

139 FERC ¶ 61,211
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

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

v.

Docket No. EL02-71-036

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 DENYING REHEARING

(Issued June 13, 2012)

1. In this order, we deny the California Parties'¹ Request for Rehearing of Opinion No. 512,² which affirmed in all respects the Initial Decision issued in this case.³ In the

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.

Initial Decision, the Presiding Administrative Law Judge (ALJ or Presiding Judge) denied the exceptions of the California Parties and granted summary disposition in favor of respondent sellers.

I. Background

2. A brief summary of the recent history in this proceeding is provided here. Previous orders contain detailed descriptions of the background and procedural history leading to the trial-type hearing before the ALJ in this case, addressing whether any individual public utility seller's violation of the Commission's market-based rate quarterly reporting requirement led to an unjust and unreasonable rate for that particular seller in California during the 2000-2001 period.⁴

A. Ninth Circuit Remand

3. On September 9, 2004, the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) issued a remand to the Commission.⁵ The Ninth Circuit Remand originated from a complaint filed by the State of California, *ex rel.* Bill Lockyer, Attorney General of the State of California (California AG) on March 20, 2002, alleging, among other things, that generators and marketers selling power into markets operated by the California Independent System Operator Corporation (CAISO) and the California Power Exchange Corporation (CalPX) failed to report transaction-specific information about their sales and purchases at market-based rates in 2000, as required under the Commission's market-based rate program, and that wholesale sellers failed to properly file quarterly transaction reports for spot market sales of energy to the California Energy Scheduling Resources Division of the California Department of Water Resources (CERS) in 2001.⁶ The Ninth Circuit held that the Commission's authorization of market-based

² *State of California, ex rel. Bill Lockyer v. British Columbia Power Exchange Corp.*, Opinion No. 512, 135 FERC ¶ 61,113 (2011) (Opinion No. 512).

³ *State of California, ex rel. Bill Lockyer v. British Columbia Power Exchange Corp.*, 130 FERC ¶ 63,017 (2010) (Initial Decision).

⁴ *See, e.g.*, Opinion No. 512, 135 FERC ¶ 61,113 at PP 2-27.

⁵ *State of California, ex rel. Bill Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004), *cert. denied*, *Coral Power, L.L.C. v. Cal. ex rel. Brown*, 551 U.S. 1140 (2007) (Ninth Circuit Remand).

⁶ *See State of California, ex rel. Bill Lockyer v. British Columbia Power Exchange Corp.*, 99 FERC ¶ 61,247, *order on reh'g*, 100 FERC ¶ 61,295 (2002).

rate tariffs complied with the Federal Power Act (FPA), but that the Commission erred in ruling that it lacked authority to order refunds for violations of its reporting requirement and remanded the case for further refund proceedings.⁷ The Ninth Circuit did not order any refunds, leaving it to the Commission to consider the appropriate remedial options.⁸

B. The Commission's Remand Orders

4. In response to the Ninth Circuit Remand, the Commission issued a series of orders defining the scope of the remand proceeding and setting the matter for hearing. In its March 21 Order, the Commission directed that the hearing was to focus solely on “whether, based on the facts and circumstances associated with each individual seller, that 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.”⁹ The proceeding was *not* to address any tariff violations (such as gaming and anomalous bidding behavior that were raised in the *CPUC* remand case).¹⁰ The Commission required analysis that would apply the hub-and-spoke test with a twenty percent threshold to determine if the sellers gained market power subsequent to the Commission’s original grant of market-based rate authority.¹¹

5. In its April 15 Order, the Commission addressed certain outstanding procedural matters.¹² The California Parties argued in their request for rehearing that the purpose of the quarterly reporting requirement was to ensure that sellers’ market-based rates were

⁷ See *State of California, ex rel. Bill Lockyer v. British Columbia Power Exchange Corp.*, 122 FERC ¶ 61,260, at P 1 (2008) (March 21 Order), *order on clarification*, 123 FERC ¶ 61,042 (2008) (April 15 Order), *order on reh’g and clarification*, 125 FERC ¶ 61,016 (2008) (October 6 Order), *order rejecting request for reh’g*, 129 FERC ¶ 61,276 (2009) (December 28 Order), *initial decision on motions for summary disposition*, 130 FERC ¶ 63,017 (2010), *order affirming initial decision*, 135 FERC ¶ 61,113 (2011).

