

UNITED STATES OF AMERICA 152 FERC ¶ 63,007
FEDERAL ENERGY REGULATORY COMMISSION

Public Utilities Commission of the State of California Docket No. EL02-60-007

Complainant,

v.

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

Respondents.

California Electricity Oversight Board

Docket No. EL02-62-006

Complainant,

(consolidated)

v.

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

Respondents.

ORDER ON SHELL AND IBERDROLA MOTIONS TO STRIKE TESTIMONY AND
EXHIBITS OF CALIFORNIA PARTIES

(Issued July 23, 2015)

1. On June 26, 2015, Shell Energy North America (US), L.P. (Shell) filed a Motion to Strike Portions of the Direct Testimonies and Exhibits of the California Complainants' Witnesses (June 26 Motion). The June 26 Motion included a request to expedite an answer to the motion from the California Parties,¹ which they opposed and I denied by Order dated June 29, 2015. On June 30, 2015, Shell filed an errata to its June 26 Motion, correcting certain page and line numbers of testimony that it seeks to strike. All references in this Order to page and line numbers of challenged testimony are to items as so corrected.

¹ Shell June 26 Motion at 19-20.

2. On July 1, 2015, Iberdrola Renewables, LLC (Iberdrola) filed a Motion to Strike Testimony of Michel Peter Florio, Gerald Taylor and Peter Fox-Penner (July 1 Motion).
3. The California Parties filed answers opposing the Shell and Iberdrola motions on July 13 and July 16, 2015, respectively (July 13 Answer and July 16 Answer).

I. Shell's June 26 Motion

4. Shell's June 26 Motion seeks to strike portions of the prefiled direct testimony and accompanying exhibits of each of the California Parties' twelve witnesses.² Shell's requests fall into five broad categories, of which the first category details several subcategories of objectionable testimony. A request to strike testimony is evaluated in accordance with Rule 509(a) of the Commission's Rules of Practice and Procedure, which provides in general that the presiding judge "should exclude from evidence any irrelevant, immaterial, or unduly repetitious material."³

A. Irrelevant Testimony

5. Shell asserts that the testimony and exhibits falling into its first category are objectionable as irrelevant because they are outside the scope of the case or lack a nexus to the issues set for hearing.⁴ Shell lists five subcategories of this objection that stem mainly from its interpretation of various passages from the Commission's 2014 Opinion No. 537 in the related case of *Puget Sound Energy, Inc.*⁵ The challenged testimony, Shell asserts, falls beyond the scope established by the Commission for avoiding or overcoming the *Mobile-Sierra* presumption in this proceeding.⁶ Shell emphasizes that the

² The twelve California Parties witnesses are: Ronald O. Nichols, Raymond Hart, John Pacheco, Susan T. Lee, Michel Peter Florio, Carolyn A. Berry, Gerald A. Taylor, Peter S. Fox-Penner, Richard E. Goldberg, Metin Celebi, Michele Kito, and Peter Berck.

³ 18 C.F.R. § 385.509(a) (2014).

⁴ Shell June 26 Motion at 4-7.

⁵ *Puget Sound Energy, Inc. 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, 151 FERC ¶ 61,173, at P 98 (2015) (*Puget Sound Energy v. All Jurisd. Sellers*).

⁶ Shell June 26 Motion at 4-11.

Commission, in its February 19, 2015 Order on Rehearing in this case, directed that the “hearing will focus only on specific conduct by specific parties to the contracts at issue.”⁷

6. In particular, Shell points out that significant portions of the challenged testimony merely provide general descriptions of the market disruptions and dysfunction that occurred, without making a substantive connection between these market conditions and the specific long-term contracts at issue.⁸ Shell also contends that the testimony simply identifies “high prices” without more,⁹ and that testimony concerning the “down the line burden” on ratepayers fails to correspond to the specific Shell long-term contract at issue.¹⁰ Shell also argues that some of the testimony relies on an Initial Decision issued on March 28, 2014 in the *Puget Sound Energy, Inc.* case¹¹ that has been reversed in part and remanded by the Commission in Opinion No. 537.¹²

