151 FERC ¶ 61,173
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Puget Sound Energy, Inc. Docket No. EL01-10-085

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

OPINION No. 537

ORDER ON INITIAL DECISION

(Issued May 22, 2015)

I. Introduction

1. This case is before the Commission on exceptions to an Initial Decision issued March 28, 2014 by the presiding Administrative Law Judge (Presiding Judge).[1] This case concerns bilateral wholesale energy contracts entered into by the parties in the Pacific Northwest spot market during 2000 and 2001. Specifically, this case arises out of the Remand Proceeding established by the Commission pursuant to the decision of the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) in *Port of Seattle*,[2] which required the Commission to include purchases of energy in the Pacific Northwest by the California Energy Resources Scheduling division of the California Department of Water Resources (CERS) in its determination of whether refunds are warranted. *Port of Seattle* also required the Commission to examine in detail new evidence of market

[1] *Puget Sound Energy, Inc.*, 146 FERC ¶ 63,028 (2014) (Initial Decision).

[2] *Port of Seattle v. FERC*, 499 F.3d 1016 (9th Cir. 2007) (*Port of Seattle*).

manipulation and account for such evidence in any future orders regarding the award or denial of refunds in this proceeding.[3]

2. The central question to be addressed in this proceeding is whether the City of Seattle, Washington (Seattle) and the California Parties[4] have made the necessary showing to avoid or overcome the *Mobile-Sierra* presumption[5] that the bilateral spot market contracts at issue are just and reasonable under section 206 of the Federal Power Act (FPA)[6] or to obtain relief under section 309 of the FPA.[7] Initially, this proceeding included a number of respondents who have since settled.[8] The remaining nine respondents to Seattle's allegations are: Avista Energy, Inc. and Avista Corporation d/b/a Avista Utilities (Avista); Cargill Power Markets, LLC (Cargill); El Paso Marketing Company, L.L.C. (f/k/a El Paso Marketing, L.P. and El Paso Merchant Energy, L.P.) (El Paso); Exelon Generation Company, LLC, Successor-In-Interest to Constellation Energy Commodities Group, Inc. and Constellation Power Source, Inc. (Exelon or

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[3] *Id.* at 1035.

[4] For purposes of this proceeding, California Parties are the People of the State of California, *ex rel.* Kamala D. Harris, Attorney General of the State of California; the Public Utilities Commission of the State of California; and Southern California Edison Company.

[5] *See United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 344 (1956) (*Mobile*); *Federal Power Comm'n v. Sierra Pacific Power Co.*, 350 U.S. 348, 335 (1956) (*Sierra*).

[6] 16 U.S.C. § 824e (2012).

[7] 16 U.S.C. § 825h (2012).

[8] Since filing their preliminary statement of claims with the Presiding Judge in August 2012, Seattle has entered into settlement agreements with Idaho Power Company and IDACORP Energy, L.P.; Nevada Power Company and Sierra Pacific Power Company; PacifiCorp; Puget Sound Energy, Inc.; MPS Merchant Services, Inc. and MPS Canada Corp.; Dynegy Power Marketing, LLC; TransCanada Energy Ltd.; Morgan Stanley Capital Group Inc.; BP Energy Company; Pinnacle West Capital Corporation and Arizona Public Service Company; American Electric Power Service Corporation; Iberdrola Renewables, LLC; ENMAX Corporation; and Powerex Corp. California Parties have entered into settlement agreements with Avista Energy, Inc.; Avista Corporation d/b/a Avista Utilities; Powerex Corp.; and TransAlta Energy Marketing (U.S.) Inc. and TransAlta Energy Marketing (California) Inc.

Constellation); PPL Montana, LLC and PPL EnergyPlus, LLC (PPL); Public Service Company of Colorado (PSCo); Shell Energy North America (US), L.P., d/b/a Coral Power, L.L.C. (Shell or Coral); and TransAlta Energy Marketing (U.S.) Inc. and TransAlta Energy Marketing (California) Inc. (TransAlta). California Parties have asserted claims against the following two remaining Respondents: TransCanada Energy Ltd. (TransCanada) and Shell.

3. In this order, the Commission affirms in part and reverses in part the factual findings in the Initial Decision, and remands the proceeding to the Presiding Judge to issue a revised partial Initial Decision, consistent with the direction provided in this order.[9] Specifically, and as discussed below, the Commission directs the Presiding Judge to issue a revised partial Initial Decision on the issues of False Exports and bad faith with respect to California Parties' claims against Coral. We affirm the Presiding Judge on all other issues.

II. <u>Background</u>

A. <u>Procedural History</u>

4. This proceeding originated with a complaint filed by Puget Sound Energy, Inc. (Puget) under section 206 of the FPA in October 2000, which requested prospective caps on the prices at which sellers subject to Commission jurisdiction, including sellers of

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[9] The transactions addressed in this order occurred during the 2000-2001 energy crisis in the Western United States, which predated the anti-manipulation provisions of the Energy Policy Act of 2005 (EPAct 2005). Pub. L. No. 109-58, § 1283, 119 Stat. 594 (2005) (adding new section 222 to the FPA). At the time of the Western Energy 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. This situation, in fact, led the Commission to act after the Western Energy Crisis to address market behavior more directly. *See, e.g.*, *Investigation of Terms and Conditions of Pub. Util. 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 rates tariffs); *see also Investigation of Terms and Conditions of Pub. Util. Market-Based Rate Authorizations*, 114 FERC ¶ 61,165, *reh'g denied*, 115 FERC ¶ 61,053 (2006) (rescinding some of the market behavior rules and removing other rules from the tariffs as they were included in Prohibition of Energy Market Manipulation), *Prohibition of Energy Market Manipulation*, Order No. 670, FERC Stats. & Regs. ¶ 31,202, *reh'g denied*, 114 FERC ¶ 61,300 (2006) (codifying the EPAct 2005 anti-manipulation authority). The analysis and the determinations made in this proceeding are therefore fact-specific and limited to the facts and circumstances of this particular case.

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 California and the 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]

5. The Commission initially dismissed Puget's complaint.[12] Subsequently, based on requests in the California Refund Proceeding[13] for additional process with regard to sales in the Pacific Northwest, the Commission found the need for further development of the factual record with regard to spot market sales in the Pacific Northwest.[14] Thus, the Commission established a separate evidentiary proceeding to "facilitate development of a factual record on whether there may have been unjust and unreasonable charges for spot market bilateral sales in the Pacific Northwest for the period beginning December 25, 2000 through June 20, 2001."[15]

6. The preliminary evidentiary hearing was conducted before an administrative law judge (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. 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

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[10] Puget, Complaint, Docket No. EL01-10-000 (filed Oct. 26, 2000) (Puget Complaint).

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

[12] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 93 FERC 61,294, at 62,019 (2000) (December 2000 Order).

[13] The term "California Refund Proceeding" refers to the litigation in Docket No. EL00-95.

[14] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 96 FERC ¶ 61,120, at 61,520 (2001) (July 2001 Order).

[15] *Id*.

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

reduced availability of hydroelectric power due to drought, increased demand, and relatively high natural gas prices.[17] The ALJ also determined that transactions in the Pacific Northwest involving purchases of energy by CERS which was consumed in California could not be subject to refund because such transactions were beyond the scope of the original Puget complaint.[18]

7. In May 2002, parties to this proceeding filed with the Commission motions to reopen the evidentiary record in this 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.[19] In response to parties' motions, the Commission reopened the evidentiary record on December 19, 2002, giving parties the opportunity to submit "additional evidence concerning potential refunds for spot market bilateral sales transactions in the Pacific Northwest for the period January 1, 2000 through June 20, 2001 . . . ."[20]

8. In a 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 weighed against ordering refunds.[21] In subsequent orders denying rehearing of the June 25, 2003 Order, the Commission affirmed its previous findings that the CERS transactions involved energy that was physically delivered and ultimately consumed in California and, as such, should be excluded from the Pacific Northwest refund proceeding, which dealt solely with sales "into" the Pacific Northwest.[22] Various parties appealed to the Ninth Circuit.

9. In its August 24, 2007 opinion, the Ninth Circuit remanded this proceeding to the Commission to reconsider two substantive issues: (1) whether refunds are warranted for purchases of energy made by CERS in the Pacific Northwest spot market; and (2) new

[17] *Id.* at 65,369-70.

[18] *Id.* at 65,331-32.

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

[20] *Id.* P 12.

[21] *Puget Sound Energy, Inc.*, 103 FERC ¶ 61,348, at PP 35, 53 (2003).

[22] *Puget Sound Energy, Inc.*, 105 FERC ¶ 61,183, at P 42 n.43 (2003), *order denying reh'g*, 106 FERC ¶ 61,109, at PP 10-13 (2004).

evidence of market manipulation that may affect the Commission's determination regarding the award or denial of refunds.[23] The Ninth Circuit did not address the merits of the issues remanded to the Commission or appropriate remedies, if any.

10. On October 3, 2011, the Commission issued an order establishing an evidentiary hearing to address the issues remanded by the Ninth Circuit.[24] The Commission directed the Presiding Judge to reopen the record to permit parties to present evidence of unlawful market activity during the period from December 25, 2000 through June 20, 2001 (Section 206 Period).[25] The Commission specified that (1) the *Mobile-Sierra* public interest presumption applies to the contracts at issue;[26] and (2) a market-wide remedy, such as the approach taken in the California Refund Proceeding, would not be appropriate here.[27]

11. The Commission directed the Presiding Judge to determine which parties, if any, engaged in unlawful market activity without a legitimate business purpose and whether the identified unlawful activity directly affected the negotiation of specific bilateral contracts, resulting in unjust and unreasonable rates. The Commission also directed the Presiding Judge to determine, if necessary, a refund methodology applicable to any such contracts and calculate refunds. The Commission noted that it would consider further steps to be taken upon review of the Presiding Judge's factual determinations.[28]

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[23] *Port of Seattle*, 499 F.3d at 1035.

[24] *Puget Sound Energy, Inc.*, 137 FERC ¶ 61,001, at P 16 (2011) (Order on Remand).

[25] *Id.* P 16.

[26] *Id.* P 20.

[27] *Id.* P 24.

[28] *Id.* P 23, P 29. The Commission has considerable discretion in establishing an appropriate remedy for any violations that may have occurred. *E.g., 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

(continued …)

12. On September 13, 2012, the Presiding Judge issued an order bifurcating the proceeding into two phases. Phase I would consider (1) whether, with respect to individual sellers' specific contracts, *Mobile-Sierra* protection had been avoided as a result of unlawful activity without a legitimate business reason that directly affected contract rates, and (2) whether, for any contract at issue in this case to which the *Mobile-Sierra* presumption applies, whether the requirements necessary for modification of a bilateral contract rate had been satisfied. Phase II would consider the appropriate refund methodology, if necessary.[29]

13. Subsequently, the Presiding Judge issued an order rejecting California Parties' assertion that they may overcome the *Mobile-Sierra* presumption by demonstrating that the subject transactions imposed an excessive burden on consumers.[30] California Parties subsequently filed a Motion for Interlocutory Appeal, which was granted on December 6, 2012. On December 21, 2012, the Commission issued an Order Granting Interlocutory Appeal clarifying that "refund claimants in this proceeding may overcome the *Mobile-Sierra* presumption by presenting evidence that a particular contract rate imposes an excessive burden on consumers or seriously harms the public interest."[31]

14. On April 5, 2013, the Commission issued an order granting in part and denying in part requests for rehearing of the Order on Remand.[32] The Commission denied rehearing

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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); *see also Consol. Edison Co. of N.Y., Inc. v. FERC*, 510 F.3d 333 (D.C. Cir. 2007); *Pub. Utils. Comm'n of Cal. v. FERC*, 462 F.3d 1027, 1053 (9th Cir. 2006) (*CPUC*); *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).

[29] *Puget Sound Energy, Inc.*, Docket No. EL01-10-085, at P 15 (Sept. 13, 2012) (Order Confirming Rulings from the September 6, 2012 Prehearing Conference).

[30] *Puget Sound Energy, Inc.*, Docket No. EL01-10-85, at P 8 (Dec. 6, 2012) (Order Denying in Part and Granting in Part California Parties Motion for Clarification of Interlocutory Appeal).

[31] *Puget Sound Energy, Inc.*, 141 FERC ¶ 61,248, at P 1 (2012) (Order Granting Interlocutory Appeal).

[32] *Puget Sound Energy, Inc.*, 143 FERC ¶ 61,020 (2013) (Order on Rehearing).

of its determination that the *Mobile-Sierra* presumption applies to the contract rates in this case,[33] but granted rehearing to permit parties to submit evidence on transactions entered into during the period from January 1, 2000 to December 24, 2000 (Section 309 Period).[34] The Commission specified, however, that because it previously established a refund date of December 25, 2000 for Puget's original complaint, it may only order refunds for earlier transactions under its FPA section 309 authority insofar as any "refund claimants … demonstrate[e] a seller's specific violation of a substantive provision of the FPA or tariff, compliance with which the Commission can enforce by taking actions 'necessary and appropriate.'"[35]

B. <u>The Initial Decision</u>

15. After an extensive evidentiary hearing, on March 28, 2014, the Presiding Judge issued the Initial Decision that addressed Phase I of the proceeding. The Presiding Judge noted that Seattle and California Parties bear the burden of proof in this proceeding "because they are the proponent[s] of an order to abrogate the subject contracts and to require refunds."[36] The Presiding Judge also explained that the adjudication of the contracts in dispute is subject to "the more rigorous application of the statutory 'just and reasonable' standard of review"[37] known as the *Mobile-Sierra* public interest standard. The Presiding Judge clarified, consistent with the Supreme Court's decision in *Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1 of Snohomish County,*[38] that the *Mobile-Sierra* public interest standard is not a "public interest" standard separate and apart from the "just and reasonable" requirement of FPA sections 205 and 206, but rather a "differing *application* of the just and reasonable standard" in which rates set at arm's length in bilateral contracts are presumed to be just and reasonable.[39]

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[33] *Id.* PP 13-18.

[34] *Id.* P 32.

[35] *Id.* (quoting *CPUC*, 462 F.3d 1027).

[36] Initial Decision, 146 FERC ¶ 63,028 at P 674.

[37] *Id.*

[38] 554 U.S. 527 (2008) (*Morgan Stanley*).

[39] Initial Decision, 146 FERC ¶ 63,028 at P 675 (quoting *Morgan Stanley*, 554 U.S. at 535) (emphasis in original).

16. The Presiding Judge affirmed that the *Mobile-Sierra* presumption applies to the contracts at issue, all of which were conducted under the WSPP Agreement. The Presiding Judge explained that the Commission previously held that the WSPP Agreement evinces the "intent that neither seller nor buyer be able to seek changes under section 205 or 206 other than under the 'public interest' standard of review."[40] Thus, explained the Presiding Judge, the subject contracts must be presumed just and reasonable unless a complainant can avoid application of the presumption by demonstrating that a particular Respondent engaged in "unfair dealing at the contract formation stage," which "alter[ed] the playing field for contract negotiations," and had "a causal connection … [to] the contract rate."[41] Further, the Presiding Judge added that the *Mobile-Sierra* presumption can also be overcome, but only if the Commission concludes that the contract seriously harms the public interest. The Presiding Judge stated that the U.S. Supreme Court has expressly rejected attempts to use marginal cost as a test of the reasonableness of a contract, stating that the "Commission's contract-abrogation power is reserved for those *extraordinary circumstances* where the public interest will be *severely harmed*."[42]

17. With regard to the claims asserted by Seattle, the Presiding Judge found that Seattle has not established a basis, under either section 206 or 309 of the FPA, for abrogating any of the contracts at issue in this proceeding or for receiving any refunds. The Presiding Judge found that Seattle failed to demonstrate that any seller engaged in unlawful market activity or that specific contract rates were directly affected. Further, the Presiding Judge found that Seattle failed to demonstrate that the subject contract rates imposed an excessive burden on consumers or seriously harmed the public interest, noting that the evidence of record reflects that rate increases during the relevant period were a result of a myriad of factors, many of which had nothing to do with wholesale energy costs.[43]

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[40] *Id.* P 681 (citing *Nevada Power Co. v. Enron Power Mktg., Inc.*, 103 FERC ¶ 61,353, at P 36 (2003)).

[41] *Id.* (quoting *Morgan Stanley*, 554 U.S. at 547, 554-55).

[42] *Id.* P 680 (quoting *Morgan Stanley*, 554 U.S. at 547, 550-51) (emphasis added by Presiding Judge).

[43] *Id.* PP 934-972, 1711-1726.

18. With regard to California Parties' claims, the Presiding Judge found that California Parties had presented evidence that as many as 166 of Coral's contracts with CERS may have been tainted by unlawful market activity. However, the Presiding Judge concluded that significant questions of fact and law remain with respect to those transactions that must be resolved in Phase II of the proceeding. As to the remainder of California Parties' refund claims against TransCanada and Coral, the Presiding Judge found that California Parties had not demonstrated a basis to abrogate the contracts at issue.[44]

C. Briefs on Exceptions and Opposing Exceptions

19. California Parties, Seattle, Commission Trial Staff (Trial Staff), TransCanada, and Shell filed timely briefs on exceptions. California Parties, Trial Staff, Seattle Respondents,[45] TransCanada, Shell, Exelon, PPL, PSCo, Cargill, Avista, and TransAlta filed briefs opposing exceptions on June 16, 2014.[46]

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[44] *Id.* PP 1384-1430, 1693-1710, 1727-1747.

[45] The Seattle Respondents are Avista, Cargill, El Paso, PPL, PSCo, Shell, and TransAlta. Shell responds only to claims relating to the Section 206 Period, as it did not sell to Seattle during the Section 309 Period. In addition to the joint filing as Seattle Respondents, many of these Respondents also filed separate briefs opposing exceptions, as noted above, which incorporate by reference the Seattle Respondents' brief and make substantially identical arguments but within the context of the filer's specific company.

[46] On April 11, 2014, the Commission granted Trial Staff's Motion for Extension of Time to file briefs on exceptions and briefs opposing exceptions. Notice of Extension of Time, Docket No. EL01-10-85 (Apr. 11, 2014).

III. Spot Market Definition

A. Initial Decision[47]

20. The Presiding Judge adopted the definition of a spot market for the Western Electricity Coordinating Council (WECC) consistent with the definition advanced uniformly by the Respondents' witnesses and expressly adopted by the Commission in previous orders: "Spot market sales in the WECC are sales that are 24 hours or less and are entered into the day of or day prior to delivery."[48] The Presiding Judge found that Seattle's proposed definition, which would have included transactions with durations of up to one year,[49] is both "illogical and inconsistent with actual trading practices in the Pacific Northwest."[50] Moreover, the Presiding Judge found that, even under Seattle's proposed definition, Seattle failed to demonstrate that it is entitled to refunds.[51]

B. Briefs on Exceptions

21. Seattle argues that the definition of spot market adopted by the Presiding Judge ignores material structural differences between the organized markets for wholesale

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[47] We note that, due to the Presiding Judge's findings regarding the defects in Seattle's case, which apply equally to all Seattle Respondents and were sufficient to dispose of Seattle's refund claims under both sections 206 and 309 of the FPA, the Initial Decision did not make seller-specific findings. As discussed below, we affirm the Presiding Judge's finding that Seattle is not entitled refunds for the reasons provided in the Initial Decision and therefore find that it is not necessary to further address the individual Seattle Respondents' briefs on exceptions. We also note that the individual Seattle Respondents raise arguments that are addressed in their joint brief and those arguments are addressed herein.

[48] Initial Decision, 146 FERC ¶ 63,028 at P 933 (quoting *Western Elec. Coordinating Council*, 133 FERC ¶ 61,026, at P 1, n.3 (2010) (*WECC*); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 95 FERC ¶ 61,418, at 62,545 n.3 (2001) (June 2001 Order)).

[49] Seattle's proposed definition of spot market included (1) a sale that lasts one month or less, and (2) a sale that lasts longer than one month but less than one year if the sale was not part of the purchaser's long-term planning process. *Id.* P 932 n.810.

[50] *Id.* P 933.

[51] *Id.* P 933 n.816.

energy in California and the bilateral markets in the Pacific Northwest. Seattle states that a 2001 Commission order recognized that the definition for a spot sale for this case had to take these structural differences into account.[52] Seattle claims that the Presiding Judge relied primarily on the testimony of witnesses for the Seattle Respondents, none of which discussed the structural differences between the California and Pacific Northwest markets.

22. Seattle also contends that the Presiding Judge failed to consider all of the record evidence before adopting a definition of "spot market." In particular, Seattle refers to the August 27, 2001 testimony in which a Commission Trial Staff witness proposed that, in the acceptable business practice in the Pacific Northwest, spot sales should include transactions "for hourly, daily, monthly basis, and can be up to a year."[53] Seattle also alleges that the Presiding Judge did not consider the brief filed by Trial Staff in September 2001, which included similar assertions. Further, Seattle asserts that the Presiding Judge failed to address the testimony of a Pacific Northwest trader, Stan Watters, who testified that he believed that the definition of spot market for these proceedings should include transactions up to and including one month in duration.[54] Seattle argues that, as a result of the Presiding Judge's failure to consider this evidence, the adopted definition of spot sale is arbitrary and capricious.[55]

1. <u>Briefs Opposing Exceptions</u>

23. Seattle Respondents, Trial Staff, and Exelon argue that the Presiding Judge adopted the proper definition of spot market for use in this proceeding. Seattle Respondents assert that the definition adopted by the Presiding Judge is consistent with the definition expressly adopted by the Commission for the WECC, which includes the Pacific Northwest, as recently as 2010.[56] Seattle Respondents and Exelon also contend that the Presiding Judge properly concluded that the weight of evidence in the record

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[52] Seattle Brief on Exceptions at 42-45 (citing July 2001 Order, 96 FERC ¶ 61,120 at n.74).

[53] *Id.* at 44 (citing Ex. SCL-37).

[54] *Id.* at 44-45 (citing Ex. SCL-83 at 3).

[55] *Id.* at 45.

[56] Seattle Respondents Brief Opposing Exceptions at 75 (citing *WECC*, 133 FERC ¶ 61,026 at P 1 n.3 ("Spot market sales in WECC are sales that are 24 hours or less and are entered into the day of or day prior to delivery.")).

supported the adopted spot market definition.[57] Moreover, Seattle Respondents claim that Seattle's witnesses offered no credible support for Seattle's position because neither had personal experience trading in the Pacific Northwest during 2000 and 2001.[58]

24. Seattle Respondents also contend that the Presiding Judge appropriately considered the structural differences between the Pacific Northwest and the California energy markets.[59] Seattle Respondents state that they do not disagree with Seattle's observation that there are fundamental differences between the two markets (e.g., a bilateral market in the Pacific Northwest versus an organized, central clearing price market in California), but reject the notion that these differences require a different definition of the spot market because, according to Seattle Respondents, the unopposed evidence in this proceeding demonstrates the widely-accepted position that spot market transactions are trades for immediate delivery.[60]

25. Finally, Seattle Respondents argue that the Presiding Judge expressly considered and rejected the 2001 Trial Staff testimony and brief, as well as the testimony of Mr. Watters. Seattle Respondents assert that neither of the prior Trial Staff witnesses testified or were subject to cross-examination in this proceeding. Further, Seattle Respondents state that, regardless of the spot market definitions offered in the prior testimony, both Trial Staff and Mr. Watters concluded that Seattle should not be awarded refunds in this proceeding.[61]

26. Trial Staff contends that Seattle's proposed spot market definition is based on a misunderstanding of Trial Staff's testimony in the earlier phase of this proceeding.[62] Trial Staff explains, however, that it is not currently taking a position on the proper definition of "spot sale" because, in its opinion, Seattle has not provided evidence of a

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[57] *Id.* at 75-76; Exelon Brief Opposing Exceptions at 51-53.

[58] Seattle Respondents Brief Opposing Exceptions at 76.

[59] *Id.* at 77 (citing Initial Decision, 146 FERC ¶63,028 at P 708).

[60] *Id.* at 77-78.

[61] *Id.* at 79-80 (citing Initial Decision, 146 FERC ¶ 63,028 at P 637; Ex. SCL-83 at 2, 6).

[62] Trial Staff Brief Opposing Exceptions at 21-22 (stating that Trial Staff's brief recommended providing parties the opportunity to provide evidence "for transactions longer than one month but not more than one year, that particular contracts were not part of long term planning and thus should be considered spot transactions.").

specific statutory or tariff violation, nor has it provided evidence that a particular seller engaged in unlawful market activity that directly affected a particular contract price. Thus, Trial Staff contends that the definition of "spot sale" in the Pacific Northwest is irrelevant. Nevertheless, to the extent that its previous brief is a part of the record of this proceeding, Trial Staff argues that Seattle has not met the requirements for including transactions longer than a month, as suggested by the brief.[63]

2. Commission Determination

27. We affirm the Presiding Judge's finding on this issue. Seattle's arguments to the contrary are inconsistent with the Commission's previous finding that the definition of a "spot market sale" applicable throughout the entire WECC is "sales that are 24 hours or less and are entered into the day of or day prior to delivery."[64] The Pacific Northwest markets are within WECC, so that definition is applicable here.[65] Moreover, despite well-established structural differences between the centrally-cleared California Independent System Operator Corporation (CAISO) markets and the bilateral Pacific Northwest spot markets, there is sufficient record evidence, including expert testimony by traders with firsthand knowledge of the customs and practices in the Pacific Northwest markets, that supports the Presiding Judge's finding that Seattle's proposed definition is inconsistent with actual trading practices in the Pacific Northwest.[66]

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[63] Trial Staff Brief Opposing Exceptions at 21-22.

[64] *WECC*, 133 FERC ¶ 61,026, at P 1 n.3 (2010).

[65] We note that the Commission has previously used the terms "spot market sales" and "short-term bilateral sales" to distinguish between sales made in the centrally cleared California markets and the short-term sales through bilaterally-negotiated contracts in the Pacific Northwest markets. *People of the State of California ex rel. Brown v. Powerex Corp.*, 135 FERC ¶ 61,178, at PP 32-34 (2011) (*Brown*); *reh'g denied*, 139 FERC ¶ 61,210 (2012). This distinction was made to highlight the fundamental differences between the two markets and for the purpose of explaining why sales in the Pacific Northwest spot market were not properly part of the California refund proceeding, but did not require, or even discuss, the adoption of a unique definition for the Pacific Northwest transactions. *See id.*

[66] *See* Initial Decision, 146 FERC ¶ 63,028 at PP 932-933.

IV. Seattle's Refund Claims

A. Initial Decision

28. The Presiding Judge found that, with respect to its request for relief under section 206 of the FPA, Seattle had not met its evidentiary burden either for avoiding or overcoming the *Mobile-Sierra* presumption. With regard to avoiding the presumption, the Presiding Judge found that Seattle has not made the central evidentiary showing of unlawful market activity by any Respondent, as required by the Order on Remand. Indeed, the Presiding Judge reported that Seattle witness Mr. Hanser clarified, in response to questioning from the Presiding Judge, that he was "not alleging any illegal conduct by any of the Respondents in this case."[67] The Presiding Judge also stated that Seattle's only other witness, Mr. Morter, stated that he too was "not making any allegations regarding unlawful activity or misconduct by El Paso … or any other Respondent."[68] The Presiding Judge characterized these statements as "fatal" to Seattle's attempt to avoid application of the *Mobile-Sierra* presumption.[69]

29. Similarly, the Presiding Judge found that the fundamental failure of Seattle's attempt to overcome the *Mobile-Sierra* presumption was that Seattle's witnesses, contrary to the direction of the Commission, did not tie any alleged burden or harm to specific contracts or sellers. To the contrary, the Presiding Judge found that the rate increases experienced by Seattle during the relevant period were the result of factors such as Seattle's business decision to reduce its long-term purchases, sell its share of the Centralia coal plant, and increase reliance on the wholesale spot market, all at a time when hydroelectric power generation was limited by the lowest water year on record for 60 years. Further, the Presiding Judge found that Seattle failed to analyze the effects of supply and demand fundamentals on price. The Presiding Judge also observed that bond offering excerpts intended to support Seattle's claim that increased wholesale power costs resulted in excessive burden actually showed that Seattle maintained its AAA credit rating during and after the period at issue. Finally, the Presiding Judge noted that Seattle's average electric rates remained the lowest of the 25 largest cities in the United States during 2001. Thus, the Presiding Judge concluded that Seattle's evidence was not

[67] *Id.* P 1711 (citing Tr. 2074:10-15, 2116:24-2117:1 (Hanser)).

