125 FERC ¶ 61,016
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

State of California, *ex rel*. Bill Lockyer,
Attorney General of the State of California

v. Docket No. EL02-71-010

British Columbia Power Exchange Corporation,
Coral Power, LLC, Dynegy Power
Marketing, Inc., Enron Power Marketing,
Inc., Mirant Americas Energy Marketing, LP,
Reliant Energy Services, Inc., Williams
Energy Marketing & Trading Company,

All Other Public Utility Sellers of Energy and
Ancillary Services to the California Energy
Resources Scheduling Division of the
California Department of Water Resources, and

All Other Public Utility Sellers of Energy and
Ancillary Services into Markets Operated by the
California Power Exchange and California
Independent System Operator

ORDER ON REHEARING AND CLARIFICATION

(Issued October 6, 2008)

1. In this order, we address the requests for clarification and rehearing filed in response to the Commission's March 21, 2008 order,[1] which addressed the remand by the

[1] *State of California, ex rel. Bill Lockyer v. British Columbia Power Exchange Corp.*, 122 FERC ¶ 61,260 (2008) (March 21 Order).

United States Court of Appeals for the Ninth Circuit, *State of California ex rel. Lockyer v. FERC*.[2] This order also addresses issues raised on rehearing of the March 21 Order that were not addressed in the Commission's April 15, 2008 order clarifying the March 21 Order.[3] For the reasons discussed below, we will grant in part and deny in part the requests for clarification and rehearing of the March 21 Order.

I. Background

2. The Commission's March 21 Order addressed the Ninth Circuit's Decision that the Commission erred in ruling that it lacked authority under the Federal Power Act (FPA) to order refunds for violations of the Commission's market-based rate quarterly reporting requirements[4] during the 2000-2001 period at issue in this proceeding and remanded the case for further refund proceedings.[5]

3. Specifically, in the March 21 Order, the Commission established a trial-type hearing before an Administrative Law Judge (ALJ) to address whether, based on the facts and circumstances associated with each individual public utility seller, that seller's improper or untimely filing of its quarterly transaction reports masked an accumulation of market power such that the market-based rates were unjust and unreasonable.[6] In order to make such a determination, the Commission found that it would need to supplement the record and permit wholesale purchasers that made short-term market-based rate purchases through the California Independent System Operator (CAISO), the California Power Exchange (PX), and the California Energy Resources Scheduling Division of the California Department of Water Resources (CERS), from January 1, 2000 to October 1, 2000, to present evidence that any seller that violated the quarterly reporting requirement

[2] 383 F.3d 1006 (9th Cir. 2004), *cert. denied*, *Coral Power, L.L.C. v. Cal. ex rel. Brown*, 127 S.Ct. 2972, 168 L. Ed. 2d 719 (2007) (Ninth Circuit Decision).

[3] *State of California, ex rel. Bill Lockyer v. British Columbia Power Exchange Corp.*, 123 FERC ¶ 61,042 (2008) (April 15 Order).

[4] 16 U.S.C. § 824d(c) (2006).

[5] Ninth Circuit Decision, 383 F.3d at 1017.

[6] March 21 Order at P 32. The Commission noted that it was not clear on the record developed thus far "that there has been any demonstration of a nexus between a particular seller's reporting failures and any gain in market share that would have given that particular seller the potential to exercise market power, thus making the rates charged by the seller unjust and unreasonable." *Id*. P 31.

did or did not gain an increased market share sufficient to give it the ability to exercise market power and thus cause its market-based rates to be unjust and unreasonable.[7] The Commission also directed such "sellers to submit for the hearing record copies of the previously filed proper quarterly reports for the period January 1, 2000 – October 1, 2000…[as well as] any improper quarterly reports that were filed for that period."[8]

4. Regarding the relevant time periods at issue in this case, the Commission explained that the initial March 20, 2002 complaint filed in this proceeding concerned calendar years 2000 and 2001. Thus, the Commission divided that time period into three segments: (1) from January 1, 2000 until October 1, 2000, the day before the date that the refund period began; (2) from October 2, 2000 until June 20, 2001, the date that the price cap was imposed in California (i.e., the refund period established in the refund proceedings); and (3) from June 21, 2001 until December 31, 2001, which includes the final period covered in California's complaint during which a price cap was in place. The Commission noted that during the second period, the Commission ordered refunds by establishing a mitigated market clearing price (MMCP) in an attempt to replicate what it believed to be the just and reasonable rates that a competitive energy market would have produced. On remand, the Commission only addressed the first of these three periods.[9]

5. On March 28, 2008, the California Parties[10] filed an expedited request for limited rehearing of the March 21 Order asserting that: (a) the March 21 Order erroneously excludes from the remand proceeding sales to CERS during the period from January 18, 2001 - June 20, 2001; and (b) the March 21 Order failed to direct sellers to provide corrected quarterly reports for the January 1 – October 1, 2000 period (California Parties' March 2008 Rehearing Request).

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[7] *Id.* P 33. Sellers were similarly permitted to present evidence to the contrary. *Id.* P 2.

[8] *Id.* P 35.

[9] *Id.* P 34.

[10] The California Parties include the People of the State of California *ex rel.* Edmund G. Brown, Jr., Attorney General; the Public Utilities Commission of the State of California (California Commission); Pacific Gas and Electric Company (PG&E); and Southern California Edison Company (SoCal Edison).

6. Duke Energy Corporation (Duke), on April 4, 2008, and the Settled Parties,[11] on April 7, 2008, filed requests for clarification or rehearing requesting that the Commission clarify that, by virtue of their previous settlements with California, they be dismissed from this proceeding.

