

150 FERC ¶ 61,079
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
Norman C. Bay, and Colette D. Honorable.

Public Utilities Commission of the State of California Docket No. EL02-60-011

Complainant

v.

Sellers of Long-Term Contracts to the California
Department of Water Resources

Respondents.

California Electricity Oversight Board

Docket No. EL02-62-010

Complainant

(consolidated)

v.

Sellers of Energy and Capacity Under Long-
Term Contracts with the California Department of
Water Resources

Respondents.

ORDER ON REQUEST FOR REHEARING OR CLARIFICATION

(Issued February 9, 2015)

1. The People of the State of California *ex rel.* Kamala D. Harris, Attorney General of California, and the Public Utilities Commission of the State of California (together, Complainants) filed a request for rehearing or clarification of the Commission's order on

remand from the United States Court of Appeals for the Ninth Circuit (Ninth Circuit),¹ which established a trial-type, evidentiary hearing before an Administrative Law Judge (ALJ) to supplement the existing record in this proceeding.² In this order, we clarify the scope of the evidence that may be adduced at the hearing and accordingly dismiss as moot Complainants' alternative request for rehearing.

I. Background

2. These consolidated proceedings stem from two separate but virtually identical complaints challenging certain wholesale energy contracts entered into between 2000 and 2001, during the period of market dysfunction in the western United States.

3. In its underlying order, the Commission consolidated the complaints and established a hearing to address “whether the dysfunctional California spot markets adversely affected the long-term bilateral markets, and, if so, whether modification was warranted of any individual contract at issue.”³ The Commission also instructed the presiding ALJ to determine the applicable standard of review for challenged contracts not containing explicit *Mobile-Sierra* language.⁴ The ALJ held that “the *Mobile-Sierra* public interest standard of review applie[d] to a negotiated contract unless the contract expressly state[d] otherwise....”⁵ The Commission affirmed this holding,⁶ and it was appealed to the Ninth Circuit.

¹ *Pub. Utils. Comm'n of the State of Cal., et al. v. FERC*, 550 F.3d 767 (9th Cir. 2008).

² *Pub. Utils. Comm'n of the State of California v. Sellers of Long Term Contracts to the California Department of Water Resources*, 149 FERC ¶ 61,127 (2014) (Remand Order).

³ *Pub. Utils. Comm'n of the State of California v. Sellers of Long Term Contracts to the California Department of Water Resources*, 99 FERC ¶ 61,087 (2002).

⁴ See *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), *Federal Power Commission v. Sierra Pacific Power Company*, 350 U.S. 348 (1956); *Pub. Utils. Comm'n of the State of California v. Sellers of Long Term Contracts to the California Department of Water Resources*, 102 FERC ¶ 61,025, at P 13 (2003) (contract rates for wholesale energy sales are presumed to be just and reasonable, but the presumption can be overcome if the contract seriously harms the public interest).

⁵ *Pub. Utils. Comm'n of the State of California v. Sellers of Long Term Contracts to the California Department of Water Resources*, 102 FERC ¶ 63,013, at P 45 (2003).

4. The initial Ninth Circuit decision found that the Commission had erred in applying the *Mobile-Sierra* precedent to conclude that the challenged contracts were just and reasonable.⁷ However, after issuing its ruling in *Morgan Stanley*, a companion case,⁸ the Supreme Court granted a petition for *certiorari* and remanded to the Ninth Circuit its initial decision in this case,⁹ and the Ninth Circuit in turn, vacated its prior decision, and remanded the case to the Commission “for proceedings consistent with the Supreme Court’s rulings” in *Morgan Stanley*.¹⁰

5. The Commission’s Remand Order reopened the record in these proceedings and set the matters for a trial-type, evidentiary hearing to gather evidence on: (1) the difference “down the line” between having the contracts at issue in effect and not having them in effect; (2) whether that difference seriously harm[ed] the public interest; (3) whether the sellers under a particular contract at issue engaged in unlawful market activity in the spot market; and, if so (4) whether such activity had a direct effect on the negotiations of the contract at issue.¹¹

⁶ *Pub. Utils. Comm’n of the State of California v. Sellers of Long Term Contracts to the California Department of Water Resources*, 103 FERC ¶ 61,354, at P 3 (2003).

