

139 FERC ¶ 61,212
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

San Diego Gas & Electric Company

Docket No. EL00-95-263

v.

Sellers of Energy and Ancillary Services

Investigation of Practices of the
California Independent System Operator
and the California Power Exchange

Docket No. EL00-98-245

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

Docket No. EL02-71-037

v.

British Columbia Power Exchange Corp., *et al.*

Puget Sound Energy, Inc.

Docket No. EL01-10-073

v.

Sellers of Energy and Ancillary Services

State of California *ex rel.* Jerry Brown,
Attorney General for the State of California

Docket No. EL09-56-014

v.

Powerex Corp. (f/k/a British Columbia
Power Exchange Corp.), *et al.*

(Not Consolidated)

ORDER DENYING CLARIFICATION AND REHEARING

(Issued June 13, 2012)

1. In this order, we deny the California Parties'¹ Request for Clarification or, in the Alternative, Rehearing of the Commission's May 24, 2011 order,² which denied the California Parties' motion seeking: (1) the consolidation of specified proceedings;³ (2) summary disposition, or in the alternative; (3) settlement procedures and an evidentiary hearing in the consolidated proceedings.

I. Background

2. A more detailed factual background of these proceedings is included in the Order Denying Consolidation and in the Order Dismissing CERS Complaint that were issued

¹ For purposes of this proceeding, the California Parties are the State of California, *ex rel.* Kamala E. Harris, Attorney General, the California Public Utilities Commission, Pacific Gas and Electric Company, and Southern California Edison Company.

² *San Diego Gas & Elec. Co.*, 135 FERC ¶ 61,177 (2011) (Order Denying Consolidation).

³ The California Parties sought to consolidate a complaint filed on May 22, 2009, *People of the State of California, ex rel. Edmund G. Brown Jr., Attorney General v. Powerex Corp. (f/k/a British Columbia Power Exchange Corp.)*, Docket No. EL09-56-000 (CERS Complaint), *dismissed*, 135 FERC ¶ 61,178 (*Order Dismissing CERS Complaint*), along with three ongoing "Remand Proceedings." The Remand Proceedings are: (1) the "*Lockyer* proceeding," *see Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004), *cert. denied*, 127 S. Ct. 2972 (2007) (*Lockyer*), *order on remand*, 122 FERC ¶ 61,260 (*Lockyer Order on Remand*), *clarified*, 123 FERC ¶ 61,042, *reh'g granted*, 125 FERC ¶ 61,016 (2008) (*Lockyer Order on Rehearing and Clarification*), *initial decision on motions for summary disposition*, 130 FERC ¶ 63,017 (2010) (*Lockyer Initial Decision*), *order affirming initial decision* 135 FERC ¶ 61,113 (2011) (Opinion No. 512), *reh'g denied*, 139 FERC ¶ 61,211 (2012); (2) the "*CPUC* proceeding," *see Pub. Util. Comm'n of the State of Cal. v. FERC*, 462 F.3d 1027 (9th Cir. 2006) (*CPUC*), *order on remand*, 129 FERC ¶ 61,147 (2009) (*CPUC Order on Remand*), *clarification and rehearing granted*, 135 FERC ¶ 61,183 (2011) (*CPUC Order on Rehearing*); and (3) the "*Port of Seattle* proceeding," *see Port of Seattle, Washington v. FERC*, 499 F.3d 1016 (9th Cir. 2007) (*Port of Seattle*), *cert. denied*, 130 S. Ct. 1050 (2010).

simultaneously.⁴ In brief, California and the Western states experienced dramatically high wholesale electricity prices due to a combination of natural, economic and regulatory factors in 2000 and 2001.⁵ In response to the Western Energy Crisis, numerous proceedings were initiated at the Commission. In relevant part these include the *CPUC*, *Lockyer*, *Port of Seattle*, and *Morgan Stanley* proceedings.

3. In summary, the *CPUC* proceeding is focused on the appropriate refund to be paid by sellers for certain transactions in the California Independent System Operator Corporation (CAISO) and the California Power Exchange Corporation (CalPX) markets.⁶ The *Lockyer* proceeding centered on whether any seller's improper or untimely filing of its quarterly transaction reports masked an accumulation of market power that led to an unjust and unreasonable rate for that seller during the 2000-2001 period.⁷ The *Port of Seattle* proceeding addresses potential refunds to wholesale buyers of electricity that purchased energy in the short-term supply market in the Pacific Northwest.⁸ The *Morgan Stanley* proceeding involved buyers seeking to abrogate or reform contracts they signed during the Western Energy Crisis.⁹

⁴ See *Order Denying Consolidation*, 135 FERC ¶ 61,177 (2011); *Order Dismissing CERS Complaint*, 135 FERC ¶ 61,178 (2011), *reh'g denied*, 139 FERC ¶ 61,210 (2012).

