

153 FERC 61,386  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Puget Sound Energy, Inc.

Docket No. EL01-10-135

v.

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

ORDER DENYING REHEARING

(Issued December 31, 2015)

1. In this order, we deny requests for rehearing of Opinion No. 537,<sup>1</sup> which affirmed the majority of the Initial Decision issued in this case,<sup>2</sup> and remanded a limited set of issues to the Presiding Administrative Law Judge (Presiding Judge) for further consideration.

**I. Background**

2. A brief summary of the recent history in this proceeding is provided here. Previous orders contain more detailed descriptions of the background and procedural history leading to the trial-type hearing before the Presiding Judge in this case, addressing

---

<sup>1</sup> *Puget Sound Energy, Inc.*, Opinion No. 537, 151 FERC ¶ 61,173 (2015).

<sup>2</sup> *Puget Sound Energy, Inc.*, 146 FERC ¶ 63,028 (2014) (Initial Decision).

whether refunds are warranted for sales in the Pacific Northwest spot market during the period from January 1, 2000 through June 20, 2001.<sup>3</sup>

**A. Ninth Circuit Remand**

3. On August 24, 2007, the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) remanded this proceeding to the Commission.<sup>4</sup> The Ninth Circuit Remand originated with a complaint filed by Puget Sound Energy, Inc. (Puget) under section 206 of the Federal Power Act (FPA) in October 2000, which requested prospective caps on the prices at which sellers subject to Commission jurisdiction, including sellers of energy or capacity under the Western Systems Power Pool Agreement (WSPP Agreement), may sell energy or capacity into the Pacific Northwest wholesale power markets. Puget also requested that, to the extent refunds were necessary, the Commission set a refund date 60 days after the filing of the complaint.<sup>5</sup> The Commission denied refunds without making an explicit finding as to whether spot market prices in the Pacific Northwest were unjust and unreasonable, and also found that sales to the California Energy Resources Scheduling division of the California Department of Water Resources (CERS) were properly excluded from the proceeding.<sup>6</sup>

4. The Ninth Circuit remanded this proceeding to the Commission specifically to reconsider: (1) whether refunds are warranted for purchases of energy made by CERS in the Pacific Northwest spot market; and (2) new evidence of market manipulation that may affect the Commission's determination regarding the award or denial of refunds.<sup>7</sup>

---

<sup>3</sup> See, e.g., Opinion No. 537, 151 FERC ¶ 61,173 at PP 4-14; *Puget Sound Energy, Inc.*, 137 FERC ¶ 61,001, at PP 2-15 (2011) (Order on Remand), *order on reh'g*, 143 FERC ¶ 61,020 (2013) (Order on Rehearing).

<sup>4</sup> *Port of Seattle*, 499 F.3d 1016 (9<sup>th</sup> Cir. 2007) (Ninth Circuit Remand).

<sup>5</sup> See October 31, 2000 Notice of Puget Complaint, Docket No. EL01-10-000.

<sup>6</sup> *Puget Sound Energy, Inc.*, 103 FERC ¶ 61,348, at PP 35, 53 (2003), *order denying reh'g*, 105 FERC ¶ 61,183, at P 42 n.43, *order denying reh'g*, 106 FERC ¶ 61,109, at PP 10-13 (2004).

<sup>7</sup> Ninth Circuit Remand, 499 F.3d at 1035.

## B. The Commission's Remand Orders

5. On October 3, 2011, the Commission issued an order establishing an evidentiary hearing to address the issues remanded by the Ninth Circuit.<sup>8</sup> The central question to be addressed at hearing was whether the City of Seattle, Washington (Seattle) and the California Parties<sup>9</sup> made the necessary showing to avoid or overcome the *Mobile-Sierra* presumption<sup>10</sup> that the bilateral spot market contracts at issue are just and reasonable under section 206 of the FPA<sup>11</sup> or to obtain relief under section 309 of the FPA.<sup>12</sup> The 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 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) (collectively, Seattle Respondents). The respondents to California Parties' claims are TransCanada Energy Ltd. (TransCanada) and Shell (collectively, Respondents).

6. 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 Refund Period).<sup>13</sup> The Commission specified that: (1) the *Mobile-Sierra* public interest presumption applies to

---

<sup>8</sup> Order on Remand, 137 FERC ¶ 61,001 at P 16.

<sup>9</sup> 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.

<sup>10</sup> See *United Gas Pipeline 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*).

<sup>11</sup> 16 U.S.C. § 824e (2012).

<sup>12</sup> 16 U.S.C. § 825h (2012).

<sup>13</sup> Order on Remand, 137 FERC ¶ 61,001 at P 16.

the contracts at issue;<sup>14</sup> and (2) a market-wide remedy, such as the approach taken in the California Refund Proceeding<sup>15</sup> would not be appropriate here.<sup>16</sup>

7. 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.<sup>17</sup> The Commission noted that it would consider further steps to be taken upon review of the Presiding Judge's factual determinations.<sup>18</sup>

---

<sup>14</sup> *Id.* P 20.

<sup>15</sup> The term "California Refund Proceeding" refers to litigation in Docket No. EL00-95.

<sup>16</sup> Order on Remand, 137 FERC ¶ 61,001 at P 24.

<sup>17</sup> On September 13, 2012, the Presiding Judge issued an order bifurcating the proceeding into two phases. Phase I considered issues of refund liability and Phase II, if necessary, would address the appropriate refund methodology. *Puget Sound Energy, Inc.*, Docket No. EL01-10-085, at P 15 (Sep. 13, 2012) (Order Confirming Rulings from the September 6, 2012 Prehearing Conference).

<sup>18</sup> Order on Remand, 137 FERC ¶ 61,001 at PP 23, 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 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 (9<sup>th</sup> 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).

8. In the Order on Rehearing, the Commission granted in part and denied in part requests for rehearing of the Order on Remand. The Commission denied rehearing of its determination that the *Mobile-Sierra* presumption applies to the contract rates in this case,<sup>19</sup> 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 Refund Period).<sup>20</sup> 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.’ ”<sup>21</sup>

### C. The Initial Decision

9. 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.”<sup>22</sup> 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”<sup>23</sup> known as the *Mobile-Sierra* public interest standard. The Presiding Judge explained, consistent with the Supreme Court’s decision in *Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1 of Snohomish County*,<sup>24</sup> that the *Mobile-Sierra* public interest standard is not a 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

---

<sup>19</sup> Order on Rehearing, 143 FERC ¶ 61,020 at PP 13-18.

<sup>20</sup> *Id.* P 32.

<sup>21</sup> *Id.* (quoting *CPUC*, 462 F.3d at 1058).

<sup>22</sup> Initial Decision, 146 FERC ¶ 63,028 at P 674.

<sup>23</sup> *Id.*

<sup>24</sup> 554 U.S. 527 (2008) (*Morgan Stanley*).

standard” in which rates set at arm’s length in bilateral contracts are presumed to be just and reasonable.<sup>25</sup>

10. 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 [of the FPA] other than under the ‘public interest’ standard of review.”<sup>26</sup> Thus, explained the Presiding Judge, the subject contracts must be presumed just and reasonable unless a complainant can demonstrate 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.”<sup>27</sup> Further, the Presiding Judge added that the *Mobile-Sierra* application 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*.”<sup>28</sup>

11. With regard to the claims asserted by Seattle, the Presiding Judge found that Seattle had 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

---

<sup>25</sup> Initial Decision, 146 FERC ¶ 63,028 at P 675 (quoting *Morgan Stanley*, 554 U.S. at 535) (emphasis in original).

