

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

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

State of California, *ex rel.* Bill Lockyer,
Attorney General of the State of California

v.

Docket No. EL02-71-048

British Columbia Power Exchange Corporation,
Coral Power, LLC, Dynegy Power
Marketing, Inc., Enron Power Marketing,
Inc., Mirant Americas Energy Marketing, LP,
Reliant Energy Services, Inc., Williams
Energy Marketing & Trading Company,

All Other Public Utility Sellers of Energy and
Ancillary Services to the California Energy
Resources Scheduling Division of the
California Department of Water Resources, and

All Other Public Utility Sellers of Energy and
Ancillary Services into Markets Operated by the
California Power Exchange and California
Independent System Operator

ORDER ON REMAND

(Issued November 3, 2015)

1. In this order, the Commission addresses the remand by the United States Court of Appeals for the Ninth Circuit, *people of the state of Cal., ex rel. Harris v. FERC*.¹ In the

¹ 784 F.3d 1267 (9th Cir. 2015) (*Harris Remand*).

Harris Remand, the court granted a petition by the California Parties² challenging Commission orders on remand from *state of Cal., ex rel. Lockyer v. FERC*.³ In the *Lockyer* Remand, the Ninth Circuit Court of Appeals rejected challenges to the Commission's market-based rate program, but held that the Commission erred in finding that it lacked authority to order refunds for violations of market-based rate quarterly reporting requirements. The court remanded the case for the Commission to consider whether, in its discretion, to order refunds.⁴

2. On remand, the Commission established a hearing to address whether any seller violated the quarterly reporting requirements and, if so, whether, under the "hub-and-spoke" analysis, that seller's market share during the period in question increased sufficiently to enable it to exercise market power and thus charge "unjust and unreasonable" rates. The presiding Administrative Law Judge (ALJ) granted the respondent-sellers' motions for summary judgment, finding that complainant-purchasers had not satisfied their burden to show that any seller's market share had increased and, therefore, that its rates were unjust and unreasonable. The Commission affirmed.⁵

3. In the *Harris* Remand, the Ninth Circuit found that the Commission erred in limiting the remand proceedings to consideration of only market-share evidence.⁶ The court stated that "[t]o fully consider whether a reported rate was just and reasonable, the agency must consider claims and evidence beyond the hub-and-spoke" market power screen.⁷ The court also stated that the Commission must determine whether the California Parties' claims have been resolved in other proceedings.

4. As will be explained below, this order re-establishes a trial-type hearing before an ALJ to address whether any individual public utility seller's violation of the Commission's market-based rate quarterly reporting requirement led to an unjust and

² The California Parties include the People of the State of California, *ex rel.* Kamala D. Harris, Attorney General, the Public Utilities Commission of the State of California, Pacific Gas and Electric Company, and Southern California Edison Company.

³ 383 F.3d 1006 (9th Cir. 2004) (*Lockyer* Remand).

⁴ *Lockyer* Remand, 383 F.3d at 1016-18.

⁵ *State of Cal., ex rel. Bill Lockyer v. Brit. Colom. Power Exch. Corp.*, 135 FERC ¶ 61,113 (2011), *order on reh'g*, 139 FERC ¶ 61,211 (2012).

⁶ *Harris* Remand, 784 F.3d at 1274-75.

⁷ *Id.* at 1275.

unreasonable rate for that particular seller in California during the 2000-2001 period. In this hearing, parties will not be limited to present claims and evidence of market concentration based exclusively on the hub-and-spoke test; rather, consistent with the instructions from the *Harris Remand*, they will be permitted to present alternative market power analyses.

I. Harris Remand

5. In the *Harris Remand*, the court concluded that since it had stated in the *Lockyer Remand* that enforceable transaction reporting is a necessary ingredient of a lawful market-based tariff, the Commission's insistence that proof of market concentration be demonstrated exclusively by the hub-and-spoke test contravened its prior directives.⁸ Specifically, the court found that:

Reliance on the hub-and-spoke market share measure alone immunizes sellers from any consequence for failure to report market transactions and ignores the agency's statutory charge under § 205 of the FPA: to determine whether sellers charged a "just and reasonable" rate.⁹

6. The court then remanded the complaint to the Commission for adjudication. The court stated that:

the Commission must review the transaction reports to determine whether a just and reasonable price was charged by each seller, with specific attention to whether reporting deficiencies masked manipulation or accumulation of market power.¹⁰

7. The court also addressed the Commission's assertion that it addressed manipulation claims and evidence in other proceedings.¹¹ While acknowledging that the Commission has entered a final order authorizing refunds for manipulative tariff

⁸ *Harris Remand*, 784 F.3d at 1269-70.

⁹ *Id.* at 1270.

¹⁰ *Id.* at 1277.