7. In their July 13 answer to Shell’s motion, the California Parties respond that the challenged testimony cannot be stricken under Commission Rule 509 for the reasons Shell has given because Shell has mischaracterized the Commission’s Orders regarding the scope of the hearing.¹³ The California Parties point out that the Commission disfavors motions to strike, underscore the “heavy burden” associated with prevailing on such requests,¹⁴ and assert that Shell is just “[s]eeking to exclude what it cannot rebut at hearing.”¹⁵ The California Parties argue that context matters and that the passages Shell requests to strike are “specific (not general) to Shell’s manipulation and its impact on the Shell Contract” and that the California Parties’ direct case is presented as an integrated

⁷ *Id.* at 6 (citing *Pub. Utils. Comm’n of Cal. v. Sellers of Long Term Contracts*, 150 FERC ¶ 61,079 (2015) (*CPUC v. Sellers*) (Order on Rehearing)).

⁸ *Id.* at 7-8.

⁹ *Id.* at 9.

¹⁰ *Id.* at 10.

¹¹ *Puget Sound Energy v. All Jurisd. Sellers*, 146 FERC ¶ 63,028 (2014).

¹² Shell June 26 Motion at 10-11.

¹³ California Parties July 13 Answer at 2.

¹⁴ *Id.* at 4-6.

¹⁵ *Id.* at 6.

whole in which each of their witnesses present evidence and conclusions that build on one another.¹⁶

8. As the California Parties correctly point out, motions to strike are largely disfavored by courts,¹⁷ and the Commission is in accord with this position, stating that “objectionable material will not be struck unless the matters sought to be omitted from the record have no possible relationship to the controversy, may confuse the issues, or otherwise prejudice a party.”¹⁸ The Commission has reasoned that the imposition of this heavy burden on the movant is justified because “a complete record upon which the Commission can base its decision” is the preferred approach in administrative proceedings.¹⁹

9. The relevance of the challenged testimony and exhibits depends on the contours of the controversy set to be adjudicated. While Shell is correct that the focus of this hearing is on the specific contracts and the specific conduct designated by the Commission’s Orders, the issues to be resolved here are inherently intertwined with the energy crisis and market dysfunction that persisted during the negotiation of the contracts and its aftermath. In the Supreme Court’s *Morgan Stanley* opinion²⁰ that initiated the remand and the Commission’s November 17, 2014 Order on Remand²¹ that set this case for hearing, both decisions highlighted the roles of the “dysfunctional spot market” and “the playing field for contract negotiations” in describing the questions to be adjudicated here.²² These elements require consideration of the economic forces at play during the relevant time period and their impacts on the contracts at issue. The challenged testimony offered by the California Parties addresses these concerns.

¹⁶ *Id.* at 7.

¹⁷ *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distribs.*, 647 F.2d 200, 201 (D.C. Cir. 1981); *Capitol Sprinkler Inspection, Inc. v. Guest Servs., Inc.*, 630 F.3d 217, 226 (D.C. Cir. 2011).

¹⁸ *Power Mining, Inc.*, 45 FERC ¶ 61,311, at 61,972 n.1 (1988) (citations omitted).

¹⁹ *CenterPoint Energy Gas Transmission Co.*, 109 FERC ¶ 61,197, at P 36 (2004).

²⁰ *Morgan Stanley Capital Grp. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527 (2008) (*Morgan Stanley*).

²¹ 149 FERC ¶ 61,127 (2014) (Order on Remand).

²² *See Morgan Stanley*, 554 U.S. at 547, 552-54; Order on Remand at 16-17.

10. This is not to say that Shell's theory of the case is wrong and the California Parties' theory is right. This is only to say that it is premature to exclude the challenged testimony before the hearing has begun. Rather than throwing out that testimony wholesale at this early stage, it is more prudent to allow it to be presented and test its persuasive weight at the hearing.

11. Accordingly, Shell's request to strike the testimony and exhibits identified in section I, subsections A-E of the appendix to its June 26 Motion is DENIED.

