but not in  
6 any capacity related to any of the non-settling defendants).

(First Settlement Order 4–5 n.3, ECF No. 2300-5).

7 First, according to Jolley’s testimony, DGI was a partner of Dynege Marketing & Trade.  
8 It was therefore released as a member of a Settling Defendant.

9 Second, DII was the parent of the parent of DGI. Under the release, parents of parents of  
10 Settling Defendants, as well as parents of members of Settling Defendants, were released. But  
11 DII was *the parent* of a parent (Dynege Holdings, Inc.) of a member (DGI) of a Settling  
12 Defendant (Dynege Marketing & Trade). There is no language in the release indicating that it is  
13 infinitely recursive, i.e., that it includes parents of parents of members, etc., ad infinitum. There  
14 is a single recursive clause, “and each of their assigns, representatives . . . .” DII therefore only  
15 falls under the definition of “Released Parties” if “parents” under the language of the release was  
16 intended to include parents of parents. The Court finds that it was. The term “corporate parent”  
17 means “[a] corporation that has a controlling legal interest in another corporation.” Black’s Law  
18 Dictionary 418 (10th ed. 2014). The essential characteristic of a “parent” entity is its control  
19 over the other entity, not the degree to which it is separated from the controlled entity via  
20 corporate formalities.

21 Third, DMT is a subsidiary of DMT Holdings, which is in turn a subsidiary of Dynege  
22 Holdings, Inc., which in turn is a parent of DGI, which in turn is a member of a Settling  
23 Defendant (Dynege Marketing & Trade). Under the release, subsidiaries of parents of Settling  
24 Defendants are released. It would therefore be clear that DMT is released if DGI were itself a  
Settling Defendant, because DMT is a (grand)subsidiary of DGI’s parent (Dynege Holdings,

1 Inc.). But DGI is not a Settling Defendant. Rather, it is a member of a Settling Defendant  
2 (Dynergy Marketing & Trade). The release cannot reasonably be read to include  
3 (grand)subsidiaries of parents of members of Settling Defendants. As noted, the release is not  
4 infinitely recursive.

5 **B. Motion No. 2962**

6 The remaining Defendants ask the Court to reconsider its March 2017 denial of summary  
7 judgment in the '1019 Case based on its finding that that there remained a genuine issue of  
8 material fact as to whether Plaintiffs Carthage College and Briggs & Stratton received sufficient  
9 notice of the NYMEX settlement. The Court was unsure at the time whether Plaintiffs' broker  
10 Kaztex, who had received the notice, had a duty to notify Plaintiffs. Movants note that in its  
11 recent August 2017 order addressing a similar motion, the Court ruled that the case law indicated  
12 that the NYMEX court's finding that constitutionally sufficient notice had been provided was not  
13 amenable to collateral attack here. (*See* Order, 13, ECF No. 2957 (citing *Hesse v. Sprint Corp.*,  
14 598 F.3d 581, 588 (9th Cir. 2010) (citing *Epstein v. MCA, Inc.*, 179 F.3d 641, 648 (9th Cir. 1999)  
15 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985)))).

16 Plaintiffs argue that in the case of movants, it previously appeared that Kaztex had only  
17 received notice in its capacity as a class member itself, not as Plaintiffs' agent, and that the  
18 record has not changed in that regard. But movants correctly note in reply that the reason the  
19 Court recently granted summary judgment on this issue despite any potential fact issues  
20 concerning notice was because any such fact issues were precluded; under the case law, the  
21 NYMEX court's findings that notice to class members had been sufficient was simply not  
22 collaterally attackable here. The factual distinction Plaintiffs ask the Court to recognize may be  
23 valid, but the Court would have to ignore *Hesse* in order to address it. The Court is not free to do  
24 so and finds that it must reconsider.