⁸ Ninth Circuit Remand, 383 F.3d at 1018.

⁹ March 21 Order, 122 FERC ¶ 61,260 at P 32.

¹⁰ *Id.* P 33 & n.65 (referencing *Public Utilities Commission of California v. FERC*, 462 F.3d 1027 (9th Cir. 2006)).

¹¹ *Id.* PP 25, 33, 35.

¹² April 15 Order, 123 FERC ¶ 61,042.

just and reasonable, rather than to measure market shares.¹³ They further argued that (i) the hub-and-spoke analysis was an inadequate market power screen, (ii) the Commission had recognized use of the pivotal supplier test in bilateral sales markets, such as sales to CERS, and (iii) the Commission had recognized that the dysfunction of the single-price auction used in California had adversely affected the bilateral sales markets.¹⁴

6. In its October 6 Order, the Commission first clarified the relevant time period at issue in the proceeding and expanded the scope of the proceeding to include certain sales made to CERS.¹⁵ The Commission then denied the California Parties' request for rehearing on all counts.¹⁶ The Commission found that the California Parties' challenge to the directive to evaluate the quarterly reports to determine whether the reports indicate a possible increase in market share amounted to a collateral attack on the Commission's market power analysis.¹⁷ The Commission ruled that the principal purpose of the quarterly transaction reporting requirement is to assist it in monitoring market-based rates through an ongoing measurement of market shares, which in turn determine market power.¹⁸ The Commission reaffirmed that such market power review is an appropriate means to determine whether rates are just and reasonable.¹⁹

7. The Commission also rejected the California Parties' argument that its twenty percent hub-and-spoke test is an inappropriate market power screen for the Commission to use in this proceeding.²⁰ The Commission held that it must use the

¹³ October 6 Order, 125 FERC ¶ 61,016, at P 22.

¹⁴ *Id.* P 23.

¹⁵ *Id.* P 19.

¹⁶ *Id.* P 24.

¹⁷ “[T]he 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.” *Id.* (footnote omitted).

¹⁸ *Id.* PP 24, 29.

¹⁹ *Id.* P 24.

²⁰ *Id.* P 30.

standards for assessing market power of market-based rate sellers that were in effect at the time the transactions occurred:

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....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 Remand Decision requires the Commission to do so.²¹

Thus, the Commission reaffirmed the use of the hub-and-spoke test to measure sellers' market power during the relevant time period.

8. At that time, the California Parties also sought permission to file all customary analyses of market power and market function that use data collected in the quarterly reports as a means of investigating the nexus between reporting, market function, and market power accumulation.²² The Commission denied the California Parties' request, reiterating that the March 21 Order made clear that this proceeding focuses solely on violations of the quarterly transaction reports as a basis for potential refund liability.²³

9. Finally, the California Parties argued that the Commission erred in the March 21 Order 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.²⁴ The Commission also denied rehearing on this issue.²⁵ The Commission noted that while sellers are on notice that they will be subject to penalties for their own violations, they are

²¹ *Id.* (citations omitted).

²² *Id.* P 32.

²³ *Id.*

²⁴ *Id.* P 33.

²⁵ *Id.* P 36.

not on notice that they will be subject to penalties for someone else's violations of filing requirements.²⁶

10. On November 5, 2009, the California Parties filed a request for rehearing and clarification of the October 6 Order.²⁷ Specifically, they sought rehearing of paragraph 32 of the October 6 Order, which excluded from this proceeding evidence of market manipulation and tariff violations related to bilateral sales to CERS on the grounds that these issues are addressed in the *CPUC*²⁸ proceeding on remand.²⁹ The California Parties argued that the best evidence of market power is direct evidence of its existence in supplier conduct.³⁰ They therefore requested the Commission to permit evidence of market manipulation and tariff violations with respect to CERS bilateral transactions.³¹

11. In response, the Commission issued its Order Rejecting Request for Rehearing on December 28, 2009.³² The Commission rejected the California Parties' request to include evidence of market manipulation and tariff violations related to bilateral sales to CERS.³³ The Commission reiterated that the purpose of this proceeding is to focus exclusively on violations of quarterly transaction reporting requirements as a basis for potential refund liability, not other potential tariff violations such as gaming and

²⁶ *Id.* P 38 (“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.”).