B. Testimony Offering Legal Conclusions and Interpreting Legal Documents

12. Shell's second category of objectionable testimony challenges purported legal conclusions by California Parties witnesses Taylor and Berry, who review and interpret certain legal documents.²³ Shell declares that there is a "well-established prohibition on witness testimony as to legal conclusions."²⁴ Shell points to a number of federal court opinions establishing that lay witnesses cannot testify as to legal conclusions in court, and that testimony on legal conclusions is inappropriate for expert witnesses under Federal Rule of Evidence 702.²⁵

13. The California Parties respond by disputing Shell's characterization of witnesses Taylor and Berry's challenged testimony, and also dispute the applicable legal standard cited by Shell.²⁶ They point out that even if the challenged testimony consists of legal conclusions, the Commission treats such testimony as admissible under Commission Rule 509, and the more stringent rule of the federal courts as inapplicable to these administrative proceedings.²⁷

²³ Shell June 26 Motion at 11.

²⁴ *Id.*

²⁵ *Id.* at 12 (citing *United States v. Crawford*, 239 F.3d 1086, 1090 (9th Cir. 2001); *Christiansen v. Nat'l Savings & Trust Co.*, 683 F.2d 520, 529 (D.C. Cir. 1982); *Weston v. Washington Metropolitan Area Transit Authority*, 78 F.3d 682, 684 n.4 (D.C. Cir. 1996).

²⁶ California Parties July 13 Answer at 29.

²⁷ *Id.* at 28-30 (citing 16 U.S.C. § 825g) ("All hearings, investigations, and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied."); *Missouri Interstate Gas, LLC*, 142 FERC ¶ 61,195, at P 32 (2013); *ANR Pipeline Co.*, 123 FERC ¶ 61,137, at PP 8-9 (2008); *Entergy Servs., Inc.*,

14. When the Commission codified Rule 509, it expressly declined to adopt the admissibility standards of the Federal Rules of Evidence that are applied in courtroom procedure.²⁸ Instead, the Commission rule allots the judge flexibility to include or exclude evidence based on whether it is of a variety “that would affect reasonable and fair minded persons in the conduct of their daily affairs.”²⁹ In considering statements and opinions on legal matters that are offered by lay and expert witnesses, the Commission has expressed a clear preference for its Administrative Law Judges’ admitting such testimony into the record but affording it only the weight to which it is entitled when the issues are fully considered.³⁰

15. What is more, much of the content that Shell attempts to strike does not in fact constitute expert opinions as to legal conclusions. For example, Shell requests that the following testimony be stricken:

109 FERC ¶ 61,108, at P 8 (2004), *reh’g denied*, 116 FERC ¶ 61,296 (2006); *Trans Alaska Pipeline Sys.*, 52 FERC ¶ 63,022, at 65,037 (1990).

²⁸ California Parties July 13 Answer at 29-30 (citing *Revision of Rules of Practice and Procedure to Expedite Trial-Type Hearings*, 47 Fed. Reg. 19014-01 (May 3, 1982)) (“Rule 509 recodifies the existing rule on evidence. Some commenters suggest adoption of the Federal Rules of Evidence, while others find those Rules lacking in the kind of flexibility needed for administrative proceedings. The Commission will consider the possible use of the Federal Rules or the adoption of other rules at a later time.”).

²⁹ *Entergy Servs., Inc.*, 142 FERC ¶ 61,022, at P 56 (2013).

³⁰ *Entergy Servs., Inc.*, 109 FERC ¶ 61,108, at P 8 (2004) (“The Commission’s rules on admissibility are intentionally broad to allow the admission of testimony by a witness with the requisite educational background, analytical experience and skills. [footnote omitted] The judge’s initial reaction was correct when he stated his original inclination to do what is normally done and admit the testimony, and with respect to any shortcomings he perceived, use them to assess the weight to be accorded the evidence, not its admissibility. [citation omitted] In not doing so, the judge erred.”); *Trans Alaska Pipeline Sys.*, 52 FERC ¶ 63,022, at 65,037 (1990) (Leventhal, ALJ) (“Some particular phrases or sentences of those witnesses appear to constitute legal opinion but those portions of the testimony are intertwined with proper expert testimony and will not be stricken from the record. Instead they will be afforded the weight to which they are entitled when the issues in these proceedings are fully considered. With respect to those portions of the testimony, the TAPS Carriers are not prejudiced because their counsel may argue a contrary interpretation on brief.”).