[68] *Id.* (citing Tr. 3278:7-20 (Morter)).

[69] *Id.* P 934.

consistent with the type of excessive burden that the Commission and courts have held might justify the reformation of contract rates.[70]

30. With regard to Seattle's claims for the Section 309 Period, the Presiding Judge found that Seattle again had not demonstrated a basis for refunds. The Presiding Judge explained that, pursuant to the Order on Rehearing, refunds could be obtained under section 309 if a refund claimant could demonstrate a seller's specific violation of a substantive provision of the FPA or tariff. The Presiding Judge found that, rather than addressing individual contracts or the conduct of any of the Respondents, Seattle instead alleged that each Respondent violated its market-based tariff and section 205 of the FPA by charging unreasonably high prices, as measured by two marginal cost based benchmark analyses. The Presiding Judge found numerous deficiencies with Seattle's section 309 arguments, including its similarity to arguments already considered and rejected by the Commission in the Order on Rehearing[71] and the Supreme Court's categorical rejection in *Morgan Stanley* of the use of marginal cost as a test of reasonableness.[72] The Presiding Judge also found that Seattle's theory of refund liability based on market-wide sales that exceeded certain benchmarks was undermined by the fact that Seattle also sold energy above these benchmarks. Finally, the Presiding Judge found, for the same reasons articulated with respect to Seattle's section 206 claims, that Seattle failed to demonstrate the kind of excessive burden that may justify the reformation of contract rates. Thus, the Presiding Judge found that Seattle had likewise not met its burden to overcome the *Mobile-Sierra* presumption for its section 309 claims.[73]

B. Section 206 Refund Claims

1. Avoiding the *Mobile-Sierra* Presumption

a. Briefs on Exceptions

31. Seattle argues that the Presiding Judge erred in finding that Seattle failed to present any evidence of unlawful market activity. Seattle claims that the Presiding Judge's reliance on statements made by Seattle's two witnesses is misplaced because

[70] *Id.* PP 942-953, 1712-1716.

[71] *Id.* P 1719 (citing Order on Rehearing, 143 FERC ¶ 61,020 at P 30).

[72] *Id.* (citing *Morgan Stanley*, 554 U.S. at 548, 550-51).

[73] *Id.* PP 1717–1726.

neither witness is an attorney and therefore, according to Seattle, neither is qualified to make statements about whether market activity is lawful or unlawful.[74] Seattle also contends that, under *Morgan Stanley*, a buyer can avoid the *Mobile-Sierra* presumption by showing that a counterparty to a contract charged an unlawful price, and states that it submitted testimony and exhibits demonstrating that Seattle Respondents charged unlawfully high prices.[75] Further, Seattle asserts that the Presiding Judge made numerous errors by finding that Seattle failed to prove that Seattle Respondents' unlawful market activity directly affected contract prices. To the contrary, Seattle maintains that the unlawful market activity in question here, i.e., charging unlawful prices, itself proves the required impact on contract prices. Seattle argues that testimony offered to show that the prices charged to Seattle were consistent with "fundamental economic principles" in a short supply situation is irrelevant to the issue of causality and, therefore, the Presiding Judge's reliance on that testimony is misplaced.[76]

32. Seattle argues that spreadsheets included in its post-hearing briefing materials which show that Seattle Respondents' sales prices to Seattle during the relevant period exceeded the mitigated market clearing price (MMCP) benchmark,[77] were improperly stricken from the record as untimely. Seattle contends that the MMCPs were already in the record of this case[78] and its post-hearing brief spreadsheets were merely summaries of this evidence that constituted proper rebuttal to Seattle Respondents' initial post-hearing briefs. Finally, Seattle argues that the Presiding Judge erred by considering the evidence offered by California Parties apart from the evidence offered by Seattle to support its section 206 claims. Seattle asserts that there is only one record for this proceeding and, as a result, the Presiding Judge should have considered the evidence submitted by

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[74] Seattle notes that the Presiding Judge struck legal opinions from pre-filed testimony from one of those two witnesses on the grounds that the witness is not an attorney. Seattle Brief on Exceptions at 17-18.

[75] *Id.* at 18-19.

[76] *Id.* at 25-27.

[77] The MMCP was developed as a remedy in the California Refund Proceeding to re-set prices to competitive level. The MMCP is a proxy price based on the marginal cost of the most expensive unit dispatched to serve load in CAISO's real-time imbalance market. *See, e.g.*, *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 97 FERC ¶ 61,275, at 62,201 (2001) (December 2001 Order).

[78] Seattle states that the MMCPs are contained in California Parties' Ex. CAT-232, and are also publicly available. Seattle Brief on Exceptions at 19 n.44.

California Parties in determining whether Seattle failed to prove unlawful market activity by any Seattle Respondent. Seattle argues that the Presiding Judge erroneously, in effect, created two separate records, which has resulted in administrative inefficiencies and inconsistencies.[79]

33. Seattle also contends that the Presiding Judge failed to consider whether the market-based rates charged by the Respondents were unlawful under the Ninth Circuit's decision in *State of California, ex rel. Bill Lockyer v. FERC.*[80] Seattle asserts that the Ninth Circuit found in *Lockyer* that the market-based rates of the respondents in that case, five of which are also respondents in this case, were unlawful. Thus, Seattle argues that the Presiding Judge should have applied the Ninth Circuit's ruling in this case, or should have afforded Seattle an opportunity to adduce evidence on that issue.[81]

34. Seattle also asserts that the Presiding Judge failed to consider Seattle's undue discrimination arguments. Seattle states that its evidence shows that rates charged by Respondents frequently exceeded the MMCPs that were adopted by the Commission as just and reasonable in the California Refund Proceeding. Seattle notes that the MMCPs were applicable not just in California, but also for sales to CAISO at various delivery points in the Pacific Northwest. Seattle contends that it is similarly situated to CAISO as a not-for-profit entity that was a price taker during the Western Energy Crisis. Thus, Seattle argues that Seattle Respondents were permitted to discriminate unduly against Seattle and in favor of CAISO by limiting their market-based sales to CAISO to the MMCP price without a similar limitation imposed on their bilateral sales to Seattle.[82]

b. <u>Briefs Opposing Exceptions</u>

35. Seattle Respondents, Exelon, and Trial Staff argue that the Presiding Judge correctly found that Seattle's section 206 claims are without merit.[83] Seattle Respondents and Trial Staff refute Seattle's claims that Seattle's witnesses, Mr. Hanser and Mr. Morter, were offering only legal opinions. They assert that construing this testimony as an admission that Seattle was not alleging unlawful market activity by any Seattle

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[79] *Id.* at 20-22.

[80] 383 F.3d 1006 (9^{th} Cir. 2004) (*Lockyer*).

[81] Seattle Brief on Exceptions at 22-23.

[82] *Id.* at 23-25.

[83] Seattle Respondents Brief Opposing Exceptions at 19-20; Trial Staff Brief Opposing Exceptions at 11-13; Exelon Brief Opposing Exceptions at 16-18.

Respondent is fully supported by the record. Seattle Respondents and Exelon claim that the only allegation of misconduct presented by Seattle was that any price above certain benchmark prices was unlawful. Seattle Respondents assert that this position has already been rejected by the Commission, and is outside the scope of issues remanded by the Ninth Circuit.[84] Similarly, Trial Staff argues that the Presiding Judge correctly concluded that Seattle failed to present any evidence of unlawful activity that directly affected particular contracts, and emphasizes that *Morgan Stanley* does not establish, as Seattle has argued, that contract prices above marginal costs, in themselves, constitute unlawful activity that avoids or overcomes the *Mobile-Sierra* presumption.[85] Exelon notes that Seattle's witnesses testified that they did not even review the underlying contracts with Constellation.[86]

36. Moreover, Seattle Respondents and Exelon argue that the MMCP benchmark evidence for the Section 206 Period was not submitted as part of Seattle's section 206 case, but was later in included with Seattle's section 309 testimony, and was therefore properly stricken as out-of-time and outside the scope of permissible additional testimony.[87] Also, Seattle Respondents argue that the Presiding Judge properly excluded the MMCP analysis that Seattle attempted to include as an appendix to its post-hearing reply brief, noting that the Presiding Judge concluded that this analysis constituted new evidence and therefore would be "patently prejudicial to the Respondents and would confuse the already voluminous record" in the proceeding.[88] Thus, because Seattle Respondents contend that the post-hearing analysis was properly excluded, they argue there was no error in not considering this analysis as part of the Presiding Judge's rejection of Seattle's section 206 claims.[89]

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[84] Seattle Respondents Brief Opposing Exceptions at 2, 18-23.

[85] Trial Staff Brief Opposing Exceptions at 9-10, 19-23.

[86] Exelon Brief Opposing Exceptions at 17 (citing Initial Decision, 146 FERC ¶ 63,028 at PP 302, 783-794).

[87] Seattle Respondents Brief Opposing Exceptions at 20-23; Exelon Brief Opposing Exceptions at 18-19.

[88] Seattle Respondents Brief Opposing Exceptions at 22 (quoting *Puget Sound Energy, Inc.*, Order Granting Indicated Respondents' Motion to Strike, Docket No. EL01-10-085 at P 18 (Feb. 21, 2014)).

[89] *Id.* at 22-23.

37. Aside from timing considerations, Seattle Respondents, Trial Staff, and Exelon also argue that the Presiding Judge correctly afforded no weight to Seattle's MMCP (i.e., mitigated market clearing price) analysis because, they state, the MMCP is not an appropriate benchmark in this proceeding. Trial Staff observes that it was the Commission, and not the Presiding Judge, that made the decision to reject the option of a market-wide remedy and use of something like the MMCP. Trial Staff states that the MMCP was developed solely to calculate refunds related to the organized California market, and not to establish or respond to any specific alleged violations or unlawful behavior. Exelon likewise asserts that the Presiding Judge correctly recognized that the Commission rejected the use of the MMCP market-wide remedy for the bilateral Pacific Northwest spot market and contends that the Presiding Judge engaged in a thorough review and explanation about why the cost factors underlying the MMCP are inapplicable here. Seattle Respondents and Trial Staff also refute Seattle's allegation that the Commission's application of the MMCP to the CAISO markets in the California Refund Proceeding constitutes undue price discrimination because, they assert, Seattle is not similarly situated to CAISO. Seattle Respondents also note that the Supreme Court has explicitly rejected the use of marginal cost to determine whether rates are unlawful. Finally, Seattle Respondents claim that Seattle's insistence on basing its refund claims entirely on high prices fails to recognize that such prices were the result of competitive market forces.[90]

38. Seattle Respondents and Exelon further argue that the Presiding Judge properly separated the California Parties and Seattle records and contend that Seattle was not entitled to rely on evidence presented by California Parties. Notably, Seattle Respondents contend that California Parties' evidence did not concern Seattle's transactions at all and, therefore, Seattle was not aggrieved by the Presiding Judge's decision to require Seattle to submit its own evidence to support its claims. Seattle Respondents also observe that when the Ninth Circuit on remand directed the Commission to examine new evidence of market manipulation it "defer[red] to the discretion of FERC to determine how this new evidence shall be adduced."[91] Seattle Respondents maintain that the Presiding Judge's consideration of the Seattle record apart from the California Parties' record was necessary in order to understand which evidence was being submitted against which party and how it was relevant to a particular refund

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[90] *Id.* at 32-43; Trial Staff Brief Opposing Exceptions at 17-19; Exelon Brief Opposing Exceptions at 20-21, 26-28.

[91] Indicated Seattle Respondents at 24 (quoting *Pub. Utils. Comm'n of Cal. v. FERC*, Case Nos. 01-71051, et al. (9th Cir. Aug. 21, 2002)).

claimant's contract-specific claims.[92] Exelon asserts that the Presiding Judge allowed Seattle to proffer all evidence it wished the Presiding Judge to consider, but that Seattle ignored the Commission's explicit directive that refund claimants must resubmit into the record any previous evidence it wishes to rely on.[93]

39. Seattle Respondents and Exelon also argue Seattle's attempt to rely on the Ninth Circuit's *Lockyer* ruling is misplaced. Seattle Respondents and Exelon deny that *Lockyer* can be read as a determination that any entity's market-based rate tariffs are unlawful. They instead contend that *Lockyer* recognized that reporting violations could be causally related to an unlawful price only if they masked market manipulation or the exercise of market power that affected the prices the misreporting seller was charging. Thus, Seattle Respondents assert that addressing reporting violations in this case was unnecessary because Seattle was given the opportunity to present direct evidence of market manipulation or the exercise of market power. Also, Seattle Respondents, Trial Staff, and Exelon argue that Seattle's *Lockyer* argument ignores the Commission's express directive that the ALJ should not consider evidence related to quarterly reporting violations.[94]

40. Seattle Respondents and Trial Staff argue that Seattle misinterprets the Presiding Judge's finding that Seattle had not shown a causal connection between unlawful activity and specific contract rates. Seattle Respondents assert that Seattle erroneously interprets the Initial Decision as requiring Seattle, in order to avoid the *Mobile-Sierra* presumption, to demonstrate that each term and condition of a contract was affected by unlawful activity. Seattle Respondents state that the Presiding Judge merely found that Seattle failed to provide basic details to identify a transaction and tie it to specific wrongdoing by a seller.[95] Trial Staff asserts that the Order on Remand's criteria for proving causality were clear and that the Presiding Judge correctly applied those criteria and properly concluded that the evidence presented by Seattle falls short of "demonstrating a connection between unlawful activity by a seller and unjust and unreasonable rates under

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[92] *Id.* at 25.

[93] Exelon Brief Opposing Exceptions at 21-24.

[94] Seattle Respondents Brief Opposing Exceptions at 27-28 (citing Order on Remand, 137 FERC ¶ 61,001 at P 20, n.43; Order on Rehearing, 143 FERC ¶ 61,020 at P 18); Trial Staff Brief Opposing Exceptions at 15-16 (citing Order on Rehearing, 143 FERC ¶ 61,020 at P 24 n.48); Exelon Brief Opposing Exceptions at 25-26.

[95] Seattle Respondents Brief Opposing Exceptions at 30-31.

a specific contract."[96] Exelon contends that "Seattle makes a circular argument that it showed 'unlawful market activity' because it showed that respondents charged an 'unlawful price,' and that the 'unlawful price' 'directly affects the contract price.'"[97] Exelon asserts that Seattle's failure to provide contract- and term-specific information to show a direct effect of unlawful activity on any specific contract is fatal to Seattle's claims.[98]

c. Commission Determination

41. We affirm the Presiding Judge's finding that Seattle failed to avoid application of the *Mobile-Sierra* presumption. We agree with the Presiding Judge that Seattle's failure to allege unlawful conduct by any of the Seattle Respondents, or demonstrate a causal link between the alleged unlawful conduct and the rates under a specific contract, is fatal to Seattle's claims for refunds for the Section 206 Period. We disagree with Seattle's theory that high prices, in themselves, constitute unlawful market activity and therefore necessarily demonstrate a direct effect on contract prices. We find that this line of argument by Seattle ignores or misinterprets the Commission's explicit directives regarding refund claimants' burdens, and also misconstrues the Supreme Court's *Morgan Stanley* decision. Both make clear, as the Presiding Judge correctly found, that in order to avoid application of the *Mobile-Sierra* presumption, Seattle must first identify specific contracts and must also submit evidence demonstrating that a seller's unlawful behavior directly affected contract negotiations.[99] In particular, the Commission has previously rejected arguments that "simply identifying high prices should be sufficient to overcome or avoid the [*Mobile-Sierra*] presumption."[100] We find that the Presiding Judge correctly determined that the evidence proffered by Seattle lacked information necessary for

[96] Trial Staff Brief Opposing Exceptions at 23-24 (quoting Order on Remand, 137 FERC ¶ 61,001 at P 21).

[97] Exelon Brief Opposing Exceptions at 28.

[98] *Id.* at 28-29.

[99] Order on Remand, 137 FERC ¶ 61,001 at P 21 (citing *Morgan Stanley*, 554 U.S. at 554).

[100] Order Granting Interlocutory Appeal, 141 FERC ¶ 61,248 at P 15; *see also* Order on Rehearing, 143 FERC ¶ 61,020 at P 30 (finding that "claims of uniformly higher prices amount to little more than a variation on claims of general market dysfunction, which has been previously rejected by the Supreme Court as a basis for overcoming *Mobile-Sierra*.").

identifying specific transactions or to show that a seller's behavior directly affected a contract rate.

42. We find that the Presiding Judge properly rejected as out-of-time, with respect to Seattle's section 206 claims, Seattle's MMCP analysis. If Seattle intended to rely on this evidence, it should have timely submitted the spreadsheets as part of its section 206 case. As correctly noted by the Presiding Judge, introducing new evidence in its section 206 case as part of its section 309 claims, or in the guise of an appendix to its post-hearing reply brief, would be prejudicial to the Seattle Respondents, who would have been deprived of the opportunity to answer, and would further complicate the already voluminous record in this proceeding.[101] Moreover, we find that even if the MMCP evidence had been admitted, the Presiding Judge should have afforded it no weight since the Commission had already considered and rejected the option of a market-wide remedy for the Pacific Northwest through use of an MMCP-like benchmark.[102] The comparison of Seattle's purchase prices to the MMCP benchmark offers no evidence regarding specific sellers' behavior, its effect on specific contracts, or the burden or harm caused by those contracts. Nevertheless, we find that the Presiding Judge thoroughly considered and explained the reasons, in relation to Seattle's section 309 claims, why the MMCP is inapplicable here.[103]

43. We also disagree with Seattle's assertion that the Presiding Judge erred by failing to address its undue discrimination argument. The Presiding Judge expressly addressed and rejected that argument, stating that the analysis of structural differences between the California and Pacific Northwest markets, which refutes Seattle's claim that the MMCP is an appropriate benchmark for this proceeding, also "demonstrates that Seattle's claim of undue discrimination based on a comparison of the prices Seattle paid with the MMCP price paid by the CAISO must fail because (1) Seattle and the CAISO are not similarly

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[101] *See, e.g., Northwest Pipeline Corp.*, 92 FERC ¶ 61,287, at 62,015-16 (2000) (striking appendices to brief on exceptions that contained new material); *SFPP, L.P. Mobil Oil Corp. v. SFPP, L.P. [Tosco Corp. v. SFPP, L.P.]*, 80 FERC ¶ 63,014, at 65,208-209 (1997) (striking appendix to reply brief that included "data that goes beyond the evidence and thus exceeds the scope of material properly included in post-hearing briefs"); *Texas Eastern Transmission Corp.*, 39 FERC ¶ 63,036, at 65,204 (1987) (finding that appendices comprising substantive evidence, submitted after the close of the record, without reopening record, violates prohibition in Rule 510(c)).

[102] Order on Remand, 137 FERC ¶ 61,001 at P 24; Order on Rehearing, 143 FERC ¶ 61,020 at P 30.

[103] Initial Decision, 146 FERC ¶ 63,028 at PP 959-964.

situated and (2) the Respondents did not directly charge CAISO the MMCP price. To rule otherwise would effectively establish a market-wide remedy for the Pacific Northwest, a remedy that the Commission has continually rejected."[104] Moreover, we agree with the Presiding Judge's conclusions on this issue. It is well established that a finding of undue discrimination requires a showing that "(1) two classes of customers are treated differently; and (2) the two classes of customers are similarly situated."[105] The Commission has repeatedly emphasized the important structural differences between the California and Pacific Northwest markets.[106] Based on these differences, we agree with the Presiding Judge's finding that Seattle and CAISO are not similarly situated. Thus, applying the MMCP to the CAISO out-of-market purchases, but not to Seattle's bilateral purchases, does not constitute undue discrimination.

44. We also find that the Presiding Judge correctly rejected Seattle's arguments related to the *Lockyer* proceeding. In the Order on Remand, the Commission expressly instructed that the Presiding Judge should not consider evidence of quarterly reporting violations, which were the subject of the *Lockyer* proceeding.[107] On rehearing, the Commission upheld the categories of permissible evidence set forth in the Order on Remand, explaining that "evidence of [quarterly reporting] violations would not demonstrate the necessary connection between an unlawful act and an unjust and unreasonable contract rate . . . . If, on the other hand, a refund claimant has evidence of an overt act of manipulation that directly affected the contract rate, evidence of a reporting violation would be superfluous."[108] Given the Commission's unambiguous exclusion of evidence of quarterly reporting violations in the orders setting this matter for hearing, we find that Seattle's argument on this issue constitutes an impermissible collateral attack on those prior orders and we reject it.

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[104] *Id.* P 963 n.902 (citing Order on Remand, 137 FERC ¶ 61,001 at P 24 n.56; Order on Rehearing, 143 FERC ¶ 61,020 at P 30).

[105] *Energy Transfer Partners, L.P.*, 120 FERC ¶ 61,086, at P 169 (2007) (*Energy Transfer Partners*); *see also "Complex" Consol. Edison v. FERC*, 165 F.3d 992, 1012 (D.C. Cir. 1999); *Sebring Utility Comm'n v. FERC*, 591 F.2d 1003, 1009, n.24 (5th Cir. 1979); *Transwestern Pipeline Co.*, Opinion No. 238-A, 36 FERC ¶ 61,175, at 61,433 (1986) (undue discrimination is in essence an unjustified difference in treatment of similarly-situated customers) (*Transwestern Pipeline*).

[106] *See, e.g.*, Order on Remand, 137 FERC ¶ 61,001 at P 24.

[107] *Id.* P 19 n.43.

[108] Order on Rehearing, 143 FERC ¶ 61,020 at P 24.

45. We further reject Seattle's argument that the Presiding Judge effectively and improperly created separate records for Seattle and California Parties in this proceeding. In the Order on Remand, the Commission instructed each participant to submit the evidence upon which it intended to rely, even in the case of evidence previously submitted to the Commission.[109] Given this instruction, Seattle could not reasonably have expected to rely on evidence submitted by other parties. Also, we agree with Seattle Respondents that bifurcation of the record was necessary so that parties could clearly discern which evidence was being submitted against which party and how that evidence was relevant to particular allegations. Moreover, as discussed above, even if Seattle had been allowed to rely on California Parties' MMCP evidence, evidence showing that prices for sales to Seattle exceeded the MMCP does not in itself demonstrate unlawful activity that would be relevant to the *Mobile-Sierra* analysis.

2. Overcoming the *Mobile-Sierra* Presumption

a. Brief on Exceptions

46. Seattle argues that the Presiding Judge erred by finding that Seattle failed to overcome the *Mobile-Sierra* presumption. First, Seattle contends that the Commission should reject the standard used by the Presiding Judge for determining harm to the public interest. Seattle asserts that, under the relevant case law, the correct way to evaluate whether prices result in an excessive burden is to examine the cumulative impact of the rates Seattle paid, and not to assess the effect of individual contracts.[110] Seattle contends that the standard used by the Presiding Judge is unreasonable because it would allow entities to harm the public interest "as much as they please, so long as they do it a little bit at a time."[111]

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[109] Order on Remand, 137 FERC ¶ 61,001 at P 4 ("We will reopen the record to allow the participants to submit the information described below on which the Commission will 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.").

[110] Seattle Brief on Exceptions at 28 (citing *Texaco Inc. v. FERC*, 148 F.3d 1091, 1093 (D.C. Cir. 1998) (*Texaco*); *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 710-11 (D.C. Cir. 2000) (*TAPS*), *aff'd*, *New York v. FERC*, 335 U.S. 1 (2002); *Ariz. Corp. Comm'n v. FERC*, 397 F.3d 952, 954-55 (D.C. Cir. 2005) (*Arizona Corp. Comm'n*); *ISO New England Inc.*, 143 FERC ¶ 61,150, at P 187, n.359 (2013) (*ISO-NE*)).

[111] *Id.* at 28.

47. Second, Seattle claims that the Presiding Judge failed to consider evidence that market fundamentals were not the sole cause of high prices in the Pacific Northwest. First, while conceding that the high prices faced by Seattle were, in part, a result of needing to purchase 142 percent more power than forecast in 2001, Seattle contends that the increase in the prices Seattle had to pay for that power imposed an excessive burden on Seattle and its customers. Seattle states that the high prices it paid were not the result of supply shortages. Seattle contends that, in accepting testimony suggesting that reduced hydro generation was the single most important factor contributing to high prices during that period, the Presiding Judge ignored record evidence to the contrary, including the adverse impact of dysfunction and market manipulation in the California markets. Seattle contends that these circumstances would be relevant to whether Seattle Respondents' contracts with Seattle imposed an excessive burden.[112]

48. Finally, Seattle argues that the Presiding Judge erred by considering evidence of Seattle's business decisions, the prices at which Seattle sold power, or relative retail rates. Seattle states that the Presiding Judge's analysis of Seattle's conduct in no way diminishes the harm to the public interest. Similarly, Seattle contends that comparing Seattle's retail rates to those in other major U.S. cities has no bearing on whether the contract prices at issue imposed an excessive burden on Seattle's customers.[113]

b. Briefs Opposing Exceptions

49. Seattle Respondents, Trial Staff, and Exelon concur with the Presiding Judge's finding that Seattle failed to overcome the *Mobile-Sierra* presumption because Seattle did not demonstrate that the rates charged to Seattle imposed an excessive burden or seriously harmed the public interest. Seattle Respondents, Trial Staff, and Exelon argue that the Presiding Judge properly applied the *Mobile-Sierra* standard and therefore correctly rejected Seattle's cumulative impact theory.[114]

50. Seattle Respondents and Trial Staff also argue that, even if the cumulative impact of rates were relevant, Seattle still failed to demonstrate that the rates imposed an excessive burden or seriously harmed the public interest. Seattle Respondents and Trial Staff point out that Seattle acknowledged that at least 60 percent of the rate increases enacted in 2001 were attributable to factors unrelated to the price of power or the actions

[112] *Id.* at 31-33.

[113] *Id.* at 34-35.