7. In the April 15 Order, the Commission granted the California Parties' request for clarification stating that the Commission, in the March 21 Order, intended that the parties submit for the hearing record copies of both their original, previously-filed reports (whether those reports complied with our filing requirements or not) as well as new, corrected reports (reflecting transaction-specific data), for all purchases or sales to the ISO and PX for the January 1 – October 1, 2000 period.[12] However, with respect to the California Parties' CERS request, the Commission found that expedited treatment was not warranted stating that it would consider the matter in a future order after submission of requests for rehearing of the March 21 Order.[13] The April 15 Order also granted Duke and the Settled Parties' requests for clarification that they be dismissed as parties from this proceeding.[14]

II. Requests for Clarification or Rehearing and Answers

8. PPM Energy, Inc. (PPM), on April 16, 2008, Fresno Cogeneration Partners, L.P. (Fresno), on April 18, 2008, GWF Energy LLC (GWF), on May 1, 2008, and Strategic

[11] The Settled Parties consist of Mirant Corporation, on behalf of Mirant Americas Energy Marketing, LP, Mirant California LLC, Mirant Delta, LLC, and Mirant Potrero, LLC; Reliant Energy Services, Inc.; Idaho Power Company and IDACORP Energy L.P.; PacifiCorp; BP Energy Company; EI Paso Marketing, L.P.; Portland General Electric Company; Dynegy Power Marketing, Inc.; West Coast Power, LLC; EI Segundo Power LLC; Long Beach Generation LLC; Cabrillo Power I LLC; Cabrillo Power II LLC; Williams Gas Marketing, Inc.; Pinnacle West Capital Corporation, Arizona Public Service Company and APS Energy Services Company (collectively, Pinnacle West Companies); and Public Service Company of Colorado.

[12] April 15 Order at P 13.

[13] *Id*. P 7.

[14] *Id*. P 13.

Energy, LLC (Strategic),[15] on June 16, 2008, filed requests that the Commission clarify that, by virtue of their previous settlements with the California Parties, they be dismissed from this proceeding.

9. On April 21, 2008, as revised on April 30, 2008, the California Parties filed a request for rehearing and clarification of the March 21 Order (California Parties' April 2008 Rehearing Request). In addition to reiterating its concern regarding the time period applicable to the CERS transactions, the California Parties also argue, in sum, that the Commission erred in the March 21 Order by: (1) misapplying the Ninth Circuit Decision's holding to the extent that the Commission determined the purpose of the reporting requirement to be solely the identification of market power based on market share levels, rather than the need to ensure just and reasonable rates; (2) excluding from the proceeding evidence of tariff violations involving market manipulation; (3) limiting the monetary remedy to seller-specific disgorgement of unjust profits and not considering market-wide refunds as a remedy for market-wide unjust and unreasonable rates; and (4) failing to hold the proceeding in abeyance so that the reporting violations at issue here could be considered together with the remands in *Public Utility Commission of the State of California v. FERC*,[16] and, to the extent that it concerns overcharges for sales to CERS, *Port of Seattle, Washington v. FERC*.[17]

10. On May 6, 2008, the Modesto Irrigation District (Modesto); the Bonneville Power Administration and the Western Area Power Administration; and the City of Santa Clara, California filed answers to the California Parties' April 2008 Rehearing Request. On June 5, 2008, Competitive Supplier Group[18] filed an answer and Avista Corporation, Avista Energy, Inc., and Puget Sound Energy, Inc. collectively filed a motion to strike portions of the California Parties' April 2008 Rehearing Request or, in the alternative,

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[15] On June 4, 2008, Strategic was acquired by Direct Energy, LLC.

[16] 462 F.3d 1027 (9th Cir. 2006), *mandate pending* (*CPUC*).

[17] 499 F.3d 1016 (9th Cir. 2007), *mandate pending* (*Port of Seattle*).

[18] The following Competitive Supplier Group members joined in submitting this pleading: Aquila Merchant Services, Inc., Avista Energy, Inc., Powerex Corp., PPL EnergyPlus, LLC, PPL Montana, LLC, Public Service Company of New Mexico, Puget Sound Energy, Inc., Sempra Energy Trading LLC, Shell Energy North America (U.S.), L.P. (formerly Coral Power L.L.C.), TransAlta Energy Marketing (US) Inc., and TransCanada Energy Ltd.

motion to supplement the record. On June 20, 2008, the California Parties filed an answer to the motion to strike or, in the alternative, motion to supplement the record.

III. Discussion

A. Procedural Matters

11. Rule 713(d), of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2008), prohibits answers to requests for rehearing. Accordingly, we will reject the answers filed in this proceeding.

B. Dismissal from Proceeding

1. Request

12. PPM requests that the Commission clarify that it is no longer a party to this proceeding based on its October 4, 2007 Commission-approved settlement between PPM and the California Parties,[19] which settled any potential liability that could arise from the transactions during the time period at issue in this case.[20] PPM also states that it is authorized to state that the California Parties do not oppose PPM's request that it be dismissed as a party to this proceeding provided that such dismissal does not limit the arguments and evidence the California Parties may offer in support of their requests for relief against parties with whom they have not settled.

13. Fresno also requests that the Commission clarify that it is no longer subject to this proceeding. In support, Fresno states that during the time-out period ordered by the Ninth Circuit in *CPUC*, Fresno entered into a Settlement and Release of Claims Agreement with the California Parties,[21] which became effective on January 3, 2008.[22]

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[19] For purposes of the PPM settlement, the California Parties include: the California Attorney General, PG&E, SoCal Edison, San Diego Gas & Electric Company (SDG&E), the California Commission, the California Electricity Oversight Board (CEOB), and CERS.