On November 9, 2007, the Court entered a consent order settling the CFTC charges with five of the traders and requiring them to pay, jointly and severally, a civil monetary penalty of \$1 million. One trader went to trial and was not convicted.³¹

This excerpt does not present a legal conclusion, but merely conveys a factual statement about a legal action that transpired. Other challenged excerpts similarly discuss and present facts that were included in legal documents, which again is distinct from an expert witness offering his or her own legal opinion.³²

16. One statement in the challenged testimony does merit extirpation, however. In reference to a CFTC investigation of Shell trader practices in reporting gas price indices to trade publications, Dr. Berry is asked the following question and gives the following answer:

Q. Did Shell engage in unlawful manipulation of natural gas prices in the period January 2000 through September 2002?

*A. Yes. The U.S. Commodity Futures Trading Commission (CFTC) found that Shell committed “overt acts in furtherance of attempts to manipulate the price of natural gas in interstate commerce” in violation of Section 9(a)(2) of the Commodity Exchange Act. The CFTC found that these acts were committed “from at least January 2000 through September 2002.”*³³

17. The italicized language of this passage, made by a person who is not an attorney,³⁴ could be misperceived as the conclusion of a fully-adjudicated decision of the CFTC when in fact it is not. It quotes from a settlement order of the CFTC in which Shell agreed to pay a civil penalty without admitting or denying liability for the accusations made during the investigation, and which by its own terms is expressly limited in effect to that proceeding.³⁵ Although Dr. Berry is entitled to offer her opinion on the ultimate issue in that investigation, subject to being afforded appropriate weight (*i.e.*, “Yes”), she

³¹ Ex. CAL-268 at 10:6-9 (Berry).

³² *See, e.g.*, Ex. CAL-268 at 9:4-6 (Berry) (“The CFTC found that in over 84% of the cases it analyzed from October 2001 to June 2002, Shell’s West desk traders reported in a way that would benefit Shell’s book.”).

³³ Ex. CAL-268 at 3:5-11 (internal footnotes omitted) (Berry Direct).

³⁴ Shell June 26 Motion at 12.

³⁵ Ex. CAL-270.

is not entitled to characterize the legal effect of the outcome of that proceeding. Accordingly, the italicized language will be stricken.

18. Accordingly, Shell's request to strike the testimony and exhibits identified in section II of the appendix to its June 26 Motion is GRANTED IN PART AND DENIED IN PART. All redaction requests are rejected except for Exhibit No. CAL-268 at 3:7-11 (starting after "Yes."), together with accompanying footnotes.

C. Testimony Merely Repeating or Summarizing the Testimony of Other Witnesses

19. The next category of evidence that Shell asserts should be stricken is testimony that it characterizes as merely repeating or summarizing the testimony of other witnesses.³⁶ Shell contends that such testimony is unnecessary, cumulative, and should be stricken because it is unduly repetitious and non-probative.³⁷ The California Parties counter by characterizing the identified passages as "short summaries" and argue that Commission precedent permits this practice.³⁸

20. Shell's request might carry weight if the complained of passages spanned many pages in a row, but the identified excerpts fall well short of that, in many cases comprising segments of just a few lines, such as Exhibit No. CAL-241 at 18:5-7 (Florio) or Exhibit No. CAL-604 at 33:1-4 (Goldberg). Such passages are not unduly repetitious, but rather serve as helpful bridges for the reader by connecting how the various expert opinions of the witnesses fit together and build on one another.

21. Accordingly, Shell's request to strike the testimony and exhibits identified in section III of the appendix to its June 26 Motion is DENIED.