[114] Seattle Respondents Brief Opposing Exceptions at 47-52; Trial Staff Brief Opposing Exceptions at 28-29; Exelon Brief Opposing Exceptions at 29-39.

of any Seattle Respondent.[115] Moreover, Seattle Respondents and Trial Staff contend that Seattle presented no analysis to show that the 40 percent that is potentially attributable to power purchase prices constituted an excessive burden under the relevant standard. In addition, Seattle Respondents and Trial Staff assert that Seattle failed to analyze how market fundamentals and other factors, such as Seattle's business decisions to reduce its long-term purchases, may have contributed to increased power prices.[116] Exelon contends that the Presiding Judge analyzed all evidence of "exogenous circumstances," such as market fundamentals, a record drought, and Seattle's own supply decisions, which contributed to the high prices Seattle paid, and correctly concluded that Seattle failed to demonstrate that any specific contracts with Constellation or any other seller imposed an excessive burden on consumers or seriously harmed the public interest.[117]

51. Further, Seattle Respondents refute Seattle's assertion that the Presiding Judge erred by not considering dysfunction and manipulation in the California markets in her analysis of market fundamentals in the Pacific Northwest. Seattle Respondents assert that the proper focus in this proceeding is whether any of the Seattle Respondents to Seattle's refund claims engaged in unlawful behavior in their interactions with Seattle in the Pacific Northwest markets. Seattle Respondents argue, therefore, that Seattle's allegations regarding the California markets are irrelevant to this proceeding and amount to little more than an additional request for market-wide relief, which they assert has been expressly rejected by the Commission.[118] Exelon likewise asserts that the CAISO market design and market rules that caused dysfunction in the California markets have no bearing on the bilateral contracts in the Pacific Northwest market.[119]

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[115] Seattle Respondents Brief Opposing Exceptions at 52; Trial Staff Brief Opposing Exceptions at 29 (citing Seattle Brief on Exceptions at 29 ("Nearly 40% of those rate increases was the result of the increased price of power purchased by Seattle.")).

[116] Seattle Respondents Brief Opposing Exceptions at 52-55, 62-63; Trial Staff Brief Opposing Exceptions at 30-33.

[117] Exelon Brief Opposing Exceptions at 34-38.

[118] Seattle Respondents Brief Opposing Exceptions at 63-65 (citing Order on Remand, 137 FERC ¶ 61,001 at P 24; Order on Rehearing, 143 FERC ¶ 61,020 at P 30).

[119] Exelon Brief Opposing Exceptions at 36.

52. Seattle Respondents and Exelon also distinguish the cases cited by Seattle in support of the cumulative impact theory by arguing that all of those cases dealt with public interest findings by the Commission in a rulemaking context or cases where intervening circumstances affect an entire class of contracts in the same manner. Exelon asserts that most of the cases cited by Seattle pre-date the Supreme Court's decision in *Morgan Stanley*, which specifies that the public interest must consider the benefits to consumers of protecting the sanctity of contracts and the harm to the public from injecting volatility into the markets by abrogating contracts. Seattle Respondents contend that Seattle's request for relief involves none of the public interest factors at issue in the cases relied upon by Seattle because Seattle is not attempting to avoid some generally applicable Commission policy, and no industry-wide rulemaking is involved. Further, Seattle Respondents claim that Seattle has not provided any analysis of the individual contracts at issue that would enable the Commission to make a generalized public interest finding.[120]

53. Seattle Respondents also object that Seattle attempts to use its Brief on Exceptions to present evidence, not presented at hearing, of increases in Seattle's average residential customer's bill in 2001 as a result of the rate increases. Seattle Respondents complain that the calculations are not well-explained in the brief and do not take account of other record evidence showing, as discussed above, that much of the rate increase had nothing to do with purchased power costs or the Respondents' actions. Nor did Seattle, according to Seattle Respondents and Exelon, offer any evidence of how its residential rate increases constituted an excessive burden on consumers, particularly in light of the uncontested evidence that Seattle's customers paid the lowest electricity costs of the 25 largest cities in the United States throughout this period. Exelon argues that the extraordinary action of setting aside the bilateral contracts is not warranted in light of the comparatively low retail rates enjoyed by Seattle's customers during that period.[121]

54. Also, Seattle Respondents and Exelon challenge Seattle's assertion that the Presiding Judge improperly considered evidence of Seattle's relative retail rates and business decisions. Seattle Respondents argue that weighing Seattle's own actions and comparing its retail rates to other U.S. cities is an appropriate part of the excessive burden analysis. Seattle Respondents assert that the excessive burden analysis under *Mobile-Sierra* is not simply a calculation of whether prices were high or low in the abstract relative to past prices, but whether the contracts imposed an excessive burden

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[120] Seattle Respondents Brief Opposing Exceptions at 47-52; Exelon Brief Opposing Exceptions at 30-32.

[121] Seattle Respondents Brief Opposing Exceptions at 56; Exelon Brief on Exceptions at 38-39.

down the line "relative to the rates they could have obtained."[122] Seattle Respondents insist that the rates Seattle could have obtained but for the specific contracts are affected by Seattle's own conduct and market forces such that these other factors must be considered.[123] Similarly, Exelon insists that evidence of Seattle's prices is important because it shows that there was no excess burden of the type that might justify the reformation of contract rates.

55. In addition to alleging that Seattle applied the incorrect legal standard and failed to link the demonstrated rate increases to Seattle Respondents' actions, Seattle Respondents claim that Seattle improperly attempted to demonstrate an excessive burden in relation to their own flawed volume and price forecast. Seattle Respondents contend that a market participant's own price forecast and expectations that future market conditions will be favorable are not the correct benchmark for identifying whether subsequent, actual market prices are unjust and unreasonable. Thus, Seattle Respondents assert that Seattle's argument amounts to little more than asking to be relieved from an improvident bargain, and they urge the Commission to uphold the actual contract prices.[124]

c. Commission Decision

56. We affirm the Presiding Judge's finding that Seattle failed to overcome the *Mobile-Sierra* presumption. As correctly determined by the Presiding Judge, Seattle did not offer any evidence to tie any alleged burden or harm to specific contracts, and thereby did not demonstrate that any contracts between Seattle and any of the Seattle Respondents imposed an excessive burden or seriously harmed the public interest.

57. We find no merit in Seattle's argument that the Presiding Judge misapplied the standard for excessive burden by requiring a contract-specific analysis instead of examining the cumulative impact of the rates paid by Seattle. In *Morgan Stanley*, the Supreme Court held that when a buyer challenges a contract under the *Mobile-Sierra* standard, "[t]he *contract rate* must seriously harm the public interest."[125] Thus, *Morgan Stanley* requires a contract-specific examination of burden or harm. Further, in setting this matter for hearing, the Commission adhered to the principles set forth in *Morgan Stanley* and expressly rejected the argument that because "the rates received by individual

[122] Seattle Respondents Brief Opposing Exceptions at 59-60.

[123] *Id.* at 60-61.

[124] Seattle Respondents Brief Opposing Exceptions at 58-59.

[125] *Morgan Stanley*, 554 U.S. at 548 (emphasis added).

sellers … were uniformly above a just and reasonable rate," the Commission "should permit evidence that the rates, as a whole, imposed an undue burden on the public."[126]

58. We also find that the cases cited by Seattle in support of its cumulative impact theory are distinguishable from the circumstances presented here. Unlike the present case, *Texaco, TAPS, Arizona Corp. Comm'n and ISO-NE* all involve public interest findings made by the Commission in the context of rulemaking proceedings. As the D.C. Circuit stated in *Texaco*, "the public interest necessary to override a private contract, however, is significantly more particularized than in a rulemaking proceeding and requires analysis of the manner in which the contract harms the public interest and of the extent to which abrogation or reformation mitigates the contract's deleterious effect."[127]

59. Even if we were to accept Seattle's cumulative impact public interest standard, we would still affirm the Presiding Judge's finding that Seattle failed to demonstrate that the contract rates at issue imposed an excessive burden on consumers or seriously harmed the public interest. The Presiding Judge acknowledged that the testimony adopted by Seattle witness Mr. Hanser identifies rate increases totaling 58 percent, rate increases that Seattle instituted during the relevant period, allegedly due to increased wholesale power costs. However, the Presiding Judge correctly found that Seattle failed to tie those rate increases to any specific wholesale energy costs or any of the Seattle Respondents' contracts or behavior. Thus, even if the retail rate increases constitute an excessive burden, Seattle offered no evidence to show that its contracts with the Seattle Respondents were the cause of that burden. Indeed, as the Presiding Judge explained, the evidence reflects that these rate increases were a result of a myriad of factors, including increases in transmission costs, Seattle's capitalization of costs associated with debt acquired before the relevant period and Seattle's own business decisions, and market fundamentals such as reduced supply as a result of record drought conditions that led to limited hydroelectric power output.[128]

60. We disagree with Seattle's claim that the Presiding Judge failed to consider evidence that market fundamentals were not the sole cause of high prices in the Pacific Northwest. To the contrary, we find that the Presiding Judge thoroughly evaluated evidence presented by Seattle, such as evidence of its bond offerings, and correctly found that it demonstrates the centrality of market fundamentals in driving prices higher. We agree with the Presiding Judge's conclusion that the excerpts of bond offerings from

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[126] *See* Order on Rehearing, 143 FERC ¶ 61,020 at PP 28, 30.

[127] *Texaco*, 148 F.3d at 1097.

[128] Initial Decision, 146 FERC ¶ 63,028 at PP 945-46.

2001 and 2003 to support Seattle's excessive burden argument instead support the counterargument that the higher prices faced by Seattle were the result of market fundamentals or Seattle's business decisions. In particular, we find persuasive Seattle's own explanation in its 2001 bond offering that "financial results in 2000 were far below historical levels, due to a combination of subnormal water conditions and unusually high demand for power, which drove the cost of power supply to unprecedented levels."[129] Further, the Presiding Judge noted that Seattle reported in the 2001 bond offering that its output from "hydroelectric facilities is projected to be only 66 percent of the average output over the water conditions in the 49-year period from 1929 through 1978."[130] Finally, the Presiding Judge observes that in the 2003 bond offering, Seattle reported to the investment community that it had increased rates in 2001 after it "was required to purchase large amounts of power in the wholesale market as a result of its 1996 decision to limit purchases from Bonneville [Power Administration], … the sale of Centralia Steam Plant in May 2000, and unusually poor water conditions in the water year beginning October 1, 2000."[131]

61. We reject Seattle's assertion that the Presiding Judge improperly considered evidence of Seattle's own business decisions, the prices at which Seattle sold power, or Seattle's retail rates relative to other major U.S. cities. We find that evidence of Seattle's business decisions is relevant to the question of whether either the contract rates at issue here, or other factors, are the cause of any burden or harm faced by Seattle or its customers. As explained above, the evidence demonstrates that Seattle's decision to decrease its purchases from Bonneville and rely more heavily on the spot market and its decision to sell the Centralia Steam Plant were major contributors to the rate increases Seattle instituted in 2001. The Presiding Judge was not opining on the prudence of Seattle's business decisions, or implying that these decisions somehow diminished any harm caused by the high prices, but was properly weighing these decisions among the myriad of factors that affected prices. We likewise find that Seattle's retail rates are germane to the consideration of whether Seattle has overcome the *Mobile-Sierra* presumption. As noted by the Presiding Judge, between 2002 and 2008, Seattle instituted only a single, 1.4 percent rate increase,[132] thereby discrediting any potential claims of a "down the line" burden.

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[129] *Id.* P 948 (citing Ex. SCL-38 at 2).

[130] *Id.* (citing Ex. SCL-38 at 3).

[131] *Id.* (citing Ex. SCL-39 at 2).

[132] Initial Decision, 143 FERC ¶ 63,028 at P 947 n.855.

62. We further find that allegations that dysfunction and manipulation in the California energy markets resulted in higher prices in the Pacific Northwest are not relevant to Seattle's case for overcoming the *Mobile-Sierra* presumption. The pertinent question here is not simply whether Seattle faced high prices, but whether the rates charged to Seattle in its bilateral contracts with the Seattle Respondents imposed an excessive burden or seriously harmed the public interest. Evidence demonstrating a general correlation between high prices in one market and high prices in another does not establish a connection between a burden or harm and the rates charged by Seattle Respondents. Thus, we find that the Presiding Judge properly afforded this evidence no weight.

C. Section 309 Claims

1. Brief on Exceptions

63. Seattle takes exception to the Presiding Judge's finding that Seattle's MMCP (i.e., market mitigation clearing price) benchmark liability theory was flawed because that benchmark is specific to California and not appropriate to the Pacific Northwest. Seattle argues that this finding should be rejected for several reasons. Seattle insists that MMCPs are not unique to the California market because the cointegration analysis conducted by Seattle witness Mr. Hanser showed that contract prices in California and the Pacific Northwest had the same general relationship to each other over time. Also, Seattle comments that no Seattle Respondent challenged the accuracy or correctness of the cointegration analysis. Further, Seattle observes that the Commission itself has found that the markets in California and the Pacific Northwest are interconnected as well as interrelated.[133] Lastly, Seattle asserts that the Commission has already held that the MMCPs establish the just and reasonable price for bilateral contracts in the Pacific Northwest by applying the MMCP to out-of-market contracts in the California Refund Case.[134] Seattle contends that the Presiding Judge failed to provide a reasonable basis for distinguishing between otherwise identical transactions where Seattle was the buyer

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[133] Seattle Brief on Exceptions at 36-37 (citing *San Diego Gas & Elec. Co.*, 93 FERC ¶ 61,121, at 61,357-58 (2000) (finding that the California electricity market can affect prices throughout the Western Interconnection) (November 2000 Order); *San Diego Gas & Elec. Co.*, 95 FERC ¶ 61,115, at 61,362, 61,365-66 (2001) (imposing a West-wide price cap on certain wholesale markets and instituting an investigation into electric energy sales in WSCC); June 2001 Order, 95 FERC ¶ 61,418 at 62,545 (finding that Western wholesale energy markets are "inextricable interrelated.")).

[134] July 2001 Order, 96 FERC ¶ 61,120 at 61,515-16; December 2001 Order, 97 FERC ¶ 61,275 at 62,178.

rather than CAISO. Moreover, Seattle questions the Presiding Judge's finding that the MMCP is not an appropriate proxy for just and reasonable prices in the Pacific Northwest because it is a "remedial relief construct."[135] Seattle asserts that, while the MMCP may have been developed for a remedial purpose, it is at least probative evidence on the issue of the maximum lawful price that could have been charged in the West during the crisis due to the interrelated nature of the markets.[136]

64. Seattle argues that its second benchmark, the Pivotal Unit benchmark, should not have been included in the Presiding Judge's discussion in the Initial Decision. Seattle states that it did not request relief on the basis of this benchmark, but merely offered it as an alternative calculation to illustrate the reasonableness of the MMCP benchmark.[137]

65. Seattle also asserts that the Presiding Judge erred regarding Seattle's section 309 claims for the same reasons as those stated with regard to Seattle's section 206 claims, as discussed above.[138]

66. Lastly, Seattle contends that the Presiding Judge incorrectly concluded that the dispute between the parties concerning length of the Section 309 Period is moot. Seattle states that, whereas all parties agree that the Section 309 Period includes January 1, 2000 through December 24, 2000, Seattle contends that this refund period should also include the Section 206 Period. Seattle argues that, despite the Presiding Judge's finding that Seattle did not satisfy its burden under the section 206 refund claims, the dispute about the length of the Section 309 Period is not moot because Seattle maintains that the Presiding Judge erred regarding Seattle's section 206 claims. In addition, Seattle asserts that prior Commission orders, including the Order on Rehearing, permitted parties to submit additional refund claims for the entire refund period of January 1, 2000 through June 20, 2001.[139]

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[135] Seattle Brief on Exceptions at 40 (citing Initial Decision, 146 FERC ¶ 63,028 at P 959).

[136] *Id.* at 39-40.

[137] *Id.* at 41.

[138] *Id.* at 41-42.

[139] *Id.* at 46-47 (citing Order on Rehearing, 143 FERC ¶ 61,020 at P 32) (stating that Seattle could submit refund claims for the entire period from January 1, 2000 through and including June 20, 2001).

D. Briefs Opposing Exceptions

67. Seattle Respondents and Exelon argue that Seattle's section 309 claims are meritless for many of the same reasons as Seattle's section 206 claims, chiefly because, according to these parties, Seattle failed to provide any evidence of a statutory or tariff violation by any Seattle Respondent. Seattle Respondents and Exelon contend that Seattle's section 309 claims boil down to assertions that prices were *per se* unlawful because they exceeded a marginal cost benchmark developed for the California markets, thereby entitling Seattle to a market-wide remedy. Thus, Seattle Respondents and Exelon assert that the Presiding Judge properly rejected Seattle's section 309 claims. Specifically, Seattle Respondents and Exelon concur with the Presiding Judge's finding that selling at prices in excess of the MMCP benchmark does not constitute unlawful conduct because the MMCP is inapplicable to the Pacific Northwest markets, as the Commission has ruled repeatedly, and because reliance on a market-wide benchmark does not address individual sellers' conduct.[140] Similarly, Trial Staff states that it applies its arguments equally to Seattle's section 206 and section 309 claims.[141]

68. More specifically, Seattle Respondents and Exelon contend that the Presiding Judge was correct in distinguishing Seattle's transactions from CAISO out-of-market transactions, to which the MMCP applied. Seattle Respondents and Exelon assert that the MMCP was properly applied to the CAISO out-of-market transactions only when they were affected by CAISO market design flaws and were necessitated by the dysfunction in the California markets. Seattle Respondents and Exelon claim that Seattle has not shown any nexus between the flawed market rules in California and the contracts entered into in the Pacific Northwest markets.[142]

69. Trial Staff supports the Presiding Judge's decision to reject the cointegration analysis presented by Seattle witness Mr. Hanser, which purported to demonstrate that the California and Pacific Northwest markets acted as one. Trial Staff asserts that, while the Commission has previously found that the California and Pacific Northwest markets were interrelated, it did not find, as alleged by Mr. Hanser, that prices in the California

[140] Seattle Respondents Brief Opposing Exceptions at 67-69; Exelon Brief Opposing Exceptions at 40-50.

[141] *See* Trial Staff Brief Opposing Exceptions at 8, 27.

[142] Seattle Respondents Brief Opposing Exceptions at 71-72; Exelon Brief Opposing Exceptions at 46-48.

market directly affected prices in the Pacific Northwest.[143] Trial Staff also notes that the Commission found that the various Western markets were different in important ways.[144] Trial Staff contends that Mr. Hanser's analysis shows merely similar patterns in price movement, but without any evidence to support conclusions about why those patterns exist. Moreover, Trial Staff asserts that Mr. Hanser's cointegration analysis does nothing meaningful to help address the question of whether a specific seller's unlawful conduct had a direct effect on a contract price.[145]

70. Seattle Respondents object to Seattle's assertion that the Presiding Judge erred by considering Seattle's Pivotal Unit benchmark theory because Seattle, itself, submitted that evidence. That Seattle later abandoned that theory does not mean that the Presiding Judge erred in pointing out that the Pivotal Unit benchmark provides no basis for Seattle to obtain refunds, according to Seattle Respondents.[146] Exelon argues that, because the award of refunds under section 309 is a form of equitable relief, Seattle's own conduct is relevant as equitable relief should not be awarded to a party who engaged in the same activity for which it seeks redress.[147]

71. Finally, Seattle Respondents argue that the Presiding Judge correctly ruled that the issue of whether section 309 also applies to the Section 206 Period is moot. Seattle Respondents do not contest whether Seattle was at liberty to allege theories under section 309 for both periods, but contend that the dispute about the length of the Section 309 Period is moot in light of the alleged deficiency of Seattle's evidence to support either its section 206 or section 309 claims.[148]

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[143] Trial Staff Brief Opposing Exceptions at 25 (citing November 2000 Order, 93 FERC ¶ 61,121 at 61,357-358).

[144] Trial Staff Brief Opposing Exceptions at 25-26 (citing June 2001 Order, 95 FERC 61,418 at 62,545).

[145] Trial Staff Brief Opposing Exceptions at 25-27.

[146] Seattle Respondents Brief Opposing Exceptions at 70-71.

[147] Exelon Brief on Exceptions at 49-50 n.223.

[148] Seattle Respondents Brief Opposing Exceptions at 72-74.

E. Commission Determination

72. For many of the same reasons as explained above in relation to Seattle's section 206 refund claims,[149] we affirm the Presiding Judge's finding that Seattle is not entitled to refunds under FPA section 309. The Presiding Judge correctly recites the legal standard for relief under FPA section 309, as set forth in the Order on Rehearing: "refund claimants may attain the relief under FPA section (if at all) by demonstrating a seller's specific violation of a substantive provision of the FPA or tariff, compliance with which the Commission can enforce by taking actions 'necessary and appropriate.'"[150] Despite this instruction, Seattle did not address individual contracts or sellers' conduct. Seattle instead focused on allegations that prices exceeding the MMCP demonstrate that sellers exercised market power, which according to Seattle violated both their market-based rate tariffs and the FPA section 205 requirement that rates be just and reasonable. While we agree with the Presiding Judge's assessment of the flaws in Seattle's benchmark analyses, as discussed below, we also agree with her characterization of Seattle's section 309 case as a "general argument that prices in the Pacific Northwest were 'too high'," an argument that was rejected by the Commission in the Order on Rehearing.[151]

73. Aside from the fundamental flaw in Seattle's MMCP benchmark theory of section 309 liability, which fails to demonstrate specific violations of the FPA or any tariff, we also concur with the Presiding Judge's finding that the MMCP benchmark is specific to the California markets and is not an appropriate benchmark for the Pacific Northwest. The Commission has already rejected the option of a market-wide remedy in this proceeding based on fundamental differences between the California and Pacific Northwest markets:

> Unlike the Pacific Northwest spot market, however, the California markets operated through a centralized power exchange using a central clearing price. 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

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[149] *See supra* PP 41-45, 56-62.

[150] Initial Decision, 146 FERC ¶ 63,028 at P 955 (quoting Order on Rehearing, 143 FERC ¶ 61,020 at P 32).

[151] Initial Decision, 146 FERC ¶ 63,028 at P 958 (quoting Order on Rehearing, 143 FERC ¶ 61,020 at P 30).

> to pay for a given transaction and each buyer has the opportunity to attempt to negotiate a lower price.[152]

74. The Presiding Judge also correctly found that the MMCP was developed as a remedial construct, and not a measure of liability, for the California Refund Proceeding.[153] Specifically, the MMCP was used to re-calculate hourly rates based on the marginal cost of the most expensive unit dispatched to serve load in CAISO's real-time imbalance market. Thus, as stated by the Presiding Judge, the MMCP reflects California's heavy reliance on natural-gas fired generation and does not account for the difference in the resource profile of the Pacific Northwest, which is more heavily reliant on hydroelectric power. The Presiding Judge also correctly found that the MMCP does not include fixed costs, profit margin, marketer costs, or transmission costs.[154] Thus, because the MMCP does not account for many inputs relevant to contract prices in the Pacific Northwest, we find that the Presiding Judge successfully refuted Seattle's claim that the MMCP is a reasonable benchmark for just and reasonable rates in the Pacific Northwest spot market.

75. We reject Seattle's argument that the Commission has already held that MMCPs establish a just and reasonable price for bilateral contracts in the Pacific Northwest by applying MMCPs to CAISO out-of-market contracts in the California refund proceeding. In providing a remedy for the CAISO out-of-market transactions, the Commission linked the need for the remedy specifically to flaws in the California markets, explaining that the "California market structure and rules provide the opportunity for sellers to exercise market power when supply is tight and can result in unjust and unreasonable rates under the FPA. … These statements are most true with respect to the ISO's daily [out-of-market] purchases."[155] In contrast, the bilateral transactions at issue here were conducted under an entirely different market structure. Other than generalized demonstrations of similar price trends in both markets, Seattle has not shown a nexus between the defects in the California markets and the spot contracts entered into in the Pacific Northwest. Thus, we find that the MMCP is inapposite as to the question of just and reasonable rates in the bilateral Pacific Northwest spot market.

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[152] Order on Remand, 137 FERC ¶ 61,001 at P 24 (internal citations omitted).

[153] Initial Decision, 146 FERC ¶ 63,028 at PP 960-961 (citing July 2001 Order, 96 FERC ¶ 61,120).

[154] *Id*. P 961.

[155] July 2001 Order, 96 FERC ¶ 61,120 at 61,515.

76. Further, we find Seattle's reliance on prior Commission findings regarding the interrelated nature of the two markets to be misplaced. Seattle ignores the important distinction between the prospective West-wide price cap imposed by the Commission in 2001 and the refunds requested here. Because the *Mobile-Sierra* presumption applies to the contracts at issue here, the Commission cannot retroactively apply a market-wide benchmark to determine refund liability, but must examine each individual seller's conduct as it relates to each contract, and must assess the impact of the contract rates on consumers. Thus, the justification for applying a prospective price cap West-wide does not mean that the two markets should be treated the same for purposes of determining whether refunds are warranted. We also find that Seattle ignores portions of the relevant precedent that highlight major structural differences, despite the Commission's finding that the California and Pacific Northwest markets are interrelated:

> [W]e are mindful that the West is a single market which is at once inextricably interrelated, yet characterized by important differences. Fundamental in this regard is that the California spot market[s] are presently administered largely through the ISO's centralized clearinghouse, which operates a single price auction, while sales in the rest of the West are consummated on an individual contract basis and not through a centralized clearinghouse.[156]

The Commission emphasized that its mitigation plan was designed to account for these differences: "The plan adopted by the Commission is tailored to provide a uniform scheme of mitigation that at the same time recognizes the differences between the two markets."[157]

77. For similar reasons, we find that the Presiding Judge correctly rejected Seattle's cointegration analysis as evidence to support their claim that the two markets should be treated the same. As stated by the Presiding Judge, "Mr. Hanser has acknowledged that his cointegration analysis does not establish any *causal* link between the two markets. Neither did he establish any clear relationship between these two fundamentally different markets other than to observe that prices often moved in the same direction at the same time."[158] Moreover, evidence of price trends does nothing to demonstrate specific

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[156] June 2001 Order, 95 FERC ¶ 61,148 at 62,545.

[157] *Id.* 95 FERC ¶ 61,418 at 62,556.

[158] Initial Decision, 146 FERC ¶ 63,028 at P 964 (emphasis in original).

violations of the FPA or a tariff, which would be required to find refund liability under FPA section 309, as explained above.[159]

78. We likewise find that the Presiding Judge did not err by considering Seattle's Pivotal Unit benchmark analysis in concluding that Seattle is not entitled to refunds under FPA section 309. Regardless of Seattle's intent, or lack thereof, to use this evidence as the basis of its claim for relief, Seattle did in fact offer the Pivotal Unit benchmark analysis into evidence, and we find no error in the Presiding Judge determining that such evidence was relevant to the refund issue. Regardless, the Presiding Judge did not deny relief on the basis of flaws in the Pivotal Unit benchmark analysis. As noted above, the fundamental flaw in Seattle's section 309 case, as correctly acknowledged by the Presiding Judge, is that Seattle relied exclusively on generic claims of high prices and did not address individual contracts and the conduct of each seller as it relates to the formation of each contract. Additionally, as discussed above, the Presiding Judge provided ample grounds for rejecting the MMCP benchmark beyond the defects in the Pivotal Unit benchmark analysis.

79. We agree with Exelon that Seattle's conduct is relevant to the question of whether refunds are warranted and, for the reasons explained above,[160] find that the Presiding Judge properly weighed this evidence.

80. Finally, we find that the Presiding Judge correctly found that the dispute regarding the length of the Section 309 Period is moot. Because we affirm the Presiding Judge's finding that Seattle failed to substantiate its refund claims under either section 206 or 309, we also affirm the Presiding Judge's finding that the question of the length of the Section 309 Period is moot.

V. California Parties' Refund Claims

A. Initial Decision

81. The Presiding Judge found that California Parties had not sustained their evidentiary burden to demonstrate that high contract prices were the result of unlawful activity by TransCanada. Specifically, the Presiding Judge found that California Parties failed to demonstrate that TransCanada engaged in fraud, duress, or bad faith. The Presiding Judge noted California Parties' attempt to aggregate their claims of fraud, duress, or bad faith using the same evidence, and found that the primary evidence

[159] *See supra* P 14.

