

137 FERC 61,001
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Puget Sound Energy, Inc.

Docket No. EL01-10-026

v.

All Jurisdictional Sellers of Energy and/or
Capacity at Wholesale into Electric Energy
and/or Capacity Markets in the Pacific
Northwest, Including Parties to the Western
Systems Power Pool Agreement

ORDER ON REMAND

(Issued October 3, 2011)

1. This case is before the Commission on remand from the United States Court of Appeals for the Ninth Circuit (Ninth Circuit).¹ In light of the Ninth Circuit's remand order, the Commission orders an evidentiary, trial-type hearing before an Administrative Law Judge (ALJ) to address the issues remanded by the Ninth Circuit.

2. This matter concerns bilateral wholesale energy contracts entered into in the Pacific Northwest spot market between December 25, 2000 and June 20, 2001, involving numerous Commission-jurisdictional and non-Commission-jurisdictional entities, including the California Energy Resources Scheduling (CERS) division of the California Department of Water Resources. On October 26, 2000, Puget Sound Energy, Inc. (Puget) filed a complaint petitioning the Commission for an order setting a prospective cap on the prices at which sellers may sell energy or capacity into the Pacific Northwest wholesale

¹ *Port of Seattle, Washington v. FERC*, 499 F.3d 1016 (9th Cir. 2007) (*Port of Seattle*).

power markets.² The Commission initially dismissed Puget's complaint,³ but upon further consideration established a preliminary evidentiary hearing before an ALJ to facilitate development of a record on whether the rates for bilateral spot market sales, other than sales through the California markets, during the relevant period may have been unjust and unreasonable.⁴ Based upon the ALJ's findings in the preliminary evidentiary hearing, the Commission denied requests for refunds.⁵

3. In its August 24, 2007 opinion, the Ninth Circuit required the Commission to further consider two issues. First, the Ninth Circuit found that the Commission had abused its discretion in denying relief for transactions involving energy purchased in the Pacific Northwest that was ultimately consumed in California. The Ninth Circuit stated that the Commission must, on remand, consider those purchases, including the purchases of energy made by CERS, in its determination of whether refunds are warranted for sales in the Pacific Northwest spot market.⁶ Second, the Ninth Circuit directed the Commission, on remand, to examine in detail the new evidence of market manipulation, submitted after the ALJ made factual findings and account for such evidence in any future orders regarding the award or denial of refunds in this proceeding.⁷ The Ninth Circuit did not address the merits of the issues remanded to the Commission or the appropriate remedies, if any.⁸

4. In this order, we establish an evidentiary, trial-type hearing before an ALJ to address the issues remanded by the Ninth Circuit. We reopen the record to allow the participants to submit the information described below on which the Commission will

² *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 93 FERC ¶ 61,294, at 61,988 (2000) (December 15, 2000 Order).

³ *Id.* at 62,019.

⁴ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 95 FERC ¶ 61,115, at 61,351, 61,365 (2001).

⁵ *Puget Sound Energy, Inc.*, 103 FERC ¶ 61,348 (2003) (June 25, 2003 Order), *reh'g denied*, 105 FERC ¶ 61,183 (2003) (November 10, 2003 Order).

⁶ *Port of Seattle*, 499 F.3d at 1035.

⁷ *Id.*

⁸ Specifically, the Ninth Circuit stated that it “decline[d] to reach the merits of [the Commission’s] ultimate decision to deny refunds but urge the Commission to further consider its decision ...” *Id.*

adjudicate this proceeding. If any party wishes to rely on evidence previously submitted to the Commission, it must resubmit that evidence, along with an explanation of its relevancy to their claims.