[20] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 121 FERC ¶ 61,014 (2007).

[21] For purposes of the Fresno agreement, the California Parties include: the California Attorney General, PG&E, SoCal Edison, SDG&E, the California Commission, CERS, and the CEOB.

[22] Fresno Request for Clarification at 2.

Fresno states that the agreement fully encompasses transactions during the period at issue in the Commission and court proceedings and was entered into under the general auspices and supervision of the Court of Appeals.[23] Fresno asserts that Commission approval of its settlement under Rule 602[24] is not necessary for it to constitute an effective resolution of a dispute and the release of claims for purposes of this complaint proceeding. Thus, Fresno requests that the Commission treat its settlement as equivalent to a settlement that has been filed under Rule 602 and approved by the Commission. Further, Fresno requests that the Commission clarify that any respondent in this proceeding that has fully settled with the California Parties for the transactions during the period at issue in this proceeding is also dismissed.

14. Similarly, GWF requests that the Commission clarify that it is no longer a party to this proceeding because GWF's generating facilities were not operational until after July 2001.[25] In support, GWF explains that in 2001, it entered into a long-term power sales agreement with the California Department of Water Resources for sales of capacity and energy from three plants that GWF was constructing or planned to construct (the Original Agreement), which the Commission accepted for informational purposes, effective

[23] Fresno also explains that its answer to the original complaint filed in this proceeding pointed out that Fresno's quarterly filings contained transaction-specific data about its market-based rate sales. Fresno states that the Attorney General's subsequent response acknowledged and did not dispute this factual assertion. Nonetheless, Fresno states that the Commission's orders in this proceeding did not rule on Fresno's motion to dismiss or focus on this factual point. *See* Fresno Rehearing Request at 1-2 (citing Answer and Motion for Summary Disposition of Fresno Cogeneration Partners LP, Wellhead Power Gates, LLC, and Wellhead Power Panoche, LLC, Docket No. EL02-71-000 (filed April 10, 2002) at 15-16 and Answer in Opposition of Complainant the State of California *ex rel*. Bill Lockyer To Motions to Dismiss, Motions for Summary Disposition/Dismissal, and Motions for Summary Judgment, Docket No. EL02-71-000 (filed April 24, 2002) at 4, n.3).

[24] 18 C.F.R. § 385.602 (2008).

[25] GWF also states that it is authorized to state that the California Parties do not oppose GWF's request that it be dismissed as a party to this proceeding provided that such dismissal does not limit the arguments and evidence the California Parties may offer in support of their requests for relief against parties with which they have not settled.

December 4, 2001.[26] In 2002, GWF states that the California Commission and CEOB filed complaints with the Commission seeking to abrogate numerous contracts, including the Original Agreement. The California Commission later withdrew its complaint against GWF due to a settlement agreement reached by GWF and the State of California, in which the parties agreed to a renegotiated agreement. GWF states that the settlement agreement also included a withdrawal of all claims against GWF relating to all sales made pursuant to the Original Agreement.[27] GWF states that, given its comprehensive settlement with the California Parties as to claims that arose out of its market-based rate sales, GWF should be dismissed from this proceeding.

15. Strategic also requests clarification that it is no longer a party to the complaint in this proceeding, if and when the Commission approves the April 30, 2008 settlement and release of claims agreement that Strategic and the California Parties[28] filed with the Commission.[29] In support, Strategic states that the Commission, in the April 15 Order, granted a motion to dismiss when a settlement between the California Parties and a party to this proceeding has been filed with, but not yet approved by, the Commission.[30] Strategic states that the settlement will fully release Strategic from claims in this proceeding and that it is authorized by the California Parties to represent that they do not object to the grant of a motion to dismiss Strategic as a respondent in this proceeding, upon Commission approval of the settlement and fulfillment of the terms of the agreement.

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[26] *GWF Energy LLC*, 97 FERC ¶ 61,297 (2001). GWF states that the three projects from which sales pursuant to the Original Agreement would be made began commercial operations in August 2001, July 2002, and 2003.

[27] GWF Request for Clarification at 5 (citing *Public Utilities Commission of the State of California v. Allegheny Energy Supply Company, LLC*, Notice of Partial Withdrawal with Prejudice of Complaint as to GWF Energy LLC, filed Sept. 5, 2002 (Docket No. EL02-60-000)).

[28] For purposes of the Strategic agreement, the California Parties include: the California Attorney General, PG&E, SoCal Edison, SDG&E, the California Commission.

[29] *See San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, Joint Offer of Settlement between Strategic Energy LLC and the California Parties, filed April 30, 2008 (Docket No. EL00-95-000).

[30] April 15 Order at n.24.

2. Commission Determination

16. We will grant the requests for clarification on this issue and direct that PPM, Fresno,[31] GWF, and Strategic be dismissed as parties from this proceeding. With regard to Strategic, we note that, on June 30, 2008, the Commission approved an uncontested settlement agreement between Strategic and the California Parties, resolving claims arising from events and transactions in western electricity markets during the period from January 1, 2000 through June 20, 2001.[32] As the Commission stated in the April 15 Order, our general policy is to relieve a respondent to a complaint or investigation from further participation where that respondent has settled its potential liability.[33] Further, in the March 21 Order, the Commission "encourage[d] the parties to make every effort to settle their dispute before hearing procedures are commenced."[34] In addition, no party has protested these requests for clarification. Thus, we find that, PPM, Fresno, GWF, and Strategic should be dismissed from this proceeding, due to their respective settlements resolving all claims against them arising out of their transactions during the period at issue.