[160] *See supra* P 61.

proffered by California Parties' witness Mr. Taylor in support of these claims was a generic benchmark price which, even if valid for establishing the prevailing Pacific Northwest market price, does not establish duress, fraud, or bad faith in the formation of the contract.[161] In addition, the Presiding Judge found that California Parties, despite providing the appropriate separate legal definitions for duress, fraud, and bad faith in their initial legal brief, did not make the necessary showings under those definitions. The Presiding Judge was not persuaded by evidence of two parking transactions by TransCanada, the only specific conduct alleged by California Parties as constituting bad faith, because California Parties failed to refute evidence that indicated these two transactions were for legitimate business reasons. Finally, the Presiding Judge noted that nothing in the trader tapes provided by TransCanada, which, according to the Presiding Judge, provide the best evidence of the actual contract negotiations, demonstrates duress, fraud, or bad faith.[162]

82. With regard to California Parties' refund claims against Coral, the Presiding Judge determined that unlawful activity by Coral may have contributed to or exacerbated high contract prices. The Presiding Judge found that California Parties established a *prima facie* case that at least 47 of the subject contracts were tainted by deceptive False Export activities.[163] The Presiding Judge relied primarily on the False Export screen and testimony, presented by California Parties' witness Mr. Taylor, that examined whether in any given hour a supplier (1) submitted a day-ahead or day-of export schedule to CAISO that was not a wheel-through or circulation transaction, and (2) made a real-time sale in the same hour to CERS. The Presiding Judge found that the rebuttal evidence offered by Coral could not be relied upon to establish the true sources of energy that Coral sold to CERS but instead reflected the last stage of a strategy on Coral's part to take energy out of California and sell it back to CERS, misrepresented as coming from the Pacific Northwest. However, the Presiding Judge stated that insufficient production on Coral's

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[161] Initial Decision, 146 FERC ¶ 63,028 at P 1388 (quoting Order Granting Interlocutory Appeal, 141 FERC ¶ 61,248 at P 15) (rejecting California Parties' argument that "simply identifying high prices should be sufficient to overcome or avoid the [*Mobile-Sierra*] presumption.")).

[162] *Id.* PP 1391-1393.

[163] The Presiding Judge explains that California Parties describe a False Export as "a transaction in which a supplier purchasing power generated within the ISO would file with the ISO a Day Ahead or Day Of schedule showing a fictitious export of power that was generated with the ISO to a recipient with load (or a sink) outside California and then sell the energy to CERS as [an out of market transaction] in Real Time, falsely representing it as coming from outside the ISO." *Id.* P 1405 (internal quotes omitted).

part precluded her from analyzing the transactions with the level of granularity necessary to support a contract specific inquiry and, as a result, "there remain significant questions of fact and law with respect to these transactions."[164] Thus, the Presiding Judge afforded Coral the opportunity to demonstrate, during Phase II of this proceeding, that the contracts in question were not False Exports and/or that the rates charged to CERS in those contracts were nonetheless just and reasonable.[165]

83. In addition, the Presiding Judge found that California Parties demonstrated that as many as 119 of Coral's contracts with CERS may have been tainted by "bad faith," based on the same evidence submitted in support of California Parties' False Export claims. The Presiding Judge explained that the WSPP Agreement requires construction in accordance with Utah law, under which one or more of the following factors must be present to support a finding that a party acted in bad faith: "(i) [t]he party lacked an honest belief in the propriety of the activities in question; (ii) the party intended to take unconscionable advantage of others, or (iii) the party intended to or acted with the knowledge that the activities in question would hinder, delay, or defraud others."[166]

84. The Presiding Judge found that California Parties provided compelling evidence that Coral exported power in a deceptive manner so that it could resell that power to CERS as if it originated in the Pacific Northwest. The Presiding Judge determined that these transactions involved at least two instances of deceptive conduct, the false indication that the energy generated in California was being exported and the false indication that the power being purchased in real-time came from the Pacific Northwest. Thus, the Presiding Judge found that these trade practices demonstrate that Coral engaged in contract negotiations with CERS in bad faith as that term is defined under Utah state law. However, as with the False Export transactions, the Presiding Judge concluded that significant questions of fact and law remain with respect to those transactions. Thus, the Presiding Judge stated that Coral may demonstrate, in Phase II of this proceeding, that the contracts were not negotiated in bad faith and/or that the rates associated with those contracts were nonetheless just and reasonable based on Coral's costs and market conditions.[167]

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[164] *Id.* P 1414.

[165] *Id.*

[166] *Id.* P 1419 (quoting *Valcarce v. Fitzgerald*, 961 P.2d 305, 316 (Utah 1998) (*Valcarce*)).

[167] *Id.* PP 1419-1422.

85. The Presiding Judge found that California Parties failed to demonstrate undue discrimination by either TransCanada or Coral. The Presiding Judge explained that under this theory, California Parties bear the burden of showing that "(1) two classes of customers are treated differently; and (2) the two classes of customers are similarly situated."[168] The Presiding Judge found as a threshold matter that CERS was uniquely situated as compared to other buyers in the Pacific Northwest during that period. Further, the Presiding Judge concluded that the evidence presented by California Parties was insufficient to support a finding of undue discrimination.[169]

86. Finally, the Presiding Judge found that California Parties failed to establish that Coral exercised market power. First, the Presiding Judge stated that California Parties failed to provide seller specific evidence and relied instead on a regression analysis that included market participants who are no longer or never were part of this proceeding. Also, the Presiding Judge faulted California Parties for using a market power test that was not adopted by the Commission during the CERS Period and cannot be applied to Coral retroactively. The Presiding Judge noted that the hub-and-spoke analysis was the undisputed standard for assessing market power during the relevant time period and that the Commission has previously rejected California Parties' argument that it was an inappropriate market power screen to use in the *Lockyer* proceeding.[170]

87. In those cases where California Parties failed to establish a *prima facie* case sufficient to avoid application of the *Mobile-Sierra* presumption, the Presiding Judge found that California Parties failed to demonstrate that either TransCanada's or Coral's sales to CERS imposed an excessive burden on consumers or seriously harmed the public interest. As an initial matter, the Presiding Judge found that California Parties' reliance on an aggregated estimate of $5 million in overpayments by CERS is insufficient by itself to support abrogation of the subject contracts because that figure includes prices paid to sellers other than TransCanada or Coral who are no longer or never were part of this proceeding and also because ordering refunds on the basis of the aggregated figure would

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[168] *Id.* P 1394 (quoting *Energy Transfer Partners*, 120 FERC ¶ 61,086 at P 169).

[169] *Id.* PP 1396-1403, 1423-1427.

[170] *Id.* PP 1428-1430 (citing *California ex rel. Lockyer v. British Columbia Power Exch. Corp.*, Opinion No. 512, 135 FERC ¶ 61,113 (2011) (Opinion No. 512)). The Presiding Judge noted that California Parties did not allege that TransCanada exercised market power. *Id.* P 1386.

result in the abrogation of the contracts with TransCanada and Coral based on the impact of others' sales.[171]

88. The Presiding Judge next noted that TransCanada's hourly sales volume to CERS was typically low in volume relative to the total hourly volume and therefore concluded that the record did not support allegations that TransCanada's contracts with CERS imposed an excessive burden. The Presiding Judge also pointed to record evidence demonstrating that TransCanada's prices were generally below the average prices paid by CERS. Nevertheless, the Presiding Judge stated that even if TransCanada made substantial profits from its sales to CERS, *Morgan Stanley* makes clear that "bilateral, market-based contracts should not be voided on the basis of gross margins as that would be a 'reinstitution of cost-based rather than contract-based regulation.'"[172] More important, the Presiding Judge observed that the record reflected that CERS' costs were only one half of one percent higher under the actual contracts negotiated with TransCanada than they would have been had the transactions taken place at the MMCP level advocated as a benchmark by California Parties.[173] As such, the Presiding Judge found that the subject contract rates do not impose an excessive burden on consumers or seriously harm the public interest.[174] The Presiding Judge also found, with respect to those contracts between CERS and Coral that were not tainted by False Export or bad faith, that California Parties failed to demonstrate that those contracts imposed an excessive burden on consumers or seriously harmed the public interest for the same reasons discussed regarding CERS' contracts with TransCanada.[175]

89. Finally, the Presiding Judge rejected arguments that California Parties' claims are barred by laches, statutes of limitations, or the unclean hands doctrine. The Presiding Judge rejected TransCanada's statute of limitations arguments. The Presiding Judge found that the Utah statute of limitations governing contact claims is inapplicable, because California Parties assert their claims of duress, bad faith and fraud not as a matter

[171] *Id.* PP 1695-1696. The Presiding Judge notes that the Commission has already rejected this type of result. *Id.* P 1696 (citing Order on Rehearing, 143 FERC ¶ 61,020 at PP 26, 30).

[172] *Id.* P 1700 (quoting *Morgan Stanley*, 554 U.S. at 550).

[173] *Id.* P 1702 (citing California Parties Initial Br. at 169-172).

[174] *Id.* The Presiding Judge reiterated that the MMCP is not an appropriate benchmark for the Pacific Northwest bilateral market. *Id.* PP 1703-1705.

[175] *Id.* PP 1709-1710.

of state contract law but to show that the *Mobile-Sierra* presumption is inapplicable to the contracts at issue. Moreover, even if the Utah statute of limitations applied, the Presiding Judge was persuaded by California Parties' argument that the statute of limitations had been satisfied in 2001 since all parties have been on notice that California Parties were asserting concepts of duress as part of their case and, specifically, that TransCanada was put on notice when Puget filed the complaint that initiated this proceeding on October 26, 2000. Next, the Presiding Judge accepted California Parties assertion that, because they do not seek broad, market-wide penalties but only request refunds for specific contracts, they are not seeking a penalty barred by the federal statute of limitations. With regard to the doctrine of laches, the Presiding Judge agreed with California Parties that California Parties were not sleeping on their rights or manipulating the legal process to delay consideration of these claims and, further, that TransCanada has no legitimate basis for claiming surprise or undue prejudice.[176]

90. The Presiding Judge rejected allegations that CERS engaged in inequitable conduct that would invoke the unclean hands doctrine, explaining that "the evidence of record reflects that CERS made every effort to protect the health and welfare of Californians, the viability of the electricity grid, and California's economy during the Western Energy Crisis."[177]

B. <u>Standard of Proof</u>

1. <u>Briefs on Exception</u>

91. California Parties argue that the Presiding Judge erred by providing Coral with another opportunity to present evidence on liability during Phase II of the proceeding. California Parties contend that once it established its *prima facie* case that Coral had engaged in False Exports or conducted transactions in bad faith, the burden shifted to Coral to discredit or rebut California Parties' evidence. California Parties assert that the legal consequence of Coral's failure to do so is that California Parties' False Export and bad faith claims prevail and the Presiding Judge's findings of fact must stand, without additional opportunity to litigate this issue.[178]

92. Trial Staff and Shell take exception to the Presiding Judge's finding that California Parties established a *prima facie* case against Coral that certain transactions were tainted

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[176] *See id.* P 1706.

[177] *Id.* P 1707.

[178] California Parties Brief on Exceptions at 132-138.

by False Exports or bad faith. Shell argues that the Presiding Judge erred by not rejecting California Parties' allegations against Coral and by expanding the scope of Phase II of this proceeding, which was intended to focus solely on remedies, to resolve the outstanding "significant questions of fact and law" with regard to the contracts between Coral and California Parties that may be tainted by False Export or bad faith. Shell contends that, if additional fact-finding is necessary to substantiate California Parties' claims and make the contract-specific determinations necessary to avoid the *Mobile-Sierra* presumption, California Parties have failed to meet their burden to prove the allegations by a preponderance of evidence. Shell asserts that, by faulting Shell for not offering into evidence the trader audiotapes transcripts of the negotiation of every spot contract at issue, the Presiding Judge impermissibly shifted the burden to Shell to prove what *Mobile-Sierra* already presumes. Further, Shell and Trial Staff argue that California Parties have the burden to demonstrate that Coral engaged in unlawful activity that directly affected a particular contract, which California Parties have not done. Thus, Trial Staff and Shell claim that the Presiding Judge improperly shifted the burden to Coral to provide a response with a level of granularity that exceeds the general allegations of California Parties that are not tied to specific contracts.[179]

2. Briefs Opposing Exceptions

93. California Parties argue that the Presiding Judge erred by suggesting that Coral may re-litigate issues in Phase II of the proceeding. California Parties maintain that they have proven Coral's liability and the only remaining issue is to calculate the level of damages associated with Coral's False Export activities and the contracts between Coral and CERS that are tainted by bad faith. California Parties also dispute Shell's contention that the Presiding Judge improperly shifted the burden to Coral by deferring until Phase II of the proceeding the resolution of "significant questions of fact and law." California Parties aver that the Presiding Judge applied the proper standard of proof by first finding that California Parties established a *prima facie* case against Coral, which then shifted the burden to Coral to rebut California Parties' evidence. California Parties contend that the Presiding Judge correctly found that Coral failed to carry its burden to produce sufficient rebuttal evidence and, as such, California Parties assert that, as a matter of law, the Presiding Judge should have found Coral liable and set only remedy issues for Phase II of the proceeding.[180]

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[179] Shell Brief on Exceptions at 38-43; Trial Staff Brief on Exceptions at 6-7, 22-26.

[180] California Parties Brief Opposing Exceptions at 81-82, 101-103.

3. **Commission Determination**

94. We agree with California Parties, Shell, and Trial Staff that re-litigating issues of refund liability in Phase II of this proceeding would be inappropriate. As discussed below, we partially remand the Initial Decision back to the Presiding Judge.

95. The issues to be resolved during Phase I of the proceeding, as agreed to by the parties and adopted by the Presiding Judge were (1) whether "an individual seller engag[ed] in unlawful market activity, without a legitimate business reason, that directly affected the particular contract or contracts to which that seller was a party such that the presumption of just and reasonable rates applicable to bilateral contracts under the *Mobile-Sierra* standard … no longer applies,"[181] and (2) whether, for any contract to which the *Mobile-Sierra* standard applies, "the requirements necessary for modification of a rate under the *Mobile-Sierra* public interest standard [have] been satisfied."[182]

96. The question of whether contracts between CERS and Coral should be modified because the rates in those contracts were directly affected by False Exports and/or bad faith, such that the *Mobile-Sierra* presumption no longer applies, falls squarely within the scope of issues to be resolved in Phase I. The Presiding Judge found that California Parties had established a *prima facie* case that "at least 47 of the subject contracts were tainted by deceptive False Export activities,"[183] and "as many as 119 of the subject contracts may have been tainted by 'bad faith'."[184] However, the Presiding Judge also found that "[t]here remain significant questions of fact and law with respect to those transactions that must be resolved in Phase II of this proceeding,"[185] and thus afforded Coral an opportunity to present additional evidence regarding these transactions during Phase II.[186]

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[181] *Puget Sound Energy, Inc.*, Docket No. EL01-10-085, at 7 (July 16, 2012) (Order Establishing Procedural Schedule, Scheduling Prehearing Conference, and Ruling on Motion); *see also* Initial Decision, 146 FERC ¶ 63,028 at P 25.

[182] Initial Decision, 146 FERC ¶ 63,028 at P 25. Phase II was for the purpose of considering an appropriate refund methodology, if necessary.

[183] Initial Decision, 146 FERC ¶ 63,028 at P 1737.

[184] *Id.* P 1738.

[185] *Id.* P 1739.

[186] *Id.*

97. It is unclear from the Initial Decision what significant issues of fact and law remain to be resolved. Without additional explanation to clarify the nature and scope of these issues, we cannot affirm the Presiding Judge's finding that California Parties have established a *prima facie* case that unlawful activity has directly affected any of the subject contracts. The Presiding Judge's finding that "*at least*" 47 of the subject contracts were tainted by False Export activities appears to leave open the question of how many contracts were actually affected. The Presiding Judge's finding that "*as many as*" 119 of the subject contracts "*may have*" been tainted by bad faith also appears to leave open substantive questions about the number of contracts affected. In addition, as discussed in greater detail below, we cannot determine from the Initial Decision how the Presiding Judge defined individual contracts or what the basis may have been for adopting any such definition.

98. Further, in affording Coral the opportunity to present additional evidence on refund liability in Phase II of the proceeding, the Presiding Judge acknowledged that "Coral's insufficient production in response [to the evidence presented by California Parties] precluded the undersigned from analyzing the transactions with the level of granularity necessary to support a contract specific inquiry."[187] However, as the party seeking contract abrogation, California Parties bear the burden of proof.[188] The party with the burden of proof bears the burden of production, or the need to provide sufficient evidence to establish a *prima facie* case.[189] Once it establishes a *prima facie* case, the burden of going forward shifts to the opposing party; although the ultimate burden of proof remains with the proponent.[190] The party bearing the burden of proof will prevail only if, when the record is closed, the preponderance of evidence supports its position.[191]

99. As applied to this case, the burden of proof requires California Parties to establish a *prima facie* case, on a contract specific basis, that Respondents engaged in unlawful market activity that directly affected the rate under a specific contract. Only if California Parties met that burden would the burden shift to Coral to provide contract specific evidence to rebut California Parties' evidence. If California Parties did, as asserted by

[187] *Id.* P 1414.

[188] *Id.* P 674.

[189] *Dir. OWCP v. Greenwich Collieries*, 512 U.S. 267, 276 (1994).

[190] *Id.* at 273, 279-280. (finding that "when the party with the burden of persuasion establishes a *prima facie* case supported by 'credible and credited evidence,' it must either be rebutted or accepted as true.").

[191] *See, e.g.*, *Southern Co. Serv., Inc.*, 23 FERC ¶ 63,018 (1983).

the Presiding Judge, make a *prima facie* case that Coral failed to rebut, then California Parties should prevail and there should be no need for additional consideration of whether Coral should be liable for refunds; the Presiding Judge could move directly to the remedy issue in Phase II. On the other hand, if substantial issues of fact and law remain such that the Presiding Judge cannot analyze the transactions "with the level of granularity necessary to support a contract specific inquiry"[192] on the basis of evidence already in the record, then we must question whether California Parties succeeded in meeting its burden of proof.

100. For the above reasons, we find that the Presiding Judge may not have engaged in the required contract specific analysis in concluding that California Parties made a *prima facie* case that Coral engaged in False Export activities and/or negotiated in bad faith such that the *Mobile-Sierra* presumption should not apply to an as-of-yet undetermined number of the subject contracts. Accordingly, we reverse the Initial Decision with respect to the Presiding Judge's findings on California Parties' allegations of False Export and bad faith against Coral and remand these issues to the Presiding Judge to make additional findings consistent with the directions set forth in this order.

101. Thus, the Presiding Judge is directed to issue a revised partial Initial Decision on the issues of False Exports and bad faith with respect to California Parties' claims against Coral, consistent with the direction provided below. The revised partial Initial Decision will be issued in accordance to Subpart G of the Commission's Rules of Practice and Procedure.[193] Upon issuance of the revised partial Initial Decision, participants may file briefs on and opposing exceptions pursuant to Rule 711[194] concerning revised findings, and may incorporate by reference briefs on or opposing exceptions previously filed in this proceeding concerning findings unaltered by the Presiding Judge.

C. Classification of Contracts

1. Briefs on Exceptions

102. TransCanada concurs with the Presiding Judge that California Parties have not established a basis for abrogating any of the contracts between TransCanada and CERS. However, TransCanada suggests that some of the Presiding Judge's language could be construed as accepting California Parties' classification of "contracts." TransCanada

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[192] *See* Initial Decision, 146 FERC ¶ 63,028 at PP 1414, 1422.

[193] 18 C.F.R. §§ 385.701-.716 (2014).

[194] 18 C.F.R. § 385.711 (2014).

contends that, in contrast to the various methods of contract identification used by California Parties' witnesses, the best evidence for identifying individual contracts, in accord with the WSPP Agreement, is by reference to the terms of taped confirmation agreements.[195]

103. Trial Staff argues that Mr. Taylor's False Export screens used the "wrong unit of analysis" by frequently looking only at a one-hour slice of a longer transaction and this failure to conduct an analysis at the transaction level overstates the extent of alleged False Export transactions and biases his findings towards finding manipulation. Trial Staff assert that because Mr. Taylor conducted his analysis on an hourly basis, instead of a transaction basis, he found violations in some hours but not other hours for the same transaction. Thus, Trial Staff contends that Mr. Taylor's analysis is not systematically linked to any particular contract and cannot satisfy the Commission' directive that "[p]arties seeking refunds must submit evidence not only on whether unlawful activity occurred, but must also demonstrate a connection between unlawful activity by a seller and unjust and unreasonable rates under a *specific contract*."[196]

2. Briefs Opposing Exceptions

104. California Parties urge the Commission to affirm the contract designations proposed by California Parties and adopted by the Presiding Judge.[197] California Parties explain that they defined the relevant contracts as designated by the CERS ID number, based on contemporaneous transaction data that CERS maintained, and consistently applied this approach among the Respondents. Using this method, California Parties report that Mr. Taylor identified 156 separate contracts for Coral and 161 for TransCanada. In contrast to California Parties' consistent designation of what constitutes a contract, California Parties observe that Coral and TransCanada each applied very different methods for designating contracts. California Parties assert that Coral's claim of 323 separate contracts, based on deal tickets rather than CERS confirmation records, was inadequately supported by the record and should be rejected. California Parties likewise object to TransCanada's proposed classification method by reference to the

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[195] TransCanada Brief on Exceptions at 10-15.

[196] Trial Staff Brief on Exceptions at 15-16 (quoting Order on Remand, 137 FERC ¶ 61,001 at P 21 (emphasis added)).

[197] California Parties note that they have stipulated agreements with both Coral and TransCanada regarding the designation of the hourly transactions at issue in this proceeding, including the hour, quantity, price, and delivery point. California Parties Brief Opposing Exceptions at 104-105.

terms of the taped Confirmation Agreement as unreliable. California Parties contend that TransCanada referred only to "transactions" and not "contracts" and could not explain internal inconsistencies of the grouping of some hourly transactions into a single contract, while classifying others as multiple contracts. Further, California Parties argue that any perceived deficiencies in the definition of the relevant contracts can be resolved during Phase II of this proceeding.[198]

3. **Commission Determination**

105. We find that the question of contract designation is a threshold issue in this proceeding because the *Mobile-Sierra* presumption attaches to individual contracts. As pointed out by Trial Staff, the "unit of analysis" could have profound implications for the finding of violations, depending on whether a contract is viewed as a 24-hour block trade or 24 single-hour transactions.[199] Further, as acknowledged by California Parties, each of the parties appear to have used a different interpretation as to what constitutes a contract. The Initial Decision does not explain which definition was adopted, or on what basis. The Initial Decision is also somewhat inconsistent regarding what the Presiding Judge construed as an individual contract. For example, the Presiding Judge states that California Parties alleged in their Initial Brief that 36 of CERS' contracts with Coral were affected by False Exports,[200] yet finds that at least 47 of CERS' contracts with Coral are tainted by False Export activities.[201] And, that finding is somehow derived from evidence from Mr. Taylor's analysis that purportedly shows that Coral falsely exported 2,798 MWh across 139 individual hours.[202] As such, it is unclear from the Initial Decision what represents a "contract," which in turn creates ambiguity with respect to the Presiding Judge's findings on the number of contracts affected by unlawful activity. Thus, we direct the Presiding Judge to make findings in the revised partial Initial Decision on what constitutes an individual contract and to apply that definition consistently in the analysis of whether California Parties have demonstrated that Coral engaged in False Export activities or bad faith that directly affected the rates under specific contracts with CERS.

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[198] California Parties Brief Opposing Exceptions at 103-113.

[199] *See* Trial Staff Brief on Exceptions at 16.

[200] Initial Decision, 146 FERC ¶ 63,028 at P 1022.

[201] *Id.* P 1404.

[202] *Id.* P 1407.

D. Avoiding the *Mobile-Sierra* Presumption

1. False Export

a. Briefs on Exceptions

106. Shell and Trial Staff argue that the False Export activity described by California Parties is mere coincidence and not unlawful activity that can serve as the basis for avoiding the *Mobile-Sierra* presumption. Shell and Trial Staff assert that Mr. Taylor mistakenly attributes many of the City of Glendale, California's (Glendale) exports to Coral.[203] Also, Shell asserts that the screens offered by Mr. Taylor failed to identify or offer into evidence a single contract in which a Coral net export is linked contractually with a Coral sale to CERS. Indeed, Shell and Trial Staff contend that the only connection between the net export identified in the screen and the Coral sale to CERS is that they occurred in the same hour. Thus, Shell argues that the screening methodology relied upon by the Presiding Judge cannot provide the contract-specific finding necessary to avoid the *Mobile-Sierra* presumption. Shell claims that the only contract-specific evidence offered by California Parties was a showing that in 20 hours a Coral sale to CERS was associated with an upstream transaction involving Coral. Coral contends that none of Coral's upstream transactions involved day-ahead or hour-ahead power coming out of CAISO and therefore do not meet California Parties' definition of False Export. Further, Shell notes that allegations related to 19 of these 20 hours were withdrawn by California Parties and one additional hour was never alleged as a False Export.[204]

107. Shell contends that multiple witnesses, including California Parties' own witness Ms. Lee, testified as to a number of reasons why Coral's practice of scheduling exports of electricity out of CAISO at locations in the south and making sales to CERS in the Pacific Northwest in the same hour made economic sense and constituted a legitimate business practice. Shell asserts that Mr. Taylor's inexpert opinion that the transactions made no sense economically should not be credited and was inconsistent with the definition of False Export offered by Mr. Taylor. Thus, Shell argues that the Presiding Judge's conclusion, based only on Mr. Taylor's opinion that Shell's behavior was not economically rational, was not supported by the preponderance of the evidence and

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[203] Shell states that Coral and Glendale entered into a marketing agreement during the summer of 2003, pursuant to which Coral marketed and scheduled some of Glendale's generation. Shell Brief on Exceptions at 64.

[204] Shell Brief on Exceptions at 44-49, 98-99; Trial Staff Brief on Exceptions at 13-19.

should be rejected.[205] Trial Staff similarly argues that the Presiding Judge's finding that a False Export strategy is behavior that was inconsistent with the operation of efficient, competitive markets is not supported by the record in this case, or by prior Commission rulings.[206]

108. Further, Shell and Trial Staff emphasize that the False Export alleged by California Parties is not the False Import previously found by the Commission to be a tariff violation because the alleged False Export transactions neither misrepresented an import nor circumvented a price cap. Shell and Trial Staff suggest that Mr. Taylor invoked the Commission's 2003 Gaming Order[207] to describe False Exports as the first part of the "Ricochet" or False Import strategy in which a supplier scheduled a fictitious export of power purchased in the CAISO control area, parking the energy outside California, and then selling the energy as an "import" in real-time at an elevated price that exceeded the otherwise applicable cap that would have applied absent the fictitious export and subsequent import sale. Shell and Trial Staff explain that the Commission found that a False Import violated the market monitoring and information protocol (MMIP) of the CAISO tariff because "the market participants engaging in False Import deceived the [CA]ISO by falsely representing that their available power had been imported in order to receive a price above the cap."[208]

109. In contrast to False Import, Shell asserts that Mr. Taylor acknowledged that False Export couples a real electricity import with a spot sale that transfers real power to CERS in the Pacific Northwest, and was not used to evade any price cap.[209] Further, Shell argues that the record contains no allegation, and the Presiding Judge made no finding, that Coral ever misrepresented any of the information required by the WSPP Agreement in a spot-sale contract with CERS. Shell contends that characterizing False Export as a

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[205] Shell Brief on Exceptions at 49-53.

[206] Trial Staff Brief on Exceptions at 20-21.

[207] *American Elec. Power Serv. Corp.*, 103 FERC ¶ 61,345 (2003) (Gaming Order); *order on reh'g*, 106 FERC ¶ 61,020 (2004) (Gaming Rehearing Order).

