

135 FERC ¶ 61,183  
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

v.

Docket No. EL00-95-236

Sellers of Energy and Ancillary Services  
Into Markets Operated by the California  
Independent System Operator Corporation  
and the California Power Exchange

ORDER ON REQUESTS FOR REHEARING AND CLARIFICATION,  
AND MOTIONS TO DISMISS

(Issued May 26, 2011)

1. In this order, we grant in part and deny in part requests for rehearing of an order on remand from the United States Court of Appeals for the Ninth Circuit (Ninth Circuit),<sup>1</sup> establishing an evidentiary, trial-type hearing before an Administrative Law Judge (ALJ) and holding the hearing in abeyance pending settlement judge procedures.<sup>2</sup> In this order, we clarify the scope of the hearing, address requests for rehearing and clarification, and act on motions to dismiss.

**Background**

2. In the *CPUC Decision*, the Ninth Circuit expanded the scope of the proceeding to include not only the existing matters subject to refund but also:

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<sup>1</sup> *Pub. Util. Com'n of the State of Cal. v. FERC*, 462 F.3d 1027 (9<sup>th</sup> Cir. 2006) (*CPUC Decision*). On April 15, 2009, the Ninth Circuit issued its mandate for Commission action on this remand. See *Pub. Util. Com'n of the State of Cal. v. FERC*, slip op. No. 01-71051 (Apr. 15, 2009).

<sup>2</sup> *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 129 FERC ¶ 61,147 (2009) (Remand Order).

(1) transactions entered into prior to October 2, 2000; (2) forward transactions; and (3) energy exchange transactions. The Remand Order set the matter for hearing and instructed the ALJ to gather evidence on: (1) whether any of the sellers named as respondents in this proceeding engaged in violations of the relevant tariffs, rules or regulations governing the markets, in effect prior to October 2, 2000 in organized markets operated by the California Independent System Operation Corporation (CAISO) and California Power Exchange Corporation (CalPX); and (2) whether any such violation(s) affected the market clearing price for a trading hour during which the violation occurred.<sup>3</sup> The Commission specified that participants may submit evidence with respect to violations of a provision in the then-current CAISO and CalPX tariffs, known as the Market Monitoring and Information Protocol (MMIP), that barred all participants in the CAISO and CalPX markets from engaging in gaming or anomalous behavior in those markets.<sup>4</sup> The Remand Order also defined which categories of the MMIP violations would be addressed in the hearing.<sup>5</sup>

3. The Commission also stated that when it receives the factual determinations of the ALJ with respect to each seller, the Commission will determine what further steps should be taken.<sup>6</sup> In the Remand Order, the Commission also expanded the scope of the hearing to include forward transactions and energy exchange transactions.<sup>7</sup>

4. The Commission received 13 requests for rehearing and clarification raising issues pertaining to the scope of the hearing. Several parties also filed motions to dismiss seeking dismissal from the instant proceeding.<sup>8</sup>

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<sup>3</sup> *Id.* P 19.

<sup>4</sup> *Id.* P 20.

<sup>5</sup> *Id.* P 20-22.

<sup>6</sup> *Id.* P 2.

<sup>7</sup> *Id.* P 3.

<sup>8</sup> Motions to Dismiss were submitted by Avista Corporation doing business as Avista Utilities and Avista Energy, Inc. (Avista), Midway Sunset Cogeneration Company (Midway), and Public Service Company of New Mexico and Tucson Electric Power Company (PNM). CALifornians for Renewable Energy, Inc. (CARE) filed an answer to PNM's and Midway's motions to be excused from the instant proceeding.

5. Settlement judge procedures that commenced in December 2009 did not result in any formal settlement agreements. On July 16, 2010, the Chief Judge terminated the settlement judge procedures and appointed a Presiding Judge. During the pre-hearing conference, the Presiding Judge encouraged participants to request the Commission to act on pending rehearing requests, stating that the Commission clarification of the scope of the hearing is needed in order to proceed with the hearing.<sup>9</sup> Subsequently, multiple parties filed motions requesting that the Commission expedite action on pending requests for rehearing and/or excuse them from further participation in the proceeding by virtue of their settlements.<sup>10</sup>

6. In September 2010, the Commission issued an order soliciting supplemental comments on the following two questions: (1) which violations and unlawful activity, as proposed by the California Parties, should be included in the scope of the instant proceeding and (2) what are the grounds for inclusion or exclusion of a specific violation or unlawful activity from the scope of the instant proceeding.<sup>11</sup>

7. The Commission received a total of 17 filings<sup>12</sup> in response to the September 2010 Order. Several of the filings did not address the questions posed

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<sup>9</sup> Prehearing Conference Transcript, Docket No. EL00-95-248 (Aug. 2, 2010).