²⁷ *See* December 28 Order, 129 FERC ¶ 61,276 at P 6.

²⁸ *Pub. Util. Comm'n of Cal. v. FERC*, 462 F.3d 1027 (9th Cir. 2006).

²⁹ December 28 Order, 129 FERC ¶ 61,276 at PP 6, 7.

³⁰ *Id.* P 7.

³¹ *Id.*

³² The March 21 Order, the April 15 Order, the October 6 Order, and the December 28 Order are, collectively, the “remand orders.”

³³ December 28 Order, 129 FERC ¶ 61,276 at P 8.

anomalous bidding behavior.³⁴ The Commission stated that this purpose has been the focus of this proceeding since its inception.³⁵

C. The Initial Decision

12. The Presiding Judge found that under section 206 of the FPA, the California Parties, as the complainant, bore the burden of proof to establish a *prima facie* case against the respondent sellers.³⁶ She framed the central issue in this proceeding:

[W]hether, based on the facts and circumstances associated with each individual seller, that 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.³⁷

13. To establish a *prima facie* case, pursuant to the Commission's statement of the central issue, the Presiding Judge found the California Parties were required to present evidence in their direct testimony (i) that the sellers improperly or untimely filed or failed to file their quarterly transaction reports, (ii) that the sellers individually accumulated market power as measured by the test that the Commission used at the time when the alleged reporting violations occurred, and (iii) that a nexus existed between the sellers improper or untimely quarterly transaction reports and their individual accumulation of market power.³⁸ The ALJ also found that in order to establish a *prima facie* case, the California Parties' direct testimony must make a showing as to all three elements.³⁹

14. The Presiding Judge then ruled that due to the California Parties' inability (or refusal) to establish that sellers individually accumulated market power as measured by

³⁴ *Id.*

³⁵ *Id.* P 12.

³⁶ *See* Initial Decision, 130 FERC ¶ 63,017 at P 36 & n.106, P 217.

³⁷ *Id.* P 36 (citing March 21 Order, 122 FERC ¶ 61,260 at Ordering Paragraph (B)).

³⁸ *Id.* P 36.

³⁹ *Id.*

the hub-and-spoke test, they failed to establish a *prima facie* case; consequently, she granted the motions for summary judgment.⁴⁰

D. Opinion No. 512

15. In Opinion No. 512, the Commission affirmed, in all respects, the Initial Decision. Opinion No. 512 confirmed that pursuant to section 206 of the FPA, the California Parties, as the complainant, bore the burden of proof to establish a *prima facie* case against the respondent sellers.⁴¹ In Opinion No. 512 the Commission determined that the ALJ correctly concluded that the California Parties failed to establish that the sellers individually accumulated market power as measured by the hub-and-spoke test.⁴² Opinion No. 512 also confirmed the ALJ's finding that the California Parties raised issues of fact regarding whether all or some of the sellers satisfied the Commission's reporting requirement.⁴³ Nevertheless, without a showing that the sellers accumulated market power under the hub-and-spoke analysis, the Commission affirmed that the California Parties could not demonstrate that a nexus existed between the sellers' improper or untimely quarterly transaction reports and their individual accumulation of market power.⁴⁴

II. Request for Rehearing

16. On June 3, 2011, California Parties filed their Request for Rehearing of Opinion No. 512 and Motion for Expedited Treatment (Rehearing Request) specifying four errors. These specifications of error repeat the previously-rejected arguments raised in earlier requests for rehearing and/or their brief on exceptions to the Initial Decision. California Parties allege that Opinion No. 512 misinterprets the Ninth Circuit Remand and/or the Commission remand orders.⁴⁵

⁴⁰ *Id.* PP 37, 68, 212, 218, 229, 238.

⁴¹ Opinion No. 512, 135 FERC ¶ 61,113 at P 30 & n.70.

⁴² *Id.* P 32 & n.73.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Rehearing Request at 19-20.