I. Background

A. Commission Proceedings

5. This proceeding originated with a complaint filed by Puget under section 206 of the Federal Power Act (FPA)⁹ in October 2000. Puget's complaint requested caps on the prices at which sellers subject to Commission jurisdiction, including sellers of energy or capacity under the Western Systems Power Pool Agreement (WSPP Agreement), may sell energy or capacity into the Pacific Northwest wholesale power markets. Puget alleged that the California and Pacific Northwest were part of a substantially integrated wholesale power market of the Western Interconnection; thus, market conditions in California influenced market conditions in the Pacific Northwest.¹⁰ Puget also requested that, to the extent refunds were necessary, the Commission set a refund date sixty days after the filing of the complaint.¹¹

6. The Commission dismissed Puget's complaint.¹² Subsequently, in response to a complaint filed by San Diego Gas and Electric Company (SDG&E), the Commission adopted a "market monitoring and mitigation plan for the [western] spot markets"¹³ and ordered market participants to engage in settlement discussions, including "settling past accounts related to sales in the Pacific Northwest."¹⁴ The Commission later found the need for further development of the record with regard to the Pacific Northwest sales. Thus, the Commission established a separate evidentiary proceeding to "facilitate development of a factual record on whether there may have been unjust and unreasonable

⁹ 16 U.S.C. § 824e (2006).

¹⁰ Puget October 26, 2000 Complaint, Docket No. EL01-10-000.

¹¹ See October 31, 2000 Notice of Puget Complaint, Docket No. EL01-10-000.

¹² December 15, 2000 Order, 93 FERC at 62,019.

¹³ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 95 FERC ¶ 61,418, at 61,568 (2001).

¹⁴ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 96 FERC ¶ 61,120, at 62,521 (2001).

charges for spot market bilateral sales in the Pacific Northwest for the period beginning December 25, 2000 through June 20, 2001.”¹⁵

7. The preliminary evidentiary hearing was conducted before an ALJ in September 2001. The ALJ recommended to the Commission that no refunds were warranted for wholesale power sales in the Pacific Northwest during the relevant period.¹⁶ The ALJ found no evidence of market power and concluded that the Pacific Northwest spot market was competitive and functional during the relevant period of time. The ALJ found that, while California energy prices affected energy prices in the Pacific Northwest, prices in the region were driven up by a combination of factors, including reduced availability of hydroelectric power due to drought, increased demand, and relatively high natural gas prices.¹⁷ As a result, the ALJ determined that prices were not unjust or unreasonable and that refunds were unwarranted.¹⁸

8. The ALJ also determined that transactions in the Pacific Northwest involving energy that was consumed in California could not be subject to refund because such transactions were beyond the scope of the original Puget complaint. The ALJ found that the Puget complaint, which formed the basis of the Pacific Northwest refund proceeding, focused on sales of energy “into” the Pacific Northwest, whereas purchases made by CERS were actually purchases “into” California, where the energy was consumed. Thus, the ALJ recommended that parties’ claims for refunds of the CERS transactions should not be considered in the Pacific Northwest refund proceeding.¹⁹

9. In May 2002, parties to this proceeding filed with the Commission motions to reopen the evidentiary record in the Puget proceeding, alleging that new evidence had emerged as a result of the various investigations into Enron’s manipulation of the California markets that was also relevant to market conditions in the Pacific Northwest.²⁰ In response to parties’ motions, the Commission reopened the evidentiary record on December 19, 2002, giving parties the opportunity to submit “additional evidence

¹⁵ *Id.* at 61,520.

¹⁶ *Puget Sound Energy, Inc.*, 96 FERC ¶ 63,044 (2001) (ALJ Recommendations).

¹⁷ *Id.* at 65,369-70.

¹⁸ *Id.* at 65,385.

¹⁹ *Id.* at 65,331-32.

²⁰ *See Puget Sound Energy, Inc.*, 101 FERC ¶ 61,304, at P 3 (2002)

concerning potential refunds for spot market bilateral sales transactions in the Pacific Northwest for the period January 1, 2000 through June 20, 2001”²¹

10. In addition, on March 26, 2003, Commission staff made available to the public its Final Report on Price Manipulation in Western Markets,²² which analyzed whether any entity manipulated short-term prices in electric energy or natural gas markets in the west, or otherwise exercised undue influence over wholesale prices in the west, for the period January 1, 2000 forward. The Final Report also provided extensive discussion of various techniques of alleged market manipulation or attempted market manipulation that were employed by Enron and other entities in markets throughout the country. Importantly, staff concluded in the Final Report that “the run-up of spot prices in the Pacific Northwest region is not fully explained by input prices such as the cost of natural gas.”²³