[208] Shell Brief on Exceptions at 55-56 (quoting Gaming Order, 103 FERC ¶ 61,345 at P 39); Trial Staff Brief on Exceptions at 9-13 (quoting Gaming Rehearing Order, 106 FERC ¶ 61,020 at PP 87-88).

[209] Shell Brief on Exceptions at 56 (citing Ex. CAT-671 at 2:9-2:24; Taylor, Tr. At 2571:7-9 (9/20)).

misrepresentation or deception is based on unsupported assumptions.[210] Moreover, Shell asserts that California Parties failed to prove by the preponderance of the evidence any price effect from the alleged False Export transactions.[211] Finally, Shell claims that the Presiding Judge erroneously relied on withdrawn allegations of “multi-party” False Export transactions to support the finding of False Export.[212]

b. Briefs Opposing Exceptions

110. California Parties argue that the record supports the Presiding Judge’s finding that California Parties established a *prima facie* case that Coral engaged in False Exports. California Parties recite a chronology of events, which were documented by California Parties’ exhibits or testimony, that they claim supports the results of Mr. Taylor’s False Export screen and undercuts Coral’s claim that these were legitimate back-to-back transactions.[213]

111. California Parties deny that Mr. Taylor’s screen identified only random coincidence and claim that this theory is wrong for two reasons. First, California Parties reiterate Mr. Taylor’s testimony that an overlap between exports and imports by the same party during the same hour is not economically rational. Second, California Parties maintain that evidence from Coral’s business documents, emails, and trader tapes corroborates that the correlation captured by Mr. Taylor’s screen was precisely the deceptive scheme alleged by California Parties. Further, California Parties challenge as unsupported Coral’s and Trial Staff’s argument that Mr. Taylor’s screen offered no evidence of Coral parking electricity outside of California. To the contrary, California Parties argue that the record shows that Coral repeatedly arranged for false sinks outside of California in order to turn the energy around for sale to Coral. California Parties also argue that the evidence contradicts Coral’s and Trial Staff’s argument that Mr. Taylor improperly attributed Glendale’s exports to Coral. California Parties claim that “alliance documents” between Coral and Glendale make clear that both parties anticipated that Coral would manage Glendale’s market operations, as indicated by email chains and

[210] *Id.* at 55-68.

[211] *Id.* at 68-69.

[212] *Id.* at 70-71.

[213] California Parties Brief Opposing Exceptions at 51-62, 76-81.

trader tapes, such that Mr. Taylor had a firm basis for attributing Glendale's exports to Coral.[214]

112. California Parties argue that Mr. Taylor's False Export screen conservatively identified harmful behavior that violated tariffs, singling out those Coral contracts that were well above the highest *Power Markets Week* price for the corresponding hour. California Parties allege that the ability to buy low-priced day-ahead energy in California and make last-minute, high-priced import sales to CERS was the precise reason Coral engaged in this practice, which shows that False Export was based on deception and therefore violated the CAISO tariff and also Coral's market-based rate authority.[215]

113. California Parties reject arguments raised in the Briefs on Exception that attempt to distinguish the False Export practice defined by California Parties in this proceeding from the False Import practice found in the Gaming Order to be a tariff violation. California Parties claim that it is irrelevant whether the False Export transactions alleged here evaded a price cap, as did the False Import transactions, because the Commission expressly allowed for evidence of unlawful activity beyond the unlawful practices identified in the Gaming Order.[216] California Parties also assert that Mr. Taylor made clear that he did not rely on the prior False Import definition in his analysis and also allege that the activity identified by Mr. Taylor's screen necessarily involved the fraudulent representation to CAISO and CERS that the power it was selling came from outside California, which independently violated the MMIP and Coral's market-based rate authority, regardless of whether any of the identified transactions evaded a price cap.[217]

114. California Parties also refute Coral's and Staff's arguments that False Exports, as described by Mr. Taylor, were not a tariff violation because the behavior was economically rational. California Parties allege that unlawful activity may be economically rational from the perspective of the perpetrator, but that mere economic rationality is not an excuse for wrongdoing. California Parties contend that Trial Staff's argument that Coral's alleged False Export transactions actually helped the market by

[214] *Id.* at 69-73.

[215] *Id.* at 64-66.

[216] *Id.* at 67 (citing Order on Remand, 137 FERC ¶ 61,001 at P 19).

[217] *Id.* at 68-69.

providing temporal arbitrage ignores the facts. California Parties maintain that Coral was aware of the devastating price effects of its behavior.[218]

115. California Parties argue that Coral failed to rebut California Parties' *prima facie* case that at least 47 of Coral's contracts with CERS were False Exports. California Parties contend that the centerpiece of Coral's defense, that the transactions were legitimate back-to-back sales at the California Oregon Border, was discredited at hearing based on evidence that many of these sales involved a string of upstream transactions in which Coral devised a loop of fictitious transactions in order to source energy in California and fraudulently sell it back to CERS as an import from the Pacific Northwest. California Parties assert that testimony by Coral's witness Mr. Tranen did not account for these upstream transactions. Thus, California Parties contend that the Presiding Judge correctly found that Mr. Tranen's analysis cannot be relied upon to establish the true sources of the energy that Coral sold to CERS. Further, the analysis conducted by Mr. Tranen in response to Mr. Taylor's redirect-examination testimony revealed that there may have been more than 300 hours in which Coral was deliberately exporting power so that it could be resold to CERS at the higher import price.[219]

c. <u>**Commission Determination**</u>

116. As an initial matter, as discussed above, due to potential errors in how the Presiding Judge applied the standard of proof on this issue, we cannot affirm the Presiding Judge's finding that California Parties established a *prima facie* case that at least 47 of CERS' contracts with Coral were tainted by False Export activity. Thus, we will reverse this portion of the Presiding Judge's findings and direct the Presiding Judge to issue a revised partial Initial Decision, consistent with the direction below.

117. With regard to the substance of California Parties' claims of False Export, we first note that the Commission has previously found, in the California Refund Proceeding, that False Export transactions are tariff violations.[220] Specifically, in that proceeding the Commission affirmed the presiding ALJ's finding that False Exports violated a number of applicable sections of the CAISO MMIP because this practice involved the submission of false information to CAISO and, therefore, subversion of export scheduling requirements, and also because it effectively constituted the withholding of capacity from

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[218] *Id.* at 73-75.

[219] *Id.* at 76-81.

[220] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, Opinion No. 536, 149 FERC ¶ 61,116, at PP 120-121 (2014) (California Refund Order).

day-ahead markets to raise the price in the real-time markets.[221] The Commission also concurred with the presiding ALJ's rejection of arguments that the analysis of False Exports is bound by the same parameters as the analysis of False Imports, or Ricochet, in the Gaming Order and, therefore, no showing of import prices exceeding the price cap is required for False Exports.[222] We find that the rationale articulated by the presiding ALJ in that proceeding applies with equal force here and therefore reject attempts by Shell and Trial Staff to discredit California Parties' False Export theory by comparison to the False Import transactions that were addressed in the Gaming Order.

118. However, while we agree with the Presiding Judge that California Parties have presented evidence that Coral engaged in False Export activity,[223] we find that the Presiding Judge has not sufficiently explained how the evidence demonstrates a causal connection between False Export activities by Coral and each of the 47 contracts at issue. Also, as discussed above,[224] the Presiding Judge does not articulate a standard for the classification of contracts. Thus, we cannot determine the basis for the Presiding Judge's findings on this issue.

119. It is well established that the *Mobile-Sierra* analysis is a contract-specific inquiry.[225] Thus, in order to establish a *prima facie* case that Coral engaged in False Export activities such that the *Mobile-Sierra* presumption should not apply, California Parties must show by preponderance of the evidence that Coral engaged in False Export activity and that any such activity directly affected a specific contract rate. Only if the evidence submitted by California Parties is sufficient to make that showing does the burden shift to Coral to show on a contract-by-contract basis that a transaction is not a False Export or that the rates in the contract are nevertheless just and reasonable.

120. In the revised partial Initial Decision, we direct the Presiding Judge, using a consistently applied definition of "contract" to make findings about whether California

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[221] *Id.* P 120 (finding that False Exports violated sections 2.2.11.1, 2.2.11.1.1-2, 2.1.1.5, and 2.1.1.1 of the CAISO MMIP).

[222] *Id.* P 121.

[223] *See, e.g.*, Ex. CAT-104.

[224] *Supra* P 105.

[225] *See, e.g.*, *Morgan Stanley*, 554 U.S. at 554; Order on Remand, 137 FERC ¶ 61,001 at PP 20-21; *Brown*, 135 FERC ¶ 61,178 at P 77; *Nevada Power Co. v. Enron Power Mktg., Inc.*, 125 FERC ¶ 61,312, at P 28 (2008).

Parties have demonstrated False Export activity that directly affected the rate under a specific contract. First, the revised partial Initial Decision should conclusively identify which, if any, of the contracts was affected by False Export activities. Second, the revised findings should include discussion of the evidence that demonstrates the causal link between any unlawful activity and the effect it had on a specific contract rate. The Presiding Judge should exclude from consideration the evidence of 19 hours of "multi-party" transactions that was subsequently withdrawn by California Parties. Finally, the Presiding Judge should analyze whether, for any specific contract, Coral presented evidence to rebut California Parties' *prima facie* case. If the Presiding Judge finds that Coral has failed to provide sufficient rebuttal evidence with respect to any individual contract, the Presiding Judge should find that California Parties have prevailed such that that particular contract no longer enjoys *Mobile-Sierra* protection and the remedy for any such contracts will be determined during Phase II of this proceeding, without additional opportunities to present evidence on the issue of liability.

2. <u>Bad Faith</u>

a. <u>Briefs on Exception</u>

121. California Parties assert that the Presiding Judge erred by finding that TransCanada did not engage in bad faith. California Parties acknowledge that the Presiding Judge correctly recited the applicable law on bad faith,[226] but incorrectly applied the law to TransCanada's behavior in 91 of the contracts with CERS. California Parties argue that record evidence shows that TransCanada was well aware of, and took advantage of, CERS' lack of meaningful purchase options, and used that advantage to charge CERS prices that were far above prevailing market prices. California Parties question the Presiding Judge's finding that TransCanada's knowledge of CERS' situation was not, by itself, sufficient to show bad faith absent evidence of some additional overt unlawful act conflicts with the established law.[227]

122. California Parties defend the analysis presented by Mr. Taylor and argue that the Presiding Judge incorrectly characterized it as "simply identifying high prices." Rather,

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[226] California Parties state that the Presiding Judge found that Utah law defines bad faith as taking "unconscionable advantage of others." California Parties assert that unconscionability "has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." California Parties Brief on Exceptions at 40-41 (quoting *Ryan v. Dan's Food Stores, Inc.*, 972 P.2d 395, 402 (Utah 1998)).

[227] *Id.* at 40-43, 48-50, 54-55.

California Parties contends that the approach used by Mr. Taylor was for the purpose of showing that the prices that TransCanada charged to CERS were much higher than the prevailing prices in the Pacific Northwest market, thereby indicating that TransCanada took advantage of CERS by charging a price CERS could not reject. Also, California Parties maintain that the index price used by Mr. Taylor is a good barometer of the prevailing market price in the Pacific Northwest, and assert that the Presiding Judge recognized this fact by accepting this index price analysis as corroborating evidence of Coral's bad faith.[228] California Parties also argue that, because Mr. Taylor's analysis was contract specific, the high prices charged by TransCanada identified therein support California Parties' claims of bad faith.[229] California Parties contend that record evidence shows that TransCanada's average gross margins on sales to CERS were nearly 400 percent, and argue that this evidence demonstrates that TransCanada engaged in exploitative pricing. California Parties allege that TransCanada deliberately concealed from Canadian counterparties that it was selling to CERS "in order to keep from diluting the rich opportunity that TransCanada knew it had with CERS."[230]

123. California Parties also argue that their witnesses demonstrated, contrary to the Presiding Judge's findings, that the two parking transactions involving CERS undertaken by TransCanada were not for legitimate business reasons, but for the purpose of withholding energy so that it could be sold in real time.[231]

124. Shell argues that the Presiding Judge's finding that a taint of bad faith may avoid the application of the *Mobile-Sierra* presumption for as many as 119 of Coral's spot-sale contacts is spurious and unsustainable for five reasons. First, Shell contends that the Commission's orders setting this case for hearing explicitly exclude state contract law-based claims of bad faith from the scope of permissible evidence. Shell states that the Commission denied rehearing of California Parties' request to include evidence of violations of state law good faith obligations, explaining that "permitting such evidence

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[228] *Id.* at 46 (citing Initial Decision, 146 FERC ¶ 63,028 at P 1420).

[229] *Id.* at 46-47.

[230] *Id.* at 53 (quoting Ex. CAT-669 at 12 (relaying a conversation between TransCanada trader Maura Binley and a Portland General trader in which Ms. Binley requested that the Portland General trader "retain the confidentiality of where [the energy] is actually going.")).

[231] *Id.* at 81-82.

would require [the Commission] to interpret and apply state contract law."[232] Shell asserts that the Presiding Judge ignored this conclusion and failed to address the merits of Shell's argument that allegations of bad faith are outside the scope of this case.[233]

125. Second, Shell argues that even if claims of bad faith were within the scope of this proceeding the Presiding Judge misinterpreted and misapplied applicable law. Shell and Trial Staff note that, rather than distinguishing between three distinct state law challenges – fraud, duress, and bad faith – California Parties offered a composite defense of "fraud-duress-bad faith," which is not legally cognizable under Utah law, which governs state contract-law based claims under the WSPP Agreement.[234]

126. Shell and TransCanada further contend that bad faith is not a basis for challenging contract formation under Utah law because the only duty of good faith and fair dealing under Utah law attaches to performance of an already formed contract. Thus, Shell and TransCanada assert that bad faith, based on Utah law, cannot be used to avoid the *Mobile-Sierra* presumption, which addresses contract formation and not performance under a contract. Shell argues that the Presiding Judge misinterpreted Utah law by relying on *Valcarce,* which was an action for attorney's fees for a meritless legal action not brought in good faith, and did not address bad faith as a challenge to contract formation.[235]

127. Third, Shell argues that the Presiding Judge erroneously relied on a price screen that identified only contracts having a price exceeding a certain price, but did not take into account any aspect of contract negotiations and provided no evidence of bad faith in the formation of any contract. Shell observes that the Supreme Court and the Commission have rejected contract abrogation based on price alone.[236] Also, Shell argues that applying this price screen would lead to the absurd result that Coral would have been required either to not sell to CERS during certain hours or to sell to CERS at a

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[232] Shell Brief on Exceptions at 74 (quoting Order on Rehearing, 143 FERC ¶ 61,020 at P 20).

[233] *Id.* at 73.

[234] *Id.* at 77; Trial Staff Brief on Exceptions at 23.

[235] Shell Brief on Exceptions at 77-82; TransCanada Brief on Exceptions at 8-9.

[236] Shell Brief on Exceptions at 83 (citing *Morgan Stanley*, 554 U.S. at 548; Order Granting Interlocutory Appeal, 141 FERC ¶ 61,248 at P 15).

price below Coral's purchase cost.[237] Trial Staff also takes exception to the Presiding Judge's apparent reliance on the price screen as corroborating the finding that Coral used deceptive trade practices.[238]

128. Fourth, Shell argues that the Presiding Judge erred by linking bad faith to Mr. Taylor's False Export allegations in a way that has no basis in Utah law or in California Parties' own allegations or evidence. In particular, Shell asserts that the Presiding Judge nowhere explains how, if a finding of bad faith is linked to a finding of False Export, as many as 119 contracts are tainted by bad faith, yet only 47 contracts are tainted by False Export. Shell also contends that if the Presiding Judge's False Export findings fail, the related finding of bad faith based on evidence of False Export is likewise unsupportable and must be rejected.[239] Trial Staff likewise contends that the False Export evidence presented by California Parties is so flawed that it cannot sustain a finding that California Parties have succeeded in making a *prima facie* case of unlawful activity against Coral. Trial Staff asserts that evidence that does not support a finding that conduct may be unlawful cannot support a finding of bad faith.[240]

129. Fifth, similar to Shell's objections to the Presiding Judge's False Export findings, Shell contends that to the extent the Presiding Judge erroneously relied on evidence of 19 hours of "multi-party" transactions that were subsequently withdrawn by California Parties, the Presiding Judge committed a procedural error by allowing California Parties to introduce new allegations during redirect examination of Mr. Taylor. Moreover, Shell argues that any finding of deception and therefore bad faith in these transactions is illogical because, in order to find deception in the failure of a seller to disclose upstream purchase costs, there must be some obligation to disclose these costs. Shell asserts that such an obligation has never existed under the WSPP Agreement or confirmations, under Coral's market-based rate schedule, or anywhere else.[241]

130. Further, Trial Staff and Shell except to the Presiding Judge's failure to make findings on the required contract-specific basis. Trial Staff argues that the Presiding Judge failed to identify which of the "as many as 119" of the subject contracts many have

[237] *Id.* at 84.

[238] Trial Staff Brief on Exceptions at 25-26.

[239] Shell Brief on Exceptions at 85-86.

[240] Trial Staff Brief on Exceptions at 22-23.

[241] Shell Brief on Exceptions at 86-91.

been tainted by bad faith. Shell argues that California Parties have offered no contract-specific evidence, which precludes the Presiding Judge's finding that *Mobile-Sierra* presumption has been avoided as to any of Coral's 323 spot-sales contracts with CERS.[242]

131. Additionally, Trial Staff contends that substantial record evidence rebuts California Parties' claim that Coral exploited CERS by charging uncompetitively high prices on the basis of its knowledge that CERS lacked reasonable alternatives.[243]

b. <u>Briefs Opposing Exceptions</u>

132. California Parties contend that the Presiding Judge correctly found that Coral engaged in bad faith in 119 of its contracts with CERS and refutes Coral's arguments in opposition of that finding. California Parties refute Coral's assertion that the Commission excluded claims of bad faith from this case. California Parties aver that *Morgan Stanley* provides for challenges to the *Mobile-Sierra* presumption based on duress, fraud, or bad faith,[244] and note that the Commission has expressly stated that the Commission's guidance regarding the types of permissible evidence in this proceeding was "not intended to alter the general state of the law, as summarized in *Morgan Stanley*."[245] California Parties also argue that, because bad faith is being used as a basis for avoiding the *Mobile-Sierra* presumption, and not, as Respondents assert, as a basis for abrogating a contract under state law, it is irrelevant that Utah state law does not recognize bad faith in the formation of a contract as grounds for contract abrogation.[246]

133. California Parties also take issue with Trial Staff's and Coral's assertions that the Presiding Judge erred by relying on Mr. Taylor's *Power Markets Week* High Price + $75/MWh screen for any purpose, even as evidence that corroborated other evidence of bad faith. California Parties reiterate their prior argument that this screen was not simply

[242] *Id.* at 37, 98-99; Trial Staff Brief on Exceptions at 26.

[243] Trial Staff Brief on Exceptions at 23-24 (citing *Pub. Utils. Comm'n of the State of California v. Sellers of Long Term Contracts to the California Dep't of Water Resources, et al.*, 103 FERC ¶ 61,354, at PP 42-60 (2003) (finding that CDWR had options and that the rates, terms, and conditions of its long-term contracts were not the product of unequal bargaining power) (Long Term Contracts Order)).

[244] *Id.* at 82-83 (citing *Morgan Stanley*, 554 U.S. at 547).

[245] *Id.* at 82 (quoting Order on Rehearing, 143 FERC ¶ 61,020 at P 27).

[246] *Id.* at 83-88.

about identifying high prices, but about using a conservative measure of price comparison to discern exploitative conduct. California Parties maintain that Mr. Taylor's evidence, which recognized a dysfunctional market as the baseline, showed that CERS paid much higher prices relative to an already inflated index because Coral took advantage of CERS' lack of alternatives. Further, California Parties claim that the *Power Markets Week* index price was a good barometer of the prevailing market price in the Pacific Northwest. California Parties contend that, because the day of index price where Coral made its sales to CERS was typically far above the other index prices, which tracked one another closely, this index price analysis corroborates Coral's bad faith.[247]

134. California Parties also note that evidence of bad faith shown by Mr. Taylor's False Export screen was not the only evidence relied upon by the Presiding Judge. In particular, California Parties highlight the evidence they claim discredited Coral's back-to-back transaction defense. California Parties dispute Coral's claim that this evidence was introduced for the first time as a new allegation during redirect examination of Mr. Taylor. California Parties assert that the Presiding Judge correctly observed that this evidence was actually introduced by Mr. Taylor in this direct testimony.[248] California Parties acknowledge that the Presiding Judge permitted additional evidence on this issue on redirect, but only in response to challenges made by Coral's counsel during Mr. Taylor's cross-examination.[249]

135. California Parties challenge Coral's claim that it could not have engaged in deceptive conduct without a pre-existing duty to disclose upstream purchase costs, and claim that Coral is missing the point. California Parties maintain that the question is not whether Coral had a duty to disclose upstream purchase costs, but whether it was intentionally misrepresenting the source of power it sold to CERS. California Parties argue that evidence shows that Coral made such misrepresentations and, as such, was acting in bad faith.[250]

136. Trial Staff and TransCanada argue that the Presiding Judge correctly found that TransCanada did not engage in bad faith in the formation of its contracts with CERS. They assert that the Presiding Judge correctly observed that California Parties were

[247] *Id.* at 88-93.

[248] *Id.* at 96-97 (citing Initial Decision, 146 FERC ¶ 63,028 at P 1421; Taylor Direct Testimony, Ex. CAT-041 at 81; Ex. CAT-104).

[249] *Id.* at 98-99.

[250] *Id.* at 99-100.

required to apply the appropriate, separate legal definitions for duress, fraud, and bad faith to the facts of this case in order to support a finding of unlawful activity. Trial Staff avers that, on exceptions, California Parties attempted to change its position by alleging only bad faith with respect to TransCanada's 91 contracts with CERS, even though California Parties made no attempt to distinguish between allegations of duress, fraud, or bad faith in their testimonies and briefs that preceded the Initial Decision. Trial Staff contends that the record contains substantial evidence to rebut California Parties' bad faith allegations against TransCanada, the essence of which is that TransCanada took advantage of CERS through exploitative pricing. TransCanada argues that California Parties fail to provide citations to the record for many of their allegations on this exception. For example, TransCanada asserts that the record is devoid of evidence that TransCanada knew CERS had no choices, or to support the claim that TransCanada consistently netted unconscionable margins. In contrast, Trial Staff and TransCanada point out that TransCanada placed in the record the trader tape for every transaction it engaged in with CERS, none of which are cited by California Parties to support its exceptions on this issue.[251]

137. Trial Staff and TransCanada also contend that the Presiding Judge correctly dismissed the *Power Markets Week* + $75/MWh analysis as evidence of bad faith. They argue that the screen does not demonstrate any exploitive behavior, but merely compares prices to a benchmark that has not been established as reasonable. Trial Staff points out that the Presiding Judge assumed *arguendo* that the *Power Markets Week* benchmark was a reasonable gauge and still correctly concluded that such a "generic benchmark does not establish evidence of duress, fraud, or bad faith in the formation of the contract."[252] However, Trial Staff and TransCanada contend that the record does not support a conclusion that the *Power Markets Week* index price was a good barometer of prevailing prices in the Pacific Northwest, as TransCanada strongly contested this point and explained, for example, that *Power Markets Week* reported day-ahead pricing whereas TransCanada's sales to CERS were all day-of. Trial Staff maintains that this screen, despite California Parties' explanations of how it allegedly identifies or corroborates deceptive behavior during contract negotiations, simply identifies high prices and is not persuasive.[253]

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[251] Trial Staff Brief Opposing Exceptions at 48-52, 55-56; TransCanada Brief Opposing Exceptions at 11-13, 14-16.

[252] Trial Staff Brief Opposing Exceptions at 53 (quoting Initial Decision, 146 FERC ¶ 63,028 at P 1389).

[253] Trial Staff Brief Opposing Exceptions at 52-56; TransCanada Brief Opposing Exceptions at 20-22.

138. Similarly, TransCanada contends that this screen does not present evidence of any illicit and intentional act during contract negotiations and observes that Mr. Taylor acknowledged as much during his testimony, thereby refuting California Parties' theory that the *Power Markets Week* screen can support a showing of bad faith. Further, TransCanada claims that Mr. Taylor never reviewed any of the trader tapes or read transcripts of those tapes between CERS and TransCanada and acknowledged that review of such material could negate his initial finding of bad faith. In contrast, TransCanada states that the Presiding Judge did review and summarize the trader tapes and concluded that "nothing in these negotiations demonstrate 'fraud, duress, or bad faith' on the part of TransCanada."[254]

139. Trial Staff and TransCanada also argue that the record contains no evidence to support California Parties' claim that CERS lacked alternatives and that TransCanada sought to take advantage. To the contrary, TransCanada points to record evidence showing that CERS repeatedly declined to buy energy TransCanada offered. Further, TransCanada contends trader tapes show that in only four percent of their transactions with CERS did they refuse to reduce the offer price and that CERS set the price 40 percent of the time. TransCanada maintains that this record evidence dispels any notion that TransCanada took advantage of CERS. TransCanada avers that California Parties mischaracterize TransCanada's documents and actions and ignore evidence demonstrating that CERS and California consumers benefitted from TransCanada's sales. Trial Staff alleges that the evidence presented by California Parties in support of these claims lacks specificity with respect to specific contracts, outside of activity that involved the parking of energy for a handful of hours on March 20, 2001, which the Presiding Judge reviewed and determined that California Parties provided no evidence that the two parking contracts involved bad faith. TransCanada maintains that there were legitimate business reasons for the two parking transactions, pointing to testimony indicating that these transactions were consistent with TransCanada's typical business practices. Moreover, Trial Staff contends that the record shows that CERS did have alternatives, pointing to a separate case[255] involving long-term contracts entered into by CERS during the same time period in which the Commission found that CDWR had options.[256]

[254] TransCanada Brief Opposing Exceptions at 18-20 (quoting Initial Decision, 146 FERC ¶ 63,028 at P 1393).

[255] Long Term Contracts Order, 103 FERC ¶ 61,354 at PP 42-60.

[256] Trial Staff Brief Opposing Exceptions at 56-58; TransCanada Brief Opposing Exceptions at 22-24, 30-34, 88-91.

140. Trial Staff and TransCanada dispute California Parties' claim on exceptions that alleged unconscionable margins earned by TransCanada support California Parties' bad faith argument. Trial Staff and TransCanada assert that comparing the initial price TransCanada paid for energy to the ultimate sales price to CERS is not relevant to the issue of bad faith in the negotiation of contracts but may indicate, at best, that TransCanada attempted to maximize profits. Trial Staff points out that Mr. Taylor admitted that maximizing profits, in itself, is insufficient to demonstrate bad faith. Moreover, Trial Staff and TransCanada highlight that *Morgan Stanley* makes clear that bilateral, market-based contracts should not be voided on the basis of gross margins.[257] Further, Trial Staff and TransCanada contend that Mr. Taylor's calculations of TransCanada's margins are meritless because, among other things, the data relied upon by Mr. Taylor to calculate TransCanada's margins did not show the prices TransCanada paid for the power it resold to CERS except for in a few instances.[258]

141. Trial Staff and TransCanada maintain that the Presiding Judge did not impose a requirement for California Parties to present evidence of some additional overt or unlawful act in order to establish bad faith and argue that the Presiding Judge correctly applied the applicable law. TransCanada claims that California Parties parsed language from the Initial Decision to make a misleading argument and also misinterpreted Utah law with regard to the showing necessary to establish bad faith. TransCanada asserts that California Parties' reliance on *Valcarce*, cited by California Parties for their proposed definition of bad faith, is misplaced because that case has nothing to do with contract formation, but with whether attorneys' fees were available under Utah law. Next, TransCanada contends that the doctrine of unconscionability under Utah common law is far more complex than described by California Parties and requires a showing of unfair surprise which, according to TransCanada, California Parties did not, and cannot, allege.[259] Moreover, TransCanada argues that California Parties' bad faith claim is

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[257] Trial Staff Brief Opposing Exceptions at 59; TransCanada Brief Opposing Exceptions at 26 (citing *Morgan Stanley*, 554 U.S. at 550 ("A presumption of validity that disappears when the rate is above marginal cost is no presumption of validity at all, but a reinstitution of cost-based rather than contract-based regulation.")).