- A. In finding that the requisite “accumulation of market power” may be established only by proving that each Respondent itself possessed market power as measured under the 20 percent generation capacity hub-and-spoke test.
- B. In finding that the requisite “nexus” between a particular Respondent’s improper or untimely filing of quarterly transaction reports and the accumulation of market power may be established only by proving a “direct causal relationship” between an individual seller’s misreporting and that same seller’s individual accumulation of market power.
- C. In finding that each Respondent’s reporting deficiencies are immaterial in the absence of a showing that the Respondent accumulated market power as measured under the 20 percent generation hub-and-spoke test.
- D. In finding that evidence of unauthorized sales of energy or ancillary services is outside the scope of this proceeding.

III. Supplement to Request for Rehearing

17. On July 7, 2011, California Parties filed a Supplement to their Request for Rehearing of Opinion No. 512 to bolster its arguments (Supplement).⁴⁶ The Supplement

⁴⁶ California Parties request that the Commission accept the Supplement arguing that the Commission may allow additional evidence on rehearing if it was not available for consideration by the Commission at the time of the final order. *See* Supplement at 1-2 & n.2 (citing 18 C.F.R. § 385.713(c)(3) (2010); *Dominion Cove Point LNG, LP* 118 FERC ¶ 61,007, at P 88 (2007) (accepting evidence submitted on rehearing regarding safety issues, vacated in part on other grounds); *ANR Pipeline Co.*, 109 FERC ¶ 61,038 (2004) (accepting new evidence submitted with a request for rehearing); *Streamlining Comm’n Procedures for Review of Staff Action*, 55 Fed. Reg. 50677, at 50,680 (Dec. 10, 1990), FERC Stats. and Regs., Regulations Preambles 1986-1990 ¶ 30,906, at 31,863 (1990) (Order No. 530) (explaining that, “[u]nder compelling circumstances it may be appropriate for the Commission to grant requests to supplement rehearing material on a timely basis after the 30 days has expired. The statutory deadline will have been met by the filing of whatever request for rehearing can be prepared and filed within that 30-day time frame and, upon a showing of good cause, the Commission can permit a reasonable and timely supplement”). Here, California Parties argue there is good cause to allow the supplement, as the oral argument took place after the thirty day time limit for requests for rehearing and the statements referenced go directly to the California Parties’ main points.

includes certain statements made by the Commission's Solicitor during a June 8, 2011 oral argument before the Ninth Circuit in another matter:⁴⁷

Well, the Commission, as well as any would be complainant, consumers, competitors of the market-based sellers, can look at the actual price figures that are reported [in quarterly transaction reports] and determine whether in fact there is some type of anomaly, some type of anomalous result that would suggest that in fact the rate ... is not appropriately the result of a competitive market

I want to emphasize that should the Commission find anomalous results ... the Commission has full remedial authority to do whatever it needs to do to protect consumers. This can be ... full retroactive refunds. This can be the full disgorgement of profits.⁴⁸

California Parties contend that these statements "concede" to California Parties' argument that the purpose of after-the-fact quarterly transaction reports was always to allow an after-the-fact assessment of actual market behavior and to look for evidence of anomalous results, rather than to simply re-run the Commission's initial market power screens.

18. California Parties then cite the following statement:

The before-the-fact market-based rate authorization doesn't have any relevance or legality without the after-the-fact reporting of particular rates.

The Commission's approach is a two phase approach. We believe that the two step approach is consistent with what this Court said in *Lockyer*. The Court said that the after-the-fact reporting requirements are an integral component of the before-the-fact market-based rate authorization. The change in rate is really a two step process brought about by the initial

⁴⁷ See Supplement and Appendix A thereto (citing transcription of recording of oral argument in *Montana Consumer Counsel v. FERC*, No. 659 F.3d 910 (9th Cir. 2011)).

⁴⁸ Supplement at 3, Appendix A at 17:1-7; 18:6-15.

filing of the market-based rate tariff and the after-the-fact reporting of the particular rate.⁴⁹

California Parties contend that here the Commission's Solicitor conceded the critical role of after-the-fact reporting.

IV. Discussion

A. Preliminary Matters

19. We will accept the Supplement; the California Parties filed it before the Commission acted on the California Parties' Request for Rehearing.