<sup>26</sup> *Id.* P 681 (citing *Nev. Power Co. v. Enron Power Mktg., Inc.*, 103 FERC ¶ 61,353, at P 36 (2003) (*Nevada Power*)).

<sup>27</sup> *Id.* (quoting *Morgan Stanley*, 554 U.S. at 547, 554-55).

<sup>28</sup> *Id.* P 680 (quoting *Morgan Stanley*, 554 U.S. at 547, 550-51) (emphasis added by Presiding Judge).

were a result of a myriad of factors, many of which had nothing to do with wholesale energy costs.<sup>29</sup>

12. 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 False Export activities or bad faith. However, the Presiding Judge concluded that significant questions of fact and law remained 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.<sup>30</sup>

#### **D. Opinion No. 537**

13. In Opinion No. 537, the Commission affirmed, in most respects, the Initial Decision. However, given the Presiding Judge's finding that "[t]here remain significant questions of fact and law with respect to [Coral's] transactions that must be resolved in Phase II of this proceeding,"<sup>31</sup> and the decision to afford Shell, Coral's successor-in-interest, an opportunity to present additional evidence regarding these transactions during Phase II,<sup>32</sup> the Commission found 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.<sup>33</sup>

Thus, the Commission reversed the Initial Decision with respect to the Presiding Judge's findings on California Parties' allegations of False Export and bad faith against Coral and remanded those issues to the Presiding Judge to make additional findings.<sup>34</sup>

---

<sup>29</sup> *Id.* PP 934-972, 1711-1726.

<sup>30</sup> *Id.* PP 1384-1430, 1693-1710, 1727-1747.

<sup>31</sup> *Id.* P 1739.

<sup>32</sup> *Id.*

<sup>33</sup> Opinion No. 537, 151 FERC ¶ 61,173 at P 100.

<sup>34</sup> *Id.*

The Commission directed 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.<sup>35</sup>

14. The Commission also reversed and remanded the Initial Decision on the question of contract designation. The Commission instructed the Presiding Judge to make findings on what constitutes an individual spot market 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.<sup>36</sup>

15. On June 22, 2015, California Parties, Seattle, and Shell submitted requests for rehearing. On July 7, 2015, Seattle Respondents, Shell, and TransCanada filed answers. On July 17, 2015, California Parties filed an answer to the answers filed by Shell and TransCanada.

## **II. Discussion**

### **A. Procedural Issues**

16. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2015), prohibits answers to a request for rehearing. Accordingly, we will reject the answers filed by Seattle Respondents, Shell, TransCanada, and California Parties.

17. We next turn to the specific issues raised on rehearing.

### **B. Spot Market Definition**

#### **1. Opinion No. 537**

18. The Commission affirmed the Presiding Judge's finding that "[s]pot market sales in the Western Electricity Coordinating Council (WECC) are sales that are 24 hours or less and are entered into the day of or day prior to delivery."<sup>37</sup> The Commission found

---

<sup>35</sup> *Id.* P 101.

<sup>36</sup> *Id.* P 105.

<sup>37</sup> Initial Decision, 146 FERC ¶ 63,028 at P 933 (quoting *W. 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)).

that the definition adopted by the Presiding Judge was consistent with the definition advanced uniformly by the Respondents' witnesses and expressly adopted by the Commission in previous orders. The Commission found that Seattle's proffered definition, which would have included transactions with durations of up to one year,<sup>38</sup> was illogical and inconsistent with actual trading practices in the Pacific Northwest.<sup>39</sup>

## 2. Seattle Rehearing Request

19. Seattle argues that the Commission erred by affirming the Initial Decision's finding that spot sales are transactions that last 24 hours or less and were entered into on the day of or day before the transaction. Seattle asserts that the Commission relied on the June 19, 2001 Order as authority for the Commission's finding, but maintains that the June 19, 2001 Order was not intended to be the final word on the definition of "spot market" for the entire West. Seattle notes that, in the June 25, 2001 Order, the Commission acknowledged that "[w]hat is a 'spot sale' for bilateral transactions in the Pacific Northwest may differ from what is a 'spot market' sale in the California ISO and PX organized spot markets,"<sup>40</sup> and asserts that if the issue had been settled by the June 19, 2001 Order it would have been unnecessary for parties to present evidence on this issue at subsequent evidentiary hearings. Seattle argues that the Commission failed to consider Seattle's evidence on this point, specifically referencing 2001 testimony offered by former Commission trial staff, and a Pacific Northwest trader, Mr. Stan Watters.<sup>41</sup>

## 3. Commission Definition

20. We deny rehearing on this issue. On rehearing, Seattle in effect repeats arguments that the Commission has already considered and rejected. While the June 19, 2001 Order may have left room for debate as to whether the definition of "spot market" should be uniform throughout the WECC, the Commission has, as recently as 2010, definitively

---

<sup>38</sup> 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.

<sup>39</sup> Opinion No. 537, 151 FERC ¶ 61,173 at P 20.

<sup>40</sup> Seattle Rehearing Request at 66 (quoting *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 96 FERC ¶ 61,120, at 61,520 (2001) (July 25, 2001 Order)).

<sup>41</sup> *Id.* at 65-68.

spoken on this issue and has adopted a uniform, WECC-wide definition of “spot market” that includes only “sales that last 24 or less and are entered into the day of or day prior to delivery.”<sup>42</sup> In Opinion No. 537, the Commission rejected the broad definition put forth by Seattle as inconsistent with the Commission’s finding in *WECC*.<sup>43</sup> Thus, Seattle is incorrect that the Commission relied on the June 19, 2001 Order to support its finding regarding the definition of spot sales. Moreover, the Commission considered all relevant evidence presented by Seattle, including prior testimony and briefs by Trial Staff and the testimony of Mr. Watters. As to the prior Trial Staff testimony referenced by Seattle, we note that Trial Staff did not advocate for adopting the definition propounded by Seattle, but merely recommended providing an opportunity for parties to present evidence that the broader definition would be appropriate.<sup>44</sup> In its Brief Opposing Exceptions, Trial Staff argued that Seattle had not presented evidence to support its position that transactions longer than a month should be considered spot sales.<sup>45</sup> Thus, the Commission correctly found that the weight of the evidence supported the Presiding Judge’s finding regarding the definition of “spot market.”

### C. Seattle’s Refund Claims

#### 1. Opinion No. 537

21. The Commission affirmed the Presiding Judge’s finding that Seattle failed to avoid application of the *Mobile-Sierra* presumption. The Commission agreed 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 Refund Period. The Commission disagreed with Seattle’s theory that high prices, in themselves, constitute unlawful market activity and therefore necessarily demonstrate a direct effect on contract prices.<sup>46</sup>

---

<sup>42</sup> *WECC*, 133 FERC ¶ 61,026 at P 1 n.3.

<sup>43</sup> Opinion No. 537, 151 FERC ¶ 61,173 at P 27.

<sup>44</sup> *Id.* P 26 n.62.

<sup>45</sup> *Id.* P 26 (citing Trial Staff June 16, 2014 Brief Opposing Exceptions, Docket No. EL01-10-085 at 21-22).

<sup>46</sup> *Id.* P 41.