### **III. MOTIONS TO CERTIFY ORDER FOR INTERLOCUTORY APPEAL**

Several Defendants in the ‘1019, ‘915, and ‘1351 Cases ask the Court to certify its March 30, 2017 denials of summary judgment for interlocutory appeal under 28 U.S.C. § 1292(b). The Court denies the motion. The immediate appeal of the denial of summary judgment would not likely advance the termination of the present litigation but is more likely to delay it. These cases are already over a decade old. They have been to the Court of Appeals twice and to the Supreme Court once, and they have outlasted the tenure of the district judge originally assigned to hear them. The Court intends to conclude the consolidated pretrial proceedings and remand to the transferor courts in the most expeditious manner possible. The Court will not certify these issues for interlocutory appeal based on the speculation that the Court of Appeals may choose to hear those issues together with the pending appeals. At a minimum, even if the Court of Appeals chose to do that, it would almost certainly extend the time to determine the pending appeals.

### **IV. MOTION FOR SUGGESTION OF REMAND**

Plaintiffs in the class action cases (the ‘233, ‘1019, ‘987, ‘1351, and ‘915 Cases) have asked the Court to issue a suggestion of remand to the JPML. *See* J.P.M.L. Rule 10.1(b)(i). The Court solicited the motion at an August 9, 2017 fairness hearing, indicating that Plaintiffs should file it after briefing was completed on Motions for Summary Judgment Nos. 2745 and 2764. The parties agree that those motions are moot. Two appeals are pending concerning the Court’s denial of class certification and the Court’s dismissal of claims against Defendant CenterPoint Energy Services, Inc. Plaintiffs ask the Court to enter a proposed order that does not simply suggest remand but rather: (1) stays the actions in this Court; (2) stays or denies without prejudice (it is not clear) the pending motions to reconsider, for consideration by the transferor courts after remand; (3) suggests to the JPML that the cases be remanded after the mandates issue in the pending appeals; and (4) is entered into the docket but not submitted to the JPML



1 until the mandates issue from the Court of Appeals. (*See* Proposed Order, ECF No. 2961-1). The  
2 Court will not enter the proposed order. If Plaintiffs themselves do not believe the class action  
3 cases should be immediately remanded, the Court will not issue a suggestion of remand.  
4 Plaintiffs implicitly admit that the Court should not suggest remand until the pending appeals are  
5 decided. That being the case, the Court will not enter a superfluous order indicating what it may  
6 do in the future. The Court agrees with Defendants that upon issuing the present order, it should  
7 simply stay the cases and await the Court of Appeals' rulings in the two pending appeals.

### 8 CONCLUSION

9 IT IS HEREBY ORDERED that the Motion for Leave to File Supplemental Brief (ECF  
10 No. 2946) and the Motion to Reconsider (ECF No. 2962) are GRANTED.

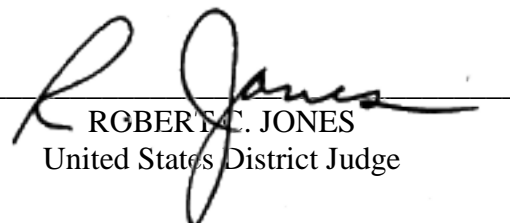
11 IT IS FURTHER ORDERED that the Motion to Reconsider (ECF No. 2959) is  
12 GRANTED IN PART and DENIED IN PART. Xcel Energy Inc.; Northern States Power Co.;  
13 Dynegy Illinois, Inc.; Dynegy GP, Inc.; El Paso Corp.; and Williams Merchant Services Co. are  
14 entitled to summary judgment based on release, but DMT GP, LLC is not.

15 IT IS FURTHER ORDERED that the Motions to Certify (ECF Nos. 2967, 2968) and the  
16 Motion for Suggestion of Remand (ECF No. 2961) are DENIED.

17 IT IS FURTHER ORDERED that the consolidated cases are STAYED, and the parties  
18 shall notify the Court upon the issuance of the Court of Appeals' rulings in Appeals Nos. 16-  
19 17099 and 17-16227.

20 IT IS SO ORDERED.

21 Dated this 20th day of November, 2017.

22  
23   
24 ROBERT C. JONES  
United States District Judge