<sup>10</sup> Motions for expedited consideration of rehearing requests were filed by the following entities: Indicated Suppliers (American Electric Power Service Corp., Constellation Energy Commodities Group, Inc. and Constellation NewEnergy Inc., MPS Merchant Services, NV Energy, Powerex Corp., Shell Energy North America, and TransAlta Energy Marketing (US) Inc.), Mirant Corporation and RRI Energy, Inc., Indicated Public Entities (California Cities of Redding, Santa Clara, Pasadena, and Burbank, the Modesto Irrigation District, the Turlock Irrigation District, the Sacramento Municipal Utility District, and the Arizona Power Cooperative, Inc.).

<sup>11</sup> *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 132 FERC ¶ 61,209 (2010) (September 2010 Order).

<sup>12</sup> Three of the 17 filings are answers to the supplemental comments. In addition, the California Parties filed an answer to one of the answers to supplemental comments. Rule 213(a) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a) (2011), prohibits an answer to an answer unless otherwise permitted by the decisional authority. We are not persuaded to allow the California Parties' answer to the answer to supplemental comments.

by the Commission in the September 2010 Order but reiterated the arguments made in the rehearing requests.<sup>13</sup>

## **Discussion**

### **A. Whether the Commission Should Dismiss from This Proceeding Parties Who Have Settled with the California Parties?**<sup>14</sup>

8. Ibedrola Renewables Inc., MPS Merchant Services, Inc. (MPS),<sup>15</sup> Avista, American Electric Power Service Corporation (AEP), Indicated Settled Parties,<sup>16</sup> Mirant Corporation (Mirant)<sup>17</sup> and RRI Energy, Inc. (RRI),<sup>18</sup> and PacifiCorp ask the Commission to clarify that parties who entered into global agreements with the California Parties are no longer parties to and not obligated to participate in the instant proceeding. In support, they argue that the Commission has previously

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<sup>13</sup> On March 11, 2011, Commissioner Cheryl A. LaFleur issued a memorandum to the file in sixty dockets, including Docket No. EL00-95, documenting her decision, based on a memorandum from the Office of General Counsel's General and Administrative Law section, dated February 18, 2011, not to recuse herself from considering matters in those dockets.

<sup>14</sup> For the purpose of this proceeding, the California Parties are Pacific Gas and Electric Company, Southern California Edison Company, the State of California *ex rel.* Edmund G. Brown, Attorney General, and the Public Utilities Commission of the State of California.

<sup>15</sup> MPS is also known as Aquila Merchant Services, Inc. and Aquila Power Corporation.

<sup>16</sup> Indicated Settled Parties include Arizona Public Service Company, Pinnacle West Capital Corporation, and APS Energy Services Company, BP Energy Company, Constellation Energy Commodities Group, Inc., Dynegy Power Marketing, Inc., West Coast Power, LLC, El Segundo Power LLC, Long Beach Generation LLC, Cabrillo Power I LLC, Cabrillo Power II LLC, Idaho Power Company and IDACORP Energy L.P., Portland General Electric Company, Public Service Company of Colorado, and Puget Sound Energy Company.

<sup>17</sup> Mirant states that it acts on behalf of Mirant Americas Energy Marketing, LP, Mirant California, LLC, Mirant Delta, LLC, and Mirant Potrero, LLC.

<sup>18</sup> Mirant and RRI filed a joint request for rehearing.

dismissed settled parties from ongoing proceedings.<sup>19</sup> MPS, Indicated Settled Parties, Mirant and RRI, and AEP are concerned that if the California Parties are not precluded from using the evidence of settled parties' trading practices, they may still be compelled to participate in the hearing to ensure that no adverse findings are made in their absence. Accordingly, they request the Commission to clarify that settled parties' market behavior will not be examined during the hearing and will have no bearing on the decision of the proceeding.