22. The Commission also found that the Presiding Judge properly rejected as out-of-time, with respect to Seattle's section 206 claims, Seattle's mitigated market clearing price benchmark (MMCP) analysis. If Seattle intended to rely on this evidence, it should have timely submitted the spreadsheets as part of its section 206 case. Moreover, the Commission found that, given the clear instruction in the Order on Remand,<sup>47</sup> Seattle could not reasonably have expected to rely on the MMCP evidence submitted by California Parties.<sup>48</sup> In addition, the Commission found 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.<sup>49</sup>

23. Based on well-established structural differences between the California and Pacific Northwest markets, the Commission affirmed the Presiding Judge's finding that Seattle and CAISO are not similarly situated. Thus, the Commission held that applying the MMCP to the CAISO out-of-market purchases, but not to Seattle's bilateral purchases, does not constitute undue discrimination.<sup>50</sup>

24. The Commission also affirmed the Presiding Judge's rejection of Seattle's theories of refund liability related to the *Lockyer* proceeding<sup>51</sup> and explained that the Commission had unambiguously excluded evidence of quarterly reporting violations in the orders setting this matter for hearing.<sup>52</sup>

---

<sup>47</sup> 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.”).

<sup>48</sup> Opinion No. 537, 151 FERC ¶ 61,173 at P 45.

<sup>49</sup> Order on Remand, 137 FERC ¶ 61,001 at P 24; Order on Rehearing, 143 FERC ¶ 61,020 at P 30.

<sup>50</sup> Opinion No. 537, 151 FERC ¶ 61,173 at P 43.

<sup>51</sup> The “*Lockyer* proceeding” refers to litigation in Docket No. EL02-71.

<sup>52</sup> Opinion No. 537, 151 FERC ¶ 61,173 at P 44.

25. In addition, the Commission affirmed the Presiding Judge's finding that Seattle failed to overcome the *Mobile-Sierra* presumption. The Commission agreed with the Presiding Judge that Seattle failed to demonstrate that any contracts between Seattle and any of the Seattle Respondents imposed an excessive burden or seriously harmed the public interest. Further, the Commission rejected 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. The Commission found that the Presiding Judge had thoroughly considered the evidence offered by Seattle and correctly concluded that the evidence reflects that rate increases faced by Seattle 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.<sup>53</sup>

26. With regard to Seattle's section 309 refund claims, the Commission affirmed the Presiding Judge's finding that Seattle is not entitled to refunds under FPA section 309 for many of the same reasons as explained above in relation to Seattle's section 206 refund claims. Specifically, the Commission again rejected Seattle's MMCP benchmark theory of liability and concurred with the Presiding Judge's finding that the MMCP benchmark is specific to the California markets and is not an appropriate benchmark for just and reasonable rates in the Pacific Northwest.<sup>54</sup>

27. Finally, the Commission agreed with the Presiding Judge that the dispute about the length of the Section 309 Refund Period is moot because Seattle failed to substantiate its refund claims under either section 206 or 309.<sup>55</sup>

## **2. Seattle Rehearing Request**

28. Seattle argues that the Commission erred by finding that Seattle failed to avoid application of the *Mobile-Sierra* presumption to the subject contracts. Seattle asserts that, contrary to the Commission's findings, Seattle did allege unlawful market activity that directly affected contract prices. Specifically, Seattle states that each of its section 206 refund claims was based on allegations that a Respondent seller violated section 205 of the FPA, the seller's market-based rate tariff, and section 37 of the WSPP Agreement by

---

<sup>53</sup> *Id.* PP 56-62.

<sup>54</sup> *Id.* PP 72-77.

<sup>55</sup> *Id.* P 78.

charging unlawful prices. Seattle emphasizes that each of its witnesses for the hearing presented evidence that each Respondent charged Seattle prices for wholesale energy that fell outside of the “zone of reasonableness.” First, Seattle describes the cointegration analysis presented by Mr. Philip Q. Hanser, which Seattle claims demonstrates the long-term relationship between the prices for wholesale energy in the Pacific Northwest and the California markets. Seattle again asserts that the MMCP<sup>56</sup> analysis used for calculating refunds in the California Refund Proceeding, provides reasonable proxies for the highest lawful price sellers could have charged for wholesale energy if the Pacific Northwest market had been competitive during that period. Thus, Seattle claims that its evidence showing that, for the period from December 25, 2000 through June 20, 2001, Seattle Respondents frequently charged Seattle market-based rates that exceeded the MMCPs, demonstrates that the prices charged to Seattle by Seattle Respondents fell outside the “zone of reasonableness” and therefore were unlawful.<sup>57</sup>

29. Seattle also contends that the Commission erred by affirming the Presiding Judge’s rejection of certain material submitted by Seattle. Seattle recounts that the Presiding Judge rejected as out-of-time Appendix I to Seattle’s post-hearing reply brief and a portion of Seattle’s section 309 testimony, both of which offered evidence concerning MMCPs. Seattle denies that the MMCP spreadsheets it attached to its post-hearing reply brief constitute “evidence” because Seattle did not rely on this material to prove that prices Seattle Respondents charged Seattle during the Section 206 Refund Period fell outside the “zone of reasonableness.” Rather, Seattle maintains that it relied solely on the testimony of its witnesses Mr. Hanser and Mr. Morter, as well as findings the Commission itself made in orders issued in the California Refund Proceeding in Docket No. EL00-95, to prove its section 206 theory of liability. Seattle asserts that Appendix I merely served as an alternate method for showing that prices exceeded the “zone of reasonableness.” Further, Seattle reiterates that the MMCP evidence was already in the record at the time it submitted its post-hearing reply brief. For those reasons, Seattle contends that admitting Appendix I would not have prejudiced any Respondent.<sup>58</sup>

---

<sup>56</sup> The MMCP analysis 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 19, 2001 Order).

<sup>57</sup> Seattle Rehearing Request at 13-22.

<sup>58</sup> *Id.* at 22-24.

30. With regard to its section 309 testimony, Seattle argues that the MMCP material is relevant to claims for the Section 309 Refund Period because it “provided necessary context for the skyrocketing energy price during the period January 1 through December 24, 2000.”<sup>59</sup> Thus, Seattle contends that the Commission was incorrect to characterize the section 309 testimony as out-of-time section 206 testimony. Also, Seattle asserts that the Commission erred by affirming that even if it had been admitted, the material concerning MMCPs was not entitled to any weight. Seattle again contends that the Commission was wrong to find that the MMCP benchmark cannot be used to prove Seattle’s refund liability claims. Additionally, Seattle argues that the Commission misinterpreted the Order on Remand to create the requirement that Seattle submit all of the evidence on which it intended to rely. Seattle notes that California Parties had already submitted the MMCP evidence into the record and maintains that Seattle should have been entitled to rely on California Parties’ evidence. Seattle disagrees with the Presiding Judge’s determination that separate records for California Parties’ and Seattle’s refund claims were necessary; Seattle argues the parties involved are sophisticated businesses that would not have had difficulty understanding Seattle’s claims or the evidence supporting them. Finally, Seattle claims that the Commission failed to respond to Seattle’s arguments that the effective division of the record violates *Port of Seattle*, results in administrative inefficiencies, and is internally inconsistent.<sup>60</sup>

31. Seattle challenges the Commission’s finding that Seattle failed to prove the causal connection between unlawful market activity and contract prices, as required by *Morgan Stanley*. Seattle interprets the Initial Decision as improperly requiring Seattle to prove each term and condition of each contract in order to prove causality, thereby imposing requirements beyond those established by the Commission in the Order on Remand. Seattle reiterates that unlawful market activity in the form of unlawfully high prices by definition affects the contract price.<sup>61</sup>

32. Seattle argues that the Commission erred by affirming the Presiding Judge’s rejection of Seattle’s arguments related to the *Lockyer* proceeding. Seattle notes that, in affirming the Presiding Judge’s findings on this issue, the Commission pointed out that in the Order on Remand and Remand Rehearing Order, the Commission expressly instructed the Presiding Judge not to consider any evidence of reporting violations by sellers that were resolved in the *Lockyer* proceeding. Seattle contends that the Commission’s position on this issue fails to take into account the Ninth Circuit’s recent

---

<sup>59</sup> *Id.* at 25.