⁵ See generally, *Morgan Stanley Capital Group, Inc. v. Pub Util. Dist. No. 1 of Snohomish County*, 554 U.S. 527, 538 (2008) (*Morgan Stanley*), *order on remand*, 125 FERC ¶ 61,312 (2008) (*Morgan Stanley Order on Remand*).

⁶ See *CPUC*, 462 F.3d at 1035, *CPUC Order on Rehearing*, 135 FERC ¶ 61,183.

⁷ See *Lockyer Order on Remand*, 122 FERC ¶ 61,260 at P 23. The hearing in the *Lockyer* proceeding commenced on May 1, 2009, the Presiding ALJ issued an Initial Decision on Motions for Summary Disposition on March 18, 2010. See *Lockyer Initial Decision*, 130 FERC ¶ 63,017. The Commission affirmed the Initial Decision on May 4, 2011. See *Opinion No. 512*, 135 FERC ¶ 61,113, *reh'g denied*, 139 FERC ¶ 61,211 (2012).

⁸ See *Port of Seattle*, 499 F.3d at 1022.

⁹ See *Morgan Stanley*, 554 U.S. at 540-42. The *Morgan Stanley* proceeding has since been resolved by settlement. A related case, the "CDWR" proceeding, remains pending before the Commission on remand from the 9th Circuit. See *Pub. Util. Comm'n of the State of Cal. v. Sellers of Long Term Contracts to the Cal. Dep't of Water Res.; Cal. Oversight Bd. v. Sellers of Energy and Capacity Under Long-Term Contracts with*

(continued...)

4. On the same day California Parties filed its Motion to Consolidate, the California Attorney General (California AG) filed a complaint against the various entities that made short-term bilateral sales to the California Energy Resources Scheduling Division (CERS) of the California Department of Water Resources (DWR) during the period January 18, 2001 to June 20, 2001. We addressed the CERS Complaint in a separate order.¹⁰

5. The Commission has twice previously denied the California Parties' motions to consolidate,¹¹ (finding the nature and scope of the proceedings remained distinct), and the Commission in the most recent Order Denying Consolidation again determined that the California Parties failed to demonstrate that consolidation (or summary disposition) would be appropriate in the four separate proceedings.

II. Clarification

A. Request for Clarification

6. On June 23, 2011, the California Parties filed their *Request for Clarification or, in the Alternative, Rehearing of Order Denying Motion Requesting Consolidation, Summary Disposition, or, in the Alternative, Hearing and Settlement Procedures* (Rehearing Request). First, the California Parties request the Commission to clarify that, whatever procedural structure it uses, the Commission will base its determination of a market-wide refund remedy upon all of the evidence of market manipulation/tariff violations and the charging of unlawful rates.¹² The California Parties argue that given the interrelated nature of the California electricity markets, that this approach is the only way for the Commission to make a reasoned determination based upon substantial evidence and

the Cal. Dep't of Water Res., 103 FERC ¶ 61,354 (order on initial decision), *reh'g denied*, 105 FERC ¶ 61,182 (2003), *remanded sub nom. Pub. Util. Comm'n of the State of Cal. v. FERC*, 474 F.3d 587 (9th Cir. 2006), *vacated and remanded*, 554 U.S. 527 (2008), *remanded*, 530 F.3d 767 (9th Cir. 2009).

¹⁰ See *Order Dismissing CERS Complaint*, 135 FERC ¶ 61,178, *reh'g denied*, 139 FERC ¶ 61,210 (2012).

¹¹ See *Lockyer Order on Remand*, 122 FERC ¶ 61,260 at P 23, *Lockyer Order on Rehearing and Clarification*, 125 FERC ¶ 61,016 at P 41; *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 103 FERC ¶ 61,359, at P 11 (2003) (*SDG&E Order Denying Consolidation and Granting Protective Order*).