[258] Trial Staff Brief Opposing Exceptions at 59-60; TransCanada Brief Opposing Exceptions at 24-30.

[259] Trial Staff Brief Opposing Exceptions at 60-61; TransCanada Brief Opposing Exceptions at 34-41.

outside the scope of this proceeding because the Commission expressly excluded evidence of violations of state law.[260]

c. Commission Determination

142. As a threshold matter, we reject arguments that claims of bad faith are outside the scope of this proceeding. The Commission did preclude the submission of evidence of violations of state law,[261] but also expressly stated that nothing in its orders setting this matter for hearing was "intended to alter the general state of law, as summarized in *Morgan Stanley*."[262] *Morgan Stanley* unequivocally recognized that the Commission "has ample authority to set aside a contract where there is unfair dealing at the contract formation stage – for instance, if it finds traditional grounds for the abrogation of the contract such as fraud or duress."[263]

143. We find that parties' attempts to conflate the Commission's holding regarding the exclusion of state good faith obligations in the Order on Rehearing with the types of traditional grounds of contract abrogation misconstrue the Order on Rehearing. In that proceeding, California Parties argued that they should be able to submit "evidence of unfairness, bad faith, fraud, or duress" and argued separately that "evidence involving violations of state law good faith and fair dealing obligations found in the Uniform Commercial Code (UCC), the Utah Commercial Code, and the California Commercial Code should be permitted."[264] In the Order on Rehearing, the Commission explicitly precluded the submission of "evidence of state good faith obligations,"[265] but made clear that evidence of traditional grounds of contract abrogation such as fraud, duress, and bad

[260] TransCanada Brief Opposing Exceptions at 14.

[261] Order on Rehearing, 143 FERC ¶ 61,020 at P 25.

[262] *Id.* P 27; *see also* Order Granting Interlocutory Appeal, 141 FERC ¶ 61,248 at P 13.

[263] *Morgan Stanley*, 554 U.S. at 547.

[264] Order on Rehearing, 143 FERC ¶ 61,020 at PP 19-20.

[265] *Id.* P 25.

faith was permitted by reiterating that the Order on Remand was "not intended to alter the general state of law, as summarized in *Morgan Stanley*."[266]

144. We likewise reject arguments that bad faith is not a basis for challenging contract formation under Utah. This line of argument is misplaced because the evidence of bad faith is not being offered here to abrogate a contract under Utah state law, but to make an argument that the *Mobile-Sierra* presumption should not apply. However, because the WSPP Agreement requires construction under Utah law, we find that it is necessary to look to Utah law for the applicable legal requirements for a showing of bad faith. Relying on Utah law, the Presiding Judge correctly found that "[t]o find that a party acted in 'bad' faith, the trial court must show that *one or more* of the following factors existed: (i) [t]he party lacked an honest belief in the propriety of the activities in question; (ii) the party intended to take unconscionable advantage of others; *or* (iii) the party intended to or acted with the knowledge that the activities in question would hinder, delay, or defraud others."[267] Even though *Valcarce* set forth the test for bad faith specifically in the context of determining whether to award attorney's fees for meritless litigation, the three types of behavior identified by the test amount to the same type of behavior that would result in unfair dealing at the contract formation stage. Thus, we reject arguments that *Valcarce* is inapplicable in this context.

145. We affirm the Presiding Judge's finding that California Parties failed to demonstrate that TransCanada engaged in fraud, duress, or bad faith. We agree with the Presiding Judge's conclusion that California Parties are required to allege duress, fraud, and bad faith separately. Further, even assuming *arguendo* that California Parties did properly allege bad faith, we find numerous flaws in California Parties' attempt to use this theory to avoid application of the *Mobile-Sierra* presumption. First, the Presiding Judge correctly found that California Parties' principle evidence in support of its composite theory of fraud, duress, and bad faith was Mr. Taylor's *Power Markets Week* + $75/MWh test. The Presiding Judge properly characterized this test as "a generic 'benchmark' screen that does not take into account in any way the actual contract negotiations between the parties regarding specific contracts."[268] Regardless of whether Mr. Taylor's benchmark is a reasonable proxy for the prevailing Pacific Northwest

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[266] *Id.* P 27 (reiterating that the Order on Remand was "not intended to alter the general state of law, as summarized in *Morgan Stanley*.") (quoting Order Granting Interlocutory Appeal, 141 FERC ¶ 61,248).

[267] Initial Decision, 146 FERC ¶ 63,028 at P 1419 (quoting *Valcarce*, 961 P.2d at 316).

[268] *Id.* P 1389.

market price, evidence of a high price charged to CERS does not demonstrate any unfair dealing at the contract formation stage.

146. We find that California Parties' claim that the Presiding Judge required evidence of some "additional overt unlawful act" to show bad faith by TransCanada is incorrect. To support their argument that the Presiding Judge erred by requiring an additional overt unlawful act, California Parties cite P 1391 of the Initial Decision, in which the Presiding Judge finds that:

> Trial Staff correctly observes that the California Parties must apply [separate legal definitions for duress, fraud, or bad faith] to the facts of this case in order for the undersigned Presiding Judge to find that a particular seller engaged in unlawful market activity in the spot market, which directly affected the particular contracts to which that seller was a party.[269]

We find no merit in California Parties' interpretation of this paragraph as requiring evidence of an additional unlawful act to demonstrate bad faith. Rather, the Presiding Judge correctly found that, in order to show bad faith, which would constitute unlawful activity, California Parties were required to separately allege bad faith and satisfy the test for bad faith specifically, rather than attempting to rely on the same evidence under a composite theory of duress-fraud-bad faith.

147. The Presiding Judge correctly found that California Parties made only two specific allegations against TransCanada of activity constituting bad faith, involving two parking transactions on March 20 and 21, 2001. As noted by the Presiding Judge, TransCanada presented unrebutted evidence that these transactions were consistent with TransCanada's typical business practices and the record contains no evidence that TransCanada used the parking transactions to conceal from CERS the source of the energy. Further, the Presiding Judge found that TransCanada's submission of all the trader tapes for every transaction with CERS during the CERS Period includes no evidence that negotiations between CERS and TransCanada were tainted by duress, fraud, or bad faith.[270]

148. We reject California Parties' argument that so-called "unconscionable margins" constitute evidence of duress, fraud, or bad faith. We find that the Presiding Judge correctly concluded that California Parties' calculation of TransCanada's margins was flawed because it relied on estimated average daily prices for the energy purchased by

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[269] *Id.* P 1391 (citing Order on Remand, 137 FERC ¶ 61,001 at P 21) (internal quotes omitted).

[270] *Id.* PP 1392-1393.

TransCanada, which "ignores critical factual circumstances surrounding the transactions between CERS and TransCanada,"[271] and also fails to reflect the market volatility of prices at that time. Also, we find that this line of argument is, in essence, a variation of California Parties' previous argument that "simply identifying high prices should be sufficient to overcome or avoid the [*Mobile-Sierra*] presumption,"[272] which was rejected by the Commission in the Order on Rehearing.[273] Moreover, as noted by the Presiding Judge, the Supreme Court made clear in *Morgan Stanley*, "bilateral, market-based contracts should not be voided on the basis of gross margins as that would be 'a reinstitution of cost-based rather than contract-based regulation.'"[274]

149. However, as discussed further below, we will reverse the Presiding Judge's finding that as many as 119 of Coral's contracts with CERS were tainted by bad faith because of potential errors in how the Presiding Judge applied the standard of proof, as discussed above, and other potential flaws in the Presiding Judge's analysis of this issue.

150. We find that the Presiding Judge applied an inconsistent standard in evaluating California Parties' aggregate claims of fraud, duress, and bad faith against TransCanada as compared to Coral. As with the discussion of California Parties' claims against TransCanada, the Presiding Judge correctly acknowledged that California Parties failed to distinguish between claims of fraud, duress, or bad faith against Coral. However, instead of requiring, as with the claims against TransCanada, that California Parties "apply these separate definitions to the facts of this case,"[275] the Presiding Judge appears to have improperly segregated, and found evidence in support of, separate claims of bad faith against Coral. The Presiding Judge also acknowledged the insufficiency of the *Power Markets Week* plus $75/MWh benchmark as evidence in support of these claims,[276] yet nevertheless proceeded to find that California Parties made a *prima facie* case against Coral on this issue.

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[271] *Id.* P 1699.

[272] Order Granting Interlocutory Appeal, 141 FERC ¶ 61,248 at P 15.

[273] *Id.*; Order on Rehearing, 143 FERC ¶ 61,020 at P 30.

[274] Initial Decision, 146 FERC ¶ 63,028 at P 1700 (quoting *Morgan Stanley*, 554 U.S. at 550).

[275] *Id.* P 1391.

[276] *Id.* PP 1417-1418.

151. The Presiding Judge stated that California Parties provided "compelling evidence" that Coral engaged in False Export activities and found that this same evidence supports a finding that the subject contracts were tainted by bad faith negotiations by Coral at the contract formation stage.[277] We find several deficiencies in this line of reasoning. First, as discussed above, we are reversing the Presiding Judge's findings on California Parties' False Export claims against Coral. As such, these findings cannot serve as a basis for a finding of bad faith. Second, the Presiding Judge fails to explain how, if the False Export evidence forms the basis of the bad faith finding, as many as 119 contracts are tainted by bad faith, when only 47 contracts were found to involve False Export activity. The Presiding Judge failed to specify what evidence supports findings of bad faith in the remaining 72 contracts. Third, the Presiding Judge placed importance on Coral's awareness that "CERS was in a vulnerable position and ready to pay high prices if necessary to avoid blackouts,"[278] despite a conflicting finding that CERS' vulnerable position was widely known at the time and therefore rejected California Parties' claim that a limited group of sellers possessed and took advantage of this knowledge.[279]

152. In the revised partial Initial Decision, we direct the Presiding Judge to make contract specific findings of bad faith by Coral that address only California Parties' actual allegations of bad faith. These findings should be based solely on California Parties' application of the separate legal definition of bad faith to the facts of this case and the evidence provided by California Parties to support those allegations. If the Presiding Judge finds that California Parties' False Export evidence is properly included in that set of evidence, we direct the Presiding Judge to account for any revised, contract-specific findings on False Exports and to explain any differences in the number of contracts affected by False Export activity and those tainted by bad faith. As with the revised findings on False Exports, the revised partial Initial Decision should conclusively identify which, if any, of the contracts was affected by bad faith negotiations by Coral and should address any relevant rebuttal evidence presented by Coral. If the Presiding Judge finds that Coral has failed to provide sufficient rebuttal evidence with respect to any individual

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[277] *Id.* P 1418.

[278] *See id.* P 1420.

[279] In response to California Parties' allegations of undue discrimination against Coral, the Presiding Judge found it implausible that a limited set of sellers knew that CERS was frequently short in real-time given the extensive media coverage, rolling blackouts, and political uproar at the time. *Id.* P 1425 (quoting Ex. CAT-022 at 7:14-20 (testimony of California Parties witness Ms. Lee, stating that it was "obvious to any individual seller" that CERS had to purchase extremely large volumes of energy in real-time)).

contract, the Presiding Judge should find that California Parties have prevailed such that that a particular contract no longer enjoys *Mobile-Sierra* protection and the remedy for any such contracts will be determined during Phase II of this proceeding, without additional opportunities to present evidence on the issue of liability.

3. Market Power

a. Briefs on Exception

153. California Parties argue that the Presiding Judge erred in finding that California Parties failed to prove that Coral exercised undue market power. California Parties contend that the Presiding Judge failed to properly account for the regression analysis offered in support of California Parties' market power claims. California Parties claim that the fact that the CERS regressions included other sellers does not negate the relevance of that evidence to Coral because the testimony specifically found that Coral's realization of higher prices for larger quantities sold was "consistent with the exercise of market power."[280]

154. Further, California Parties assert that the Presiding Judge erred by concluding that only a hub-and-spoke analysis was sufficient to show market power because the hub-and-spoke test only looks at market structure, not seller behavior, and is therefore not useful for testing whether market power has been exercised. Moreover, California Parties argue that courts and antitrust agencies have agreed that direct evidence is sufficient to show market power. California Parties assert that the Presiding Judge incorrectly disregarded the direct evidence offered in favor of the hub-and-spoke test.

155. Additionally, California Parties contend that the Presiding Judge erred by finding that the hub-and-spoke analysis was required because it was the standard for assessing market power during the CERS Period and, as such, application of a different standard would impose a retroactive change to the rules. California Parties argue that the Commission and Courts of Appeals have accepted standards other than the 20 percent hub-and-spoke screen.[281] California Parties also insist that the retroactivity principle is inapplicable here because the hub-and-spoke screen determines whether market-based rate authority should be granted in the first instance and this case is not about whether

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[280] California Parties Brief on Exceptions at 60 (citing Ex. CAT-631 at 35-36).

[281] *Id.* at 62-63 (citing *CPUC*, 462 F.3d at 1039; November 2000 Order, 93 FERC ¶ 61,294 at 61,366-67, n.80); *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 75 (2007) (Cross-Referenced at 119 FERC ¶ 61,295 (2007)).

market-based rate authority should have been granted.[282] Finally, California Parties argue that the Presiding Judge's reliance on the *Lockyer* proceeding to support enforcement of the hub-and-spoke screen was unsupported because in *Lockyer* the Commission expressly directed use of the hub-and-spoke test, but there was no similar directive in this proceeding.[283]

156. California Parties also contend that the Presiding Judge failed to account for how the structure and rules of the California markets may have provided opportunities for sellers to exercise market power and also did not address the testimony of other California Parties' witnesses that showed how the exercise of market power played a role in other violations committed by the Respondents.[284]

157. California Parties further object that the Presiding Judge erred by conflating market fundamentals with legitimate business behavior. Nevertheless, California Parties contend that Respondents failed to submit sufficient evidence to support their argument that market fundamentals explained their high prices, particularly the prices that CERS paid relative to other buyers. In contrast, California Parties claim that their witnesses demonstrated that, although scarcity was a factor in the prices paid during the CERS Period, this scarcity played only a supporting role that set the stage for the exercise of market power. Also, California Parties contend that Respondents' behavior cannot be justified or excused on the basis of market design flaws or credit risk. California Parties maintain that Respondents failed to provide evidence that the premiums charged to CERS by Respondents were actually related to perceived risk.[285]

b. **Briefs Opposing Exceptions**

158. Trial Staff and Shell assert that the Presiding Judge correctly found that California Parties failed to prove that Coral exercised market power. Trial Staff and Shell argue that the Presiding Judge correctly found that California Parties failed to provide any seller-specific evidence, noting that Dr. Reynolds presented no regression analysis of Coral's prices to CERS as he did for other Respondents in his pre-filed direct testimony, and that Dr. Reynolds' additional regression examined prices CERS paid to all suppliers, including those not alleged to have possessed market power, not just to Coral. In

[282] *Id.* at 63-65.

[283] *Id.* at 65-66.

[284] *Id.* at 66-68.

[285] *Id.* at 68-82.

addition, Trial Staff faults Dr. Reynolds' additional regression for calculating market share on an hour-by-hour basis, only for market participants that actually sold in that hour, which is not a commonly accepted practice. Trial Staff disputes that this analysis demonstrates that Coral possessed market power in the Pacific Northwest spot market. Trial Staff also contends that neither of California Parties' other witnesses, Mr. Taylor and Dr. Fox-Penner, performed a market power analysis or presented evidence that Coral possessed market power.[286]

159. Trial Staff and Shell also dispute California Parties' claims to have presented legally sufficient "direct evidence" of market power. Trial Staff notes California Parties' argument that courts and antitrust agencies have agreed that direct evidence is sufficient to show market power, but contend that the Commission's market-based rate analysis is not explicitly tied to the antitrust agencies merger guidelines.[287] Shell asserts that, in discussing acceptable methods of proving market power, the Ninth Circuit has put forth two types of acceptable proof: (1) evidence of restricted output and supracompetitive prices to demonstrate injury to competition and thus the actual exercise of market power; and (2) circumstantial evidence pertaining to the structure of the market.[288] Shell argues that California Parties have offered neither type of evidence because the record shows that Coral's prices reflected prevailing market prices and California Parties have put forward no evidence that Coral withheld electricity.[289]

160. Trial Staff asserts that the Commission was using the hub-and-spoke test for market power during the relevant period and has previously affirmed rejection of California Parties' argument that hub-and-spoke is an inappropriate market power screen. Trial Staff argues that the fact that the Commission discontinued use of the hub-and-spoke test in November 2001 does not alter the fact that it was the standard at the time and, therefore, the Commission is required to use the standards for assessing market-based rate sellers that were in effect at the time the transaction took place. Trial Staff

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[286] Shell Brief Opposing Exceptions at 19-23; Trial Staff Brief Opposing Exceptions at 61-64.

[287] For example, Trial Staff notes that the Commission did not modify its market power analysis to reflect changes in the Horizontal Merger Guidelines issued by the U.S. Department of Justice and the Federal Trade Commission in 2010. Trial Staff Brief Opposing Exceptions at 66.

[288] Shell Brief Opposing Exceptions at 23-24 (citing *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995)).

[289] *Id.* at 25.

further argues that California Parties' attempt to distinguish between a test used to determine if an entity has market power and the actual exercise of market power is unpersuasive. Trial Staff maintains that if it is not demonstrated in the first place that a seller possesses market power, there is no point of reference to determine whether the seller actually exercised market power.[290]

161. Trial Staff and Shell both contend that the Presiding Judge correctly relied upon the Commission's decision in *Lockyer* to find that California Parties were required to use the hub-and-spoke screen for market power in this proceeding. They assert that although in *Lockyer*, unlike here, the Commission expressly directed the use of the hub-and-spoke test, the rationale behind the *Lockyer* decision applies with equal force here because using a different standard would violate notice requirements and retroactively establish agency rules and tests.[291] Shell notes that the Commission has previously rejected a collateral attack on the hub-and-spoke measure of market power that was used at the time.[292]

162. Trial Staff argues that, in addition to Dr. Reynolds' failure to use the then-applicable hub-and-spoke market power screen, his statistical tests suffer from three other flaws that render his conclusions unjustified because Dr. Reynolds defined the product and geographic markets too narrowly, and failed to properly model price and quantity. Also, Trial Staff claims that the results of Dr. Reynolds' regression analysis for CAISO-declared emergency conditions, which shows that Respondents generally ignored emergency conditions instead of using the emergency as an opportunity to demand higher prices, is inconsistent with California Parties' contention that CERS had no alternatives in the real-time market.[293]

163. TransCanada argues that California Parties allege for the first time in their Brief on Exceptions that TransCanada had or exercised market power.[294] TransCanada avers

[290] Trial Staff Brief Opposing Exceptions at 66-68.

[291] *Id.* at 68-69; Shell Brief Opposing Exceptions at 25-26.

[292] Shell Brief Opposing Exceptions at 26 (citing Opinion No. 512, 135 FERC ¶ 61,113 at P 40).

[293] Trial Staff Brief Opposing Exceptions at 69-72.

[294] TransCanada Brief Opposing Exceptions at 79 (citing California Parties Brief on Exceptions at 3, 67-68 ("the reason [TransCanada was] able to extract high premiums from CERS was the pervasive exercise of market power that characterized the CERS Period.")).

that California Parties failed to provide evidence with regard to TransCanada that would satisfy the hub-and-spoke market power screen and therefore avers that California Parties' claim that TransCanada exercised market power is incorrect.[295]

164. Trial Staff and TransCanada assert that the Presiding Judge correctly recognized the role of market fundamentals in the prices paid by CERS. Trial Staff and TransCanada claim that California Parties' argument that the Presiding Judge conflated market fundamentals with legitimate business behavior mischaracterizes the Presiding Judge's findings. Trial Staff and TransCanada contend that the Presiding Judge properly recognized the factors that contributed to the Western Energy Crisis and found that evidence of record does not demonstrate that actions attributable to TransCanada caused the Western Energy Crisis.[296]

c. <u>Commission Determination</u>

165. We affirm the Presiding Judge's finding that California Parties failed to prove that Coral possessed or exercised market power. We find that Dr. Reynolds' analyses were not seller specific and did not identify specific contracts that were directly affected by an exercise of market power. General conclusions about price trends do not satisfy the contract specific burden under *Mobile-Sierra* and therefore, contrary to California Parties' arguments, do not provide "direct evidence" of market power in this context. Further, because Dr. Reynolds did not present any market power analyses that would support the contract specific examination required by *Mobile-Sierra*, we find that the Presiding Judge's conclusions regarding the hub-and-spoke test are not relevant to the question of whether California Parties presented evidence sufficient to show that the *Mobile-Sierra* presumption should not apply.

166. We find that the Presiding Judge appropriately gave no weight to California Parties' arguments that the structure and rules of the market provided opportunities for sellers to exercise market power. The *Mobile-Sierra* inquiry is not about whether market dysfunction exists that would provide opportunities for unlawful activity, but whether a

[295] *Id.* at 80.

[296] Trial Staff Brief Opposing Exceptions at 72-76; TransCanada Brief Opposing Exceptions at 82-88 (both citing Initial Decision, 146 FERC ¶ 63,028 at PP 1734-1735).

specific seller actually did engage in unlawful activity that directly affected a contract rate.[297]

167. We find that California Parties' argument that the Presiding Judge improperly conflated market fundamentals with legitimate business behavior is irrelevant for two reasons. First, California Parties presented neither a hub-and-spoke analysis for any Respondent in this proceeding, nor direct evidence that any seller possessed or exercised market power. Thus, there was no need for Respondents to demonstrate that the prices charged to CERS were not the result of market power. Second, the Presiding Judge did not rely on the role of market fundamentals in finding that California Parties failed to establish that either Coral or TransCanada exercised market power, but instead focused on California Parties' failure to present seller-specific evidence.[298]

168. We find that the Presiding Judge correctly recognized that California Parties did not allege that any of CERS' contracts with TransCanada were tainted by TransCanada's exercise of market power and therefore did not need to make additional findings on this issue.

4. <u>Undue Discrimination</u>

a. <u>Briefs on Exception</u>

169. California Parties except to the Presiding Judge's finding that Coral did not unduly discriminate against CERS. California Parties assert that the key principle of the Commission's evaluation of price discrimination is that "those who are similarly entitled must be treated equally,"[299] and that discrimination can only be justified by cost or other factual differences between customers.[300] California Parties dispute the Presiding Judge's conclusion that CERS was uniquely situated as compared to other buyers, but also concede that CERS was unique and argue that CERS' uniqueness was part of the reason why it was discriminated against. In other respects, however, California Parties

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[297] *See Morgan Stanley*, 554 U.S. at 547 ("the mere fact that the market is imperfect, or even chaotic, is no reason to undermine the stabilizing force of contracts … .").

[298] Initial Decision, 143 FERC ¶ 63,028 at PP 1386, 1428-1430.

[299] California Parties Brief on Exceptions at 16 (quoting *Sebring*, 591 F.2d at 1008).

[300] *Id.* at 17 (citing *Transwestern Pipeline*, 36 FERC ¶ 61,175 at 61,433).

assert that CERS was also similarly situated to every other buyer of hourly energy in the day of market except that it was more vulnerable because of its need to buy energy on an emergency basis.[301]

170. California Parties defend the "matching" methodology employed by Dr. Fox-Penner. California Parties explain that this methodology involved comparing sales of a given seller to CERS and to similarly situated buyers to determine whether there was undue price discrimination. California Parties note that an exact match was not always possible and, in those instances where the location of the transactions differed, Dr. Fox-Penner used published transmission costs to adjust the prices for comparison. California Parties assert that the $50/MWh premium threshold used by Dr. Fox-Penner to confirm undue price discrimination was a conservative buffer that was sufficient to rule out a legitimate source of price differentials such as credit risk. California Parties argue that the Presiding Judge's insistence on a strict matching approach would make it almost impossible to ever identify price discrimination in such markets.[302]

171. California Parties argue, contrary to the finding by the Presiding Judge that Dr. Fox-Penner's matching analysis failed to account for significant factors such as credit, timing, and duration that could have resulted in price differentials, that Dr. Fox-Penner presented a detailed analysis that compared all of the following attributes of the CERS and non-CERS transactions: (1) product definition and attributes; (2) quantity of purchases; (3) times of transaction; (4) duration of the transaction; (5) credit risk; and (6) location. California Parties aver that Dr. Fox-Penner's comparisons of each of these factors on an hour-by-hour, transaction-by-transaction basis establish that Coral treated CERS differently from other buyers that Coral sold to in the Pacific Northwest without a supportable cost justification for the differences.[303]

172. California Parties also argue that the Presiding Judge's finding that TransCanada did not engage in undue discrimination against CERS was not reasoned decision-making, for many of the same reasons as discussed with regard to Coral. California Parties assert that there were likely more than the 26 hours identified by Dr. Fox-Penner in which TransCanada discriminated due to the conservative nature of Dr. Fox-Penner's test. California Parties explain that the test resulted in so few matched transactions to compare because virtually all of TransCanada's short-term sales were either to CERS or to another party, but seldom to both during the same hour. California Parties also contend that,

[301] *Id.* at 17-19.

[302] *Id.* at 34-36.

[303] *Id.* at 20-28.

although the timing of the transactions found to be discriminatory by Dr. Fox-Penner was different, the product sold by TransCanada did not change as a result of the timing and, therefore, California Parties dispute the Presiding Judge's finding that the transactions were not comparable. California Parties insist that the timing of a transaction cannot justify discrimination.[304]

173. California Parties claim that the Presiding Judge did not engage in reasoned decision-making because none of the five paragraphs in the Initial Decision that dismissed the price discrimination argument addressed the record of Coral's actual prices. California Parties contend that Coral charged CERS an average premium of $211/MWh more than it charged similarly-situated purchasers for short-term, day of energy.[305]

174. California Parties also refute the Presiding Judge's rejection of Dr. Fox-Penner's standard deviation analysis as applicable to TransCanada. California Parties note that the standard deviation analysis presents an issue of first impression for the Commission and urges the Commission to except this analysis as a valid means by which to measure price discrimination. California Parties contend that the standard deviation method used by Dr. Fox-Penner is especially suitable in the context of short-term, bilateral markets because a transaction can be compared against the entire relevant market, and the transaction would only be found discriminatory if it were significantly outside the expected price distribution for the same product within that market.[306]

175. California Parties contend that the conclusion that Respondents unduly discriminated against CERS was consistent with corroborating evidence such as the regression analysis undertaken by Dr. Fox-Penner in response to criticism of the matching methodology. California Parties claim that the use of regression analysis in discrimination litigation is "legion" and "one of the best empirical tool[s] for uncovering discrimination."[307] California Parties assert that the regression analysis was performed for the purpose of determining whether a Respondent's sales to CERS were systematically priced higher than sales to other purchasers when the effects of sales

[304] *Id.* at 28-31.

[305] *Id.* at 17-18.

[306] *Id.* at 31-34.