<sup>60</sup> *Id.* at 24-28.

<sup>61</sup> *Id.* at 28-30.

decision in *Cal. ex. rel. Harris v. FERC*.<sup>62</sup> Seattle asserts that *Harris* made clear that that arguments concerning reporting violations have not been resolved in the *Lockyer* proceeding and therefore the Commission should not have barred the Presiding Judge from considering these arguments.<sup>63</sup>

33. Seattle also asserts that the Commission failed to consider its alternative theory of refund liability based on allegations of undue discrimination. Seattle argues that Seattle and CAISO are similarly situated in that they were both charged prices that exceeded the MMCPs, but were treated differently because CAISO was granted refunds of amounts it paid in excess of the MMCPs, whereas Seattle has been denied that relief.<sup>64</sup>

34. Seattle argues that the Commission erred by affirming the Presiding Judge's finding that Seattle failed to overcome the *Mobile-Sierra* presumption, with respect to its section 206 refund claims, by demonstrating an undue burden on consumers or serious harm to the public interest. Seattle contends that the Commission erroneously adopted a contract specific analysis of excessive burden instead of examining the cumulative impact of the burdens cause by the rates Seattle Respondents charged Seattle. Seattle denies that *Morgan Stanley* can be interpreted to require a contract-specific analysis of burden or harm and maintains that the spot market transactions at issue here could never be found to cause serious harm to ratepayers down the line. Seattle asserts that if the *Mobile-Sierra* presumption were to be applicable to spot transactions that are 24 hours or less, there is no limit on the price a seller can charge for those spot sales, a result that would contravene the purpose of FPA section 205.<sup>65</sup>

35. Seattle argues that the Commission misinterpreted the cases previously cited<sup>66</sup> by Seattle in support of its cumulative impact theory. Seattle maintains that *Texaco* and *Arizona Corp. Commission* stand for the proposition that the Commission can modify a private contract based on generalized findings of harm. Seattle asserts that, in *Texaco*, the United States Court of Appeals for the D.C. Circuit (D.C. Circuit) held that the Commission had properly considered the impact of the contracts at issue, as a group, and

---

<sup>62</sup> 784 F.3d 1267 (9<sup>th</sup> Cir. 2015) (*Harris*).

<sup>63</sup> Seattle Rehearing Request at 31-32.

<sup>64</sup> *Id.* at 33-34.

<sup>65</sup> *Id.* at 34-37.

<sup>66</sup> *Texaco Inc. v. FERC*, 148 F.3d 1091 (D.C. Cir. 1998) (*Texaco*); *Arizona Corp. Comm'n v. FERC*, 397 F.3d 952 (D.C. Cir. 2005) (*Arizona Corp. Commission*).

held that those impacts were sufficient to satisfy the *Mobile-Sierra* requirements for modifying a private contract.<sup>67</sup> Similarly, Seattle claims that the D.C. Circuit held, in *Arizona Corp. Commission*, that findings regarding the overall impact of a group of contracts, as opposed to the analysis of the impact of an individual contract, are sufficient to demonstrate serious harm to the public interest such that contract modification is justified.<sup>68</sup> Seattle alleges that the circumstances here are analogous to those present in *Arizona Corp. Commission* because the “artificial manipulation of markets and [the Commission’s] abdication of its regulatory responsibility ... affected an entire class of contracts (Seattle’s contracts in the Pacific Northwest spot market) in the same manner – they drove prices to outrageously high levels ....”<sup>69</sup>

36. Seattle disputes the Commission’s finding that, even if it were to accept Seattle’s cumulative impact theory, Seattle still would not have satisfied its burden because it failed to demonstrate that the contracts at issue, as opposed to market fundamentals or other factors, were the cause of rate increases. Seattle acknowledges that a significant portion of the demonstrated rate increases was the result of an increased need to purchase power in 2001.<sup>70</sup> However, Seattle maintains that the biggest driver of the increased cost was the dramatically increased price of power, which Seattle claims was 963 percent of the forecast price. Seattle contends that it established that 27 percent of its entire cost of purchasing power in the wholesale market in 2001 was made up of spot purchases from Seattle Respondents. Seattle argues that the Commission failed to address this evidence.<sup>71</sup>

37. Seattle argues that the Commission erred by finding that market fundamentals or Seattle’s own business decisions were the central cause of high prices in the Pacific Northwest during the relevant period. Seattle reiterates that Mr. Hanser’s cointegration analysis demonstrates that unlawful actions by sellers directly affected the price Seattle paid for wholesale power during the Section 206 Refund Period, but contends that the Commission failed to address this evidence. Seattle notes that the Initial Decision found

---

<sup>67</sup> Seattle Rehearing Request at 37-38 (citing *Texaco*, 148 F.3d at 1093-95, 1097).

<sup>68</sup> *Id.* at 38-39 (citing *Arizona Corp. Commission*, 397 F.3d at 1006, 1014-15).

<sup>69</sup> *Id.* at 39.

<sup>70</sup> Seattle states that it projected it would purchase 1,713,456 MWhs in the wholesale market in 2001 at an average price of \$22.96 per MWh, but actually purchased 2,437,907 MWh’s at an average price of \$215 per MWh. *Id.* at 41.

<sup>71</sup> *Id.* at 40-42 (citing Ex. SCL-84, 85, 86, 87, 88, 91, 92, 93, and 94).

that defects in the California market contributed to the Western Energy Crisis and argues that these same defects contributed to an excessive burden suffered by Seattle's consumers.<sup>72</sup> Seattle also disputes the Commission's finding that allegations of dysfunction and manipulation in the California markets are not relevant to Seattle's case for overcoming the *Mobile-Sierra* presumption. Seattle states that *Morgan Stanley* expressly acknowledges that evidence of circumstances exogenous to contract negotiations can support a finding of excessive burden.<sup>73</sup>

38. Further, Seattle contends that the Commission improperly considered Seattle's business decisions, the prices at which Seattle sold power, and Seattle's retail rates relative to other major U.S. cities. Seattle argues that, because the Commission lacks jurisdiction to order Seattle to pay refunds, it cannot consider Seattle's retail rates in determining whether Seattle had demonstrated an undue burden or serious harm to the public interest. Moreover, Seattle asserts that the Commission has consistently refused to consider whether a purchaser has acted prudently when determining whether wholesale rates are just and reasonable and there is no basis for diverging from that precedent here. Lastly, Seattle contends that the Commission's analysis of Seattle's retail rates relative to other major U.S. cities is flawed because, under *Mobile-Sierra*, the focus of the inquiry should not be how much Seattle's consumers paid relative to other consumers, but whether Seattle's consumers paid more under the challenged contracts than they would have if rates had been just and reasonable. Seattle argues that the focus on retail rates ignores other harm to the public interest such as depleting Seattle's retained earnings and the subsequent issuance of bonds, which Seattle claims damaged Seattle's credit rating.<sup>74</sup>

39. Seattle claims that the Commission erred by refusing to consider the discriminatory nature of rates charged to Seattle as it applies to the determination of whether Seattle was able to overcome the *Mobile-Sierra* presumption. Seattle argues that the Commission rejected Seattle's discrimination claim because accepting this theory would result in a market-wide remedy. Seattle asserts that a showing that the rates charged to Seattle were unduly discriminatory supports a finding that the rates seriously harmed the public interest.<sup>75</sup>

---

<sup>72</sup> *Id.* at 42-46.