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[31] We note that while we are clarifying in this order that Fresno may be dismissed as a party from this proceeding, our clarification is not as broad as the generic clarification requested by Fresno (i.e., that the Commission clarify "that any respondent in this proceeding that has settled with the California Parties, in a settlement that fully encompasses transactions during the period at issue in this proceeding, is also relieved as a respondent and, if necessary, should be dismissed from the proceeding."). *See* Fresno Request for Clarification at 3-4.

[32] *San Diego Gas & Electric Co*., 123 FERC ¶ 61,316 (2008).

[33] April 15 Order at P 13 (citing *Lockyer v. British Columbia Power Exchange Corp*., 99 FERC ¶ 61,247, at 61,022 (2002); *Ariz. Pub. Serv. Co*., 106 FERC ¶ 61,021 (2004), *reh'g pending*; *Colorado River Commission of Nevada*, 106 FERC ¶ 61,022 (2004), *reh'g pending*). For example, in *Enron Power Marketing, Inc*., 106 FERC ¶ 61,182 (2004), the Commission relieved parties from participating in a proceeding in which they had filed a settlement stating that, to do otherwise, "would undercut the ability of parties to settle - an important tool in managing cases and issues the Commission faces." *Id*. P 12.

[34] March 21 Order at P 36.

C. CERS Transactions

1. Request

17. The California Parties argue that the Commission erred by excluding sales to CERS from this proceeding by limiting the scope of inquiry to sales made to CERS during the January 1, 2000 through October 1, 2000 period, a time period during which CERS did not exist.[35] They explain that the Commission's reasoning for limiting the scope of the proceeding was because the Commission already granted refund relief for sales during the October 2, 2000 – June 20, 2001 period using the MMCP approach.[36] However, the California Parties argue that the Commission extended MMCP relief only to CAISO and PX spot market sales transactions, but has not granted any refunds for bilateral sales to CERS.[37] Accordingly, the California Parties request that the Commission clarify that this proceeding includes sales made to CERS for the January 18 – June 20, 2001 period and that sellers are required to submit original and corrected transaction reports for all spot market bilateral sales to CERS, including reports for sales to CERS that sellers made under the Western Systems Power Pool Agreement (WSPP Agreement).

2. Commission Determination

18. The Commission will grant, in part, the California Parties' request for rehearing on this issue. We first note that sellers to CERS were on notice that they would be included in this proceeding because sales to CERS were clearly discussed in the Attorney General's initial March 20, 2002 complaint in this proceeding, the Commission's May 31, 2002 order on that complaint,[38] and in the Ninth Circuit's Decision.[39] Further, unlike the situation regarding sales in the CAISO and PX spot markets during the January 18 –

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[35] California Parties' March 2008 Rehearing Request at 6 (citing March 21 Order at P 34). CERS began making purchases on January 18, 2001.

[36] *See San Diego Gas & Elec. Co.*, 96 FERC ¶ 61,120 (2001) and *San Diego Gas & Electric Co.*, 93 FERC ¶ 61,121 (2000).

[37] California Parties' March 2008 Rehearing Request at 10.

[38] *State of California, ex rel. Bill Lockyer v. British Columbia Power Exchange Corp.*, 99 FERC ¶ 61,247, at 62,055 (*Lockyer I*), *order on reh'g*, 100 FERC ¶ 61,295 (2002) (*Lockyer II*).

[39] Ninth Circuit Decision, 383 F.3d at 1010.

June 20, 2001 period, the bilateral sales to CERS were not subject to mitigation using MMCP. Thus, to the extent that any quarterly reporting violations potentially masked market power by public utilities who sold to CERS during the January 18 – June 20, 2001 period, those transactions warrant review with respect to potential remedial action.

19. Therefore, we will allow limited inclusion of sales made to CERS for the January 18 – June 20, 2001 period in this proceeding and will allow the California Parties to present evidence that any public utility seller that violated the quarterly reporting requirement failed to disclose an increased market share during the January 18 – June 20, 2001 period sufficient to give it the ability to exercise market power and thus cause its market-based rates to be unjust and unreasonable.

20. Finally, we will grant the California Parties' request to include reports for sales to CERS that sellers made under the WSPP Agreement. The Commission, in *Lockyer I*, stated that it would "not require sellers to report information regarding transactions pursuant to the WSPP Agreement, provided that the WSPP has reported those transactions consistent with the reporting requirements for WSPP transactions."[40] However, it is not clear on the record developed thus far if sellers' filed the quarterly transaction-specific information pursuant to the WSPP Agreement consistent with the Commission's reporting requirements. Thus, to the extent that any quarterly reporting violations potentially masked market power by public utilities who sold to CERS pursuant to the WSPP Agreement during the January 18 – June 20, 2001 period, those transactions warrant review with respect to potential remedial action. Accordingly, we will require the public utility sellers who sold to CERS pursuant to the WSPP Agreement during the January 18 – June 20, 2001 period (who have not already settled in this proceeding) to file quarterly transaction reports consistent with the Commission's reporting requirements.

[40] *Lockyer I*, 99 FERC at 62,067. The Commission made this finding because, for many years, the WSPP was obligated to report, on a quarterly basis, transaction-specific information for each transaction made pursuant to the WSPP Agreement. *See Western Systems Power Pool*, 99 FERC ¶ 61,104 (2002). The WSPP's reporting requirement was eliminated in an April 25, 2002 order. Marketers are now required to report WSPP transactions directly to the Commission by their inclusion in marketers' quarterly transaction reports. California Parties' April 2008 Rehearing Request at 18-19.