9. Midway and PNM filed motions seeking to be dismissed from the proceeding by virtue of their respective settlements with the California Parties. They state that their dismissal from the proceeding should be considered without prejudice to the California Parties presenting their full array of evidence, including evidence concerning actions by PNM and Midway that may have affected market clearing prices, when seeking relief from parties who have not settled with the California Parties. In response, CARE opposes the motions to dismiss, arguing that the record of the proceeding is not complete and that before the trial-type hearing can be commenced, all participants must provide information on all sales in the western markets.

#### **Commission Determination**

10. We clarify that parties who have settled with the California Parties are hereby dismissed as respondents from the instant proceeding by virtue of their settlements with the California Parties. The claims that the California Parties may have against the settled parties are barred from being relitigated in the instant proceeding. No remedies will be available against the parties who settled with the California Parties.

11. We, however, also clarify that the settled parties may be subpoenaed to testify as witnesses and may be subject to evidence production and data requests as any other entity that has first-hand knowledge of the events during the relevant period. Each such request will be subject to the rules of discovery and evidence applicable to the ALJ proceedings. In addition, the California Parties and other parties are not precluded from offering evidence involving the settled parties' market behavior, provided such evidence submissions are relevant to the scope of the hearing and meet other applicable rules of evidence.

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<sup>19</sup> Parties cite to *State of Cal., ex rel. Bill Lockyer, Attorney of the State of Cal. V. British Columbia Power Exchange*, 123 FERC ¶ 61,042, at P 13 (2008).

**B. Whether the Hearing Should Address the Same Trading Practices That Have Been Resolved through Settlements with Trial Staff in Various Show Cause Proceedings?**<sup>20</sup>

12. MPS, Powerex Corp. (Powerex), Sempra Energy Trading LLC (Sempra), Shell Energy North America (Shell),<sup>21</sup> and AEP argue that the instant proceeding includes exactly the same practices that were resolved through settlements with the Commission Trial Staff in the Show Cause Proceedings. Avista argues that the California Parties are precluded from pursuing their claims against Avista because of the Trial Staff's finding that Avista did not engage in any improper trading behavior or any efforts to manipulate the market.<sup>22</sup> Sempra and AEP argue that pursuant to Commission precedent,<sup>23</sup> the California Parties are precluded from relitigating any claims and/or issues regarding their trading practices that were the subject matter of the settlement agreement with Trial Staff. Sempra and Avista also argue that the relitigation of the same trading practices is precluded by the doctrines of *res judicata* and collateral estoppel.

13. Powerex adds that relitigation of the same trading practices is precluded by the June 2009 Order<sup>24</sup> binding all entities that intervened in the Show Cause Proceedings to the terms of the settlement between Powerex and Trial Staff. Powerex believes that permitting relitigation of the same gaming practices would constitute a collateral attack on the June 2009 Order. Powerex, Shell, and AEP also argue that a decision to allow relitigation of the same trading practices would

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<sup>20</sup> *American Electric Power Service Corp., order to show cause concerning gaming and/or anomalous market behavior*, 103 FERC ¶ 61,345 (2003) (Gaming Order); *New England Power Co., order to show cause concerning gaming and/or anomalous market behavior through the use of partnerships*, 103 FERC ¶ 61,364 (2003); *Investigation of Anomalous Bidding Behavior and Practices in the Western Markets*, 103 FERC ¶ 61,347 (2003); and others (collectively show Cause Proceedings).

<sup>21</sup> Shell was formerly known as Coral Power, L.L.C.

<sup>22</sup> *See Avista Corp.*, 107 FERC ¶ 61,055, at P 11 (2004).

<sup>23</sup> Sempra and AEP cite to *Aquila Merchant Serv., Inc.*, 127 FERC ¶ 61,218 (2009) (June 2009 Order).

<sup>24</sup> Powerex cites to *id.* P 34.

undermine the Commission's well-established policy of encouraging settlements.<sup>25</sup>

14. Shell and AEP add that even the most generous potential remedy available in the instant proceeding would be appreciably less than the amounts they have already agreed to refund pursuant to their respective settlement agreements with Trial Staff.<sup>26</sup> Shell also argues that unless and until the Ninth Circuit issues an order setting aside the Commission's acceptance of its settlement with Trial Staff, the settlement remains the final resolution of Shell's liability for alleged violations committed prior to October 2, 2000.

15. In addition, Sempra states that if the Commission allows relitigation of Sempra's trading practices, the Commission then should act on Sempra's July 25, 2003 rehearing request of the Gaming Order. Sempra explains that its rehearing request would be no longer moot and the Commission would have to address the issue of whether Sempra's trading practices constituted tariff violations.