11. In the June 25, 2003 Order, the Commission affirmed the ALJ’s findings and denied refunds for purchases in the Pacific Northwest spot market. The Commission declined to make an explicit finding as to whether spot market prices in the Pacific Northwest were unjust or unreasonable. Instead, the Commission concluded that even if spot market prices were unjust and unreasonable, the balance of equities tipped against ordering refunds.²⁴ The equitable factors cited by the Commission included: (1) the fact that a large portion of the power in the Pacific Northwest was bought and sold by governmental entities that are not subject to the Commission’s jurisdiction and thus not liable for refunds; (2) the unfairness of awarding refunds to entities that imprudently relied on the spot market; (3) the adverse consequences that refunds would have on the Pacific Northwest market; and (4) the volume and complexity of transactions that would need to be recalculated.²⁵

12. On November 10, 2003, the Commission denied requests for rehearing of the June 25, 2003 Order, and also affirmed the ALJ’s findings that the CERS transactions involved energy that was physically delivered and ultimately consumed in California and,

²¹ *Id.* P 12.

²² March 26, 2003 Final Report on Price Manipulation in Western Markets, Docket No. PA02-2-000 (Final Report).

²³ Final Report, Chapter 6, page 58.

²⁴ June 25, 2003 Order, 103 FERC ¶ 61,348 at P 35, 53.

²⁵ *Id.* P 36-50.

as such, should be excluded from the Pacific Northwest refund proceeding, which dealt solely with sales “into” the Pacific Northwest.²⁶

B. Ninth Circuit Decision

13. The Ninth Circuit remanded two substantive issues to the Commission.²⁷ First, the Ninth Circuit found that, despite a great deal of new evidence submitted to the Commission in the spring of 2003, the Commission failed to consider the new evidence, relying instead on the ALJ’s factual findings, which were issued prior to the submission of new evidence. The Ninth Circuit stated that the Commission’s only reference to the new evidence appeared in the November 10, 2003 Order when the Commission explained on rehearing that, “[i]n reaching its decision to terminate the proceeding, the Commission considered the complete record, including the material submitted in the March 2003 filings.”²⁸

14. The Ninth Circuit stated that, according to the parties seeking refunds, the new evidence indicated that the Pacific Northwest spot market was involved in and affected by Enron’s manipulation of the California markets. Thus, the Ninth Circuit concluded that the Commission erred in failing to “consider or examine the new evidence showing intentional market manipulation in California and its potential ties to the Pacific Northwest.”²⁹ The Ninth Circuit remanded this issue to the Commission noting that the Commission may need to call for additional fact-finding “if the record evidence of market manipulation is not sufficient to enable [the Commission] to make a reasoned

²⁶ November 10, 2003 Order, 105 FERC ¶ 61,183 at n.43.

²⁷ In addition to remanding the two substantive issues to the Commission, the Ninth Circuit made the following threshold procedural holdings: (1) finding that Puget had standing to bring the appeal despite the fact that it had prevailed before the Commission in the underlying proceeding; (2) rejecting Puget’s contention that its complaint in the underlying proceeding was withdrawn as a matter of law, thereby nullifying the entire refund proceeding at issue; and (3) rejecting parties’ claims that the original Puget complaint did not request a refund date and, therefore, the Commission had no authority to order refunds. *Port of Seattle*, 499 F.3d at 1026-30.

²⁸ *Id.* at 1034-35 (quoting November 10, 2003 Order, 105 FERC ¶ 61,183 at P 22).