[307] *Id.* at 37 (citing Ex. CAT-421 at 7, n.5 (Reference Manual on Scientific Evidence, 2d ed., Federal Judiciary Center 2000)).

quantity, natural gas prices, transmission congestion, emergencies, peak conditions, and monthly market charges were controlled for.[308]

176. Further, California Parties argue that the Presiding Judge erred in rejecting Dr. Fox-Penner's marginal cost analyses of Respondents, which were not, by themselves, intended to be independent measures of undue price discrimination, but were performed to demonstrate that Respondents charged prices well above their marginal costs and thus above prices that would be expected in a competitive market.[309]

b. **Briefs Opposing Exceptions**

177. Trial Staff, Shell, and TransCanada assert that the Presiding Judge correctly found that Respondents did not unduly discriminate against CERS. Trial Staff argues that Commission precedent is clear regarding the standard that applies to claims of undue discrimination and contends that the Presiding Judge applied the proper precedent, under which the complainant bears the burden to show (1) two classes of customers are treated differently without justification on the basis of factual differences, and (2) those two classes of customers are similarly situated. Trial Staff asserts that the Presiding Judge never found simply that discrimination was impossible because CERS was uniquely situated, but rather found that CERS was uniquely situated in a number of material ways and those unique characteristics were material to the prices it was charged.[310] TransCanada also asserts that the Presiding Judge applied the proper legal standard and argues that California Parties ignore the elements necessary to establish undue discrimination and misstate the applicable law. Further, TransCanada avers that California Parties ignore the plethora of legitimate reasons that contract pricing can differ, and thereby suggest an impossible legal standard that would produce results that are incompatible with the concept of market-based pricing.[311]

178. Trial Staff, Shell, and TransCanada argue that the Presiding Judge correctly found that CERS was uniquely situated as compared to other buyers in the Pacific Northwest in a number of material ways, including that CERS was required to obtain energy critical to CAISO operation, that it faced considerable credit risk issues, and the sheer volume of its energy purchases. Trial Staff and TransCanada assert that Dr. Fox-Penner's argument

[308] *Id.* at 36-38.

[309] *Id.* at 38-39.

[310] Trial Staff Brief Opposing Exceptions at 34-35.

[311] TransCanada Brief Opposing Exceptions at 46-49.

that CERS was a highly creditworthy entity, along with his conservative estimate of a reasonable risk premium, are flawed because he discounts sellers' reasonable perception of risk at the time of the transactions. Trial Staff, Shell, and TransCanada contend that the evidence demonstrates that the market did perceive transactions with CERS as highly risky, due to credit risk and regulatory uncertainty, such that a substantial risk premium was appropriate. Shell and TransCanada contend that an after-the-fact calculation of an "appropriate" level of risk premium would have to include information that sellers could not have known when making decisions about transacting with CERS, including questions about whether CERS would obtain timely financing.[312] Further, Shell contends that under FPA section 205, in the context of private contracts, "[a] fixed rate contract between the parties may justify a rate disparity, rendering it lawful … ."[313] Shell disputes California Parties' claim that this precedent applies only to long-term contracts, arguing that the D.C. Circuit did not indicate any intent to so limit its holdings.[314]

179. Trial Staff, Shell, and TransCanada also argue that the Presiding Judge correctly found that Dr. Fox-Penner's "matching" analysis was insufficient to support a finding of undue discrimination against CERS because Dr. Fox-Penner failed to control for critical factors such as the time the counterparties reached the agreement and the duration of the transaction. Trial Staff claims that California Parties' repeated reference to "Dr. Fox-Penner's hour-by-hour, transaction-by-transaction analysis" in their Brief on Exceptions is misleading because Dr. Fox-Penner didn't catalog transactions but merely the hourly prices of larger transactions. Shell further contends that Dr. Fox-Penner's matching analysis does not sufficiently account for differences between counterparties, reiterating its assertion that CERS presented a unique risk as compared to other buyers. Also, Shell states that, because Coral rarely sold to anyone at the California-Oregon Border other than CERS, Dr. Fox-Penner matched these transactions to sales at the Nevada-Oregon Border and did not appropriately account for higher demand at the California-Oregon Border or congestion-related costs. Similarly, TransCanada asserts that Dr. Fox-Penner failed to fully account for congestion costs and thus misstated the difference in prices for sales to CERS versus sales to other buyers at different locations. Shell argues that, pursuant to the mismatches inherent in Dr. Fox-Penner's methodology, Coral would have

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[312] Trial Staff Brief Opposing Exceptions at 35-40, 74-75; Shell Brief Opposing Exceptions at 28-37, 40-50; TransCanada Brief Opposing Exceptions at 56-65.

[313] Shell Brief Opposing Exceptions at 38 (quoting *City of Bethany v. FERC* ,727 F.2d 1131, 1139 (D.C. Cir. 1984)).

[314] *Id.* at 39-40.

had to sell at a loss in 57 percent of the "matched" hours in order to avoid Dr. Fox-Penner's undue discrimination threshold.[315]

180. TransCanada emphasizes that the timing of the transactions analyzed by Dr. Fox-Penner is important because, in addition to showing whether the transactions being compared were actually matches, the number of hours before delivery refutes California Parties' claims that TransCanada unduly discriminated by waiting to sell energy to CERS. TransCanada asserts that the longer the period between confirmation and delivery, the greater the risk to which TransCanada was exposed due to the potential for prices to change from hour to hour. TransCanada claims that, without accounting for this risk, Dr. Fox-Penner incorrectly presumed that risk was equal between sales of multiple hours to CERS and sales of one hour to other buyers.[316]

181. Further, Trial Staff, Shell, and TransCanada contend that the standard deviation analysis used by Dr. Fox-Penner to expand upon the results of this matching analysis again ignores important differences between the transactions that Dr. Fox-Penner characterizes as matches, as well as credit risk concerns that could justify price disparities.[317] Shell elaborates that the standard deviation analysis compared daily average prices and daily standard deviation against Coral's hourly transaction data and also data for sales outside of the Pacific Northwest bilateral spot market. Shell claims that this mismatch between daily and hourly data sets renders this analysis irrelevant to the question of undue discrimination. Moreover, Shell argues that this methodology compares a transaction with one customer to an average rate charged to all customers without first determining that the comparisons represent sales to similarly situated customers, as required by the test for identifying undue discrimination.[318]

182. TransCanada avers that the standard deviation analysis cannot prove undue discrimination because the database used for the analysis included only sales to non-CERS buyers at the California-Oregon Border, yet TransCanada claims to have provided

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[315] Trial Staff Brief Opposing Exceptions at 40-43; Shell Brief Opposing Exceptions at 52-56; TransCanada Brief Opposing Exceptions at 50-51, 55-56.

[316] TransCanada Brief Opposing Exceptions at 53-56.

[317] Trial Staff Brief Opposing Exceptions at 44.

[318] Shell Brief Opposing Exceptions at 59 (citing *Sw. Elec. Coop. v. FERC*, 347 F.3d 975, 981 (D.C. Cir. 2003) ("Only upon a complainant's showing that a rate design has different effects on similarly situated customers does the burden shift to the respondent to justify those disparities.")).

evidence that it made no sales to non-CERS buyers at that location during the hours covered by the data. Thus, because TransCanada only made sales to CERS during the time and at the location included in the analysis, it could not, by definition, have discriminated against CERS. Moreover, TransCanada asserts that the normal distribution curves and probabilities relied upon by California Parties are skewed due to Dr. Fox-Penner's inclusion of different types of products, rather than comparing only the prices for the same product, sold under similar conditions. TransCanada also points out that California Parties only allege undue discrimination by TransCanada on February 22, 2001, yet the evidence shows TransCanada's pricing behavior with CERS on February 21, 22, and 23. Additionally, TransCanada asserts that the trader tapes show that trades during the 22 hours in question on February 22, 2001 involved bargaining and negotiation and are not indicative of undue discrimination.[319]

183. Trial Staff and TransCanada argue that Dr. Fox-Penner's flawed matching and standard deviation analyses are not saved by the regression analysis presented in Dr. Fox-Penner's rebuttal testimony. They contend that the Presiding Judge properly found that this test "suffers from the same flaws as [Dr. Fox-Penner's] matching methodology in that it also fails to properly control for the duration of transactions, the timing of agreements, or credit risk.[320] TransCanada cites Dr. Fox-Penner's admission that the regression analysis was developed "precisely to get around the fact that matching transactions may not be common or even present,"[321] and argues that if there are not matching transactions a seller cannot have engaged in undue discrimination. TransCanada claims that Dr. Fox-Penner's regression analysis shows nothing more than that different sellers charged different prices to different buyers, which would be reasonable given differences in the particulars surrounding such sales.[322]

184. Trial Staff argues that the Presiding Judge properly found that Dr. Fox-Penner's use of long-run and short-run marginal costs to show that Respondents' prices to CERS were economically inefficient was discredited by other witnesses. Trial Staff contends that the use of a cost-based benchmark is inappropriate in a bilateral, market-based rate regime, but even if such costs were a good measure of market efficiency, the specific yardsticks used by Dr. Fox-Penner were flawed because, among other things, the CERS

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[319] TransCanada Brief Opposing Exceptions at 68-77.

[320] Trial Staff Brief Opposing Exceptions at 44-45 (quoting Initial Decision, 146 FERC ¶ 63,028 at P 1426).

[321] TransCanada Brief Opposing Exceptions at 78 (citing Ex. CAT-413 at 37:3-4).

[322] TransCanada Brief Opposing Exceptions at 77-78.

Period was too short for long-run marginal costs to set prices and because an efficient market clears at the marginal cost of the most expensive generator needed, not the marginal cost of an individual seller.[323]

c. Commission Determination

185. We affirm the Presiding Judge's finding that California Parties failed to establish that either Coral or TransCanada engaged in undue discrimination against CERS. As a threshold matter, we find that the Presiding Judge conscientiously weighed the evidence of record, including the admission of California Parties witness Dr. Fox-Penner that "CERS was a uniquely situated entity in the whole WECC,"[324] and correctly determined that CERS was not so similarly situated to other buyers in the Pacific Northwest market during the CERS Period that rate differentials could not be explained by differences between customers. In particular, the Presiding Judge explained that CERS was uniquely situated in a number of material ways including "the fact that CERS was required to obtain the energy critical to reliable [CAISO] operation, credit risk issues, and the sheer volume of the energy purchases,"[325] factors which can legitimately impact prices.

186. We find that the record supports the Presiding Judge's finding that credit risk represented a material difference between CERS and other buyers. Indeed, several of California Parties' witnesses, while denying that any actual credit risk existed because CERS was receiving money from the State's General Fund, admit that many suppliers refused to sell to CERS due to the perceived credit risk.[326] In addition to the risk of non-payment, Respondents list regulatory risks including ongoing Commission proceedings, a requirement by CPUC that the investor owned utilities cooperate in pursuing refunds, a proposal at the California legislature to institute a windfall profits tax, and a concern that CDWR would exercise its authority to find prices unreasonable and decline to pay for CERS' purchases.[327] We find that Dr. Fox-Penner's hindsight analysis of credit risk did not properly account for how suppliers perceived these risks during the relevant period as would be needed to show undue discrimination.

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[323] Trial Staff Brief Opposing Exceptions at 45-46.

[324] Initial Decision, 146 FERC ¶ 63,028 at P 1424 (citing Trial Staff Reply Br. at 17-20; Tr. 1245:18-1246:4 (Fox-Penner)).

[325] *Id.*

[326] Initial Decision, 146 FERC ¶ 63,028 at PP 42, 50, 67.

[327] *See, e.g.*, *id.* PP 203, 309, 1139.

187. We find that Dr. Fox-Penner's statistical analyses did not sufficiently control for the differences between buyers todemonstrate undue discrimination; it only showed that different sellers charged different amounts to different buyers. We specifically concur with the Presiding Judge's finding that Dr. Fox-Penner's matching analysis failed to control for a number of critical factors that could justify differences in price such as the time the agreement between the counterparties was reached and the duration of the transaction. For example, TransCanada provided evidence showing that the time the agreement was made could have a substantial impact on risk because TransCanada generally would not know its energy acquisition cost until after it had agreed on a price to sell that energy to CERS. Thus, a longer period between agreement and delivery meant greater risk, thereby justifying a higher price.[328] Dr. Fox-Penner admitted that he had not considered these risks when formulating his analysis.[329] We find that the regression analysis performed by Dr. Fox-Penner on rebuttal, while controlling for a number of variables such as sales quantities, natural gas prices, transmission congestion, emergency and peak conditions, and monthly market changes, nevertheless fails to properly control for other important variables including the duration of transactions, the timing of agreements, and credit risk.[330]

188. We also find that California Parties' defense of Dr. Fox-Penner's standard deviation analysis with respect to TransCanada is misplaced. As explained by the Presiding Judge, the standard deviation analysis could not, by definition, show that TransCanada treated similarly situated classes of customers differently because it (1) compares TransCanada sales to CERS to sales made by parties other than TransCanada, and (2) it does not compare similar products.[331] Further, the standard deviation analysis is based on the flawed assumption that the comparisons being made represent sales to similarly situated customers.

189. We find that the Presiding Judge correctly rejected Dr. Fox-Penner's marginal cost analyses. As even California Parties acknowledge, these analyses do not, by themselves, show undue discrimination, but only that prices charged to CERS were above Respondents' marginal costs. We reiterate that a showing that prices are above marginal

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[328] *Id.* P 1088 (citing Ex. CAT-660 at 37 (showing the price for energy increased closer to the delivery time); Ex. TRC-77 at 5:4-6:2; Ex. TRC-1 at 47:1-5; Ex. TRC-16 at 3).

[329] *Id.* (citing Ex. TRC-77 at 7:7-8:17; Ex. TRC-79 at 2-3, 5-8).

[330] *See* Ex. CAT-413 at 37:18-38:19.

[331] Initial Decision, 146 FERC ¶ 63,028 at P 1399.

costs is not a valid basis for abrogating contracts that enjoy *Mobile-Sierra* protection.[332] Moreover, the Presiding Judge found that this evidence was discredited by other witnesses.[333]

E. Overcoming the *Mobile-Sierra* Presumption

1. Briefs on Exceptions

190. California Parties claim that the Presiding Judge erred by finding that the *Mobile-Sierra* presumption was not overcome, despite having recognized the heavy burden that the prices paid by CERS imposed on California consumers. California Parties claim that the Presiding Judge's fundamental error was considering only the contracts of the two remaining Respondents instead of analyzing the burden of the collective impact on consumers of all the contracts entered into by CERS during the CERS Period, as well as the overall impact of the Western Energy Crisis. California Parties argue that the Commission has acted in the public interest to abrogate contracts on the basis of their collective impact, particularly in instances where the protection of the *Mobile-Sierra* presumption is intended to safeguard the interests of third parties. California Parties maintain that evaluating the impact of these remaining contracts in isolation makes it virtually impossible to prove undue burden on the public under any circumstances. California Parties offer the theory that each Respondent, through each of its contracts, contributed to the overall harm and, as such, should bear responsibility for its share of the overall harm.[334]

191. Additionally, California Parties argue that the Presiding Judge improperly conflated the standards for avoiding the *Mobile-Sierra* presumption with the standards for overcoming it. California Parties maintain that relevant case law makes clear that the sole inquiry into whether the presumption has been overcome is whether consumers were burdened; there is no need to also show seller fault or bad behavior.[335] Specifically,

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[332] *Morgan Stanley*, 554 U.S. at 550 ("A presumption of validity that disappears when the rate is above marginal cost is not presumption of validity at all … .").

[333] Initial Decision, 146 FERC ¶ 63,028 at P 1426.

[334] California Parties Brief on Exceptions at 82-109 (citing *Texaco*, 148 F.3d at 1093; *TAPS*, 225 F.3d at 710-11; *Ariz. Corp. Comm'n*, 397 F.3d at 954-55; *ISO-NE*, 143 FERC ¶ 61,150 at P 187 n.359).

[335] California Parties Brief on Exceptions at 109-113 (citing *Mobile*, 350 U.S. at 344; *Sierra*, 35 U.S. at 335; *Morgan Stanley*, 554 U.S. at 530).

California Parties state that *Morgan Stanley* allows for consideration of "circumstances exogenous to contract negotiations, including natural disasters and market manipulation by entities not parties to the challenged contract" in ascertaining whether contracts impose an excessive burden on consumers to demonstrate that the focus of the *Mobile-Sierra* inquiry is on harm to the public and not on seller behavior.[336] California Parties contend that concern that the Commission did not properly consider exogenous circumstances was the precise reason the Ninth Circuit remanded this case to the Commission.[337] Based on this footnote in *Morgan Stanley*, California Parties contend that market fundamentals and evidence of market manipulation by entities not parties to the challenged contracts can provide evidence that contracts imposed an excessive burden on consumers and should be reformed.[338]

192. Because, according to California Parties, the Presiding Judge used the incorrect standard for whether the *Mobile-Sierra* presumption had been overcome, the Presiding Judge relied on a variety of irrelevant factors, including (1) that Respondents' rates were not as high as the rates that other parties charged CERS; (2) that Respondents may have charged similar rates to others; (3) the aggregate harm shown by California Parties includes harm caused by the rates of sellers who have never been subject to legal claims of unlawful activity by California Parties; (4) that analyzing harm by looking at the overall harm caused by the Western Energy Crisis would result in abrogation of Respondents' contracts with CERS based upon the impact of others' sales; and (5) in the absence of evidence of unlawful activity, the consideration of irrelevant factors such as contract rates relative to other market participants, contract volumes, and the duration of the contracts.[339]

193. California Parties also contend that the Presiding Judge misapplied evidence intended to show, once the *Mobile-Sierra* presumption had been overcome, that Respondents' rates were unjust and unreasonable. California Parties argue that they demonstrated that the MMCP is an appropriate benchmark for determining whether contract prices in the Pacific Northwest Market are just and reasonable because sales to CERS are identical to out-of-market purchases made by CAISO, and sales by CERS to CAISO, which were mitigated down to the MMCP in the California Refund Proceeding. Thus, California Parties argue that, because California Parties offered evidence showing

[336] *Id.* at 86, 110 (quoting *Morgan Stanley*, 554 U.S. at 549, n.4).

[337] *Id.* at 86-87, 110.

[338] *Id.* n.306.

[339] *Id.* at 113-120.

that prices charged by Respondents to CERS exceeded the MMCP, those sales were unjust and unreasonable and should be remedied by an appropriate method in Phase II of the proceeding.[340]

194. Further, California Parties argue that the Presiding Judge misunderstood the purpose of offering the MMCP evidence. California Parties aver that they were not advocating the use of the MMCP as a remedy in this proceeding, noting that the calculation of remedies has been reserved for Phase II. Further, California Parties object that they did not argue that the MMCP should be used to determine whether the *Mobile-Sierra* presumption had been overcome. Rather, California Parties maintain that the MMCP evidence was offered to demonstrate that the rates charged to CERS by Respondents were unjust and unreasonable. In addition, California Parties dispute the Presiding Judge's finding that TransCanada's contracts could not have imposed an undue burden on consumers because CERS' costs under those contracts exceeded the MMCP only by one half of one percent. California Parties contend that the Presiding Judge misinterpreted the evidence and that CERS' total acquisition costs would have exceeded the MMCP by 323 percent. Regardless, California Parties reiterate that this evidence was not presented to demonstrate that TransCanada's rates burdened consumers, but to show, once the presumption was overcome, that TransCanada's rates were unjust and unreasonable.[341]

195. California Parties also challenge the Presiding Judge's application of facts concerning TransCanada to Coral, citing the Presiding Judge's finding that California Parties had failed to overcome the *Mobile-Sierra* presumption for the remainder of Coral's contracts "for the same reasons discussed regarding TransCanada's contracts … ."[342] California Parties explain that the evidence regarding CERS' transactions with Coral, such as Coral's profit margins and the amount by which Coral's sales to CERS exceeded the MMCP, was specific to Coral. Further, California Parties argue that they have demonstrated, with respect to TransCanada's sales, why none of those factors is relevant to whether the presumption has been overcome and assert that those demonstrations apply with equal force to Coral.[343]

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[340] *Id.* at 121-124.

[341] *Id.* at 124-130.

[342] *Id.* at 131 (citing Initial Decision, 146 FERC ¶ 63,028 at P 1710).

[343] California Parties Brief on Exceptions at 131-132.

196. Shell and TransCanada contend that, despite correctly concluding that California Parties had not overcome the *Mobile-Sierra* presumption, the Presiding Judge erred as a matter of law by suggesting that the *Mobile-Sierra* presumption can be overcome by a seller level showing, rather than a contract specific showing, of excessive burden on consumers or serious harm to the public interest. Shell and TransCanada insist that Supreme Court and Commission precedent leave no room for questioning that the *Mobile-Sierra* presumption applies to specific bilateral contracts and not more broadly to a particular seller.[344] Also, Shell and TransCanada take exception to the Presiding Judge's conclusion that applying the *Mobile-Sierra* presumption to individual spot market contracts would effectively make it impossible to ever find the level of harm necessary to abrogate a contract. Shell instead claims that if a spot sale contract does not excessively burden consumers or seriously harm the public interest, then the Commission should not permit that contract to be abrogated unilaterally. According to Shell, that the Commission may rarely find the grounds for abrogating a *Mobile-Sierra* protected spot contract does not mean that its authority for doing so in extraordinary circumstances has been eliminated. TransCanada maintains that *Mobile-Sierra* sets a high bar to overcome, regardless of whether applied to a spot market contract or longer-term contracts.[345]

2. Briefs Opposing Exceptions

197. California Parties dispute arguments against their position that, when assessing harm to consumers, the *Mobile-Sierra* presumption applies to all of a seller's CERS contracts in aggregate rather than its individual spot contracts. California Parties therefore assert that the Presiding Judge was correct to conclude that an individual contract approach would trivialize the harm suffered. However, California Parties claim that, while the Presiding Judge got the principle correct, she erred in applying it, mistakenly holding that California Parties failed to overcome the *Mobile-Sierra* presumption.[346]

198. California Parties first recite evidence intended to demonstrate that rates during the Western Energy Crisis caused extreme harm to consumers and the public interest. California Parties list examples from the testimony of CPUC Commissioner Florio, such

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[344] Shell Brief on Exceptions at 91-96 (citing *Morgan Stanley*, 554 U.S. at 530; *NRG Power Marketing., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 174 (2010) (*NRG*)); TransCanada Brief on Exceptions at 34-38 (citing *Morgan Stanley*, 554 U.S. at 530, 547, 551; Order on Remand, 137 FERC ¶ 61,001 at P 21).

[345] Shell Brief on Exceptions at 91-97; TransCanada Brief on Exceptions at 38-46.

[346] California Parties Brief Opposing Exceptions at 12-15.

as churches holding candlelight vigils and prayer meetings dedicated to the issue of high electric prices, San Diego restaurant owners stating that they were facing bankruptcy within months, and 100,000 mobile home residents that faced eviction if they did not pay their electric bills.[347] Further, California Parties note that blackouts, which were allegedly caused by sellers withholding during the Western Energy Crisis, imposed both direct and indirect costs on consumers, businesses, and government.[348] Additionally, California Parties report that the Western Energy Crisis damaged California's credit rating, due in part to bonds issued in order to finance CERS' electricity purchase costs. California Parties assert that taxpayers have borne a significant burden in relation to the credit downgrade. California Parties argue that the Western Energy Crisis rates will continue to burden California consumers into the future due to the bond issuance that will not be fully paid until 2022. Thus, California Parties contend that all California consumers will receive the benefit of any refunds ordered in this proceeding because they will reduce the Power and Bond Charges that would otherwise be assessed to retail electricity customers in California.[349]

199. California Parties argue that record evidence contradicts Respondents' assertion that the analysis of consumer harm should consider only individual spot contracts. California Parties reiterate that disaggregating the harm into individual contracts would render *Mobile-Sierra's* "overcoming exception meaningless" and the regulatory oversight of short term electricity rates required by the FPA would no longer exist.[350] Additionally, California Parties contend that *Mobile-Sierra* case law shows that harm to consumers must be analyzed based on overall harm and the facts of the situation and not on a contract-by-contract basis.[351] California Parties argue that the Commission is charged with protecting consumers from unjust and unreasonable rates and must, therefore,

[347] *Id.* at 16-19.

[348] *Id.* at 20-22.

[349] *Id.* at 23-27.

[350] *Id.* at 27-29 (citing testimony of California Parties witness Berck).

[351] *Id.* at 29-30 (citing *ISO-NE*, 143 FERC ¶ 61,150 at P 187 n.359; *NRG*, 558 U.S. at 175; *Morgan Stanley*, 554 U.S. at 530; *Ariz. Corp. Comm'n*, 397 F.3d at 954-55; *Texaco*, 148 F.3d at 1093; *Ne. Utils. Serv. Co.*, 55 F.3d 686, 691 (1st Cir. 1995); *Mobile*, 350 U.S. at 344; *Sierra*, 350 U.S. at 355).

interpret the *Mobile-Sierra* presumption in light of that responsibility and based upon an understanding of how the market actually worked.[352]

200. California Parties claim that Respondents' attempt to refute the body of case law supporting California Parties' position runs counter to the Commission's fundamental duty to protect the public interest. California Parties assert that Respondents' "cherry-picked" language from the case law is irrelevant and the Commission should reject these arguments. Also, California Parties contend that the Respondents' use of case law conflates the standards for avoiding the *Mobile-Sierra* presumption with the standards for overcoming the presumption and reiterates its prior argument that overcoming the *Mobile-Sierra* presumption requires no finding of bad acts. In addition, California Parties assert that Respondents' contention that overcoming the *Mobile-Sierra* presumption is intended to be difficult and reserved for extraordinary circumstances fails to account for the fact that the Western Energy Crisis was extraordinary. Further, California Parties contend that recent *Mobile-Sierra* precedent demonstrates that courts do not truly believe that the presumption is "practically insurmountable."[353]

201. Trial Staff, Shell, and TransCanada argue that each of California Parties' exceptions on the issue of excessive burden is based on a misunderstanding and/or misinterpretation of the relevant *Mobile-Sierra* precedent. Trial Staff asserts that all the cases cited by California Parties involve substantial evidence linking harm to the public interest with particular contracts or contract provisions. Trial Staff contends that California Parties have made no attempt to isolate other possible causes of the harm, such as drought conditions, high gas prices, and increased demand, from the particular contracts at issue in this case and, therefore, have not demonstrated the required link between the alleged burden or harm and the contracts at issue.[354]

202. Shell and TransCanada likewise argue that none of the cases relied upon by California Parties support abandoning the contract-by-contract analysis prescribed by the Commission for this case. Shell avers that none of these cases allow a buyer to unilaterally modify contract rates simply because the prices are too high, nor do they

[352] *Id.* at 31-32.

[353] *Id.* at 31-51 (citing *Texaco*, 148 F.3d at 1093; *TAPS*, 225 F.3d at 710-11; *Ariz. Corp. Comm'n*, 397 F.3d at 953-54). California Parties also note that the phrase "practically insurmountable" appears only in Justice Stevens' dissent, and then only to opine that the FPA "does not indulge, much less require a 'practically insurmountable' presumption. *Id.* at 48 (citing *Morgan Stanley*, 554 U.S. 527).