#### **Commission Determination**

16. The trading practices that were addressed by the Commission in the Show Cause Proceedings may also be examined in the instant proceeding. Those proceedings were initiated by the Commission pursuant to its investigatory and prosecutorial authority, and the resulting settlements were with Commission Trial Staff, not with the California Parties. The instant proceeding was initiated by San Diego Gas and Electric Company's (SDG&E) complaint. In the *CPUC Decision*, the Ninth Circuit found that "[t]he two types of proceedings are quite distinct. One is investigative and prosecutorial; the other is a contested proceeding."<sup>27</sup> The Ninth Circuit also found that the Commission's investigation and enforcement proceeding does not preclude a civil proceeding instituted by a third party complaint.<sup>28</sup> Specifically, the Ninth Circuit stated:

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<sup>25</sup> Shell cites to *San Diego Gas & Elec. Co.*, 112 FERC ¶ 61,176, at P 1 (2005); and *Enron Power Mktg, Inc.*, 106 FERC ¶ 61,182, at P 12 (2004).

<sup>26</sup> Shell cites to *Coral Power, LLC*, 125 FERC ¶ 61,176, at P 17 (2008) (describing the Coral settlement as a "settlement that will return total revenues... more than would be achieved through litigation.").

<sup>27</sup> *CPUC Decision*, 462 F.3d 1050.

<sup>28</sup> *Id.* at 1049-1051.

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.<sup>29</sup>

17. The Remand Order established a trial-type hearing to address the California Parties' claims against sellers based on their trading practices prior to October 2, 2000. By disallowing the reexamination of these trading practices on the ground that the same trading practices have been resolved through settlements in the investigative proceeding, the Commission would, in effect, deny the California Parties an opportunity to pursue their claims against the sellers in the instant proceeding. Such an approach would violate the directive given to the Commission by the Ninth Circuit. For these reasons, we deny the requests by the sellers who have settled with Trial Staff to exclude an examination of their market practices from the scope of this proceeding.<sup>30</sup>

18. In regard to Sempra's request to act on its request for rehearing filed in a show cause proceeding,<sup>31</sup> that request for rehearing has been rendered moot as a result of its settlement with Trial Staff resolving all issues in that proceeding. The issue of whether Sempra's market practices constituted tariff violations will be examined in the instant proceeding and Sempra will have ample opportunity to present evidence on this issue.

C. **Whether the Commission Should Expand the Scope of the Hearing Beyond the Categories Established in the Remand Order?**

19. On rehearing,<sup>32</sup> the California Parties request that the Commission expand the scope of the hearing beyond the MMIP violation categories established in the Remand Order. Specifically, the California Parties request that the list of

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<sup>29</sup> *Id.* at 1051.

<sup>30</sup> This also applies to Avista.

<sup>31</sup> Docket No. EL03-137, *et al.*

<sup>32</sup> In addition to the request for rehearing, the California Parties also submitted supplemental comments pursuant to September 2010 Order and an answer to supplemental comments. The summary of the California Parties' arguments are based on these three filings.

violations under consideration in the instant proceeding be expanded to include the following categories: (1) trading practices that were previously excluded from the list and definitions of MMIP violations in the Show Cause Proceedings;<sup>33</sup> (2) other CAISO and CalPX tariff violations;<sup>34</sup> (3) violations of Commission orders;<sup>35</sup> (4) violations of individual seller's tariffs;<sup>36</sup> (5) violations of the Western System Coordinating Council (WSCC) reliability rules;<sup>37</sup> (6) violations of the good faith obligation under the California state law that is the governing law in both CAISO

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<sup>33</sup> The California Parties refer to underscheduling load and overscheduling load. The Remand Order excluded from the scope of the hearing underscheduling load and overscheduling load on the ground that although both practices technically violate the MMIP, underscheduling load had the effect of reducing power prices rather than increasing the profits of the entities that engaged in the strategy, and overscheduling load actually helped reduce reliability problems in the real-time market. *See* Remand Order, 129 FERC ¶ 61,147 at n.59 (citing Gaming Order, 103 FERC ¶ 61,345 at P 56-60).

<sup>34</sup> *For a complete list of CAISO tariff provisions see* California Parties Rehearing Request at 9-10; and California Parties Supplemental Comments at 9.