D. Purpose of the Quarterly Reporting Requirement

1. Request

21. The California Parties argue that the Commission's March 21 Order misapplied the Ninth Circuit Decision's holding to the extent that it found the purpose of the post-transaction monitoring to be the identification of a seller's market power, based on market share levels, rather than the need to ensure just and reasonable rates.[41] They argue that the Commission's construction of the court's decision would suggest that the Commission was not required to review whether the rates charged in the market were just and reasonable, a necessary element for the lawfulness of the Commission's market-based rate regime.

22. Specifically, the California Parties contend that the Commission's holding is inconsistent with Commission precedent, which the California Parties argue establishes that the purpose of the post-transaction reporting requirement is to ensure that the rates charged are just and reasonable, not to measure market shares.[42] They state that the Commission, in numerous cases, has held that the purpose of the market-based rate quarterly reporting is "so that the marketer's rates will be on file as required by section 205(c) of the FPA … to evaluate the reasonableness of the charges, and to provide for ongoing monitoring of the marketer's ability to exercise market power."[43] The California Parties contend that the market-based rate quarterly reports could not have been intended to determine whether a seller violated the Commission's market share screens, as the March 21 Order suggests, because the data required to be included in quarterly reports for short-term sales are entirely different from the data that the Commission would have used to compute market shares for committed and uncommitted capacity in deciding whether to permit a seller to charge market-based rates.[44]

23. Further, the California Parties argue that the Commission's 20 percent hub-and-spoke analysis is an inadequate market power screen and it would be indefensible for the

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[41] California Parties' April 2008 Rehearing Request at 18-19.

[42] *Id*. at 22-23.

[43] *Id*. (citing *Enron Power Mktg, Inc.*, 65 FERC ¶ 61,305, at 62,406 (1993). *See also Heartland Energy Servs., Inc.*, 68 FERC ¶ 61,223, at 62,065-66 (1994); *LG&E Power Mktg. Inc.*, 68 FERC ¶ 61,247, at 62,124 (1994)).

[44] California Parties' April 2008 Rehearing Request at 19.

Commission to use this same discredited market power screen on remand from the court to attempt to determine whether rates were just and reasonable.[45] They assert that, in bilateral sales markets such as those in which CERS purchased electricity, the Commission has recognized through its use of the pivotal supplier test that a seller may have market power regardless of the size of its market share. They state that the Commission also has acknowledged that the dysfunction in the single-price auction markets adversely affected the prices available in the bilateral markets where CERS was forced to purchase energy previously sold through the auction markets

2. Commission Determination

24. We will deny the California Parties' request for rehearing on this issue. The California Parties' arguments erroneously assume or imply that evaluating market share levels to determine whether a seller has market power is not relevant to the Commission's duty of ensuring just and reasonable rates. To the contrary, the Commission's primary criterion for determining just and reasonable rates at the time of these transactions was whether a seller had market power, and it did this by evaluating the seller's market share.[46] The California Parties' challenge to the Commission's directive, in the March 21 Order, to evaluate quarterly transaction reports to determine whether those reports would have indicated a possible increase in market share amounts to a collateral attack on the Commission's market power analysis, used to determine the justness and reasonableness of rates, that was in effect at the time of the transactions. Their challenge is also a collateral attack on the purpose of the Commission's quarterly reporting requirement and the court's holding that a market power review is an appropriate means of determining up-front that rates are just and reasonable.[47]

25. As the court stated in the Ninth Circuit Decision, the Commission's market-based rate approval program is based on the assumption that "[i]n a competitive market, where

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[45] *Id*. at 25-26 (citing *Pub. Util. Comm'n of the State of Cal. v. FERC*, 462 F.3d 1027, 1039 (9th Cir. 2006), *reh'g pending* (*CPUC*); *AEP Power Mktg., Inc.*, 97 FERC ¶ 61,219, at 61,969 (2001)).

[46] *See, e.g., Western Resources*, 83 FERC ¶ 61,110, at 61,532 (1998); *Louisville Gas & Electric Co*., 62 FERC ¶ 61,016, at 61,146 (1993); *Public Service Company of Indiana*, 51 FERC ¶ 61,367, at 62,205, *order on reh'g*, 52 FERC ¶ 61,260, *order granting clarification & modifying order*, 53 FERC ¶ 61,131 (1990), *dismissed*, Northern *Indiana Public Service Company v. FERC*, 954 F.2d 736 (D.C. Cir. 1992).

[47] Ninth Circuit Decision, 383 F.3d at 1013.

neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable."[48] Once the Commission makes an up-front finding that a seller does not have (or has adequately mitigated) market power, that seller's rates are assumed to be just and reasonable. Further, the court found that the Commission's market-based rate regulatory scheme was valid due to the Commission's "dual requirement of an ex ante finding of the absence of market power *and* sufficient post-approval reporting requirements."[49] Thus, the Ninth Circuit upheld the Commission's regulatory approach of using an up-front market-based rate approval based on an analysis of a seller's market power (which in turn is based on a market share analysis) and, consistent with the court's approval, the ongoing reviews should similarly investigate whether a seller obtained an excessive market share and market power since the time its market-based rates were granted or last reviewed.

26. What the California Parties in effect seek here is the application of a *different* "just and reasonable" market power test (i.e., one not based on market share) when the Commission engages in market monitoring by evaluating the quarterly reports. In monitoring and reviewing the quarterly transaction reports, however, the Commission has historically relied on the same assumption that it relies on when making its up-front finding; i.e., where a seller lacks market power (based on a determination that it does not have sufficient market share to convey market power), the resulting rates are assumed to be just and reasonable. When retrospectively reviewing quarterly reporting data, it is reasonable to apply the same "just and reasonable" test that was in effect at the time of the transactions reviewed.