[354] Trial Staff Brief Opposing Exceptions at 77-83.

condone collectivizing sales to one purchaser and making a generic public interest finding. Shell and TransCanada contend that each of these cases presents public interest concerns not present in, or distinguishable from, this case, such as (1) the Commission's initial review of a contract or tariff filing, (2) non-arm's length agreements between affiliates, (3) a generalized and industry-wide rulemaking, or (4) efforts by contracting parties to implement agreements contrary to Commission policy.[355]

203. Trial Staff, Shell, and TransCanada also argue that the Presiding Judge's refusal to consider California Parties' theory of aggregate harm is consistent with Supreme Court precedent, as well as the Commission's orders in this proceeding. Trial Staff argues that the principals set forth by the Supreme Court in *Morgan Stanley* protect sellers that enter into lawful contracts in a dysfunctional market, whereas California Parties' requested approach of aggregating all contracts to find an excessive burden would punish sellers simply for participating in a dysfunctional market. TransCanada contends that California Parties attempt to set a new, lower standard for contract reformation under *Mobile-Sierra* by claiming that any level of burden or harm is sufficient to overcome the presumption.[356]

204. Trial Staff asserts that the Presiding Judge erred in California Parties' favor by aggregating all the contracts from a particular seller but still found insufficient evidence of an excessive burden or serious harm to the public interest. Regardless of whether the correct approach for determining excessive burden is contract-by-contract or seller-by-seller, Trial Staff insists that the appropriate analysis is not the Western Energy Crisis as a whole, as urged by California Parties. Trial Staff notes that the Commission has repeatedly rejected this line of argument.[357] Trial Staff observes that the Presiding Judge did acknowledge that California Parties demonstrated the harm inflicted by the Western Energy Crisis; nevertheless, Trial Staff argues that just because the contracts at issue were entered into during the Western Energy Crisis, it does not follow that the contracts caused the harm. Trial Staff argues that, without a showing of causation, California

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[355] Shell Brief Opposing Exceptions at 66-76; TransCanada Brief Opposing Exceptions at 94-100.

[356] Trial Staff Brief Opposing Exceptions at 83-85; TransCanada Brief Opposing Exceptions at 100-103.

[357] Trial Staff Brief Opposing Exceptions at 85 (citing Order on Remand, 137 FERC ¶ 61,001 at P 21; Order on Rehearing, 143 FERC ¶ 61,020 at PP 28, 30).

Parties' arguments boil down to allegations of general market dysfunction and high prices, arguments that have been rejected by the Commission.[358]

205. Shell and TransCanada dispute California Parties' interpretation of footnote four of *Morgan Stanley*, which addresses consideration of "exogenous circumstances" in determining whether the *Mobile-Sierra* presumption has been overcome.[359] Shell contends that this footnote does not mean that a third party's market manipulation is sufficient grounds for abrogating a contract between Coral and CERS, but that the Commission must consider circumstances exogenous to contract formation that could have an impact "down the line" following contract formation. Shell and TransCanada assert that California Parties offered no evidence showing what CERS would have paid absent Coral's and TransCanada's spot-sales contracts with CERS and, therefore, their "exogenous circumstances" argument fails. TransCanada argues that California Parties have inverted the analysis required by footnote four by attributing the effects of exogenous factors to TransCanada's sales rather than determining the impact, if any, of TransCanada's contracts incremental to the impact of exogenous factors. Moreover, TransCanada asserts its price to CERS was 50 percent lower than CERS' supplier of last resort at the California-Oregon Border, demonstrating that TransCanada's contracts could not have imposed an excessive burden vis-a-vis alternatives to CERS' contracts with TransCanada.[360]

206. Trial Staff also argues that, contrary to California Parties' allegations, the Presiding Judge did not require proof of wrongdoing as a prerequisite to overcoming the *Mobile-Sierra* presumption or conflate the two standards. Rather, Trial Staff asserts that the paragraphs of the Initial Decision cited by California Parties (1) represent an inadvertent error with no substantive effect; (2) quote California Parties' own arguments and do not set forth a legal standard applied by the Presiding Judge; and (3) use the

[358] Trial Staff Brief Opposing Exceptions at 87 (citing Order Granting Interlocutory Appeal, 141 FERC ¶ 61,248 at P 1).

[359] *Morgan Stanley*, 554 U.S. at 549 n.4 ("The dissent criticizes the Commission's decision because it took into account under the heading of 'totality of the circumstances' only the circumstances of contract formation, not 'circumstances exogenous to contract negotiations, including natural disasters and market manipulation by entities not parties to the challenged contract.' … Those considerations are relevant to whether the contracts impose an 'excessive burden' on consumers relative to what they would have paid absent the contracts.").

[360] Shell Brief Opposing Exceptions at 76-80; TransCanada Brief Opposing Exceptions at 103-107; 120-122.

"absent evidence of unlawful market activity …" to isolate the issue of avoiding the *Mobile-Sierra* presumption from the issue of overcoming the presumption.[361] According to Trial Staff, because California Parties claim that the Presiding Judge conflated the standards for avoiding versus overcoming the *Mobile-Sierra* presumption, California Parties' related argument that this conflation resulted in the Presiding Judge relying on irrelevant factors such as rates charged by each Respondent individually, as opposed to the overall harm caused by the Western Energy Crisis, is equally without merit.[362]

207. Shell contends that, even if California Parties' theory of aggregate harm were appropriate, California Parties have still failed to demonstrate excessive burden on consumers or serious harm to the public interest. Shell first argues that the combination of capped retail rates and the State of California's decision to authorize CDWR to issue bonds that would spread the cost of CERS' purchases over 20 years eliminate the potential for excessive burden to consumers due to high retail prices. Further, Shell argues that California Parties' evidence of the high cost of service interruptions demonstrates that Coral's sales to CERS averted burdens on consumers and served the public interest. Shell avers that the evidence shows that Coral's sales to CERS prevented blackouts and did not cause them. Additionally, Shell asserts that the only evidence offered by California Parties regarding a "down the line" burden are the simulations that show what could have happened, not what did happen.[363] Shell argues that California Parties ignore actual retail rates, which increased less than seven cents per month for all of Respondents' aggregated contracts with CERS in the Pacific Northwest. Further, Shell asserts that testimony regarding the impact of the bond charges overstates the relevant cost to California consumers because these calculations include sales to CERS by now-settled respondents. Shell contends that with those sales removed, the charge per customer falls to just $0.069 per month, and that the impact attributable to Coral's portion of total sales is just $0.000134 per month per contract. Shell contends that this amount cannot be excessive burden sufficient to overcome the *Mobile-Sierra* presumption.[364]

[361] Trial Staff Brief Opposing Exceptions at 89-90 (citing Initial Decision, 146 FERC ¶ 63,028 at PP 1431, 1698, 1701-1702, respectively).

[362] *Id.* at 90.

[363] Shell Brief Opposing Exceptions at 86-88 (citing Ex. CAT-267 at 4:13-16, in which California Parties' witness Dr. Berck states that he was "told to assume" that the State of California spent approximately $4.97 billion in overcharges and then asked to model effects on California based on that number).

[364] *Id.* at 88-90.

208. TransCanada argues that California Parties' $5 billion estimate of aggregate harm is inflated by the prices charged to CERS by California municipalities, based on prices as high as $1,294/MWh – by far exceeding the highest price of $375/MWh that TransCanada charged to CERS. TransCanada explains that the substantial revenue collected from CERS by California municipalities and other governmental units reduced the amount of costs such entities' native ratepayers would otherwise bear, which benefitted rather than harmed them. TransCanada also disputes California Parties' aggregate estimate of harm, claiming that it includes transactions from a time period before TransCanada sold power to CERS and focuses on the impact of the Western Energy Crisis in general rather than focusing on the impacts of specific contracts.[365]

209. TransCanada further claims that California Parties' aggregate harm theory ignores the implications on incentives to enter into contracts and is therefore inconsistent with the policy behind the Supreme Court's *Morgan Stanley* decision. TransCanada argues that California Parties' attempt to retain the benefits of the energy obtained at one price, while now attempting to impose a lower price, imperils the sanctity of bilateral contracts. TransCanada contends that the aggregated harm approach conceals whether any particular sellers' contracts helped or hurt efforts to increase supply and competition and ultimately reduce otherwise-prevailing prices. As such, TransCanada maintains that California Parties' aggregate harm theory punishes a seller that sought to increase supplies available to CERS based upon the impacts of other sellers' behavior, a result that would be contrary to the public interest.[366]

210. TransCanada contends that, once the "excessive burden" is applied properly to the impact of TransCanada's sales to CERS, California Parties cannot show an excessive burden. TransCanada first argues that its evidence demonstrates that rate increases passed on to retail customers were in line with rate changes in other states over a 20-year period, which does not support the claim of excessive burden. TransCanada asserts that high or low wholesale prices that are the result of market forces, such as the evidence indicates in this case, are not a valid basis for overcoming the *Mobile-Sierra* presumption. TransCanada claims that California Parties ignore the role played by market forces in the prices paid by CERS.[367]

211. Trial Staff and TransCanada dispute California Parties' argument that the Presiding Judge misapplied or misunderstood California Parties' proffered MMCP

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[365] TransCanada Brief Opposing Exceptions at 107-113.

[366] TransCanada Brief Opposing Exceptions at 113-116.

[367] *Id.* at 116-119.

evidence. Trial Staff asserts that this argument is irrelevant, to the extent that California Parties' and the Presiding Judge agree that Pacific Northwest sales should not be reset to MMCP levels, and also based on a misapprehension of the Presiding Judge's use of the MMCP evidence. Trial Staff asserts that California Parties' arguments on this point are moot because the question of whether rates are unjust and unreasonable only comes into play after the *Mobile-Sierra* presumption has been overcome, which is not the case here. However, Trial Staff argues that the Presiding Judge correctly used the MMCP evidence offered by TransCanada to show that, even under California Parties' theory of the case, TransCanada's contracts with CERS did not impose an excessive burden on consumers.[368]

212. TransCanada contends that, contrary to California Parties' assertions, California Parties did argue for a market-wide remedy and attempt to overcome the *Mobile-Sierra* presumption through use of their MMCP testimony and evidence. Aside from the Commission's prior rejection of a market-wide remedy based on the MMCP in this case, TransCanada argues that California Parties' MMCP analysis has no merit because it fails to identify specific contracts as the cause of any specific harm. Additionally, TransCanada argues that the Presiding Judge correctly distinguished CAISO's out-of-market sales, which were mitigated to the MMCP, from Respondents' sales to CERS in the Pacific Northwest spot market. TransCanada asserts that, because the California markets and Pacific Northwest markets were different, Respondents' sales to CERS were not linked to dysfunction in the California markets as were the CAISO out-of-market purchases. Further, TransCanada distinguishes the sales on the basis that they involved different products and counterparties, were governed under different legal standards, and were made for different purposes.[369]

213. Shell argues that, even if the *Mobile-Sierra* presumption were overcome, the MMCP would still be an inappropriate proxy for just and reasonable rates in the Pacific Northwest. Shell avers that the MMCP is intended as a measure approximating marginal cost of generation in the California markets and bears no relationship to the bilateral spot market at issue here. Further, Shell asserts that the Commission has determined that the MMCP may not be used in this case due to significant structural differences between the California and Pacific Northwest spot markets.[370] Shell adds that, even if the MMCP were relevant, California Parties' arguments on this point still fail because the Supreme

[368] Trial Staff Brief Opposing Exceptions at 91-92.

[369] TransCanada Brief Opposing Exceptions at 125-133.

[370] Shell Brief Opposing Exceptions at 91-93 (citing Order on Remand, 137 FERC ¶ 61,001 at PP 18, 24).

Court in *Morgan Stanley* has rejected the notion "that the standard for reforming a particular contract validly entered into under a market-based scheme is whether the rates approximate marginal cost.[371] Similarly, TransCanada contends that the Presiding Judge correctly determined that MMCP levels, based on the marginal costs of California generation, bear no relationship to the costs of Respondents' sales in the Pacific Northwest. TransCanada asserts that evidence demonstrates that the energy TransCanada sold to CERS came from sources that had different cost and operating characteristics than marginal costs in California. Further, TransCanada disputes California Parties' argument that the Presiding Judge improperly made a remedy determination during Phase I of the proceeding by rejecting California Parties' advocacy of the MMCP as a benchmark for just and reasonable rates.[372]

214. Lastly, Trial Staff argues that the Presiding Judge correctly found that the legal reasons for finding that TransCanada's contracts did not cause an excessive burden apply equally to Coral. Trial Staff contends that the Presiding Judge did not, as claimed by California Parties, rely on facts specific to TransCanada, but only relied on the reasons provided in the discussion of TransCanada, such as the inappropriateness of aggregating all contracts as well as the failure of California Parties to demonstrate a causal link between harm and the specific contracts at issue.[373]

3. Commission Determination

215. We affirm the Presiding Judge's finding that California Parties failed to demonstrate that CERS' contracts with Coral and TransCanada imposed an excessive burden on consumers or seriously harmed the public interest. As explained above in our affirmation of the Presiding Judge's findings on Seattle's excessive burden argument,[374] overcoming the *Mobile-Sierra* presumption requires a contract specific analysis of harm. In order to overcome the *Mobile-Sierra* presumption, the party seeking contract abrogation must show that the "contract rate seriously harms the consuming public."[375]

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[371] *Id.* at 93-95 (quoting *Morgan Stanley*, 554 U.S. at 549 n.4).

[372] TransCanada Brief Opposing Exceptions at 134-137.

[373] Trial Staff Brief Opposing Exceptions at 92-93.

[374] *See supra* PP 57-61.

[375] *Morgan Stanley*, 554 U.S. at 546. To the extent that the Presiding Judge may have evaluated harm at the level of the seller, instead of individual contracts, we find this to be harmless error because the Presiding Judge still correctly found that California Parties failed to demonstrate an excessive burden on consumers or serious harm to the

(continued …)

Thus, we reject California Parties' argument that the Presiding Judge erred by not considering the cumulative impact of the contracts entered into by CERS during the CERS Period or the overall impact of the Western Energy Crisis. The law is clear on this issue. We find that California Parties' reliance on an aggregate estimate of harm amounts to little more than a generalized claim that prices were too high. The Commission has expressly rejected this approach.[376]

216. To the extent California Parties rely on the "exogenous circumstances" footnote four in *Morgan Stanley* to justify their use of an aggregate estimate of harm, we find that such reliance is misplaced. The Commission has recently addressed the relevance of this footnote in the context of overcoming the *Mobile-Sierra* presumption. The Commission found 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 … imposes an excessive burden on consumers," [377] but cautioned that "[g]eneral allegations of market dysfunction of high prices in the California markets are an insufficient basis for overcoming the *Mobile-Sierra* presumption."[378] The Commission's holding in that proceeding is consistent with the Commission's findings in the orders that set this matter for hearing.[379] Thus, we find no justification in *Morgan Stanley*, or any other relevant

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public interest. We recognize that this inquiry is fact-specific and that a number of factors could influence whether a contract rate seriously harms the consuming public.

[376] Order on Remand, 137 FERC ¶ 61,001 at P 21 ("general allegations of market dysfunction in the Pacific Northwest are an insufficient basis for overcoming the *Mobile-Sierra* presumption or finding that it is inapplicable."); Order Granting Interlocutory Appeal, 141 FERC ¶ 61,248 at P 15 (explaining that the Commission's finding that general allegations of market dysfunction are insufficient "refutes California's argument that simply identifying high prices should be sufficient to overcome the presumption."); Order on Rehearing, 143 FERC ¶ 61,020 (finding that "California Parties' claims of uniformly higher prices amount to little more than a variation on claims of general market dysfunction, which has been previously rejected by the Supreme Court as a basis for overcoming *Mobile-Sierra*.").

[377] *Pub. Utils. Comm'n of the State of California v. Sellers of Long-Term Contracts to the California Dep't of Water Resources*, 150 FERC ¶ 61,079, at P 14 (2015).

[378] *Id.*

[379] *See* Order on Remand, 137 FERC ¶ 61,001 at P 21; Order Granting Interlocutory Appeal, 141 FERC ¶ 61,248 at P 15; Order on Rehearing, 143 FERC ¶ 61,020.

precedent, for reforming a bilateral contract on the basis of an aggregate estimate of harm.

217. We find that California Parties are mistaken in their claim that the Presiding Judge conflated the standards for avoiding and overcoming the *Mobile-Sierra* presumption or otherwise required evidence of an unlawful act in order to overcome the presumption. This line of argument, like many of California Parties' exceptions on this issue, appears to be based in part on their erroneous theory that harm should be measured on an overall basis.[380] California Parties also misinterpret the Presiding Judge's findings. Specifically, California Parties take issue with the Presiding Judge's finding that "Absent unlawful activity during the contract formation stage, as discussed under Issue 1A, factors such as rates relative to other market participants at the time, contract volumes, and the duration of the contracts must be considered."[381] We find that in both instances where the Presiding Judge used the "absent unlawful activity" clause, it was done to distinguish the type of evidence required to avoid the *Mobile-Sierra* presumption from the types of evidence relevant to the inquiry as to whether the presumption has been overcome. Thus, we find that the Presiding Judge not only did not conflate the standards, but expressly distinguished them.

218. Further, we disagree with California Parties' argument that the Presiding Judge erred by considering irrelevant factors in her evaluation of harm. We find that the purportedly irrelevant factors cited by California Parties are all directly relevant to the type of contract specific analysis required to overcome the *Mobile-Sierra* presumption. For example, data related to TransCanada's volume of sales to CERS are relevant to the question of burden or harm because the level of burden imposed by such relatively light sales volumes is not likely to rise to the level of harm necessary for overcoming the presumption. The Presiding Judge was also correct to conclude that relying on California Parties' estimate of aggregate harm would be inappropriate because that figure included amounts attributable to sellers that are not Respondents in this proceeding and would penalize the Respondents for others' actions.[382]

219. We find that the Presiding Judge did not misapply or misunderstand the purpose of the MMCP evidence proffered by California Parties. As explained above with regard to

[380] *See* California Parties Brief on Exceptions at 115-119.

[381] California Parties Brief on Exceptions at 119 (citing Initial Decision, 146 FERC ¶ 63,028 at PP 1702, 1740).

[382] *See Brown*, 135 FERC ¶ 61,178 at P 101.

Seattle's section 309 refund claims,[383] the MMCP is simply not an appropriate benchmark for just and reasonable rates in this proceeding. Further, the determination of what constitutes a just and reasonable rate in the Pacific Northwest bilateral spot market would be a remedy issue for Phase II of the proceeding, to the extent Phase II is necessary. Because we find that MMCP evidence is not relevant to this proceeding, either for purposes of overcoming the *Mobile-Sierra* presumption or providing a benchmark for just and reasonable rates, we will not address arguments about whether the Presiding Judge properly calculated the extent to which TransCanada's rates exceeded the MMCPs.

220. Because California Parties' entire cumulative impact theory of excessive burden relies on a misinterpretation of the relevant case law and misapplication of the *Mobile-Sierra* presumption, we find no error in the Presiding Judge's finding that California Parties failed to overcome the presumption with respect to Coral's contracts "for the same reasons discussed regarding TransCanada's contracts."[384] California Parties simply failed to make the required, contract specific showings with respect to either Respondent. This failure applies equally to Coral and TransCanada. Thus, we find that the Presiding Judge did not need to make additional findings specific to Coral.

F. Unclean Hands, Statutes of Limitations, Laches

1. Brief on Exceptions

221. TransCanada also argues that the Presiding Judge erred by rejecting a number of theories that California Parties' claims should be barred. TransCanada first contends that the Utah statute of limitations applies here and claims that the Presiding Judge incorrectly found that California Parties' claims of duress, fraud, bad faith, and undue price discrimination were not barred by the Utah statute of limitations. TransCanada argues that neither Puget Sound's October 2000 complaint, nor testimony provided by California Parties in 2001 properly notified TransCanada that California Parties intended to argue duress. TransCanada claims that California Parties' claims were not presented until September 21, 2012, long after the Utah statute of limitations would have barred a claim. Thus, TransCanada argues that Utah's statute of limitations, which requires that these types of claims be brought no later than four years after the cause of action accrued, has not been satisfied.[385]

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[383] *See supra* PP 73-76.

[384] Initial Decision, 146 FERC ¶ 63,028 at P 1710.

[385] TransCanada Brief on Exceptions at 16-25.

222. Next, TransCanada argues that the Commission previously ruled that the federal statute of limitations barred California Parties from requesting that market prices for sales to CERS be reset regardless of whether an individual seller had violated its tariff or engaged in wrongdoing.[386] TransCanada challenges California Parties' position that the federal statute of limitations does not apply because California Parties are not requesting the type of market-wide relief rejected in *Brown*, arguing that the statute bars claims and not just remedies. Nevertheless, TransCanada alleges that California Parties misrepresent the relief they seek, noting California Parties' testimony suggesting that the MMCP is the proper benchmark for resetting rates for sales in the Pacific Northwest. Thus, TransCanada contends that California Parties are making the same argument in this proceeding that was previously rejected by the Commission and, as such, the claims should be time-barred.[387]

223. Additionally, TransCanada argues that the Presiding Judge erred by finding that California Parties' claims should not be barred by the doctrine of laches. TransCanada asserts that laches applies when a delay in asserting rights causes undue prejudice to the party against whom the claims are brought.[388] For many of the same reasons asserted in reference to the Utah statute of limitations, TransCanada argues that it was prejudiced by the passage of time because it had no notice, prior to September 2012, of California Parties' claims of fraud, duress, bad faith, and undue discrimination against TransCanada. Further, TransCanada disputes California Parties' claim that this hearing presented the first need for California Parties to pursue claims beyond whether rates charged were just and reasonable. TransCanada opines that a complaint alleging any possible basis for refunds could have been filed at any time. Also, TransCanada contends that they have been prejudiced by California Parties' position switching over time as to whether the Pacific Northwest market is distinct from the California market.[389]

224. Finally, TransCanada argues that the Presiding Judge erred by concluding that California Parties' claims are not barred by the unclean hands doctrine. TransCanada

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[386] *Id.* at 25 (citing *Brown*, 135 FERC ¶ 61,178 at PP 99-101 (rejecting the California Attorney General's request to reset prices on the basis that the federal statute of limitations "sets a five-year limit for an action, suit or proceeding for the enforcement of any civil fine, penalty, forfeiture, pecuniary or otherwise …")).

[387] *Id.* at 25-27.

[388] *Id.* at 28 (citing *Northwest Pipeline Corp.*, 56 FERC ¶ 61,231, at 61,890 (1991)).

[389] *Id.* at 28-33.

contends that allegations regarding CERS' use of confidential information and exercise of market power were supported by ample record evidence, including a prior finding by the Commission that access to CAISO's information gave CERS a competitive advantage.[390] Further, TransCanada asserts that testimony regarding the efforts made by CERS to "protect the health and welfare of the Californians, the viability of the electricity grid, and California's economy during the Western Energy Crisis" is not relevant to an analysis of whether CERS had unclean hands.[391]

2. **<u>Brief Opposing Exceptions</u>**

225. California Parties contend that the Presiding Judge correctly rejected TransCanada's arguments that California Parties' claims should be time-barred under (1) the Utah statute of limitations regarding breach of contract; (2) the federal statute of limitations regarding penalties; and/or (3) the equitable doctrine of laches. California Parties continue to assert that TransCanada has had abundant notice of California Parties' claims within the respective time periods. California Parties observe that this trial in this subdocket is merely a continuation of the proceeding originally commenced in October 2000 when Puget filed its original complaint. Also, California Parties deny that the Utah statute of limitations is applicable because California Parties are not asserting bad faith as part of a state contract claim, but as a state law standard used to show that the *Mobile-Sierra* presumption does not apply to the contracts at issue. Likewise, California Parties deny that their claims of consumer harm equate to the type of market-wide relief that would invoke the federal statute of limitations. California Parties emphasize that they are seeking refunds only for specific contracts. Finally, California Parties deny that they have been "sleeping on their rights" such that the doctrine of laches would apply. To the contrary, California Parties relate that they intervened in this proceeding as of the summer of 2001 and have been pursuing remedies for Pacific Northwest sales to CERS since that time.[392]

226. California Parties also assert that the Presiding Judge correctly rejected TransCanada's unclean hands argument. California Parties contend that TransCanada's evidence fails to prove any transgression on CERS' part. California Parties also note that courts are hesitant to apply the doctrine of unclean hands to a government agency acting in the public interest. California Parties maintain that CERS carried out its mission

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[390] TransCanada Brief on Exceptions at 46-47 (citing July 2001 Order, 96 FERC, ¶61,120 at 61,515).

[391] *Id.* at 46-66.

[392] California Parties Brief Opposing Exceptions at 131-140.

through the professional and responsible conduct of its employees, not through fraud, deceit or unfair means. Further, California Parties highlight evidence presented at hearing to demonstrate that CERS never obtained or used confidential information that gave it a competitive advantage, nor did it exercise monopsony power.[393]

G. Commission Determination

227. We affirm the Presiding Judge's findings that California Parties' claims of fraud, duress, and bad faith against TransCanada are not barred by statutes of limitations, the doctrine of laches, or the unclean hands doctrine. With find no merit in any of TransCanada's arguments that California Parties' claims are time-barred. California Parties are not asserting any new claims against TransCanada in this proceeding. Rather, California Parties have been pursuing their claims against sellers in the Pacific Northwest bilateral spot market since 2001 on a timeline largely outside their control. Not until 2011, in its Order on Remand, did the Commission determine that the *Mobile-Sierra* presumption applies to the contracts at issue in this proceeding.[394] Because fraud, duress, and bad faith constitute traditional grounds for contract abrogation in the *Mobile-Sierra* analysis, we find that California Parties are within their rights to assert these theories now, as part of their continuing effort to seek refunds for the bilateral spot contracts entered into by CERS with sellers in the Pacific Northwest.

228. We also find that this situation is distinguishable from that in *Brown*, where the Commission found that the federal statute of limitations applied to California Parties' request for a market-wide remedy.[395] In *Brown*, the Commission found that the relief requested by California Parties would be "a confiscation because it would affect all sellers to CERS regardless of culpability," and therefore the claims were subject to a five-year statute of limitations.[396] Due to the contract specific nature of the remedy available here, the Commission's holding in *Brown* is inapplicable.

229. We find no merit in TransCanada's unclean hands allegations. TransCanada has not demonstrated that CERS gained an unfair competitive advantage over any seller or exercised buyer market power. While the Commission has, as stated by TransCanada, previously found that access to CAISO's confidential information gave CERS a

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[393] *Id.* at 113-131.

[394] Order on Remand, 137 FERC ¶ 61,001 at P 20.

[395] *See Brown*, 135 FERC ¶ 61,178 at P 101.

[396] *Id.*

competitive advantage, TransCanada's reliance on this prior finding is misplaced. The Commission did not find that equitable considerations barred CERS from obtaining relief for the Pacific Northwest bilateral contracts. Rather, the Commission found that equitable considerations should not override the other reasons for not including these transactions in the refund proceedings, such as maintaining the stability of the bilateral contract market.[397] TransCanada details at length its theories of what confidential information CERS employees may have had access to, but does not support its claims that CERS in anyway enjoyed an unfair advantage or that other market participants suffered any detriment.

230. We disagree with TransCanada regarding the relevance of testimony regarding the measures taken by CERS employees to "protect the health and welfare of the Californians, the viability of the electricity grid, and California's economy during the Western Energy Crisis." We find this evidence serves to rebut TransCanada's characterization of CERS' trading strategies as buyer market power and supports the Presiding Judge's decision to reject this argument.

The Commission orders:

(A) The Initial Decision's findings of fact are hereby partially affirmed and partially reversed, as discussed in the body of this order.

(B) This proceeding is remanded to the Presiding Judge for further action consistent with the direction in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

[397] July 2001 Order, 96 FERC ¶ 61,120 at 61,515 ("Expanding the scope of transactions subject to refund … to include transactions outside the ISO and PX centralized markets would simply hinder the ability of parties to enter into new bilateral contracts.").