D. Expert Testimony Summarizing FERC, CFTC, and Other Public Material

22. Shell identifies a series of passages in the California Parties' testimony that it charges are mere summaries of orders and issuances by the Commission, the CFTC, and other governmental entities, and that under Commission precedent such summarizations

³⁶ Shell June 26 Motion at 13.

³⁷ Shell June 26 Motion at 14.

³⁸ California Parties July 13 Answer at 35.

should be stricken because the public materials can be interpreted by the presiding judge directly.³⁹

23. The California Parties respond by challenging the applicability of the precedent cited by Shell, primarily the *Sea Robin Pipeline* decision.⁴⁰ The California Parties explain that in *Sea Robin*, the witnesses were merely explaining what the Commission did in the past. Here, by contrast, the witnesses in their challenged testimony rely on media and other publicly available sources to corroborate firsthand recollections, provide context for testimony on economics, and present content that is probative and corroborative of the issues in this proceeding.⁴¹

24. Contrary to Shell's argument, it is not the case that the trier of fact can review and make sense of various public documents without the aid of a sponsoring witness to summarize and interpret them. The objective of introducing such documents into evidence is to support the testimony of the witness, not to simply flood the record with irrelevant paper. To the extent that such documents inform the testimony of Commissioner Florio, whose testimony is directed in part to the impact of the Western Energy Crisis on citizens, businesses, and government;⁴² and to Dr. Berry, whose testimony is directed in large part to how Shell purportedly engaged in unlawful activities in the natural gas spot market that affected its contract with CDWR;⁴³ they are relevant and it is the duty of those witnesses to make their relevance clear.

25. Additionally, the Berry testimony challenged by Shell in this category correlates closely with the Berry testimony challenged for propounding legal conclusions, discussed above. For the reasons given earlier, there is no more cause to strike Berry's testimony on this score than there is to strike it for those reasons.

26. Accordingly, Shell's request to strike the testimony and exhibits identified in section IV of the appendix to its June 26 Motion is GRANTED IN PART AND DENIED IN PART. All redaction requests are rejected except for Exhibit No. CAL-268 at 3:7-11 (starting after "Yes."), together with accompanying footnotes.

³⁹ Shell June 26 Motion at 15-16.

⁴⁰ 47 FERC ¶ 63,011 (1989).

⁴¹ California Parties July 13 Answer at 36-37.

⁴² Ex. CAL-241 at 2:6-3:7 (Florio Direct).

⁴³ Ex. CAL-268 at 2:16-17 (Berry Direct).

E. Voluminous and Superfluous Exhibits

27. Finally, Shell challenges the California Parties' inclusion of what it deems "voluminous" and "superfluous" exhibits from prior proceedings that it asserts are outside the scope of this proceeding.⁴⁴

28. The California Parties respond that the exhibits included by their witnesses Florio and Taylor do not improperly broaden the scope of the hearing, but that Shell's view of scope of the evidence that is relevant to the issues at hand is impermissibly narrow.⁴⁵

29. The California Parties offer Exhibit No. CAL-247, Commissioner Florio's direct testimony in Docket No. EL01-10-085, in support of a few references in his direct testimony here, Exhibit No. CAL-241.⁴⁶ Commission Rule 509(a)'s prohibition against "irrelevant, immaterial, or unduly repetitious material"⁴⁷ contemplates the exclusion of all but the most directly relevant portions of materials that are incorporated by reference in admitted exhibits, rather than their wholesale admission into the record. As Judge McCartney noted in the *Puget Sound Energy* case in a motion to strike on similar grounds, "[t]his would have made clear which allegations California Parties were asserting and allowed the Respondents to conduct discovery and cross-examination on those witnesses in this proceeding as necessary and appropriate to the development of the record."⁴⁸ It is more appropriate, therefore, for the California Parties to strike all but those pages of CAL-247 that apply directly to the references that Commissioner Florio makes to them in his direct testimony here in Ex. No. CAL-241.