27. Moreover, the court did not take issue with, as the California Parties imply, the different types of market data that the Commission requires applicants to file (and the Commission must review), in upholding the Commission's market-based rate approval program. Indeed, the court held that "so long as FERC has approved a tariff within the scope of its FPA authority, it has broad discretion to establish effective reporting requirements for administration of the tariff."[50] While the California Parties are correct that the type of market data that the Commission looks at in our up-front market-based rate analysis is different than the type of market data that the Commission looks at and requires in the quarterly transaction reports, they are incorrect in arguing that the data provided in those reports is ineffective in helping the Commission to identify whether

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[48] *Id*. (citing *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990)).

[49] *Id*. (emphasis in the original).

[50] Ninth Circuit Decision, 383 F.3d at 1013.

market shares may indicate an accumulation of market power. The purpose of the quarterly reporting is not to re-run the Commission's market power screens, but rather it is a mechanism that the Commission uses to monitor and evaluate market concentration on an ongoing basis.[51] This data assists the Commission's examination of "whether market prices [] indicate an exercise of market power."[52]

28. Further, while the Commission's up-front market power screen looks at total capacity owned or controlled, native loads, and capacity sold in computing installed or uncommitted capacity shares, the information in the quarterly transaction reports provides information regarding the seller transaction shares of actual energy sold. This transaction information assists the Commission in its ongoing monitoring of rates and helps the Commission determine whether there are any indicia of a market power concern based on actual sales that could result in unjust and unreasonable rates. If such indicia are present, the Commission will undertake further evaluation; and if further evaluation does not confirm that no market power problem is present, the Commission will institute a proceeding to revoke the market-based rate authorization or take other appropriate steps.

29. Thus, our holding in the March 21 Order is consistent with Commission precedent and one of the principal purposes of our quarterly transaction reporting requirement, which is to help us monitor market-based rates. In sum, in order for the Commission to determine whether a particular seller's rates became unjust and unreasonable (during the period at issue) since the time the Commission initially approved that seller's market-based rates, the Commission, among its market monitoring tools, may look at the transaction-by-transaction data provided in a seller's quarterly reports to assess whether there were any indicia that a seller may have had an ability to exercise market power such that its rates were unjust and unreasonable, warranting further investigation of the seller.

30. Finally, we will reject the California Parties' argument that the Commission's 20 percent hub-and-spoke analysis is an inappropriate market power screen for the Commission to use in this proceeding. The Commission is required to use the standards for assessing market power of market-based rate sellers and the reporting requirements in effect at the time the transactions took place, as well as the terms and conditions of

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[51] *See Market-Based Rates for Wholesale Sales of Electric Energy, Capacity, and Ancillary Services by Public Utilities*, Order No. 697, 72 Fed. Reg. 39,904 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252, at P 117 (2007), *clarified*, 121 FERC ¶ 61,260 (2007).

[52] *Id.*

sellers' then-operative market-based rate authorizations. While the Commission has refined its market power screen and analysis over time, the Commission cannot retroactively apply that test to transactions that took place eight years ago.[53] Doing so, would violate the requirement that all jurisdictional sellers be on notice as to what test will be applied to them. Further, courts strongly disfavor the retroactive establishment of agency rules and tests, and nothing in the Ninth Circuit Decision requires the Commission to do so.[54] Thus, we will deny the California Parties' request for rehearing on this issue.

E. Exclusion of Tariff Violations and Market Manipulation from Hearing

1. Request

31. The California Parties argue that the March 21 Order errs to the extent that it excludes from the hearing evidence of tariff violations involving sellers that manipulated the relevant markets. They argue that, as the court pointed out, the evidence from the 2000-2001 power crisis demonstrates that numerous sellers engaged in repeated and pervasive acts of market manipulation, collectively causing prices to be unjust and unreasonable, many of which manipulations involved the exercise of market power.[55] Thus, the California Parties seek clarification that all customary analyses of market power and market function that use the data collected in the quarterly reports, or that should have been collected in the quarterly reports, may be filed in this proceeding as a means of investigating the nexus between reporting, market function, and market power

[53] We note that, a seller that has been found to not possess market power could nonetheless be selling at an unjust and unreasonable rate as a result of manipulative or other illegal conduct in violation of a market rule or tariff. Any such manipulative conduct would not likely be revealed solely via the quarterly reports. While the quarterly data could be used to identify price and trading anomalies, one would need additional corroborating evidence to conclude that a market participant had manipulated the market. Possible gaming or other manipulation in violation of sellers' tariffs is at issue in the *CPUC* proceeding and to the extent that the quarterly data is useful in that proceeding, then it can be considered there.