B. The Hub-and-Spoke Market Power Test

1. California Parties' Arguments on Rehearing

20. The California Parties once more raise the argument that Opinion No. 512 erred by finding that the requisite "accumulation of market power" may be established only by proving that each Respondent itself possessed market power as measured under the twenty percent generation capacity hub-and-spoke test. California Parties state that while the Commission used the capacity-based hub-and-spoke test in the 1990s, and early 2000s as a predictive screen, it later supplemented that test with an entirely different analysis – using entirely different price and quantity data, rather than the capacity information measured in the hub-and-spoke analysis – to determine whether sellers actually exercised market power on an ongoing basis. California Parties argue that under the hub-and-spoke test, no seller could possibly fail the test during the relevant time periods.⁵⁰ California Parties urge that using tests other than the hub-and-spoke is consistent with the Commission's approach during the relevant period. According to the California Parties, a hearing that relied solely on the hub-and-spoke test would not reveal any new information and would render sellers' quarterly reports "useless." California Parties argue that a hearing to determine solely whether sellers pass the hub-and-spoke screening test is not what the Ninth Circuit Remand ordered, nor is it what the Commission's remand orders, "properly interpreted," demand. California Parties contend that to rely on the hub-and-spoke test as the sole basis for determining whether sellers

⁴⁹ *Id.* at 3, Appendix A at 19:17-19; 19:25-20:8.

⁵⁰ The relevant time periods for this proceeding were the Summer Period, January 1, 2000 through October 1, 2000, and the CERS Period, January 18, 2001 through June 20, 2001. *See* Opinion No. 512, 135 FERC ¶ 61,113 at P 15 & n.37.

actually exercised market power on an ongoing basis would be to pretend that market power did not exist or did not matter.⁵¹

2. Commission Ruling

21. The California Parties again have argued that both the Commission and the ALJ “misinterpreted” and misapplied the Commission’s remand orders in that Opinion No. 512 affirmed the requirement of an initial showing of seller market power under the hub-and-spoke analysis. Again, the California Parties are mistaken. As fully supported by the record, the Commission was justified in affirming that the Presiding Judge correctly interpreted the Commission’s directives in this proceeding.⁵² The Initial Decision is consistent with the Commission’s unambiguous orders on remand that *specifically required* the ALJ and the parties to use the Commission’s hub-and-spoke analysis to determine whether, in the first instance, each supplier with alleged reporting deficiencies in 2000-2001 had accumulated market power. The Initial Decision followed the Commission’s explicit directives and correctly found that the California Parties did not follow these instructions and thus failed to provide this essential evidence. Therefore, the ALJ appropriately concluded that this failure alone is sufficient grounds to justify summary disposition as to all sellers.⁵³

22. The Commission was explicit in its prior orders. The March 21 Order clearly indicated that the Commission would accept:

evidence that any seller that violated the quarterly reporting requirement failed to disclose 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* Sellers similarly will be permitted to present evidence to the contrary. *The hearing will focus on the individual facts and circumstances relevant to each seller.*⁵⁴

⁵¹ Rehearing Request at 2-5, 21-34; Supplement at 3.

⁵² See generally Opinion No. 512, 135 FERC ¶ 61,113 at PP 36-42; Initial Decision, 130 FERC ¶ 63,017 at PP 200-213.

⁵³ Opinion No. 512, 135 FERC ¶ 61,113 at P 36; Initial Decision, 130 FERC ¶ 63,017 at PP 37, 203, 208.

⁵⁴ March 21 Order, 122 FERC ¶ 61,260 at P 2 (emphasis added).

23. Consistent with these directives, the Commission specified the central question in this remanded proceeding to be “whether, based on the facts and circumstances associated with each individual seller, the seller’s improper or untimely filing of its quarterly transactions reports masked an accumulation of market power (*as defined by the Commission’s test for approving market based rates in effect at the time of the transaction*)”⁵⁵

24. The Commission previously confirmed this determination on rehearing, “reject[ing] 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[,]” and explained that “[t]he Commission is required to use the standards for assessing the market power of market-based rate sellers ... in effect at the time the transactions took place,” because doing otherwise would “violate the requirement that all jurisdictional sellers be on notice as to what test will be applied to them” and would constitute the “retroactive establishment of agency rules and tests.”⁵⁶

