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ex rel. Bill Lockyer, Attorney General

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

PEOPLE OF THE STATE OF CALIFORNIA ex rel.
BILL LOCKYER, ATTORNEY GENERAL

Plaintiffs,

v.

TRANSALTA ENERGY MARKETING
(CALIFORNIA), INC., a Delaware Corporation,
TRANSALTA ENERGY MARKETING (US), INC.,
a Delaware Corporation, TRANSALTA ENERGY
MARKETING CORPORATION, a Canadian
Corporation, and DOES 1-100

Defendants.

Case No.: CGC02408486

**COMPLAINT FOR CIVIL
PENALTIES (BUSINESS AND
PROFESSIONS CODE § 17200)**

1 The People of the State of California, *ex rel.* Bill Lockyer, Attorney General, allege the
2 following on information and belief:

3 **I. INTRODUCTION**

4 1. In January, 2001, the Governor of the State of California declared a state of
5 emergency because of the energy crisis in the State. Skyrocketing electricity prices and supply
6 shortages resulted in widespread blackouts, utility bankruptcy, and massive economic upheaval.
7 Defendant TransAlta Energy Marketing (California), Inc., TransAlta Energy Marketing (US),
8 Inc., and TransAlta Energy Marketing Corporation (“TransAlta”), through unjust, unreasonable,
9 and illegal overcharges and price gouging received unprecedented profits at the expense of
10 consumers, ratepayers, businesses, and the State of California. TransAlta’s profiteering and other
11 unlawful and unfair business practices resulted in hundreds of millions of dollars of overcharges
12 and illegal profits.

13 2. This action, under section 17200 of the Business and Professions Code, based on
14 unlawful rates charged by TransAlta, seeks to redress those wrongs. Each and every one of the
15 thousands of unjust and unreasonable rates charged by TransAlta was an act of unfair
16 competition, subject to civil penalty. In addition, each of the thousands of rates charged by
17 TransAlta, but not filed with the Federal Energy Regulatory Commission (“FERC”), was an act
18 of unfair competition subject to civil penalties.

19 **II. PARTIES**

20 3. Plaintiffs are the People of the State of California, *ex rel.* Attorney General of
21 California, Bill Lockyer. Business and Professions Code section 17204 provides that actions to
22 prohibit unfair and unlawful business practices may be brought by the Attorney General in the
23 name of the People of the State of California.

24 4. Defendant TransAlta Energy Marketing (California), Inc. is a Delaware
25 corporation that, at all relevant times, marketed and sold electricity in the California markets.

26 5. Defendant TransAlta Energy Marketing (US), Inc. is a Delaware corporation that,
27 at all relevant times, marketed and sold electricity in the California markets.
28

1 6. Defendant TransAlta Energy Marketing Corporation is a Canadian corporation
2 that, at all relevant times, marketed and sold electricity in the California markets.

3 7. The true names and capacities of defendants stated in this Complaint under the
4 fictitious names of Does 1 through 100, inclusive, are unknown to plaintiffs, who sue such
5 defendants by such fictitious names. Each of the fictitiously named defendants is responsible in
6 some manner for acts, occurrences, or omissions which caused the violations of law alleged
7 herein.

8 8. Unless otherwise alleged, whenever reference is made in this Complaint to any act
9 of defendants, such allegation shall mean that each defendant acted individually and jointly with
10 the other defendants named in the Complaint.

11 9. Unless otherwise alleged, whenever reference is made in this Complaint to any act
12 of any corporate or other business defendant, such allegation shall mean that such corporation or
13 other business defendant did the acts alleged in this Complaint through its officers, directors,
14 employees, agents, and/or representatives while they were acting within the actual or ostensible
15 scope of their authority.

16 10. At all relevant times alleged in this Complaint, each of the defendants has acted as
17 an agent, representative, or employee of each of the other defendants and has acted within the
18 course and scope of said agency or representation.

19 **III. JURISDICTION AND VENUE**

20 11. This Court has jurisdiction pursuant to California Constitution Article VI, section
21 10, because this case is a cause not given by statute to other trial courts.