[54] *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

[55] California Parties' April 2008 Rehearing Request at 28 (citing Ninth Circuit Decision, 383 F.3d at 1014-15, 1016, 1018)).

accumulation. They assert that this should include evidence of manipulative practices by sellers such as data that should have been collected in the quarterly reports, as well as other indicia of market function and market power based on quarterly report data.[56]

2. Commission Determination

32. We will deny rehearing on this issue. The March 21 Order made clear that this proceeding focuses solely on violations of our quarterly transaction reports as a basis for potential refund liability and that this is not a proceeding to address other potential tariff violations (such as gaming and anomalous bidding behavior), which is the subject of the *CPUC* proceeding.[57] The mandate in the *CPUC* case has not issued and the record of that case therefore has not been returned to the Commission; additionally, the Commission must be cognizant of the factual scope of each proceeding and the ramifications of our actions here on other, related proceedings. Finally, Commission precedent establishes that the Commission retains control over the scope of its proceedings.[58] It would be inappropriate for the Commission, at this stage in the proceeding, to expand or drastically recast its scope to include tariff violations, the scope of which is the key focus of the *CPUC* proceeding

F. Seller-Specific Versus Market-Wide Remedy

1. Request

33. The California Parties argue that the Commission, in the March 21 Order, erred to the extent that it limited any monetary remedy to seller-specific disgorgement of unjust profits relating only to reporting violations by that seller, and precluded market-wide refunds as a remedy for market-wide unjust and unreasonable rates.[59] They assert that, as a threshold issue, such *a priori* limitation is a fundamental denial of due process because the Commission has not had the opportunity to consider the evidence or the equities. The California Parties contend that the Commission fails to explain how a limited disgorgement remedy would constitute full refund protection for consumers where sellers did not charge a filed rate, or how such limited relief is equitable in these circumstances.

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[56] *Id*. at 30.

[57] March 21 Order at n.65.

[58] *Tennessee Gas Pipeline Co.*, 22 FERC ¶ 61,306, at 61,530 (1983) (*Tennessee Gas*).

[59] California Parties' April 2008 Rehearing Request at 31.

34. The California Parties also argue that they have amassed substantial evidence that the interrelated conduct of numerous sellers, including violations of Commission reporting requirements, together with California's single-price auctions, resulted in market-wide prices that were not just and reasonable and that exceeded the level that the applicable tariffs would have produced, absent the conduct.[60] They attach evidence to their filing that they argue demonstrates that every seller (with just two possible exceptions) with market-based pricing authority that sold into the CAISO and PX markets during the summer period substantially violated the Commission's applicable reporting requirements not only by filing inadequate reports that lacked necessary information, but, in many cases, by including false information.[61]

35. Further, the California Parties point to precedent where, they state the Commission has determined that market-wide refunds are an appropriate remedy when tariff violations affect market clearing prices.[62] In *H.Q. Energy*, the California Parties explain, the Commission concluded that the New York Independent System Operator (NYISO) had violated certain tariff provisions and ordered the NYISO to grant market-wide refunds to, and collect surcharges from, participants in the real-time market during the hours in question to restore the market clearing prices to what they would have been absent the tariff violation. Further, the California Parties point out that in *ISO New England, Inc.*,[63] the Commission emphasized that market-wide price corrections are the best way to remedy tariff violations in a single clearing-price market and rejected a proposal to reset rates for a subset of market resources, explaining that doing so would not create a superior or more lawful result.[64]

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[60] *Id*. at 32.

[61] *Id*. at Attachments B-D. The California Parties state that the reports submitted by sellers who sold to CERS were also pervasively deficient and error-ridden.

[62] *Id*. at 35-36 (citing *H.Q. Energy Servs.*, 113 FERC ¶ 61,184 (2005) (*H.Q. Energy*); *Southern Illinois Power Coop. v. Midwest Independent Transmission System Operator, Inc.*, 114 FERC ¶ 61,234, *reh'g denied*, 116 FERC ¶ 61,117 (2006); *Cities of Anaheim, Azusa, Banning, Colton, and Riverside, California v. California Independent System Operator*, 94 FERC ¶ 61,268, *order on reh'g*, 95 FERC ¶ 61,197 (2001)).

[63] 90 FERC ¶ 61,141 (2000).

[64] California Parties' April 2008 Rehearing Request at 36 (citing *id*. at 61,425-26; *City of Holland v. Midwest Independent System Operator, Inc.*, 112 FERC ¶ 61,105 (2005)).

2. Commission Determination

36. The Commission will deny rehearing on this issue. As we noted in the March 21 Order, courts have long held that the breadth of the Commission's "discretion is, if anything, at its zenith" when it is "fashioning [] remedies and sanctions, including enforcement and voluntary compliance programs in order to arrive at maximum effectuation of Congressional objectives."[65] The court in the Ninth Circuit Decision emphasized that the Commission has broad remedial discretion to address violations of the filed rate requirements of FPA section 205.[66] The court concluded that the Commission "may elect not to exercise its remedial discretion by requiring refunds, but it unquestionably has the power to do so."[67]

37. Thus, in the March 21 Order, the Commission held that because "it is not clear on the record developed thus far" that seller's reporting failures directly caused the alleged unjust and unreasonable rates at issue, the Commission would "consider[] our 'broad remedial authority' to determine appropriate remedies, if any, for sellers that violated our quarterly reporting requirement" and "weigh the equities for each individual seller."[68] The Commission specifically stated that "[o]nce the Commission is presented with the ALJ's findings of facts at issue in these proceedings, the Commission will issue a further order regarding what remedies, if any, we will impose on individual sellers."[69] In sum,

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[65] *Niagara Mohawk Power Corp*. v. *FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967). *See also Towns of Concord* v. *FERC*, 955 F.2d 67, 75 (D.C. Cir. 1992) (citing *Moss* v. *Civil Aeronautics Board*, 521 F.2d 298, 308-09 (D.C. Cir. 1975)); *Con. Edison Co. of N.Y., Inc. v. FERC*, No. 06-10-25, slip op. at 13-14, 2007 U.S. App. 29,213 (D.C. Cir. 2007); *Connecticut Valley Elec. Co. v. FERC*, 208 F.3d 1037, 1043 (D.C. Cir. 2000); *La. Pub. Serv. Comm'n v. FERC*, 174 F.3d 218, 225 (D.C. Cir. 1999); *Public Utilities Com'n of Cal. v. FERC* 462 F.3d 1027, 1053 (9th Cir. 2006).

