

Legal Briefs *

News You Can Use from the City of Oakland Office of the City Attorney

Legal Briefs is a series of essays by City Attorney John Russo to update the community on key projects, major initiatives and important legal developments in the Office of the City Attorney.

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FERC IS SHIRKING ITS FUNDAMENTAL RESPONSIBILITIES

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Frontier towns were not fit for stable families and peaceful development without a sheriff around. Professional baseball games would be meaningless without an umpire to call balls and strikes fairly. And a regional electricity market descends into plunder and naked greed if its federally mandated referee walks off the job.

On May 22, 2001, the City of Oakland, together with the State Senate and the Assembly, filed a landmark lawsuit against the Federal Energy Regulatory Commission (FERC) to get FERC to do its job. Our case is critical to California, and its outcome may well affect consumers and businesses across America.

In 1999, more than two years after deregulation, one megawatt hour of electricity in California cost an average of \$30. Today, the spot market price has spiked to over \$1,900. That's a **6300%** cost explosion. This outrageous price increase was not **caused** by California's admittedly troubled attempt at electricity deregulation, but deregulation clearly invited electricity providers to exploit a confused public and a chaotic marketplace.

Putting aside moral judgments, electricity generators have done what commodity producers have always done: charge as much as the market will bear. Understanding this essential truth about commodity markets, and in recognition of the critical role energy plays in our economy and our lives, Congress created the Federal Energy Regulatory Commission (FERC). Unfortunately for Californians, FERC stubbornly denies its very reason for existence. FERC refuses to fulfill its statutory obligation to ensure "just and reasonable" energy rates.

* This essay series was first published as *The Legal-EASE*. We have recently learned that several other reputable organizations already use this title in their publications. Consequently, this publication will be called *Legal Briefs*.

Because of FERC's abrogation of its duty to establish just and reasonable rates, Californians are suffering immediate, irreparable harm. Every additional day the citizens of California are subject to rolling blackouts results in further jeopardy to our health and safety.

In light of FERC's utter abdication of its mandate to protect the public interest, the California State Legislature, on behalf of all Californians, and the City of Oakland, on behalf of its residents, were forced to petition for relief in Federal Court. This lawsuit is not about politics; it is not about energy deregulation in California. The objective of this lawsuit is simple: FERC should do the job that Congress created it to do. FERC should, when appropriate, cap the prices charged by out-of-state generators and establish a refund program for the return of illegal windfalls obtained by the power generators.

Ironically, FERC's own Mission Statement reads like a wish list for California energy consumers: "The Commission chooses regulatory approaches that foster *competitive markets* whenever possible, assures access to *reliable service* at a *reasonable price*, and gives *full and fair consideration to environmental and community impacts* in assessing the *public interest* of energy projects."

California and Oakland have a message for FERC. Fostering "competitive markets" does not mean that power generators should be allowed to compete to see who can extort the highest price. "Reliable service" should not mean reliable rolling blackouts. Price hikes of 6300% cannot be considered "a reasonable price." And had "full and fair consideration" been given to "community impacts in assessing the public interest," the City of Oakland and the State of California would not be compelled to use the courtroom to secure what is dutifully owed by FERC to the residents of Oakland, California and the nation.

Much has already been written about the potential impact to the faltering American economy from California's electricity crisis. There is also a broader danger presented by FERC abdication. An appointed bureaucracy should not be permitted to ignore the clear will of our democratically elected Congress. Our fellow Americans should be neither confused nor distracted by all the finger-pointing surrounding California's deregulation fiasco. Mark this well: if FERC can get away with refusing to do its job here in the West, it can look away with similar impunity from price-gouging anywhere else in the United States.

California can tell the rest of the nation from bitter experience (and with due respect to poet John Donne) "ask not for whom the price spikes. It spikes for thee."

Editor's Note: Given the severity of the energy crisis in California, this lawsuit was filed as an emergency petition to the U.S. Court of Appeals, Ninth Circuit. On May 29, 2001, a three-judge panel of the Court turned down the petition, ruling that the situation is not an emergency and declining to require FERC to ensure fair electricity prices. The California Legislature and the City of Oakland will proceed with the case and petition for the matter to be heard by the entire Ninth Circuit.