<sup>73</sup> *Id.* at 51-52.

<sup>74</sup> *Id.* at 46-51.

<sup>75</sup> *Id.* at 52-53.

40. Seattle raises many of the same arguments with respect to the Section 309 Refund Period as it does for the Section 206 Refund Period, including claims that Mr. Hanser's cointegration analysis demonstrated unlawful activity by Seattle Respondents by establishing that the prices charged to Seattle by Seattle Respondents exceeded the "zone of reasonableness." Further, Seattle contends that the MMCP is an appropriate benchmark for the Pacific Northwest market. Seattle asserts that the Commission has repeatedly treated California and the Pacific Northwest as a single, "inextricably interrelated" market,<sup>76</sup> and 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 Proceeding.<sup>77</sup> Seattle contends that the Commission failed to provide a reasonable basis for distinguishing between otherwise identical transactions where Seattle was the buyer rather than CAISO. Finally, Seattle argues that there is overwhelming evidence that the Pacific Northwest and California markets were very closely related and, as such, the fact that the MMCP was formulated based on marginal units in California does not render the MMCP irrelevant as a benchmark for Pacific Northwest spot market sales.<sup>78</sup>

41. Seattle continues to argue that the dispute regarding the length of the Section 309 Refund Period is not moot because the Commission erred by finding that Seattle did not avoid or overcome the *Mobile-Sierra* presumption. As discussed above for the Section 206 Refund Period, Seattle asserts that the *Mobile-Sierra* presumption does not apply to its section 309 refund claims based on the theory that Seattle Respondents charged Seattle unlawful prices for wholesale energy. Seattle contends that the April 5 Rehearing Order stands for the proposition that refund claimants may submit section 309 claims for the entire refund period from January 1, 2000 through June 20, 2001.<sup>79</sup>

---

<sup>76</sup> *Id.* at 62-64 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 93 FERC ¶ 61,121, at 61,357-58 (2000); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 95 FERC ¶ 61,115, at 61,351, 61,356, 61,362, 61,365-66 (2000); June 2001 Order, 95 FERC at 61,545, 61,547, 61,568-70).

<sup>77</sup> *Id.* at 63 (citing July 25, 2001 Order, 96 FERC at 61,515-16; December 19, 2001 Order, 97 FERC at 62,178).

<sup>78</sup> *Id.* at 60-65.

<sup>79</sup> *Id.* at 68-71.

### 3. Commission Determination

42. We deny rehearing. Seattle's primary theory of refund liability is that Seattle Respondents charged Seattle unlawfully high prices. Seattle's argument relies on the mistaken assumption that bilaterally negotiated spot sale prices in the Pacific Northwest market are unlawful if they exceed the MMCP. In Opinion No. 537, the Commission rejected Seattle's contention that the MMCP presumptively establishes a just and reasonable price for bilateral contracts in the Pacific Northwest.<sup>80</sup> Further, as the Commission explained in Opinion No. 537, "[t]he 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."<sup>81</sup> Thus, we continue to reject Seattle's argument that contract rates that exceed the MMCP levels are *per se* unlawful. Without the showing of unlawful activity that directly affected a contract price, we find that Seattle's arguments amount to little more than a theory of high prices, and the Commission has consistently rejected arguments that "simply identifying high prices should be sufficient to overcome or avoid the [*Mobile-Sierra*] presumption."<sup>82</sup>

43. We are not persuaded to reconsider the Commission's decision regarding the Presiding Judge's rejection of Seattle's MMCP analysis in Appendix I to its post-hearing reply brief. As the Commission explained in Order No. 537, if Seattle intended to rely on the MMCP analysis for its MMCP claims, it should have timely submitted the spreadsheets as part of its section 206 case because introducing new section 206 evidence as part of its section 309 case would be prejudicial to Seattle Respondents.<sup>83</sup> Further, if, as Seattle now argues on rehearing, it relied solely on the testimony of witnesses Mr. Hanser and Mr. Morter for its section 206 refund claims, then Seattle could not have been prejudiced by the Presiding Judge's exclusion of this data. Even if Seattle intended this analysis as part of its section 309 refund claims, we find no reversible error in the Presiding Judge's rejection of the materials. As the Commission explained in Opinion No. 537, even if the MMCP analysis had been admitted, the Presiding Judge should have afforded it no weight because "the Commission had already considered and rejected the option of a market-wide remedy for the Pacific Northwest through the use of an MMCP-

---

<sup>80</sup> Opinion No. 537, 151 FERC ¶ 61,173 at P 75.

<sup>81</sup> *Id.* P 42.

<sup>82</sup> *Id.* P 41; *Puget Sound Energy, Inc.*, 141 FERC ¶ 61,248, at P 15 (2013) (Order Granting Interlocutory Appeal); Order on Rehearing, 143 FERC ¶ 61,020 at P 30.

<sup>83</sup> Opinion No. 537, 151 FERC ¶ 61,173 at P 42.

like benchmark.”<sup>84</sup> Seattle has not offered any compelling arguments on rehearing that would persuade us to reconsider the appropriateness of the MMCP as a benchmark for the bilateral Pacific Northwest spot market, or the relevance of its MMCP analysis.

44. We reject Seattle’s argument that the Commission misinterpreted the instruction in the Order on Remand that parties to this proceeding must submit their own evidence. In the Order on Remand, the Commission clearly stated that “[i]f 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.”<sup>85</sup> The Commission required each party to not only resubmit the evidence, but also to explain how that evidence was relevant to specific refund claims.<sup>86</sup> Only the party offering the evidence for its own refund claims could provide that explanation. Thus, we continue to find that, given the plain language of the Order on Remand, Seattle could not have reasonably expected to rely on evidence that was submitted by other parties. Further, it is well-established that the Commission enjoys broad discretion in structuring its own proceedings.<sup>87</sup> Therefore, we reject Seattle’s claims that the manner in which the Commission structured this proceeding violated the Ninth Circuit’s mandate in *Port of Seattle*, or otherwise resulted in administrative inefficiency or inconsistencies.

45. As explained above, the Commission finds no merit in Seattle’s theory of refund liability based on allegedly unlawful high prices. We likewise reject Seattle’s attempt to use the contract price as both the unlawful activity itself and evidence of the causal connection between the unlawful activity and the contract price. Seattle’s evidence shows only that the Seattle Respondents’ contract rates with Seattle exceeded proxy prices that were established for remedial purposes in a fundamentally different market. Thus, we continue to find that Seattle failed to demonstrate a causal link between any unlawful market activity and any specific contracts with Seattle Respondents.

---

<sup>84</sup> *Id.* P 42 (citing Order on Remand, 137 FERC ¶ 61,001 at P 24; Order on Rehearing, 143 FERC ¶ 61,020 at P 30).

<sup>85</sup> Order on Remand, 137 FERC ¶ 61,001 at P 4.

<sup>86</sup> *Id.*

<sup>87</sup> *E.g., Mobil Oil Exploration & Producing Se. Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230-31 (1991) (“An agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities... .”); *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 366 (D.C. Cir. 2003) (administrative agencies enjoy broad discretion to manage their own dockets).