[66] Ninth Circuit Decision, 383 F.3d at 1015 (citing *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 686 (D.C. Cir. 2000); *The Washington Water Power Co.*, 83 FERC ¶ 61,097, *order on responses to show cause*, 83 FERC ¶ 61,282 (1998); *Delmarva Power & Light Company*, 24 FERC ¶ 61,199, at 61,461, *on reh'g*, 24 FERC ¶ 61,380, *reh'g denied*, 25 FERC ¶ 61,308 (1983)).

[67] *Id*.

[68] March 21 Order at P 26 and 31.

[69] *Id*. P 37.

while the Commission indicated that it would impose a seller-specific remedy, it did not specifically state what type of remedial action it would take, if any, after the ALJ presents its findings.

38. Further, the FPA is generally premised on notice to sellers and customers as to when rates may be subject to change, whether they are rate increases or potential refunds. Section 205 is premised on notice to the public prior to new rates being able to take effect,[70] and section 206[71] likewise is premised on notice to sellers that rates may be changed and that refunds for rates charged after a certain date may be subjected to refund.[72] Thus, with respect to violations of the FPA section 205 filed rate requirements, public utilities are charged with following Commission rules, regulations and orders and are always "on notice" that they are subject to disgorgement or penalties if they violate the law or their filed rate tariff. While sellers are on notice that they will be subject to penalties for their own violations, they are not on notice (absent a notice of possible prospective refunds under section 206 of the FPA) that they will be subject to penalties for someone else's violations of their filing requirements. In this case, a market-wide refund remedy would only be appropriate, if at all, where all of the sellers had violated the quarterly reporting requirement. To require refunds of a seller that obeyed the orders, rules and regulations and had no notice that sales would be subject to potential refunds runs counter to fundamental notice provisions of the FPA.[73]

39. Finally, the cases cited by the California Parties do not support their request for a market-wide remedy. The authority cited in their request is a litany of cases where

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[70] 16 U.S.C. 824d(d); 18 C.F.R. § 35.3 (2008).

[71] 16 U.S.C. § 824e (2006).

[72] 16 U.S.C. 824e(b). *See also CPUC*, 462 F3d at 1046-47.

[73] In the refund proceeding, the Commission ordered a market remedy. However, in that proceeding, the initial complaint was filed on August 2, 2000 pursuant to section 206 of the FPA, which allowed the Commission to establish a refund effective date. As such, all market participants had prior notice that refunds were possible. *See San Diego Gas & Elec. Co.*, 92 FERC ¶ 61,172, at 61,608 (2000). In this case, FPA section 206 barred the Commission from extending refund responsibility to transactions prior to 60 days from the date of California's March 16, 2002 complaint. Thus, although individual sellers are effectively on notice of their own violations, there was no prior notice to all sellers in this proceeding so as to support the market remedy advocated by the California Parties.

actions were brought related directly to the tariff, and violation thereof, by an Independent System Operator or a Regional Transmission Operator. However, the California Parties' initial complaint sought refunds *from* sellers, because of violations of their own market-based rate tariffs, and not based on violations of the ISO and PX tariffs. The California Parties provide no legal rationale or nexus for why the violation of a single seller's separate, market-based rate tariff, not the tariff of the ISO or PX, should warrant a market-wide remedy.

G. Deferral of Proceedings Pending Remands in *CPUC* and *Port of Seattle*

1. Request

40. The California Parties argue that the Commission erred in failing to hold the proceeding in abeyance so that the reporting violations at issue here could be considered together with the remands in *CPUC*, and, to the extent that it concerns overcharges for sales to CERS, in *Port of Seattle*.[74] They argue that all three proceedings address the excessive rates charged largely by the same sellers during the same time periods and that it is illogical, as well as arbitrary and capricious, to adjudicate in separate cases such overlapping and interrelated issues concerning a common nucleus of operative facts. Doing so, they contend, fragments what should be a common record, and will likely lead to decisions that fail to consider the totality of relevant considerations, leading to judicial reversal.

2. Commission Determination

41. In the March 21 Order, the Commission addressed and denied the California Parties' request that we hold this proceeding in abeyance so that the reporting violations at issue here could be considered together with the remands in *CPUC* and *Port of Seattle*.[75] There, we found that, while all three proceedings involve many of the same parties and overlapping time periods, the nature and scope of the proceedings remain distinct.[76] We clarified that the focus of this proceeding is centered on the market-based rate program and the related quarterly reporting requirement and potential remedies for violations of this filing requirement. The *CPUC* proceeding, however, is focused on tariff violations as a basis for ordering refunds and the *Port of Seattle* proceeding

[74] California Parties' April 2008 Rehearing Request at 36-37.

[75] March 21 Order at P 23.

[76] *Id.*

addresses potential refunds to wholesale buyers of electricity that purchased energy in the short-term supply market in the Pacific Northwest.[77] Thus, the issues in *CPUC* and *Port of Seattle* are more appropriately addressed in those other proceedings. Further, as noted earlier, the mandates in the *CPUC* and *Port of Seattle* cases still have not issued. Finally, as noted above, Commission precedent establishes that the Commission retains control over the scope of its proceedings and, thus, we will deny the California Parties' request for rehearing on this issue.[78]

The Commission orders:

The Commission grants in part and denies in part the requests for clarification or rehearing in these proceedings, as discussed above.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

[77] We also note that the *CPUC* proceeding does not include CERS transactions, while the proceeding here does.

[78] *Tennessee Gas*, 22 FERC at 61,530.