⁷ *Pub. Utils. Comm’n of the State of Cal. v. FERC*, 474 F.3d 587 (9th Cir. 2006).

⁸ *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County*, 128 S. Ct. 2733 (2008) (*Morgan Stanley*). *Morgan Stanley* involved petition for *certiorari* filed by Morgan Stanley Capital Group and other sellers in a companion case to the one at issue here, *Pub. Util. Dist. No. 1 of Snohomish County v. FERC*, 471 F.3d 1053 (9th Cir. 2006). In *Morgan Stanley*, the Court: (1) rejected the notion that the *Mobile-Sierra* presumption is inapplicable to the Commission’s initial review of a contract; (2) held that the *Mobile-Sierra* presumption functions the same for buyers as it does for sellers; and (3) rejected the Ninth Circuit’s holding in the companion case that a contract must be formed within a fully functioning market in order to trigger the *Mobile-Sierra* presumption. *Morgan Stanley*, 128 S. Ct. at 2745-2749.

⁹ *See Sempra Generation v. CPUC*, 554 U.S. 931 (2008).

¹⁰ *Pub. Utils. Comm’n of the State of Cal. v. FERC*, 550 F.3d 767 (9th Cir. 2008).

¹¹ Remand Order, 149 FERC ¶ 61,127 at PP 22-23. The Remand Order also set for hearing the issue of whether Iberdrola Renewables, Inc. (Iberdrola, f/k/a PPM Energy, Inc.) was properly dismissed in the earlier proceedings. This issue was not raised in the instant request, and therefore will not be discussed in this order.

6. On rehearing, as further discussed below, Complainants seek confirmation that the Remand Order “does not erroneously restrict” introduction of the particular types of evidence that may be considered at hearing.¹²

7. Shell Energy North America (US), L.P. (Shell Energy, f/k/a Coral Power, L.L.C. (Shell)) filed an answer to the Rehearing Request on December 31, 2014, and Complainants filed an answer to that answer on January 6, 2015.

II. Procedural Matters

8. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2014), prohibits an answer to a request for rehearing. Accordingly, we will reject the answers filed by Shell and Complainants.

III. Request for Rehearing or Clarification

9. As discussed below, we provide certain clarifications regarding the scope of the hearing directed by the Commission in the Remand Order, and therefore dismiss as moot Complainants’ alternative request for rehearing.

A. Market Manipulation

10. The Remand Order reiterates the *Morgan Stanley* holding that when a seller under a particular contract at issue engages in unlawful market activity in the spot market, and that activity has a direct effect on the negotiations of that contract, then the *Mobile-Sierra* presumption should not apply.¹³ The Remand Order further states that this determination must be made “based on the relevant laws, regulations, orders and tariffs in effect at the time of the Western energy crisis.”¹⁴ Complainants seek confirmation that it is not only unlawful activity in the spot market that is relevant, but all evidence of unlawful market activity by a particular seller that affects negotiation of the contract at issue.¹⁵

¹² Rehearing Request at 2.

¹³ Remand Order, 149 FERC ¶ 61,127 at P 23 (citing *Morgan Stanley*, 128 S.Ct. at 2751).

¹⁴ *Id.* P 24.

¹⁵ Rehearing Request at 4.

11. In the Remand Order, the Commission stated that:

[w]hether any of the 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 then-current CAISO and CalPX tariffs included a provision, known as the Market Monitoring and Information Protocol or “MMIP,” that addressed “gaming” and “anomalous market behavior.” The MMIP barred all participants in the CAISO and CalPX markets from engaging in gaming or anomalous behavior in those markets. In recent years, the Commission has broadened the scope of relevant evidence of unlawful behavior to include “market practices and behaviors [that] constitute a violation of the then-current CAISO and CalPX and individual seller’s tariffs, as well as Commission orders.”¹⁶

12. The Commission clarifies, consistent with the discussion in the Remand Order, that relevant evidence is not limited to the spot market, and could include the respondents’ market practices and behaviors to the extent that such conduct violated a then-current tariff or Commission order. The Commission leaves it to the Presiding ALJ to make a finding, based on the record compiled at hearing, on whether the market practices offered as evidence of the respondents’ unlawful behavior violated the MMIP or other tariff provisions and Commission orders.¹⁷ We reiterate here that Complainants are expected to be very specific as to which tariff provision and/or portion of the tariff provision was allegedly violated.