22 12. This Court has jurisdiction over the defendants named above because they do
23 sufficient business in California, or otherwise have sufficient minimum contacts in California to
24 render the exercise of jurisdiction over them by the California courts consistent with traditional
25 notions of fair play and substantial justice.

26 13. Venue is proper in this Court because the cause arises in the City and County of
27 San Francisco where some of the violations of law have occurred.

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1 **IV. STATUTORY BACKGROUND**

2 **A. The Unfair Competition Act**

3 14. California Business and Professions Code section 17200 provides that “unfair
4 competition shall mean and include any unlawful, unfair or fraudulent business practice.” Section
5 17203 of the Business and Professions Code provides that “(a)ny person who engages, has
6 engaged, or proposes to engage in unfair competition may be enjoined in any court of competent
7 jurisdiction.”

8 15. Section 17206(a) provides that any person violating Section 17200 “shall be liable
9 for a civil penalty not to exceed two thousand five hundred dollars (\$2,500) for each violation,
10 which shall be assessed and recovered in a civil action brought in the name of the people of the
11 State of California by the Attorney General.” Under section 17205, these penalties are
12 “cumulative to each other and to the remedies or penalties available under all other laws of this
13 state.”

14 **B. The Federal Power Act**

15 16. The Federal Power Act (“FPA”), 16 U.S.C. §§ 824 et seq., governs sales of
16 wholesale electricity. Under the FPA, all rates and charges, changes to rates, and all contracts
17 must be filed with FERC. 16 U.S.C. § 824d. In addition, all rates and charges made, demanded,
18 or received for wholesale electricity must be just and reasonable, and any rate or charge that is not
19 just and reasonable is unlawful. 16 U.S.C. § 824d(a).

20 **V. FACTS**

21 **A. Deregulation of California Electricity Market**

22 17. In 1996, the State of California enacted AB 1890, codified in the Public Utilities
23 Code, to restructure the California Electricity market. AB 1890, *inter alia*, required California’s
24 investor owned utilities, Pacific Gas & Electric Co. (“PG&E”), Southern California Edison
25 (“SCE”), and San Diego Gas & Electric (“SDG&E”), to sell much of its electric generation
26 capacity in order to create competition in the generation and sale of wholesale electricity in
27 California.

1 18. AB 1890 also established two new institutions: the California Power Exchange
2 ("PX") and the California Independent Systems Operator ("ISO"). The PX was established under
3 state law to operate a market for the purchase and sale of electricity for delivery during the same
4 or next day. The ISO was established under state law to manage the transmission network,
5 procure electricity during actual operation ("real-time") in order to manage imbalances between
6 demand and supply as they occur, and to maintain the reliability of the transmission grid. The
7 purchases and sales of electricity in the markets administered by the PX and ISO are for
8 subsequent retail resale (to customers if the investor owned utilities, primarily). Sales of
9 wholesale electricity also occur outside of the PX and ISO markets.

10 19. The Federal Power Act grants the Federal Energy Regulatory Commission
11 ("FERC") exclusive jurisdiction over wholesale sales of electricity. 16 U.S.C. § 824. The
12 creation and operation of the PX and ISO were approved by FERC because of the role of the PX
13 and ISO in wholesale electricity sales. Thus, the PX and ISO are governed in part by tariffs filed
14 with FERC and in part by state law. Bilateral out of market sales of wholesale electricity are also
15 regulated, in theory, by FERC and the FPA.

16 **B. Operation of the California Electricity Markets**

17 20. The investor owned utilities are responsible for providing electricity to retail
18 customers (homes, businesses, industry). Before California began purchasing wholesale
19 electricity, the investor owned utilities, to the extent their own generation was insufficient to
20 supply all of the needs of their retail customers, purchased wholesale energy from generators and
21 other sellers such as TransAlta for resale, and made those purchases through both the PX and ISO
22 markets. Both the utilities and the generators are connected to the State's electricity grid, which
23 is managed by the ISO. Because of the nature of electricity (and the fact that it cannot be stored
24 once generated), the operation of the grid and balancing of supply and demand is a highly
25 complex operation. As a result, operation of the grid requires, *inter alia*, both electricity and
26 ancillary services.