<sup>35</sup> The California Parties refer to the Commission's "No Pay" order, *Cal. Indep. Sys. Operator Corp.*, 86 FERC ¶ 61,122 (1999) (accepting for filing Amendment No. 13 to the CAISO Tariff imposing penalties for uninstructed deviations by ancillary services providers). *See* California Parties Rehearing Request at 10.

<sup>36</sup> The California Parties argue that sellers' market behavior allegedly amounting to market manipulation and gaming was also in violation of their own tariffs. *See* California Parties Rehearing Request at 7 (citing at *State of Cal., ex rel. Bill Lockyer, Att. Gen. of the State of Cal.*, 125 FERC ¶ 61,016, at n.53 (2008)).

<sup>37</sup> California Parties argue that the WSCC reliability standards were incorporated by reference into the then-current CAISO tariff and thus a violation of the WSCC reliability standard constitutes a CAISO tariff violation. California Parties also argue that the WSCC's Minimum Operating Reliability Criteria were evaded by various strategies, including various withholding tactics, such as submitting no bids or high bids during system emergencies, placing generation on reserve shutdown during system emergencies, and intentionally failing to bring generation back on-line in a timely fashion after outages. *See* California Parties Rehearing Request at 8-9.

and CalPX tariffs;<sup>38</sup> and (7) all other forms of illegal conduct, such as wash trading, gas market manipulation, false reporting to publications that compile price indices, and collusion.<sup>39</sup>

20. The following parties filed supplemental comments in support for the California Parties' request to expand the scope of the hearing: City of Tacoma, Washington and Port of Seattle, Washington, and Public Utilities District No. 1 of Snohomish County, Washington. Other supplemental comments challenged the California Parties' request to expand the scope of the hearing beyond the MMIP violations.<sup>40</sup>

21. The recurring argument proffered by parties opposed to expanding the scope of the hearing is that the Commission has fully addressed and rejected California Parties' arguments concerning the same types of market behavior in the

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<sup>38</sup> The California Parties refer to CAISO Tariff section 20.7 and CalPX Tariff section 15.6. *See* California Parties Rehearing at 8, n. 34.

<sup>39</sup> The California Parties argue that the above identified activities fit squarely within the "gaming" and "anomalous behavior" definitions in sections 2.1.1 and 2.1.3 of the MMIP. *See* California Parties Answer to Supplemental Comments at 14-15.

<sup>40</sup> Parties challenging the California Parties' request are Mieco Inc., Indicated Public Entities (Bonneville Power Administration, Western Area Power Administration, the California Cities of Redding, Santa Clara, Glendale, Pasadena, and Burbank, the Modesto Irrigation District, the Turlock Irrigation District, Sacramento Municipal Utility District, Arizona Electric Power Cooperative, Inc.), Shell, Competitive Supplier Group (American Electric Power Service Corp., Avista, Edison Mission Marketing and Trading, MPS, Powerex, and TransAlta Energy Marketing (US) Inc.), Nevada Power Company and Sierra Pacific Company, and Trial Staff. Indicated Parties (Portland General Electric Company, Idaho Power Company, and IDACORP Energy L.P.) filed comments in support of the Competitive Supplier Group's comments. Avista and Dynegy Power Marketing, Inc., Cabrillo Power I LLC, Cabrillo Power II LLC, El Segundo Power LLC, Long Beach Generation LLC, and West Coast Power, LLC filed answers to the California Parties' supplemental comments opposing their request to expand the scope of the hearing. Several parties, such as Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc., Puget Sound Energy, Inc., and the Northern California Power Agency, did not respond to the specific question posed by the September 2010 Order but rather tendered arguments on the issue of the effect of settlements with the California Parties. This issue is fully addressed above.

Show Cause Proceedings. Indicated Public Entities, Shell, and Competitive Supplier Group (CSG) argue that while the Show Cause Proceedings were prosecutorial in nature, all parties were afforded an opportunity to present arguments on what constitutes a tariff violation. They argue that the California Parties sought rehearing of the Commission's determination on this issue in the Gaming Proceeding and their rehearing request was considered and denied.<sup>41</sup>

22. According to the Indicated Public Entities, the Commission exercised its prosecutorial discretion when it decided in the Show Cause Proceedings not to prosecute certain entities, transactions, and practices; however, the Commission's determination of which market behavior constituted a tariff violation in the Show Cause Proceedings was an exercise of the Commission's expertise, and these determinations were made on the basis of evidence presented by parties on both sides of the issue.<sup>42</sup> Thus, parties conclude, the issues raised by the California Parties have already been fully litigated in the Show Cause Proceedings and the California Parties' request to expand the scope of the instant proceeding beyond the previously established MMIP categories constitutes a collateral attack on the Commission's prior orders in the Show Cause Proceedings.