²⁹ *Id.* at 1035.

decision.”³⁰ In light of the remand, the Ninth Circuit offered no opinion on the Commission’s findings based on the record established by the ALJ.³¹

15. Second, the Ninth Circuit concluded that the Commission’s interpretation of the scope of the Puget complaint, which placed the CERS transactions outside the scope of the Pacific Northwest proceeding, was arbitrary and capricious. The Ninth Circuit found that Puget’s complaint, on its face, “provides no indication of an intent to exclude refunds for energy purchased in the Pacific Northwest spot market for consumption outside the geographical area.”³² The Ninth Circuit stated that the Puget complaint was concerned broadly with “(1) sellers who were (2) selling energy in the Pacific Northwest market, . . . without any constraint on the identity of the buyers or where the energy would be ultimately be consumed.”³³ The Ninth Circuit also stated that the Puget complaint served to “notify all sellers of energy in the respective markets that they may be liable for refunds . . . regardless of where the energy would be consumed.”³⁴ Accordingly, the Ninth Circuit remanded this issue to the Commission, stating that, on remand, the Commission must “include the CERS transactions when it determines whether refunds are warranted for sales in the Pacific Northwest spot market.”³⁵

II. Commission Determination

1. Unlawful Market Activity

16. Pursuant to the directives of the Ninth Circuit and the specific circumstances of this case, we find that additional procedures are needed to address possible unlawful activity that may have influenced prices in the Pacific Northwest spot market during the period from December 25, 2000 through June 20, 2001. Thus, we will set the above referenced issues remanded by the Ninth Circuit for an evidentiary, trial-type hearing before an ALJ, and we will reopen the record to permit parties to present evidence of unlawful market activity during the relevant period.

³⁰ *Id.* at 1036.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 1033-34.

³⁴ *Id.* at 1034.

³⁵ *Id.*

17. Whether any sellers in this case engaged in unlawful market activity in the spot market must be determined based on the relevant laws, regulations, orders, and tariffs in effect at the time of the Western energy crisis. The Western energy crisis predated and, in fact, was one of the motivations for the anti-manipulation provisions of the Energy Policy Act of 2005.³⁶ In addition, at the time of the crisis, neither the Commission's regulations nor its grants of market-based rate authority contained market behavior rules prohibiting market manipulation or defining prohibited market manipulation.³⁷

18. Further, unlike the California spot market, which operated through a centralized power exchange pursuant to the terms and conditions of a Commission-jurisdictional tariff, the Pacific Northwest spot market operated through bilateral contracts negotiated independently between buyers and sellers, without a central clearing price.³⁸ Most of these contracts were entered into under the terms of the WSPP Agreement, a standard form contract for electricity sales. The WSPP Agreement contained a provision that required sellers to represent that their sales did not conflict with any applicable laws or regulations.³⁹ Parties seeking refunds may submit evidence demonstrating that an individual seller violated either the WSPP Agreement or, if applicable, that the seller violated the terms of a specific bilateral contract underlying a purchase of electricity in the Pacific Northwest spot market. In addition, individual sellers had tariffs on file with the Commission; a showing that a seller violated a provision of its tariff, such as an anti-fraud provision or provision prohibiting anti-competitive market behavior, may be submitted as the basis of a claim of unlawful market activity.

19. Parties seeking refunds have also claimed that unlawful activity in the California markets resulted in unjust and unreasonable bilateral contract rates in the Pacific Northwest spot market. The then-current CAISO and CalPX tariffs contained a market monitoring and information protocol (MMIP) that prohibited "gaming" and "anomalous

³⁶ Pub. L. No. 109-58, § 1283, 119 stat. 594 (2005) (adding, among other things, a new section 222 to the FPA).

³⁷ This situation, in fact, led the Commission to act after the Western energy crisis to address market behavior more directly. *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003), *reh'g denied*, 107 FERC ¶ 61,175 (2004) (adding market behavior rules to all market-based rate tariffs).

³⁸ *Port of Seattle*, 499 F.3d at 1023.