¹² See Rehearing Request at 4-7.

arrive at a final order that is not arbitrary, capricious, and a failure of reasoned decisionmaking. To the extent that the Commission does not intend to adopt this approach, the California Parties seek rehearing.

7. In support, California Parties point to *CPUC*, in which the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

At various times, FERC has stated that it reserves the right to impose market-wide inquiries in the FERC Enforcement Proceedings; however, in these proceedings to date, it has only pursued “company-specific” investigations into the actions of various market participants, rather than conducting a market-wide inquiry. . . .

In contrast, the California Parties seek a market-wide refund remedy for tariff violations pursuant to § 309 through [their] adjudicative filing. . . . When parties seek adjudicative relief from an agency, they are entitled to a reasoned response from the agency. Here, the California Parties filed a cognizable request for relief and tendered credible evidence in support of their request.¹³

8. Based on the foregoing, the California Parties insist “the court clearly intended for the Commission, on remand, to ‘conduct[] a market-wide inquiry’ concerning the need for ‘a market-wide refund remedy for tariff violations.’”¹⁴ Further, California Parties ask the Commission to specify how the Commission intends to fulfill this mandate absent consolidation of the proceedings.

B. Commission Decision

9. California Parties’ request for “clarification” mischaracterizes the mandate and meaning of *CPUC*. California Parties argue that *CPUC* somehow requires the Commission to conduct an omnibus hearing of “**all**” of the evidence the California Parties can present that will lead to a market-wide refund remedy, or alternatively for the Commission to explain how all of this evidence can be considered in the absence of such a consolidated proceeding. This is not what the court in *CPUC* said or reasonably implied. The cited passage merely addressed the court’s holding that despite FERC’s

¹³ Rehearing Request at 6 (citing *CPUC*, 462 F.3d at 1050-51).

¹⁴ *Id.* at 6 (citing *CPUC*, 462 F.3d at 1050-51).

conducting “company-specific” enforcement proceedings, California Parties were not barred from seeking market-wide relief. The court said precisely this in the very next sentence in *CPUC*, which California Parties neglected to cite in its Rehearing Request:

A party’s valid request for relief cannot be denied purely on the basis that the agency is considering its own enforcement action that may impart a portion of the relief sought. If an aggrieved party tenders sufficient evidence that tariffs have been violated, then it is entitled to have FERC adjudicate whether the tariff has been violated and what relief is appropriate.¹⁵

10. Furthermore, the court in *CPUC* stated that “[it does] not prejudice how [the Commission] should address the merits or fashion a remedy if appropriate.”¹⁶ Thus, the court did not dictate a specific procedure to be followed in considering the merits of the California Parties’ action or the remedy, if appropriate; rather, the court deferred to the Commission on these matters. In accordance with this mandate, we have set forth reasonable procedures to fully address the merits of the *CPUC* remand and to fashion a remedy if appropriate, establishing an evidentiary, trial-type hearing (including its appropriate scope) before an ALJ (holding the hearing in abeyance pending settlement judge procedures).¹⁷ The Commission will consider the entire evidentiary record, should one be developed in that proceeding, at the appropriate time. We do not read our obligation under *CPUC* as requiring more than this. We do not read *CPUC* as requiring consolidation with the other proceedings as urged by California Parties or otherwise limiting the Commission’s ability to control its proceedings.¹⁸ In its Order Denying Consolidation, the Commission took no action that in any way prejudices the California

¹⁵ *CPUC*, 462 F.3d at 1051.

¹⁶ *Id.*

¹⁷ See *CPUC Order on Rehearing* 135 FERC ¶ 61,183.

¹⁸ See *Mobil Oil Exploration & Producing Se. Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230-31 (1991) (“An agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities... an agency need not solve every problem before it in the same proceeding. This applies even where the initial solution to one problem has adverse consequences for another area that the agency was addressing.” (internal citations omitted)); *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 366 (D.C. Cir. 2003) (administrative agencies enjoy broad discretion to manage their own dockets).

Parties' rights in the *CPUC* remand proceeding. We therefore deny California Parties' request for clarification to the degree it seeks consolidation of the aforementioned proceedings.