B. Excessive Burden

13. The Remand Order stated that “[b]uyers attempting to demonstrate an excessive burden on consumers must submit evidence on: (1) given the contract, what consumers’ rates were; (2) what consumers’ rates would have been down the line in the absence of the contract; and (3) how the difference imposes an excessive burden on consumers.”¹⁸

¹⁶ Remand Order, 149 FERC ¶ 61,127 at P 24 (footnotes omitted). CalPX refers to the California Power Exchange Corporation.

¹⁷ Consistent with the Remand Order, we reiterate that the unlawful behavior must have directly affected contract negotiations in order for the *Mobile-Sierra* presumption to be overcome. *See supra* note 13.

¹⁸ Remand Order, 149 FERC ¶ 61,127 at P 22.

Complainants seek confirmation that the Commission did not inadvertently limit what could be adduced at hearing regarding the issue of excessive burden, and seeks clarification that any excessive burden evidence permitted by *Morgan Stanley* be permitted at hearing. Complainants point to the Commission's Order Granting Interlocutory Appeal in Docket No. EL01-10-085, which states, "in attempting to overcome the *Mobile-Sierra* presumption, any relevant evidence may be considered, including evidence that specific contract rates imposed an excessive burden on consumers."¹⁹ According to Complainants, this is reinforced by the Supreme Court in *Morgan Stanley*.²⁰ There, the Court stated:

[C]ircumstances exogenous to contract negotiations, including . . . market manipulation by entities not parties to the challenged contract . . . are relevant to whether the contracts impose an "excessive burden" on consumers relative to what they would have paid absent the contracts.²¹

14. We clarify that evidence of non-parties' conduct may be introduced to the extent it is relevant to demonstrate whether the specific rate in the contracts challenged in this proceeding imposes an excessive burden on consumers relative to what they would have paid absent the contracts, which we find is consistent with the above-quoted language in *Morgan Stanley*. Again, we caution Complainants to be very specific in its claims and arguments involving non-parties. General allegations of market dysfunction or high prices in the California markets are an insufficient basis for overcoming the *Mobile-Sierra* presumption.²² Therefore, Complainants may introduce evidence of non-parties' conduct as long as it is specific and relevant to show that the respondents' tariff violations impacted the contract formation. The Commission, however, will not permit

¹⁹ *Puget Sound Energy, Inc.*, 141 FERC ¶ 61,248, at P 12 (2013) (emphasis added) (Order Granting Interlocutory Appeal). The Docket No. EL01-10 proceeding concerns bilateral wholesale energy contracts entered into in the Pacific Northwest spot market between December 25, 2000 and June 20, 2001. *Id.* P 2.

²⁰ Rehearing Request at 6.

²¹ *Morgan Stanley*, 128 S. Ct. at 2748, n.4.

²² Order Granting Interlocutory Appeal, 141 FERC ¶ 61,248 at P 15 (citing *Puget Sound Energy, Inc.*, 137 FERC ¶ 61,001, at P 21 (2011)).

re-litigation of issues arising from non-parties' actions.²³ The hearing will focus only on specific conduct by specific parties to the contracts at issue.²⁴

The Commission orders:

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

(B) The alternative request for rehearing is hereby dismissed as moot, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²³ Also, as explained in a prior order addressing issues related to the Western energy market crisis, while sellers are on notice that they will be subject to penalties for their own violations of tariffs and Commission orders, they are not on notice (absent a notice of possible prospective refunds under section 206 of the Federal Power Act, 16 U.S.C. § 824e (2012)) that they will be subject to penalties for someone else's violations of their filing requirements. *State of Cal., ex rel. Bill Lockyer, Att. Gen. of the State of Cal.*, 125 FERC ¶ 61,016, at P 38 (2008).

²⁴ See also *San Diego Gas and Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 135 FERC ¶ 61,183 at P 37 (2011).