¹¹ *Id.* at 1275-76.

violations in the California refund proceedings,¹² the court indicated that those proceedings did not concern the “nexus” between manipulative conduct and market-based rate reporting violations. Thus, the court remanded to the Commission “to evaluate reporting deficiencies and related market-based rates to determine whether they were unjust and unreasonable in light of the California Parties’ nexus claims.”¹³

8. Although the existence of widespread reporting violations and market manipulation during the California energy crisis has been established, the court explained, the nexus of these findings is “unclear at this juncture,” and left it to the Commission to consider the merits of California Parties’ nexus claim in the first instance.¹⁴ The court did not itself order any refunds, leaving it to the Commission to consider appropriate remedial options. Furthermore, the court determined that “[w]hether the California Parties’ claims have been resolved in other proceedings is also a merits question that must be resolved by the agency.”¹⁵ Finally, the court left it to the Commission to determine in the first instance whether sellers who were not themselves responsible for, but benefited from, any manipulation that the Commission may determine occurred, should be subject to potential refunds.¹⁶

II. Commission Determination

9. In light of the *Harris* Remand, we find that issues of material fact remain with respect to the question of whether, based on the facts and circumstances associated with each individual seller, that seller’s improper or untimely filing of its quarterly transaction reports masked manipulation or an accumulation of market power such that the market rates were unjust and unreasonable. These issues of material fact cannot be resolved on the record before us, and we therefore reestablish a trial-type hearing before an ALJ to address whether any individual public utility seller’s violation of the Commission’s market-based rate quarterly reporting requirement led to an unjust and unreasonable rate for that particular seller in California during the 2000-2001 period. However, while the

¹² *Id.* at 1275 (citing *Pub. Utils. Comm’n of the State of Cal. v. FERC*, 462 F.3d 1027 (9th Cir.2006), *on remand sub nom. San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs. into Mkts. Operated by the Cal. Indep. Sys.Operator Corp. and the Cal. Power Exch.*, 149 FERC ¶ 61,116 (2014)).

¹³ *Id.* at 1276.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

court found that the Commission erred in exclusively relying on the hub-and-spoke market screen, we find that the court in the *Harris* Remand did not otherwise object to the Commission's structuring of its hearings following the *Lockyer* Remand. Neither did the court state that failure to comply with the Commission's quarterly reporting requirement by itself makes the rate charged by a particular seller unjust and unreasonable. Therefore, while we will permit parties to present alternative market power analyses at hearing, as discussed below, determinations in our prior orders in this proceeding regarding the relevant time periods at issue, as well as the scope and conduct of the hearing, have not been called into question and thus would not be within the scope of the further hearing ordered here.¹⁷

10. In order to make a reasoned determination, the Commission will need to supplement the existing record and permit wholesale purchasers that made spot market-based rate purchases through the California Independent System Operator Corporation and the California Power Exchange, as well as those making spot market purchases of energy through the California Energy Resources Scheduling Division of the California Department of Water Resources (CERS), from January 1, 2000 to October 1, 2000 and from January 18, 2001 to June 20, 2001 (including sales to CERS pursuant to the Western Systems Power Pool Agreement during the January 18, 2001 to June 20, 2001 time period), to present evidence demonstrating (1) whether a seller violated the quarterly reporting requirement; (2) whether reporting deficiencies masked manipulation or accumulation of market power by that seller; and (3) whether this resulted in unjust and unreasonable prices being charged by that seller. Sellers similarly will be permitted to present evidence to the contrary.

11. The hearing will focus on the individual facts and circumstances relevant to each seller. Parties may introduce market power analyses that may include, but are not limited to, the hub-and-spoke market power test, based on information presented in sellers' electric quarterly reports, to show a nexus between deficient reporting, market function, and market power, and unjust and unreasonable prices being charged by that seller. Parties presenting this evidence should explain how a nexus is established under any such analysis. Again, sellers will be permitted to present contrary evidence.

12. Finally, parties at hearing will be permitted to present evidence on the *Harris* Remand's question as to whether sellers who were not themselves responsible for, but benefited from, any manipulation that may have occurred should be subject to potential

¹⁷ See *state of Cal., ex rel. Bill Lockyer v. Brit. Colom. Power Exch. Corp.*, 122 FERC ¶ 61,260 (2008), *order on clarification*, 123 FERC ¶ 61,042, *order on reh'g and clarification*, 125 FERC ¶ 61,016 (2008), *order on reh'g*, 129 FERC ¶ 61,276 (2009).

refunds. We note that this would not include sellers who have entered into settlement agreements with the California Parties and are therefore no longer active respondents in this proceeding.

13. When the Commission receives the factual determinations of the ALJ with respect to each seller, the Commission will address the issue of remedy in a further order. The Ninth Circuit held that determination of appropriate remedy in this proceeding is “within [the Commission]’s province in the first instance,” and that “parties are not entitled to double recovery.”¹⁸ Accordingly, when determining appropriate remedy, we will also consider whether the California Parties’ claims have been resolved in other proceedings. The Commission will then exercise its remedial discretion to determine whether a disgorgement of profits or other remedial action is appropriate for a particular seller, based on the record developed at hearing in this proceeding.

14. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission’s Rules of Practice and Procedure.¹⁹ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.²⁰ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly

¹⁸ *Harris Remand*, 784 F.3d at 1276.

¹⁹ 18 C.F.R. § 385.603 (2015).

²⁰ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission’s website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

sections 206 and 309 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning whether, based on the facts and circumstances associated with each individual seller, that seller's improper or untimely filing of its quarterly transaction reports masked an accumulation of market power such that the market rates were unjust and unreasonable. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (B) and (C) below.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2015), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

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

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.