25. The Commission sets out the scope and parameters of hearings in its orders, and the Presiding Judge and the participants must adhere to them. In their Rehearing Request, the California Parties again set forth the approach to assessing market power that they would have preferred the Commission take in setting the matter for hearing, while ignoring what the Commission actually required. In the face of the hearing orders’ straightforward language requiring use of hub-and-spoke test, the California Parties seize on the statement in paragraph 27 of the October 6 Order that the purpose of the quarterly reporting is not to re-run the Commission’s market power screens (i.e., the hub-and-spoke test). But the California Parties ignore an earlier paragraph of the same order in which the Commission, among other things, denied their request for rehearing regarding the claimed inadequacy of the hub-and-spoke analysis.⁵⁷ They also ignore a subsequent paragraph of the order in which the Commission found that it was required in this

⁵⁵ See *id.* P 35 and n.70 (emphasis added) (“Commission has long used a 20 percent generation market share as an indicator of potential generation market power.”)

⁵⁶ October 6 Order, 125 FERC ¶ 61,016 at P 30; see also *id.* P 24 (denying the California Parties’ request for rehearing regarding the application of the 20 percent market share screen).

⁵⁷ See paragraph 24 and note 56 *supra*.

proceeding to use the standards of assessing market power in effect at the time the transactions took place.⁵⁸

26. In paragraphs 27 and 28 of the October 6 Order, the Commission simply indicated that it would use the information provided in the quarterly reports to determine the presence of market power concerns.⁵⁹ If such concerns were present, the Commission would undertake further evaluation.⁶⁰ The statements cited in the Supplement are fully consistent with this approach and “conceded” nothing to the contrary.⁶¹ Significantly, the Commission did *not* state in the Order that it would use market power tests other than the hub-and-spoke test as part of this further evaluation. The Commission recognized that the California Parties, in challenging the Commission’s use of its hub-and-spoke analysis, sought “the application of a *different* ‘just and reasonable’ market power test

⁵⁸ *Id.*

⁵⁹ October 6 Order, 125 FERC ¶ 61,016 at P 28 (“This transaction information helps the Commission determine whether there are any indicia of a market power concern based on actual sales”).

⁶⁰ *Id.*

⁶¹ The statements quoted in paragraph 17, *supra*, are entirely consistent with the market-based rate orders under review in that case. *See Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh’g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh’g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh’g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh’g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010). Similarly consistent were the statements regarding the full range of potential remedies. *See* Order No. 697 at PP 5, 964; Order No. 697-A at PP 436, 454. The statements regarding the ability to review actual prices for anomalies are also consistent with these orders. *See* Order No. 697 at P 964; Order No. 697-A at P 457.

As for the discussion (quoted in paragraph 18, *supra*) regarding the Commission’s two-phase approach respecting market-based rates, again, there is no concession as the California Parties suggest. This statement merely reiterates the Commission’s policy and is entirely consistent with the Commission’s orders – the tariff filing “initiates” the rate change and the quarterly report completes it. *See* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 962; Order No. 697-A FERC Stats. & Regs. ¶ 31,268 at PP 436, 456, 461; *see also State of California, ex rel. Bill Lockyer v. FERC*, 383 F.3d. at 1013.

(i.e., one not based on market share)[.]” However, the Commission decided, for reasons of fairness and notice, that “it is reasonable to apply the same ‘just and reasonable’ test that was in effect at the time of the transactions reviewed” in order to determine on remand whether suppliers with reporting deficiencies in 2000-2001 nonetheless continued during that same period to qualify for the presumption that their market-based rates were just and reasonable.⁶² The Commission also concluded that the California Parties’ challenge to the use of the hub-and-spoke test “amounts to a collateral attack on the Commission’s market power analysis, used [at the time of the transactions] to determine the justness and reasonableness of rates”⁶³

27. To accept the argument of the California Parties would require the Commission to now find that, although it explicitly denied their request for rehearing on the use of the hub-and-spoke in paragraph 24 of the October 6 Order, the Commission somehow reversed itself *sub silentio* in paragraphs 27 and 28 of the same order, and allowed participants to employ alternative market power tests of their own choosing and invention in this proceeding. This certainly is not the case.