³⁹ WSPP Agreement § 37.

market behavior.”⁴⁰ In other proceedings, the Commission has provided extensive guidance on the types of activities occurring at the time of the crisis that constituted gaming and anomalous behavior in violation of the MMIP,⁴¹ so we need not repeat those details here. In addition, the Commission recently expanded the scope of the hearing that has been established in the California refund proceeding to include market practices that were previously excluded from the list of MMIP violations, along with other CAISO and CalPX tariff violations and violations of Commission orders.⁴² Therefore, parties may present evidence that any of the types of violations specified in the May 26, 2011 Order resulted in unjust and unreasonable contract rates.⁴³

20. We find that the Commission has not previously addressed the issue of the correct legal standard to apply in determining whether refunds should be ordered for purchases in the Pacific Northwest spot market. In the November 10, 2003 Order, the Commission noted that the ALJ, in her recommendations, identified the applicability of the *Mobile-Sierra* doctrine as an issue the Commission would have to decide if further proceedings were ordered in this case.⁴⁴ As noted above, a substantial majority of the bilateral contracts at issue were transacted pursuant to the WSPP Agreement. The Commission has confirmed in other proceedings that short-term bilateral power sales

⁴⁰ Order to Show Cause Concerning Gaming and/or Anomalous Market Behavior, *American Elec. Power Serv. Corp.*, 103 FERC ¶ 61,345, at P 19 (2003), *order on reh’g*, 106 FERC ¶ 61,020 (2004) (Gaming Order).

⁴¹ See, e.g., *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 129 FERC ¶ 61,147, at P 20-22 (2009) (CPUC Remand Order); *Nevada Power Co. v. Enron Power Mktg., Inc.*, 125 FERC ¶ 61,312, at P 25-27 (2008) (*Nevada Power*); Gaming Order, 103 FERC ¶ 61,345 at P 37-60.

⁴² *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 135 FERC ¶ 61,183, at P 26-31 (2011) (May 26, 2011 Order).

⁴³ The ALJ should not consider evidence on issues involving quarterly reporting requirement violations, which have already been resolved in a separate proceeding. *State of Cal., ex rel. Bill Lockyer*, Opinion No. 512, 135 FERC ¶ 61,113 (2011). The ALJ also should not consider evidence on the categories of potential violations rejected in the May 26, 2011 Order. May 26, 2011 Order, 135 FERC ¶ 61,183 at P 29-30 (rejecting requests to address in the hearing violations of the Western Systems Coordinating Council reliability rules and the good faith obligation under California law).

⁴⁴ November 10, 2003 Order, 105 FERC ¶ 61,183 at n.27 (citing ALJ Recommendations, 96 FERC at 65,384).

contracts like those at issue here are a type of agreement to which the Supreme Court has found that the *Mobile-Sierra* presumption generally applies, absent language therein to the contrary.⁴⁵ Thus, the rates set forth in those contracts are presumed just and reasonable, except where certain criteria are met, e.g., where it can be shown that one party to a contract engaged in such extensive unlawful market manipulation as to alter the playing field for contract negotiations.⁴⁶

21. The Supreme Court has previously determined that “the mere fact of a party’s engaging in unlawful activity in the spot market does not deprive its forward contracts of the benefit of the *Mobile-Sierra* presumption. ... Where, however, causality has been established, the *Mobile-Sierra* presumption should not apply.”⁴⁷ Thus, parties seeking refunds must submit evidence not only on whether unlawful market activity occurred, but must also demonstrate a connection between unlawful activity by a seller and unjust and unreasonable rates under a specific contract.⁴⁸ With regard to this showing of a causal connection, a party seeking refunds must submit evidence that demonstrates that the seller’s behavior “directly affect[ed]” contract negotiations.⁴⁹ Thus, buyers presenting such evidence must demonstrate that a particular seller engaged in unlawful market activity in the spot market and that such unlawful activity directly affected the particular contract or contracts to which the seller was a party. Based on the Supreme Court’s guidance in *Mobile-Sierra*, analysis of a general link between the dysfunctional spot market in California and the Pacific Northwest spot market is not adequate to establish a causal connection between a particular seller’s alleged unlawful activities and the specific contract negotiations.⁵⁰ Similarly, general allegations of market dysfunction in the

⁴⁵ *State of Cal., ex rel. Edmund G. Brown*, 135 FERC ¶ 61,178, at P 77 (2011) (CERS Complaint Order) (citing *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1 of Snohomish County*, 554 U.S. 527, 543-48 (2008) (*Morgan Stanley*)).