46. We find that the Ninth Circuit’s holding in *Harris* does not provide a reason to reverse the Commission’s decision to exclude arguments related to the *Lockyer* proceeding. Despite the remand, the *Lockyer* proceeding is still the appropriate proceeding for considering claims related to quarterly reporting violations. Specifically, the *Harris* remand directed the Commission 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.”<sup>88</sup> Further, as the Commission has explained, if “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.”<sup>89</sup> In this proceeding, Seattle was given a full opportunity to present direct evidence of market manipulation or the exercise of market power that directly affected the rates in its contracts with Seattle Respondents, but did not did not avail itself of that opportunity.

47. We reject Seattle’s claim that the Commission failed to consider Seattle’s undue discrimination theory of refund liability. Opinion No. 537 expressly considered this argument and affirmed the Presiding Judge’s rejection of Seattle’s undue discrimination argument. Specifically, the Commission agreed with the Presiding Judge that, due to important structural differences between the centrally-cleared California markets and the bilateral Pacific Northwest markets, Seattle and CAISO are not similarly situated and, therefore, applying the MMCP to CAISO’s out-of-market purchases, but not to Seattle’s bilateral purchases, does not constitute undue discrimination.<sup>90</sup> We affirm that determination here. Further, to the extent Seattle argues that the Commission in Opinion No. 537 engaged in undue discrimination by applying different remedies to similar transactions, that argument is misplaced. Seattle apparently challenges the Commission’s application of the MMCP in the California Refund Proceeding, but not to Seattle Respondents’ sales to Seattle. Of note, Seattle Respondents, at the time the contracts at issue were negotiated, could not have known that the Commission would establish the MMCP remedy or how it would be applied. Indeed, Seattle’s undue discrimination argument focuses only on the Commission’s finding that using the MMCP

---

<sup>88</sup> *Harris*, 784 F.3d at 1277. On November 3, 2015, the Commission issued an order reestablishing hearing and settlement judge procedures in Docket No. EL02-71-048 in response to the *Harris* remand. *State of Cal., ex rel. Bill Lockyer v. Brit. Colom. Power Exch. Corp.*, 153 FERC ¶ 61,137 (2015).

<sup>89</sup> Opinion No. 537, 151 FERC ¶ 61,173 at P 44 (citing Order on Rehearing, 143 FERC ¶ 61,020 at P 24).

<sup>90</sup> *Id.* P 43.

as a remedy in the California Refund Proceeding is appropriate, while also rejecting attempts to use the MMCP as a proxy for just and reasonable prices in this proceeding. Moreover, Seattle's undue discrimination theory does not allege any unlawful act by Seattle Respondents. The Commission's application of the MMCP as a remedy for CAISO's out-of-market purchases is not relevant to the contract negotiations between Seattle and the Seattle Respondents. Thus, we find no merit in Seattle's undue discrimination argument.

48. We also reject Seattle's argument that, for purposes of evaluating whether the *Mobile-Sierra* presumption has been overcome by a showing of excessive burden to consumers or serious harm to the public interest, the Commission must look at the cumulative impact of the rates charged by Seattle Respondents to Seattle. We find that Seattle's cumulative impact theory of harm conflicts with the fundamental basis of the *Mobile-Sierra* presumption. The Supreme Court's decision in *Morgan Stanley* makes clear that when one party seeks unilaterally to reform a bilaterally negotiated contract that is subject to the "public interest" presumption, the focus of the *Mobile-Sierra* inquiry is the contract rate negotiated between a buyer and a seller, and not the cumulative impact of the prices paid by one buyer to multiple sellers.<sup>91</sup>

49. We are not persuaded by Seattle's argument that the Commission misinterpreted the relevant case law regarding the findings necessary under *Mobile-Sierra* to modify a private contract. As noted above, Seattle maintains that *Texaco* and *Arizona Corp. Commission* stand for the proposition that the Commission can modify a private contract based on generalized findings of harm. We find that Seattle's argument fails to account for important aspects of those cases.

50. When dealing with *Mobile-Sierra* in the context of bilateral contracts, the fact pattern involved in most cases is whether an unfavorable contract provision will adversely affect the private interest of a utility service provider to such a degree that it will also affect the public interest, the primary example being where "the rate is so low" that "it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory."<sup>92</sup> Because this proceeding presents that fact pattern, the focus of the *Mobile-Sierra* inquiry is, as

---

<sup>91</sup> *Morgan Stanley*, 554 U.S. at 545 (the *Mobile-Sierra* presumption is "grounded in the commonsense notion that [i]n wholesale markets, the party charging the rate and the party charged [are] often sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a just and reasonable rate as between the two of them.").

<sup>92</sup> *Sierra*, 350 U.S. at 355.

discussed above, the contract rate negotiated between the buyer and seller. Here, Seattle has not provided any evidence to demonstrate how a specific contract harmed the public interest. By contrast, when the Commission is implementing new regulations that affect existing contracts, the issue is not whether Commission action impermissibly relieves one party of its “improvident bargain,” but whether the Commission is properly exercising its “plenary authority to limit or proscribe contractual arrangements that contravene the relevant public interests.”<sup>93</sup> *Texaco* presents this different fact pattern,<sup>94</sup> and therefore does not support Seattle’s argument.

51. We find that Seattle’s reliance on *Arizona Corp. Commission* is equally misplaced. In *Arizona Corp. Commission*, the D.C. Circuit stated that “[t]he *Mobile-Sierra* doctrine permits generalized findings of public interest when intervening circumstances affect a class of contracts in the same manner.”<sup>95</sup> However, we find that the intervening circumstances at issue in *Arizona Corp. Commission* are distinguishable from the circumstances surrounding the contracts at issue here. In *Arizona Corp. Commission*, conditions arose after the parties entered into the contracts that rendered them no longer just and reasonable.<sup>96</sup> By contrast, market conditions in the Pacific Northwest during the time period at issue here did not “intervene” because Seattle was aware of those market conditions when it entered into its spot contracts. Seattle has not alleged, let alone provided evidence, that circumstances changed after consummating the challenged contracts.

52. Further, in *Arizona Corp. Commission*, the court stated that the main factual question was whether the record contained evidence that tied the harm to the contracts at issue.<sup>97</sup> Seattle has failed to provide evidence to demonstrate that the effect – high

---

<sup>93</sup> See *Permian Basin*, 390 U.S. 747, 784 (1968).

<sup>94</sup> In *Texaco*, the court upheld the Commission’s authority to reform firm gas transportation contracts to incorporate straight fixed-variable, rather than modified fixed-variable rates, as required under Commission Order No. 636.

<sup>95</sup> *Arizona Corp. Commission*, 397 F.3d at 955-56.

<sup>96</sup> *Id.* at 956 (explaining that the growth of full requirements contracts after entering into settlement resulted in the erosion of excess pipeline capacity, thereby rendering firm transportation service unreliable).

<sup>97</sup> *Arizona Corp. Comm’n*, 397 F.3d at 954 (“The main factual question is whether the record contains substantial evidence of capacity curtailments on El Paso’s mainline severe enough to render firm service unreliable and thus justify Commission action under *Mobile-Sierra*.”).

contract prices – can be attributed to the challenged contracts, rather than market fundamentals or Seattle’s own business decisions, as discussed below.