30. Likewise, the California Parties offer Exhibit Nos. CAL-324, CAL-325, CAL-330, CAL-364, and CAL-397, Taylor's testimony and declarations in other proceedings, in support of references in his direct testimony here, Exhibit No. CAL-319.⁴⁹ For the same reason, they, too, must be pared down to their most directly relevant portions for admission in support of Taylor's direct testimony, and the rest should be stricken.

⁴⁴ *Id.* at 16.

⁴⁵ California Parties July 13 Answer at 38-39.

⁴⁶ *See* Shell June 26 Motion at Appendix pp. 5-6.

⁴⁷ 18 C.F.R. § 385.509(a) (2014).

⁴⁸ *Puget Sound Energy v. All Jurisd. Sellers*, Docket No. EL01-10-085, Order Granting in Part and Deyinging in Part Indicated Respondents' Motion to Strike, at P 33 (April 19, 2013).

⁴⁹ *See* Shell June 26 Motion at Appendix p. 6.

31. Accordingly, Shell's request to strike the testimony and exhibits identified in section V of the appendix to its June 26 Motion is GRANTED IN PART AND DENIED IN PART. Within five (5) business days of the date of issuance of this Order, the California Parties shall submit amended exhibits in place of Exhibit Nos. CAL-247, CAL-324, CAL-325, CAL-330, CAL-364 and CAL-397, that strike all but the material therein that is most relevant to references made to that material in Exhibit Nos. CAL-241 and CAL-319.

II. Iberdrola's July 1 Motion

32. Iberdrola's July 1 Motion joins in the requests of Shell's June 26 Motion.⁵⁰ Iberdrola further moves "to strike additional testimony of Michel Peter Florio, Gerald A. Taylor, and Peter Fox-Penner on the same grounds."⁵¹ Echoing similar arguments to those raised by Shell in its June 26 Motion, Iberdrola asserts that the Commission reopened the record of this case upon remand from the federal courts for the purpose of taking supplemental evidence on a limited number of specific topics.⁵² To support this contention, Iberdrola points to language from the Commission's Orders initiating this case that this proceeding is limited to two questions about two specific long-term contracts,⁵³ that the hearing should "focus only on specific conduct by specific parties to the contracts at issue,"⁵⁴ and that the Complainants are "expected to be specific when presenting their arguments and evidence" on the issues.⁵⁵

33. Iberdrola requests that the entirety of Commissioner Florio's testimony be stricken because it is no more than a generalized and irrelevant historical backdrop of the energy crisis.⁵⁶ Iberdrola characterizes Florio's testimony as consisting of recitations of "some

⁵⁰ Iberdrola July 1 Motion at 1.

⁵¹ *Id.* at 2.

⁵² *Id.* at 2-3.

⁵³ *Id.* at 2 (citing *CPUC v. Sellers*, 149 FERC ¶ 61,127, at P 16 (2014) (Order on Remand)).

⁵⁴ *Id.* at 3 (quoting *CPUC v. Sellers*, 150 FERC ¶ 61,079, at P 14 (2015) (Order on Rehearing)).

⁵⁵ *Id.* at 3 (quoting *CPUC v. Sellers*, 149 FERC ¶ 61,127, at P 24 (2014) (Order on Remand)).

⁵⁶ *Id.* at 4.

of the more colorful snippets from news reports” at the time of the crisis about which he has no personal knowledge.⁵⁷ The impact that the California energy crisis had as a whole on the state’s citizens, Iberdrola contends, is not the subject of the hearing in this matter.⁵⁸ Florio’s testimony, Iberdrola further contends, focuses on the wrong time period than the one at issue here—the period from May 2000 through July 2001 that pre-dates the signing of the Iberdrola contract with CDWR, not the period afterward that is relevant to the “down the line” analysis.⁵⁹ Florio, Iberdrola asserts, “does not address the impacts of the specific contracts at issue.”⁶⁰