⁴⁶ *See Nevada Power*, 125 FERC ¶ 61,312 at P 3.

⁴⁷ *Morgan Stanley*, 554 U.S. at 544-55.

⁴⁸ *See, e.g., Nevada Power*, 125 FERC ¶ 61,312 at P 24.

⁴⁹ *See, e.g., Morgan Stanley*, 554 U.S. at 554; CERS Complaint Order, 135 FERC ¶ 61,178 at P 77; *Nevada Power*, 125 FERC ¶ 61,312 at P 28.

⁵⁰ *Nevada Power*, 125 FERC ¶ 61,312 at P 28. The Commission also noted that staff’s findings in the Final Report are, in and of themselves, insufficient to establish the necessary causal connection. *Id.* n.64.

Pacific Northwest are an insufficient basis for overcoming the *Mobile-Sierra* presumption or finding that it is inapplicable.⁵¹

22. Sellers accused of unlawful manipulation in this case may submit evidence that the activity in question was, in fact, legitimate business behavior, pursuant to the Commission's prior guidance on this issue.⁵²

23. The ALJ should establish which parties engaged in unlawful market activity without a legitimate business reason during the relevant period, and should also determine whether the identified unlawful market activity directly affected the negotiation of specific bilateral contracts, resulting in unjust and unreasonable rates. We direct the ALJ, if necessary, to determine a refund methodology applicable to any such contracts and to calculate refunds. This information is to be transmitted to the Commission for consideration of further steps to be taken. We note that the Commission has considerable discretion in establishing an appropriate remedy for possible violations that may have occurred in the Pacific Northwest spot markets during the period from December 25, 2000 through June 20, 2001.⁵³

⁵¹ CERS Complaint Order, 135 FERC ¶ 61,178 at P 87 (citing *Morgan Stanley*, 554 U.S. at 547-48 (“[T]he mere fact that the market is imperfect, or even chaotic, is no reason to undermine the stabilizing force of contracts that the FPA embraced as an alternative to purely tariff-based regulation.”)).

⁵² See, e.g., CPUC Remand Order, 129 FERC 61,147 at P 21-22 (defining legitimate business behavior as “actions consistent with appropriate behavior in a competitive market, *i.e.*, actions taken to further a firm's business objectives but not involving manipulative, illegal, or otherwise anticompetitive acts,” and providing examples of evidence that could establish a legitimate business explanation for transactions that appear to fall into certain MMIP violation categories).

⁵³ *Towns of Concord v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992) (citing *Moss v. Civil Aeronautics Board*, 521 F.2d 298, 308-09 (D.C. Cir. 1975) (“Because the ‘equitable aspects of refunding past rates are ... inextricably entwined with the [agency's] normal regulatory responsibility,’ ... absent some conflict with the explicit requirements or core purposes of a statute, we have refused to constrain agency discretion by imposing a presumption in favor of refunds.”)); *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (“Finally, we observe that the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies and sanctions, including enforcement and voluntary compliance programs in order to arrive at maximum effectuation of Congressional objectives.”) (D.C. Cir. 1967);

(continued...)

24. In setting these matters for hearing, we find that given the nature of the Pacific Northwest spot market, a market-wide remedy would be inappropriate. In the California refund proceeding, the Commission established a refund methodology under which all spot market sales in the California markets were to be mitigated to the level of a mitigated market clearing price.⁵⁴ Unlike the Pacific Northwest spot market, however, the California markets operated through a centralized power exchange using a central clearing price.⁵⁵ In such a market, all sellers are paid the price bid by the marginal seller. In contrast, in a market that operates solely through bilaterally negotiated contracts, each seller receives only what a specific buyer agrees to pay for a given transaction and each buyer has the opportunity to attempt to negotiate a lower price. Given the differences between the Pacific Northwest and California spot markets, we find that the approach taken in the California refund proceeding would not be appropriate here.⁵⁶

2. Sales to CERS

25. CERS is the California Department of Water Resources' division that was created in January 2001 to purchase energy as the supplier of last resort during the California energy crisis.