53. Indeed, we continue to find that Seattle has not established that any rate increases experienced during the relevant period were attributable to Seattle’s contracts with the Seattle Respondents, as opposed to market fundamentals or Seattle’s own business decisions. As detailed in Opinion No. 537, both the Presiding Judge and the Commission thoroughly considered all of the relevant evidence and concluded that “evidence reflects that [Seattle’s] 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.”<sup>98</sup> Further, contrary to Seattle’s claims on rehearing, the Presiding Judge expressly addressed the evidence that purportedly establishes that 27 percent of Seattle’s wholesale power costs in 2001 were made up of spot purchases from the Seattle Respondents.<sup>99</sup> The evidence referenced by Seattle consists solely of transaction reporting templates provided by Seattle witness Mr. Morter.<sup>100</sup> Further, the evidence at issue consists only of lists of transactions by each seller and the cost to Seattle and does not in itself demonstrate burden or harm. Therefore, Mr. Morter’s testimony sheds no light on whether the prices in Seattle Respondents’ contracts with Seattle imposed an excessive burden on Seattle’s customers or seriously harmed the public interest.

54. We reject Seattle’s argument that the Commission erred by finding that market fundamentals and Seattle’s business decisions were the central cause of the high prices in the Pacific Northwest during the relevant period. Specifically, we find no merit in Mr. Hanser’s cointegration analysis as evidence that sellers’ unlawful activity was primarily responsible for price increases faced by Seattle.<sup>101</sup> As explained in Opinion No. 537, the cointegration analysis showed only that prices in the California markets and

---

<sup>98</sup> Opinion No. 537, 151 FERC ¶ 61,173 at P 59.

<sup>99</sup> Initial Decision, 146 FERC ¶ 63,028 at P 943.

<sup>100</sup> Mr. Morter testified that the purpose of his testimony was to address the definition of spot sales and to rebut claims that Seattle did not identify specific contracts. Ex. SCL-81 at 3-4.

<sup>101</sup> Mr. Hanser testified that the cointegration analysis showed that Seattle’s wholesale power costs and retail rates reflected unlawful actions by sellers and market dysfunction that existed in California. Initial Decision, 146 FERC ¶ 63,028 at PP 118-121.

Pacific Northwest markets often moved in the same direction at the same time, but did not establish any causal link between the two markets. Further, the Commission stated that “evidence of price trends does nothing to demonstrate specific violations of the FPA or a tariff . . . .”<sup>102</sup> Thus, the Commission did not fail to consider Mr. Hanser’s evidence, but instead considered that evidence and found it unpersuasive. Seattle offers nothing new on rehearing that would persuade us to reconsider our findings on this issue.

55. We continue to find no merit in Seattle’s argument that market dysfunction and unlawful activity in the California markets demonstrates an excessive burden on Seattle’s customers relative to what they would have paid absent the contracts at issue. Although Seattle is correct that *Morgan Stanley* acknowledges that circumstances exogenous to contract negotiations are relevant to whether contracts impose an excessive burden, Seattle fails to recognize that the contracts themselves are still the primary focus of the inquiry.<sup>103</sup> Opinion No. 537 and other Commission orders in this proceeding have long stated that generalized allegations of harm are not sufficient to overcome the *Mobile-Sierra* presumption.<sup>104</sup> Rather, any alleged harms must be tied to the contracts at issue. As noted in Opinion No. 537, Seattle failed to provide, as part of its section 206 case, evidence to tie any excessive burden or harm to the contracts at issue.<sup>105</sup>

56. We continue to find that the Presiding Judge did not err by considering evidence of Seattle’s business decisions, the prices at which Seattle sold power, and Seattle’s retail rates in comparison to other major U.S. cities. Seattle’s assertion that the Presiding Judge and Commission improperly considered the prudence of Seattle’s business decisions is

---

<sup>102</sup> Opinion No. 537, 151 FERC ¶ 61,173 at P 77.

<sup>103</sup> We also address arguments concerning the “exogenous circumstances” noted by *Morgan Stanley* in P 123, below.

<sup>104</sup> Opinion No. 537, 151 FERC ¶ 61,173 at P 215; 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*.”).

<sup>105</sup> Initial Decision, 146 FERC ¶ 63,028 at P 944.

incorrect. As stated in Opinion No. 537, the Presiding Judge merely weighed Seattle's business decisions among a myriad of other factors to determine whether Seattle's contracts with Seattle Respondents were the cause of any burden or harm.<sup>106</sup> Insofar as Seattle's bond issuance may have adversely impacted Seattle's credit rating and thereby harmed the public interest, Opinion No. 537 expressly addressed the bond issuance and found that Seattle's own testimony indicated that Seattle issued the bonds and increased its rates in response to market fundamentals, such as drought conditions, or Seattle's business decision to sell one of its steam plants.<sup>107</sup>

57. We find no merit in Seattle's argument that, because the Commission lacks authority to direct Seattle to pay refunds, the Commission cannot consider the rates charged by Seattle in comparison to the rates paid by Seattle. The Commission was not considering Seattle's retail rates for the purpose of imposing refund liability, but rather to evaluate whether Seattle's contracts with Seattle Respondents contributed to any "down the line" burden.<sup>108</sup> The Commission found that evidence showing that from 2002 through 2008, Seattle either had a rate decrease or no change to its rates, except for in 2003 when there was a 1.4 percent rate increase, was inconsistent with claims of a "down the line" burden.<sup>109</sup> Further, neither the Presiding Judge nor Commission relied on a comparison of Seattle's retail rates to rates in other major U.S. cities to determine that Seattle had not shown an excessive burden to its consumers or serious harm to the public interest. Rather, after discussing the numerous other deficiencies in Seattle's case, the Presiding Judge noted that Seattle's retail rates remained the lowest of the 25 largest U.S. cities in 2001 as another example of record evidence that weakened Seattle's claims of excessive burden.<sup>110</sup>

---

<sup>106</sup> Opinion No. 537, 151 FERC ¶ 61,173 at P 61.

<sup>107</sup> *Id.*

<sup>108</sup> In *Morgan Stanley*, the Supreme Court explained that it is not enough to simply look at whether consumers' rates increased immediately upon the relevant contracts going into effect; the Commission must also consider "whether the contracts imposed an excessive burden 'down the line,' relative to the rates they could have obtained (but for the contracts) after the elimination of the dysfunctional market." *Morgan Stanley*, 554 U.S. at 552.

<sup>109</sup> Opinion No. 537, 151 FERC ¶ 61,173 at P 61.

<sup>110</sup> Initial Decision, 146 FERC ¶ 63,028 at P 947.

58. We reject Seattle's contention that the Commission refused to consider the alleged discriminatory nature of the rates charged to Seattle in its evaluation of whether Seattle overcame the *Mobile-Sierra* presumption. As discussed above, the Commission found no merit in Seattle's undue discrimination argument for purposes of avoiding the *Mobile-Sierra* presumption, and we find this argument to be equally unpersuasive for purposes of demonstrating an excessive burden on consumers or serious harm to the public interest. Moreover, the Commission has repeatedly explained why it was appropriate to use the MMCP as a remedy for CAISO's out-of-market transactions, due to specific flaws in the centralized CAISO market, whereas such a remedy would not be appropriate for the bilateral spot contracts at issue here.<sup>111</sup>

59. With regard to its section 309 case, we find that Seattle essentially repeats arguments that the Commission has already considered and rejected in Opinion No. 537 regarding Mr. Hanser's cointegration analysis and the propriety of the MMCP as a proxy price. The Commission provided numerous reasons in Opinion No. 537 why Mr. Hanser's cointegration analysis was not relevant to the question of whether any of the Seattle Respondents engaged in unlawful market activity that directly affected the price of their contracts with Seattle.<sup>112</sup> The Commission also addressed the issue of why the MMCP is not an appropriate benchmark for the Pacific Northwest, despite the interrelated nature of the California and Pacific Northwest markets.<sup>113</sup> That the MMCP was formulated based on marginal units in California was but one of many reasons the Commission cited to explain why the MMCP is not an appropriate benchmark for just and reasonable rates in the Pacific Northwest.<sup>114</sup> For example, the Commission affirmed the Presiding Judge's finding that the MMCP is not applicable to Seattle's refund liability arguments because the MMCP was developed as a remedial construct, and not a measure of liability, and because the MMCP reflects California's heavy reliance on natural gas fired generation and therefore does not reflect many inputs relevant to contract prices in the Pacific Northwest.<sup>115</sup> The Commission also emphasized the fundamental differences

---

<sup>111</sup> Opinion No. 537, 151 FERC ¶ 61,173 at P 75; July 2001 Order, 96 FERC at 61,515 ("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.").