III. Rehearing

A. Request for Rehearing

11. California Parties also request rehearing based on two alleged errors in the Order Denying Consolidation. California Parties allege that in the Order Denying Consolidation the Commission erred:

- A. In failing to follow the mandate of *CPUC*, which rejected the Commission's earlier attempt to split the evidence of market manipulation/tariff violations into multiple, seller-specific proceedings and, instead, ordered the Commission to consider the California Parties' request for a "market-wide inquiry" and "a marketwide refund remedy."¹⁹
- B. In failing to provide due process to the California Parties, in considering relief in these proceedings, to the extent it does not consider in an aggregated fashion the totality of the evidence of tariff violations, unlawful behavior, and unjust charges.²⁰

B. Commission Determination

12. For the reasons discussed in paragraphs 6-10 *supra* addressing the request for clarification, we deny rehearing regarding California Parties' contention that the mandate in *CPUC* requires consolidation of the various proceeding. California Parties reiterates its argument that addressing the myriad issues arising from the Western crisis in segregated proceedings would "make it almost impossible for the Commission to reach a reasoned decision based upon substantial evidence."²¹ As we have repeatedly explained, we disagree with this proposition.

13. The Commission has heard and rejected virtually identical arguments regarding these proceedings before. For instance, the Commission has already ruled with respect to the *Lockyer*, *CPUC*, and *Port of Seattle* proceedings that despite some common parties

¹⁹ Rehearing Request at 3 (citing *CPUC*, 462 F.3d at 1050-51).

²⁰ Rehearing Request at 3-4.

²¹ Rehearing Request at 8.

and overlapping time periods, the nature and scope of the proceedings remain distinct and ought not to be consolidated.²² The three proceedings focus on different issues and that precedent established that the Commission retained control over the scope of its proceedings.²³ As early as June 2003, the Commission rejected a similar motion by the California Parties to consolidate the various western matters, emphasizing that “a massive single proceeding on the scale that the California Parties propose would create more problems than it would solve and would create unnecessary administrative problems for Commission staff and resources.”²⁴

14. The Commission also explained that there are also significant differences in these proceedings that warrant separate treatment, including differences in the parties, markets, time periods and legal issues.²⁵ Also each one of the four proceedings is at a different stage procedurally, some at advanced stages. For the *CPUC* and *Lockyer* proceedings, the Commission has already instituted hearing procedures and established the scope of those proceedings.²⁶ The scope of the *CPUC* proceeding was expanded to include potential refunds for spot market sales (24 hours or less), block forward market transactions (more than 24 hours in length) and energy exchange transactions (energy in exchange for more energy at a later time) in the CAISO and CalPX markets from October 2, 2000 to June 20, 2001 (Refund Period), in addition to considering tariff violations that affected the market clearing price prior to October 2, 2000.²⁷ The scope of the *Lockyer*

²² Order Denying Consolidation, 135 FERC ¶ 61,177 at P 46 (citing *Lockyer Order on Rehearing and Clarification*, 125 FERC ¶ 61,016 at P 41).

²³ *Id.*

²⁴ Order Denying Consolidation, 135 FERC ¶ 61,177 at P 46 (citing *SDG&E Order Denying Consolidation and Granting Protective Order*, 103 FERC ¶ 61,359 at P 11).

²⁵ Order Denying Consolidation, 135 FERC ¶ 61,177 at P 47.

²⁶ See *CPUC Order on Remand*, 129 FERC ¶ 61,147 and *Lockyer Order on Remand*, 122 FERC ¶ 61,260. Indeed, the *Lockyer* proceeding as at a very advanced stage. See P 3 & note 7, *supra*.

²⁷ See *CPUC Order on Remand*, 129 FERC ¶ 61,147 at P 1, *CPUC Order on Rehearing*, 135 FERC ¶ 61,183 (order on remand expanding the scope of the proceeding); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 96 FERC ¶ 61,120, at 61,499, 61,516-7 (2001) (describing the initial scope of the *CPUC* proceeding).

proceeding included whether any seller's improper or untimely filing of its quarterly transaction reports masked an accumulation of market power such that the market rates were unjust and unreasonable.²⁸ Indeed, the *Locker* Initial Decision has already been issued by the Presiding Judge (granting summary disposition in favor of respondent sellers) and affirmed by the Commission.²⁹ *Port of Seattle* involves whether there were unjust and unreasonable charges for bilateral sales, including to CERS,³⁰ into the Pacific Northwest from December 25, 2000 to June 20, 2001.³¹ The CERS Complaint sought market-wide refunds for short-term bilateral sales to CERS from January 18, 2001 to June 20, 2001. The Ninth Circuit observed that these bilateral CERS transactions were beyond the scope of the *CPUC* proceeding.³² The Commission has since dismissed the CERS Complaint.³³

15. We also explained why consolidation would be impractical.³⁴ We reiterate that a massive single proceeding on the scale that the California Parties propose would not lead to increased efficiency in the resolution of issues because it would delay the more advanced proceedings and create significant administrative problems for Commission staff and resources.³⁵

²⁸ *Lockyer Order on Rehearing and Clarification*, 125 FERC ¶ 61,016 at P 3, 18-19.