26. Parties have raised the issue of the CERS transactions in a number of other, related proceedings, but the Commission has not ruled on the merits of these claims for a variety

see also Consol. Edison Co. of N.Y., Inc. v. FERC, 510 F.3d 333 (D.C. Cir. 2007); *CPUC*, 462 F.3d at 1053; *Connecticut Valley Elec. Co. v. FERC*, 208 F.3d 1037, 1043 (D.C. Cir. 2000); *La. Pub. Serv. Comm'n. v. FERC*, 174 F.3d 218, 225 (D.C. Cir. 1999).

⁵⁴ *E.g.*, CPUC Remand Order, 129 FERC ¶ 61,147 at P 6.

⁵⁵ *E.g.*, *Port of Seattle*, 499 F.3d at 1023. In a centralized market, unlawful market activity by any spot market sellers had the potential to influence the price paid by all buyers purchasing electricity through the centralized exchanges.

⁵⁶ The Commission has previously rejected a market-wide refund methodology in a very similar context, involving a complaint requesting refunds for short-term bilateral contract sales to CERS. CERS Complaint Order, 135 FERC ¶ 61,178 at P 77 (“Thus, under this analysis, in the context of short-term bilateral contracts, a market-wide refund remedy for tariff violations would be appropriate only if a complainant clearly demonstrated that all sellers had engaged in tariff violations. Otherwise, sellers following the law would be penalized because of someone else’s bad conduct, an unfair and unreasonable result.”).

of procedural reasons.⁵⁷ Thus, there are disputed issues of material fact with respect to whether unlawful market activity may have directly affected the negotiation of specific bilateral sales to CERS in the Pacific Northwest, ultimately resulting in unjust and unreasonable rates.

27. Pursuant to the Ninth Circuit's directive, we establish a trial-type, evidentiary hearing before the ALJ and reopen the record to allow participants to supplement the record with additional evidence on CERS transactions in the Pacific Northwest spot market from January 18, 2001 to June 20, 2001. Parties may also submit evidence concerning other transactions involving purchases of power in the Pacific Northwest spot market for consumption elsewhere during the period from December 25, 2000 through June 20, 2001.

28. The CERS purchases, like other spot market purchases in the Pacific Northwest, were made bilaterally under the framework of the WSPF agreement. Therefore, as discussed above, the *Mobile-Sierra* presumption applies and the rates set in the CERS contracts are presumed to be just and reasonable.⁵⁸ Thus, as discussed above, parties seeking refunds must submit evidence demonstrating that specific unlawful market activity occurred, and must demonstrate that such activity directly affected the contract rates at issue.

29. We instruct the ALJ to determine which of the CERS transactions, if any, include unjust and unreasonable rates that are the product of unlawful market activity by the seller, and to calculate refunds as instructed above.

3. Settlement Judge Procedures

30. While we are setting these matters for a trial-type, evidentiary hearing, we encourage the participants to make every effort to settle their disputes before hearing procedures are commenced. We note that numerous settlements have already been filed and accepted by the Commission in the California refund proceeding and related proceedings. We encourage the remaining participants to take advantage of this settlement opportunity to further explore mutually acceptable resolution of the remaining issues.

⁵⁷ See, e.g., *id.* P 45 (“in this order we are not addressing the merits of the allegations ... that these sellers used market power or engaged in market manipulation in order to improperly affect the prices in their short-term bilateral sales to CERS ...”).

⁵⁸ *Id.* (citing *NRG Power Mktg., LLC v. Me. PUC*, 130 S. Ct. 693 (2010)).

31. To aid participants in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission Rules of Practice and Procedure.⁵⁹ If the participants desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.⁶⁰ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the participants with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the FPA, particularly sections 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R. Chapter I), a public hearing shall be held concerning the issues identified in the body of this order. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (B) and (C) below.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2011), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the participants decide to request a specific judge, they must make their request to the Chief Judge within ten (10) days of the date of this order.

⁵⁹ 18 C.F.R. § 385.603 (2011).

⁶⁰ If the participants decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within ten days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

(C) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the participants with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the participants' progress toward settlement.

(D) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.