### **Commission Determination**

23. In the Show Cause Proceedings, the Commission's determination of which practices constituted a violation of the then-current tariffs was based on the consideration of whether a specific trading practice merited enforcement action. In denying "the California Parties' repeated requests [to] broaden the scope of the show cause proceedings" to include other transactions, the Commission stated that "[t]he determination of which practices to investigate in these show cause proceedings falls within the Commission's prosecutorial discretion."<sup>43</sup> The Commission also noted that the "show cause proceedings were not intended to be catch-all proceedings concerning every conceivable California-related matter that

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<sup>41</sup> Parties cite to *Am. Electric Power Serv. Corp.*, 106 FERC ¶ 61,020 (2004).

<sup>42</sup> Parties argue that although the proceedings in which the MMIP categories were established were prosecutorial in nature, the legal determinations in those proceedings were made based on arguments and evidence submitted by both sides as in any civil proceeding initiated by a third party complaint.

<sup>43</sup> *Am. Electric Power Serv. Corp.*, 106 FERC ¶ 61,020 at P 85.

fell outside of the scope of the California Refund Proceeding, but are proceedings to enforce compliance with Commission-accepted tariffs.”<sup>44</sup>

24. In the *CPUC Decision*, the Ninth Circuit stated that:

... the California Parties seek a market-wide refund remedy for *tariff* violations pursuant to § 309 through its adjudicative filing. The fact that FERC may be seeking similar remedies against specific companies in its § 1b investigations does not justify its denial of the California Parties' request for § 309 relief. 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. 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.<sup>45</sup>

25. The Ninth Circuit's directive requires that the California Parties be afforded an opportunity to litigate in this complaint proceeding the issue of whether tariffs were violated. Limiting the scope of the hearing to the previously established MMIP violation categories would be equivalent to denying the California Parties this opportunity.

26. On rehearing, the California Parties identified seven categories of additional market practices that they seek to introduce in the hearing. We believe only five of these categories should be included in the scope of the hearing. Specifically, we expand the scope of the hearing to include: (1) market practices that were previously excluded from the list and definitions of MMIP violation categories in the Show Cause Proceedings; (2) other CAISO and CalPX tariff violations; (3) violations of Commission orders. We find that the inclusion of these three items is consistent with the Ninth Circuit's directive to address all tariff violations that allegedly took place prior to October 2, 2000.

27. We will also allow the inclusion of violations of individual sellers' tariffs. We, however, remind the parties that the issues involving quarterly reporting

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<sup>44</sup> *Id.* P 87.

<sup>45</sup> *CPUC Decision*, 462 F.3d at 1051 (*emphasis added*).

requirement violations have already been resolved.<sup>46</sup> While the quarterly data could be used to identify price and trading anomalies, one would need additional evidence to conclude that a market participant had manipulated the market or violated its tariff.<sup>47</sup> To succeed on the merits, the California Parties are thus required to demonstrate that a specific trading practice violated a specific provision in the seller's own tariffs.

28. We also allow the inclusion of market practices, such as wash trading, gas market manipulation, false reporting to publications that compile price indices, and collusion to the extent such conduct violated a then-current tariff. In their answer to supplemental comments, the California Parties argue that the above identified conduct violated MMIP sections 2.1.1 and 2.1.3. While we leave it to the Presiding Judge to make an initial determination on whether the above identified market practices violated MMIP or other tariff provisions, we reiterate that the California Parties are expected to be very specific when presenting their arguments and evidence on this issue. The California Parties are required to specify which tariff provision and/or portion of the tariff provision the above identified conduct was violated. General allegations will not suffice.

29. However, we will not permit any violations of the WSCC reliability rules to be addressed in the hearing. The WSCC reliability rules were only enforceable against entities that had voluntarily entered into an agreement with the WSCC. Parties were also free to withdraw from the WSCC agreement.<sup>48</sup> Except for violations of the disturbance control standard which triggered an automatic requirement to increase operating reserves, the sole remedy for all other reliability criteria violations was a monetary penalty.<sup>49</sup> In addition, it was up to WSCC to determine whether a violation occurred and pursue sanctions for such violation.<sup>50</sup> Under these circumstances, we believe it would be inappropriate to include WSCC reliability rules violations in the scope of the hearing, as the parties to WSCC agreement were not on notice that they may also be subject to refund for their WSCC reliability rules violations, if any.