²⁹ *See* P 3 & note 7, *supra*.

³⁰ *See Port of Seattle*, 499 F.3d at 1034 (the Ninth Circuit directed the Commission to include "CERS transactions when it determines whether refunds are warranted for sales in the Pacific Northwest spot market;" the Commission has not yet issued an order on remand.).

³¹ *SDG&E July 25, 2001 Order*, 96 FERC ¶ 61,120 at 61,520.

³² *CPUC*, 462 F.3d at 1063 ("We conclude that FERC's decision to exclude the CERS transactions was not arbitrary, capricious, or an abuse of discretion.").

³³ *Order Dismissing CERS Complaint*, 135 FERC ¶ 61,178, *reh'g denied*, 139 FERC ¶ 61,210 (2012).

³⁴ *Order Denying Consolidation*, 135 FERC ¶ 61,177 at P 48.

³⁵ *See id.* (*SDG&E Order Denying Consolidation and Granting Protective Order*, 103 FERC ¶ 61,359 at P 11).

16. The Commission retains broad discretion in how it chooses to structure its proceedings.³⁶ We again find that maintaining separate proceedings is more administratively manageable and will permit the Commission to focus on the case-specific issues and the selection of the most appropriate procedures for each distinct matter. We therefore deny rehearing on this issue and again reject the California Parties' latest attempt to consolidate these cases.³⁷

17. Finally, the reasons explained in paragraphs 12-16 *supra*, we reject California Parties' argument that due process requires consolidation of the various proceedings. For the last decade, the California Parties have been pursuing various administrative and judicial proceedings against various sellers who made sales into California during the Western crisis. Acting collectively or individually, the California Parties (and related entities) filed several complaints with the Commission, beginning with *San Diego Gas & Electric* in August 2000 (EL00-95), adding *Lockyer* in 2002 (EL02-71), culminating with the CERS Complaint filed in May 2009 (EL09-56). As we have explained, each of these proceedings involved distinct markets, distinct time periods, distinct legal issues and massive amounts of evidence to evaluate. At every step, the Commission has sought to resolve, within the scope of its statutory authority, the California Parties' claims in the most efficient manner possible. The Order Denying Consolidation furthers this aim and in no way denies due process to the California Parties.

18. Finally, we point out a contradiction in California Parties' due process argument. While repeatedly requesting consolidation of the four proceedings, the California Parties' own May 22, 2009 Motion to Consolidate sought to sever, for separate disposition, the claims in the *Port of Seattle* proceeding regarding electricity purchases by entities other than CERS.³⁸ There, the California Parties stated that those sales involved *different*

³⁶ See *Mobil Oil Exploration & Producing South East. Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230-31 (1991) ("An agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities... an agency need not solve every problem before it in the same proceeding. This applies even where the initial solution to one problem has adverse consequences for another area that the agency was addressing." (internal citations omitted)).

³⁷ While we deny the California Parties' motion to consolidate, we do not intend to imply that any settlement discussions the parties may have pursuant to Commission order or otherwise should be conducted on an unconsolidated basis. The Commission continues to encourage settlement on these matters and does not herein (or in any other proceeding) establish any limitations on the scope of any settlement discussions.

³⁸ Motion to Consolidate at 20-21.

purchasers serving different customers. The California Parties contended that consolidation of the non-CERS Pacific Northwest purchases with the California-related proceedings would delay achieving a just result and consume the Commission's resources and time. California Parties cannot have it both ways. It cannot reasonably propose that severance of certain Western crisis claims is just and proper because it promotes efficiency, while simultaneously claiming violations of due process when the Commission does this very thing respecting certain other Western crisis claims. We therefore deny rehearing on this issue.

The Commission orders:

- (A) Clarification is denied, as discussed in the body of this order.
- (B) Rehearing is denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.