34. The California Parties, in response, claim that that the events pre-dating the execution of Iberdrola’s contract relate to the required *Mobile-Sierra* analysis.⁶¹ The relevant issues, they say, are (1) whether manipulation affected the Iberdrola contract such that the *Mobile-Sierra* presumption should not apply; (2) whether and how the Iberdrola contract imposed an undue burden on consumers after the negotiation period of the contract and on the efforts of state officials; and (3) whether Iberdrola is a proper respondent in this case.⁶² Pre-contract events are directly relevant to all of these issues, the California Parties assert.⁶³ Moreover, the California Parties support Commissioner Florio’s reliance on the testimony of other witnesses to inform his own expressed opinions.⁶⁴

35. It is true, as Iberdrola points out, that the Commission has issued Orders in this case that limit the scope of this proceeding to two questions about two specific long-term contracts,⁶⁵ to “focus only on specific conduct by specific parties to the contracts at

⁵⁷ *Id.* at 5.

⁵⁸ *Id.*

⁵⁹ *Id.* at 5-6.

⁶⁰ *Id.* at 6.

⁶¹ California Parties July 16 Answer at 5.

⁶² *Id.* at 6.

⁶³ *Id.* at 7.

⁶⁴ *Id.* at 7-8.

⁶⁵ *CPUC v. Sellers*, 149 FERC ¶ 61,127, at P 16 (2014) (Order on Remand).

issue;”⁶⁶ and to insure that the California Parties are “specific when presenting their arguments and evidence” on the issues.⁶⁷ These limits, however, do not proscribe an inquiry into the causes and effects of the injury that the California Parties claim have been visited on that state’s citizens or the appropriate remedy that the Commission may ultimately decide to mete out.

36. It would misread the language of the Supreme Court’s decision in *Morgan Stanley*,⁶⁸ on which the Commission’s initiation of this proceeding is based, to eliminate from the record at this early stage the type of concerns that Commissioner Florio raises. In *Morgan Stanley*, the Supreme Court said that “if it is clear that one party to a contract engaged in such extensive unlawful market manipulation as to alter the playing field for contract negotiations, the Commission should not presume that the contract is just and reasonable.”⁶⁹ That “playing field” to which the Supreme Court referred was not merely the negotiating tables between Shell, Iberdrola, and CDWR, but the spot and forward markets in which Shell, Iberdrola, and CDWR were “playing” as well. This wide meaning of the relevant “playing field” was confirmed two sentences later in *Morgan Stanley*, where the Supreme Court said:

The mere fact that the unlawful activity occurred in a different (but related) market does not automatically establish that it had no effect upon the contract—especially given the Staff Report’s (unsurprising) finding that high prices in the one market produced high prices in the other.⁷⁰

37. That this proceeding is no mere inquest into a very narrow set of facts about internal contract negotiations that have nothing to do with Commissioner Florio’s concerns is further shown by the following language of the Supreme Court in *Morgan Stanley*:

The dissent criticizes the Commission’s decision because it took into account under the heading “totality of the circumstances” only the circumstances of the 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

⁶⁶ *CPUC v. Sellers*, 150 FERC ¶ 61,079, at P 14 (2015) (Order on Rehearing).

⁶⁷ *CPUC v. Sellers*, 149 FERC ¶ 61,127, at P 24 (2014) (Order on Remand).

⁶⁸ *Morgan Stanley*, 554 U.S. 527 (2008).

⁶⁹ *Id.* at 554.

⁷⁰ *Id.*

relevant to whether the contracts impose an “excessive burden” on consumers relative to what they would have paid absent the contracts. *It is precisely our uncertainty whether the Commission considered those “circumstances exogenous to contract negotiations,” discussed in Part III of our opinion, that causes us to approve the remand to FERC.*⁷¹

38. Turning next to Iberdrola’s request to strike portions of witness Taylor’s testimony, Iberdrola adds to Shell’s objections only that Taylor offers an opinion as to the legal issue of whether Iberdrola is a proper party in this proceeding.⁷² The California Parties oppose this request, incorporating their July 13 Answer to Shell’s motion.⁷³

39. As stated earlier herein, when considering statements and opinions on legal matters that are offered by lay and expert witnesses, the Commission has expressed a clear preference for its Administrative Law Judges’ admitting such testimony into the record but affording it only the weight to which it is entitled when the issues are fully considered.⁷⁴ Iberdrola has not offered any concern that goes beyond Shell’s concerns, other than to attribute the same concerns to a topic that is unique to Iberdrola.