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<sup>46</sup> *State of Cal., ex rel. Bill Lockyer, Att. Gen. of the State of Cal.*, Opinion No. 512, 135 FERC ¶ 61,113 (2011).

<sup>47</sup> *See State of Cal., ex rel. Bill Lockyer, Att. Gen. of the State of Cal.*, 125 FERC ¶ 61,016 n.53.

<sup>48</sup> *Western Sys. Coordinating Council*, 87 FERC ¶ 61,060, at 61,232 (1999).

<sup>49</sup> *Id.* at 61,232.

<sup>50</sup> *Id.*

30. We will also not permit the good faith obligation under the California law, to be addressed in the hearing, because it would require the Commission to interpret and apply state contract law.<sup>51</sup> In addition, considering a state law violation would be beyond the scope of the Ninth Circuit's mandate that the Commission consider "evidence that *tariffs* have been violated."<sup>52</sup>

31. Accordingly, we clarify on rehearing that the Presiding Judge is to address the following three issues: (1) which market practices and behaviors constitute a violation of the then-current CAISO, CalPX, and individual seller's tariffs and Commission orders; (2) whether any of the sellers named as respondents in this proceeding engaged in those tariff violations; and (3) whether any such tariff violations affected the market clearing price. The five categories described by California Parties that we have agreed to include in the scope of the hearing are subsumed in these three issues. At his discretion, the Presiding Judge will decide in which order to examine the above- listed issues.

#### **D. Miscellaneous Issues**

32. In their rehearing request, the California Parties request the Commission to clarify that they may present evidence demonstrating that the market clearing price in a specific trading hour was affected by unlawful conduct committed outside that trading hour. The California Parties also seek clarification that would allow them to adduce evidence demonstrating that market clearing prices were affected by any seller, not only respondents in this proceeding.

33. Bonneville Power Administration (BPA)<sup>53</sup> requests that the Commission clarify the description of SDG&E's complaint included in the Remand Order by specifying that SDG&E's complaint named as respondents only the sellers subject to the Commission's jurisdiction. BPA also argues that the Commission should clarify that the hearing in the instant proceeding was established to investigate the

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<sup>51</sup> See *Prohibition of Energy Market Manipulation*, 114 FERC ¶ 61,047, at P 37 (2006) (The Commission expects parties to continue to resolve most contract disputes, including those based on claims of fraud in the inducement, without the involvement of the Commission, relying on state and federal courts to apply contract law as appropriate).

<sup>52</sup> *CPUC Decision*, 462 F.3d at 1051 (*emphasis added*).

<sup>53</sup> BPA filed a motion for clarification jointly with City of Santa Clara, City of Redding, Modesto Irrigation District, Turlock Irrigation District, City of Burbank, City of Glendale, City of Pasadena, and the Sacramento Municipal Utility District.

justness and reasonableness of the rates and charges of public utilities that sold energy and ancillary services to or through the CAISO and CalPX.<sup>54</sup>

34. In a separate request for expedited clarification, the California Parties request that the Commission clarify that in the Remand Order, the Commission intended to include in the scope of the hearing “Out of Market (OOM) sales made through the [CAISO] for periods greater than twenty-four hours, up to and including one month . . .” and not block forward sales.<sup>55</sup> The California Parties explain that in *CPUC Decision*, the Ninth Circuit reversed the Commission’s decision to limit refunds only to transactions of 24-hour or less in duration.<sup>56</sup> In the California Parties’ opinion, the Commission misinterpreted the Ninth Circuit’s finding as a directive to include in the scope of the proceeding the block forward market transactions, while no one had sought to include the block forward market transactions in the scope of the instant proceeding.

35. The California Parties also ask the Commission to address their motion seeking summary disposition and consolidation of the instant proceeding with several other proceedings.

### **Commission Determination**

36. In *CPUC Decision*, the Ninth Circuit stated that “[it does] not prejudice how [the Commission] should address the merits or fashion a remedy if appropriate.”<sup>57</sup> Consistent with the Ninth Circuit’s directive to examine whether relief is warranted for possible tariff violations committed prior to October 2, 2000, the Commission instituted a trial-type hearing and defined its scope. In the Remand Order, we instructed the ALJ to examine: (1) whether any of the sellers *named as respondents in this proceeding* engaged in violations of the relevant tariff, rules or regulations governing the markets, in effect at the time in organized markets operated by the CAISO and CalPX; and (2) whether any such

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<sup>54</sup> BPA cites to *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 92 FERC ¶ 61,172, at 61,603 (2000) (August 2000 Order).