27 21. In general concept, substantial portions of the electricity requirements for any
28 given day were scheduled through the PX in conjunction with the ISO. The ISO was also able to

1 procure real-time energy as needed. These markets operate in one-hour increments (and even in
2 ten-minute increments), requiring bidding, sales, and purchases for each hour or ten-minute
3 increment. Ancillary services are separate markets operated by the ISO for the delivery of
4 electricity on demand. Generators bid into ancillary services markets and, when their bids are
5 accepted, agree to provide electricity if the ISO determines, through the operation of the grid, that
6 the electricity is needed. There are a series of different ancillary services markets that are used by
7 the ISO to provide slightly different services.

8 22. Before declaring bankruptcy and ceasing operations as a result of the energy crisis,
9 the PX operated two electricity markets: the day-ahead market for delivery the next day, and the
10 day-of market for delivery the same day. While it was operating, the PX scheduled the majority
11 of electricity in the State (through the ISO as the operator of the grid).

12 23. While demand for electricity may be reasonably forecast for any given day, the
13 forecast is never exact. As a result, every day, the ISO must supplement the day-ahead and day-
14 of electricity with real time and ancillary services electricity.

15 24. The ISO does not buy and sell electricity for its own account. As part of its market
16 functions, it assigns costs and payments to market participants based on sales and purchases in the
17 various real-time and ancillary services markets that the ISO administers.

18 25. Entities also buy and sell wholesale electricity in bilateral out of market deals.
19 These deals can and do impact market prices and supplies.

20 26. In theory, through the interaction of these various markets and out of market sales,
21 electricity supply and demand remain in check, and the ISO can operate the grid with reliability.
22 The theory did not come to fruition in California.

23 **C. Breakdown of Market and Skyrocketing Prices**

24 27. For a number of reasons, including limited supply of natural gas and possible
25 manipulation of supply by generators of electricity, the wholesale price of electricity increased
26 dramatically in California in the summer of 2000. The massive price increases and the drop in
27 supply resulted in blackouts and massive economic upheaval in the State.
28

1 28. On January 17, 2001, Governor Davis declared a state of emergency because of
2 the energy crisis. The State suffered repeated rolling blackouts, was subject to two months of
3 stage 3 electricity emergencies requiring reduced usage, and ratepayers were hit with massive
4 increases in retail electricity charges.

5 29. The two primary investor owned utilities, which each had upstreamed billions of
6 dollars to their parent companies, were subject to retail price caps and were limited in the amount
7 of revenues they could raise from ratepayers. As a result, both SCE and PG&E incurred
8 enormous debt and defaulted on payments to both the PX and the ISO. PG&E declared
9 bankruptcy. The State, as the only available creditworthy buyer, spent billions of dollars
10 purchasing electricity to keep the lights on in California.

11 30. On December 14, 2000, the Department of Energy ordered out-of-state suppliers to
12 deliver power to California. FERC also ordered both soft and hard price caps in an attempt to
13 control prices charged by generators for electricity in the State.

14 31. Prices for wholesale electricity soared. In 1999, California paid approximately \$7
15 billion for energy. In 2000 and 2001, Californians paid approximately \$27 billion for
16 approximately the same quantity of energy.

17 32. Meanwhile, generators and other sellers of electricity, including TransAlta,
18 enjoyed massive, historic profits.

19 **D. FERC's Determination of Unjust, Unreasonable, Unlawful Prices**

20 33. In a November 1, 2000 order (and repeated and reaffirmed in orders dated April
21 19, 2001, July 25, 2001, and December 15, 2001), FERC found that the "electric market structure
22 and market rules for wholesale sales of electric energy in California were seriously flawed and
23 that these structures and rules, in conjunction with an imbalance of supply and demand in
24 California, have caused, and continue to have the potential to cause, unjust and unreasonable rates
25 for short-term energy. . . ." *San Diego Gas & Electric Co., et al.*, 93 FERC ¶ 61,294 (2000).