28. We therefore re-affirm our findings in Opinion No. 512 that the Initial Decision’s finding that the California Parties’ failure to present a hub-and-spoke analysis for any seller justifies summary disposition as to all sellers.⁶⁴ The California Parties do not dispute the Initial Decision’s finding that “[t]he California Parties simply do not apply the hub-and-spoke analysis”⁶⁵

29. Given that the issue of whether suppliers accumulated market power was the threshold issue in this proceeding,⁶⁶ and given the California Parties’ failure to offer any evidence to demonstrate the accumulation of market power under the hub-and-spoke standard, our affirming the grant of summary disposition was appropriate. In addition, the Commission has already ruled on this issue in its remand orders, and California

⁶² October 6 Order, 125 FERC ¶ 61,016 at P 26.

⁶³ *Id.* P 24.

⁶⁴ *See* Opinion No. 512, 135 FERC ¶ 61,113 at P 41; Initial Decision, 130 FERC ¶ 63,017 at P 208.

⁶⁵ *Id.*

⁶⁶ *See* March 21 Order, 122 FERC ¶ 61,260 at P 35 (the 20 percent threshold under the hub-and-spoke test was the issue “the parties and presiding judge should first address”).

Parties' assignment of error here simply repeats arguments on exceptions that we have already ruled represent an impermissible collateral attack of these prior orders. Finally, we find nothing novel or inconsistent with this approach in the statements provided in the Supplement. We therefore deny rehearing on this issue.

C. Remaining Specifications of Error

1. California Parties' Arguments on Rehearing

30. The California Parties' remaining specifications of error repeat the exceptions against the Initial Decision. California Parties contend that Opinion No. 512 misinterpreted the remand orders in that: (i) it affirmed the Initial Decision's requirement of a demonstration of a "nexus" between misreporting, market power, and unjust and unreasonable rates; (ii) it affirmed the finding that alternative evidence of misreporting is "immaterial;" and (iii) it affirmed the finding that evidence of unauthorized sales of energy or ancillary services are outside the scope of this proceeding.⁶⁷

2. Commission Ruling

31. As we decided in Opinion No. 512,⁶⁸ the Commission need not revisit these specifications of error in detail as they also represent impermissible collateral attacks on the Commission's specific findings expressed in the remand orders. We restate our affirming of the Initial Decision in that the ALJ properly followed the directives of the Commission's remand orders. As previously discussed, the Presiding Judge need not have reached the merits of the nexus issue because she found the California Parties had failed to establish one of the essential elements – the accumulation of market power by a seller.⁶⁹ As to misreporting, the ALJ correctly concluded that "in the absence of a showing by the California Parties that any seller accumulated market power under the hub-and-spoke analysis, any seller's reporting deficiencies are immaterial to the resolution of their motions for summary disposition."⁷⁰ Finally, as to the scope of the

⁶⁷ See Rehearing Request at 5-6, 35-39 (nexus); 6-7, 39-40; Supplement at 3-4 (significance of misreporting); Rehearing Request at 7-8, 40-44 (scope of proceeding).

⁶⁸ Opinion No. 512, 135 FERC ¶ 61,113 at P 44.

⁶⁹ *Id.*; Initial Decision, 130 FERC ¶ 63,017 at P 37.

⁷⁰ Opinion No. 512, 135 FERC ¶ 61,113 at P 44; Initial Decision, 130 FERC ¶ 63,017 at P 68. See also *Celotex Corp. v. Gatrett*, 477 U.S. 317, 322-23 (1986) (affirming that summary judgment is proper against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on

(continued...)

proceeding, the Presiding Judge correctly followed the mandate of the Commission as articulated in the Commission's remand orders.⁷¹ We therefore deny rehearing of these issues.

V. Conclusion

32. The Commission denies California Parties' Request for Rehearing of Opinion No. 512, which affirmed that the ALJ correctly concluded that the California Parties failed to establish a *prima facie* case and therefore, the granting of the motions for summary disposition in the Initial Decision was warranted.

The Commission orders:

The request for rehearing is denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

which that party will bear the burden of proof at trial" because the failure to establish even one essential element of the case "necessarily renders all other facts immaterial."); *see also, e.g., Parth v. Pomona Valley Hosp. Med. Ctr.*, 584 F.3d 794, 798 (9th Cir. 2009).

⁷¹ *Id.*