40. Finally, Iberdrola requests that additional portions of witness Fox-Penner’s testimony be stricken because it is “pure speculation.”⁷⁵ According to Iberdrola, Fox-Penner testifies that negotiators for Shell, Iberdrola, and CDWR were aware of the likelihood of future blackouts, and that the risk of such blackouts “was undoubtedly a significant factor favoring Shell and Iberdrola during the negotiations.”⁷⁶ He concedes in his deposition, however, that he conducted no investigation concerning the effect that potential future blackouts might have had on the negotiations, never spoke to any of the individuals who participated in the negotiations, nor did he ever review any internal CDWR emails with respect to the negotiations.⁷⁷

⁷¹ *Id.* at 567, n.4 (internal citation omitted) (emphasis added).

⁷² Iberdrola July 1 Motion at 7-8.

⁷³ California Parties July 16 Answer at 9-10.

⁷⁴ *Entergy Servs., Inc.*, 109 FERC ¶ 61,108, at P 8 (2004); *Trans Alaska Pipeline Sys.*, 52 FERC ¶ 63,022, at 65,037 (1990).

⁷⁵ Iberdrola July 1 Motion at 4.

⁷⁶ *Id.* at 9.

⁷⁷ *Id.*; Ex. 1 to Iberdrola July 1 Motion (Deposition of Peter Fox-Penner at 174:12-183:21).

41. In response, the California Parties point out that the portion of the deposition used by Iberdrola to substantiate its claim omits an earlier part of the same deposition which reveals that Fox-Penner relied on information provided by another California Party witness, Susan Lee, in formulating his opinions.⁷⁸ Thus, the California Parties contend, “while [Fox-Penner] may not have spoken directly to individuals involved in the Shell and Iberdrola negotiations, he was aware, through the testimony of a percipient witness, that the reliability issues did play a role in CDWR’s view of the negotiations.”⁷⁹

42. Fox-Penner admitted in his deposition that he lacked personal knowledge of the incentives that personally affected negotiators for Shell, Iberdrola, and CDWR in connection with the effect of rolling blackouts on contract negotiations. By contrast, there is testimony from a percipient witness, Susan Lee, who does have such knowledge. Accordingly, in view of the bar of Commission Rule 509(a) against admitting “unduly repetitious material,”⁸⁰ it is appropriate to strike testimony given by Fox-Penner that offers his unsubstantiated opinion about what incentives CDWR negotiators would have had to enter into the agreement with Iberdrola to ensure that blackouts would not occur, and what advantage, if any, the awareness of these incentives would have given to the Shell and Iberdrola negotiators. Such statements appear in Fox-Penner’s testimony at Exhibit No. CAL-513 at 88:1-5 beginning with the words “The prediction,” and at 97:8-10 beginning with the words “Whether or not.”

43. Accordingly, Iberdrola’s request to strike the testimony and exhibits identified in its July 1 Motion is GRANTED IN PART AND DENIED IN PART. All redaction requests are rejected except for Exhibit No. CAL-513 at 88:1-5 beginning with the words “The prediction,” and at 97:8-10 beginning with the words “Whether or not.”

III. Order

⁷⁸ California Parties July 16 Answer at 12-14.

⁷⁹ *Id.* at 13 (emphasis in original).

⁸⁰ 18 C.F.R. § 385.509(a) (2014).

(A) Within five (5) business days of the date of issuance of this Order, the California Parties shall file and serve amended exhibits in place of the exhibits that are identified in this Order as having testimony that needs to be stricken.

(B) Within five (5) business days of their receipt of amended exhibits from the California Parties, Shell and Iberdrola shall file and serve amended exhibits that strike those portions of their answering testimony and exhibits that are rendered moot by this ruling.

SO ORDERED.

Steven A. Glazer
Presiding Administrative Law Judge