26 34. The FPA, at 16 U.S.C. § 824d(a), declares unlawful any unjust and unreasonable
27 rate or charge for wholesale electricity.
28

1 35. In its July 25, 2001 and December 19, 2001 orders (and in a refund proceeding
2 currently before FERC), FERC determined a formula for the maximum just and reasonable price,
3 based on the heat rate of any particular generating unit times the gas price plus six dollars times
4 1.1. All charges above the formula are unjust and unreasonable.

5 36. Based on FERC formula and the calculation done by ISO, TransAlta has exceeded
6 the just and reasonable price on thousands of separate occasions.

7 **E. TransAlta's Actions and Profits**

8 37. Through its scheduling coordinators, TransAlta sold wholesale electricity into the
9 California markets. It operated in all of the markets, including day-ahead, hour-ahead, real-time,
10 and ancillary services. It made thousands of electricity transactions in those markets beginning in
11 or before 1998 and continuing through 2001. TransAlta also contracted directly with the
12 California Department of Water Resources for the sale of electricity.

13 38. Under the FPA, all rates and charges, all changes to rates and charges, and all
14 contracts must be filed with the FERC. 16 U.S.C. § 824d; 18 C.F.R. § 35.1.

15 39. Since 1998, TransAlta has entered into thousands of separate transactions for the
16 sale of wholesale electricity.

17 40. TransAlta has never filed its rates, charges, changes to rates and charges, or its
18 contracts with FERC. Instead, it filed a statement with FERC that it will charge rates as agreed
19 upon by TransAlta and the purchaser. In addition, TransAlta files quarterly summaries of sales
20 (with limited information) after the fact. TransAlta's failure to file rates as required by the FPA
21 deprived the public, power purchasers, ratepayers, and FERC of notice and information necessary
22 to make informed decisions about rates.

23 41. Regardless of whether TransAlta withheld supply of electricity, exercised market
24 power, or manipulated the price of electricity or the electricity markets in any other way,
25 TransAlta charged rates in the California electricity markets that were unjust, unreasonable, and
26 therefore illegal, and did so on thousands of occasions starting in early 2000 and continuing
27 through 2001. And on thousands of occasions, it failed to file the rates it charged.

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**FIRST CAUSE OF ACTION
UNFAIR BUSINESS COMPETITION
(Business and Professions Code § 17200 et seq.)**

42. Paragraphs 1 through 41 are realleged and incorporated as if fully set forth herein.

43. Beginning on an exact date unknown to plaintiffs, but within four years preceding the filing of this complaint, defendants have engaged in acts of unfair competition as defined in Business and Professions Code section 17200, as follows: Each and every sale or purchase of wholesale electricity by defendants for which defendants failed to file the charge, rate, price or contract reflecting the terms of the sale or purchase, as required by the Federal Power Act, FPA regulations, and FERC orders setting forth filing requirements. The number of such sales or purchases is in the thousands.

44. Said violations render each defendant liable to plaintiffs for civil penalties according to proof up to \$2,500 per day for each violation, and other equitable relief as appropriate.

**SECOND CAUSE OF ACTION
UNFAIR BUSINESS COMPETITION
(Business and Professions Code § 17200 et seq.)**

45. Paragraphs 1 through 44 are realleged and incorporated as if fully set forth herein.

46. Beginning on an exact date unknown to plaintiffs, but within four years preceding the filing of this complaint, defendants have engaged in acts of unfair competition as defined in Business and Professions Code section 17200, as follows: Each and every rate, charge, or price charged by defendants in violation of the Federal Power Act, 16 U.S.C. § 824d(a), was unfair, unreasonable, and therefore unlawful.

47. Said violations render defendants liable to plaintiffs for civil penalties of up to \$2,500 per day for each violation, and other equitable relief as appropriate.

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1 **PRAYER FOR RELIEF**

2 WHEREFORE, plaintiffs pray that the Court:

- 3 1. Award civil penalties according to proof;
4 2. Award plaintiffs their costs of suit;
5 3. Grant such other and further relief as the Court deems just and proper.
6

7 Respectfully submitted,
8 Dated: May 30, 2002

9 KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
10 A Professional Corporation

11 By **BRUCE A. SCHEIDT**

12 Attorneys for the People of the State of California,
13 *ex rel.* Bill Lockyer, Attorney General
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