<sup>55</sup> California Parties Expedited Request for Clarification at 2.

<sup>56</sup> *CPUC Decision*, 462 F.3d at 1058.

<sup>57</sup> *Id.* at 1051.

violation(s) affected the market clearing price *for a trading hour* during which the violation occurred.<sup>58</sup>

37. We believe that it would be inappropriate to expand the proceeding to include market behavior by non-parties. The respondents in the instant proceeding would be placed in the undesirable position of having to explain or defend the actions of non-parties. The hearing will focus only on specific conduct by specific respondents. The California Parties may introduce evidence pertaining to conduct by non-parties but only for the purpose of demonstrating specific unlawful practices by the respondents in the proceeding.

38. For the matters set for hearing in this proceeding, we are persuaded to allow evidence of potential effect of unlawful conduct outside a trading hour on the market clearing prices in that trading hour. The California Parties will be required to demonstrate the nexus between the market clearing price in a specific trading hour and the unlawful conduct committed by a specific seller at another time.

39. Upon review of specific language in SDG&E's complaint, we agree with BPA that SDG&E's complaint sought "an emergency order capping at \$250 per MWh the prices at which *sellers subject to its jurisdiction* may bid energy or ancillary services" into CAISO and CalPX markets.<sup>59</sup> Further, we agree with BPA that in the August 2000 Order, the Commission instituted a hearing proceeding "to investigate the justness and reasonableness of the rates and charges of *public utilities* that sell energy and ancillary services to or through" the CAISO and CalPX markets. For these reasons, we grant BPA's request for clarification.

40. Upon further review, we find that the Remand Order mistakenly referred to block forward market transactions instead of forward transactions in the CAISO and CalPX markets of more than 24 hours. The California Parties' reference to OOM transactions<sup>60</sup> is confusing, because the Commission had already included OOM transactions in this proceeding,<sup>61</sup> and the Ninth Circuit upheld the

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<sup>58</sup> Remand Order, 129 FERC ¶ 61,147 at P 19.

<sup>59</sup> SDG&E Complaint, Docket No. EL00-95-000, at 1 (Aug. 2, 2000).

<sup>60</sup> OOM transactions were purchase made by the CAISO from sellers outside the CAISO market within 24 hours or less of delivery, and served to stabilize the grid when supply was insufficient to meet demand. *See CPUC Decision*, 463 F.3d at 1051.

<sup>61</sup> *Id.* at 1051, stating that "FERC's July 25, 2001 Order mandated retrospective relief for sales to [CAISO], including out of market (OOM) transactions."

Commission on that finding.<sup>62</sup> We assume that the California Parties meant to ask for clarification that forward transactions in the CAISO and CalPX markets of more than 24 hours were included in the hearing.<sup>63</sup> As directed by the Ninth Circuit, forward transactions in the CAISO and CalPX markets of more than 24 hours are included in the scope of the hearing hearing.

41. We also note that the California Parties' motion for summary disposition and consolidation has been denied by the Commission in a May 24, 2011 order.<sup>64</sup>

The Commission orders:

(A) Clarification is hereby provided, as discussed in the body of this order.

(B) Rehearing requests are hereby granted in part and denied in part, as discussed in the body of this order.

(C) BPA's request for clarification is hereby granted, as discussed in the body of this order.

(D) The California Parties' request for expedited clarification pertaining to forward transactions in the CAISO and CalPX markets of more than 24 hours is hereby granted, as discussed in the body of this order.

(E) Midway's and PNM's motions to dismiss are hereby granted, as discussed in the body of this order.

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<sup>62</sup> *Id.* at 1053, finding that "FERC did not act arbitrarily, capriciously, or in abuse of its discretion when it included the [CAISO] OOM transactions in the Remedy Proceedings."

<sup>63</sup> *Id.* at 1055-58.

<sup>64</sup> *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 135 FERC ¶ 61,177 (2011).

(F) Avista's motion to dismiss is hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Spitzer is not participating.

( S E A L )

Kimberly D. Bose,  
Secretary.