<sup>112</sup> *Id.* P 77.

<sup>113</sup> *Id.* PP 73-76.

<sup>114</sup> *See id.*

<sup>115</sup> *Id.* P 74.

between the centrally-cleared California markets and the bilateral Pacific Northwest markets.<sup>116</sup> Thus, we are not persuaded on rehearing to reconsider the Commission's determination that Seattle failed to substantiate its section 309 refund claims.

60. Because we continue to find that Seattle failed to prove refund liability under either section 206 or section 309, we affirm the Commission's prior finding that the dispute about the length of time of the Section 309 Refund Period is moot.<sup>117</sup>

**D. California Parties' Refund Claims**

**1. Issues Reversed and Remanded to Presiding Judge**

**a. Opinion No. 537**

61. The Commission reversed the Initial Decision with respect to the Presiding Judge's findings on California Parties' allegations of False Export and bad faith against Coral and remanded these issues to the Presiding Judge to make additional findings. The Commission explained that, due to ambiguity and inconsistencies in the Initial Decision, it could not be certain that the Presiding Judge 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 some of the subject contracts. Further, the Commission noted that each of the parties appears to have used a different interpretation as to what constitutes a contract. The Commission found that the Initial Decision is somewhat inconsistent regarding what the Presiding Judge construed as an individual contract and did not include discussion about why the Presiding Judge adopted any particular definition of a contract. The Commission explained that the *Mobile-Sierra* presumption attaches to contracts and therefore the "unit of analysis" could have profound implications for the finding of refund liability, depending on how a "contract" is defined. The Commission found that the Initial Decision did not "explain which definition was adopted, or on what basis," and also that the Initial Decision was also somewhat inconsistent regarding what the Presiding Judge construed as an individual contract. Thus, the Commission directed 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

---

<sup>116</sup> *Id.* P 73.

<sup>117</sup> *See id.* P 80.

engaged in False Export activities or bad faith that directly affected the rates under specific contracts with CERS.<sup>118</sup>

**b. California Parties Rehearing Request**

62. California Parties argue that the Commission erred by remanding the issue of contract designation for further findings. California Parties assert that the Presiding Judge relied on the definition that California Parties propounded and contend that of all the proffered approaches for defining a contract, only the California Parties applied a consistent methodology to every transaction. Thus, California Parties argue that it was reasonable for the Presiding Judge to adopt this methodology. Further, California Parties dispute the Commission's characterization of this issue as a threshold determination. California Parties assert that the question of what constitutes a contract can be addressed as a Phase II remedy issue. Moreover, because the quantitative analyses in this case were primarily conducted on a basis more granular (i.e., hourly) than any of the proposed contract designations, the question of what represents a contract should have no bearing on the fundamental question of whether the *Mobile-Sierra* presumption has been avoided or overcome.<sup>119</sup>

63. California Parties aver that the Initial Decision correctly found that California Parties made a *prima facie* case that Coral engaged in bad faith, and the Commission erred by reversing and remanding on this issue. As with its allegations of bad faith against TransCanada, as discussed below,<sup>120</sup> California Parties argue that they clearly and separately alleged bad faith against Coral, as opposed to fraud or duress. California Parties assert that evidence demonstrates that Coral exploited CERS by charging a price far in excess of the prevailing market price and also that much of Coral's interaction with CERS was fraudulent, which is a basis for a finding of bad faith. Similarly, California Parties claim that evidence shows that Coral's transactions with CERS were characterized by duress, which is another basis for finding bad faith. Further, California Parties assert that, although Mr. Taylor's *Power Markets Week* high price + \$75 screen stands on its own as evidence of bad faith, the Presiding Judge properly used it as corroborating evidence.<sup>121</sup>

---

<sup>118</sup> *Id.* PP 94-101, 105.

<sup>119</sup> California Parties Rehearing Request at 81-90.

<sup>120</sup> *See infra* PP 83-86.

<sup>121</sup> California Parties Rehearing Request at 107-116.

64. California Parties also argue that the Commission mistakenly found as a basis for remand an alleged conflict between the Presiding Judge's finding that Coral had special knowledge regarding CERS' vulnerable position and the Presiding Judge's separate finding that CERS' vulnerable position was widely known. California Parties assert that, while CERS' predicament was widely known, only a handful of sellers, including Coral and TransCanada, exploited the situation by charging excessively high contract prices. California Parties also note that Coral and TransCanada had additional pricing leverage over CERS because other potential sellers refused to sell based on perceived credit risk.<sup>122</sup>

65. In addition, California Parties argue that the Commission erred by reversing the Initial Decision's finding that California Parties made a *prima facie* case that Coral engaged in False Export activities that affected at least 47 of its contracts with CERS. California Parties explain that, in order to determine whether Coral engaged in False Export activity, Mr. Taylor used a screen that examined whether, in any given hour, Coral: (1) submitted a day-ahead or day-of export schedule to CAISO that was not a wheel-through or circulation transaction; and (2) in the same hour, made a real-time sale to CERS. California Parties, thereby purport to show deception on the part of Coral as to the true source of the energy sold to CERS. California Parties contend that Mr. Taylor's False Export screen showed a "demonstrable correlation" between Coral's exports out of California and its real-time sales, at inflated prices, to CERS, where no such correlation should be expected. California Parties argue that Coral's business documents, emails, and trader tapes corroborate Mr. Taylor's False Export screen. California Parties assert that the Presiding Judge considered and relied on this evidence to properly conclude that California Parties made a *prima facie* case that Coral engaged in False Export activities with respect to 47 of its 156 contracts with CERS, thereby shifting the burden to Coral to rebut the allegations.<sup>123</sup>

66. California Parties argue that the Initial Decision correctly found that Coral's "back-to-back" transaction defense failed to rebut California Parties' *prima facie* case because it could not be relied upon to establish the true sources of the energy Coral sold to CERS. Thus, California Parties contend that the Commission erred by remanding this issue to the Presiding Judge because, according to California Parties, the record and the Initial Decision support a finding of liability against Coral.<sup>124</sup> California Parties argue

---

<sup>122</sup> *Id.* at 116-118.

<sup>123</sup> *Id.* at 119-122

<sup>124</sup> *Id.* at 122-138.

that the Commission's remand substantially prejudices California Parties, particularly in light of the resignation of the Presiding Judge and assignment of a replacement judge.<sup>125</sup>

67. Additionally, California Parties argue that the Commission erred by precluding the Presiding Judge, on remand, from considering evidence of Coral's multi-party transactions. California Parties acknowledge that its witness, Mr. Taylor, conceded in his testimony that the 19 hours of multi-party transactions at issue did not fit the technical definition of False Export. Therefore, California Parties claim that there is no reason for the Commission to exclude this evidence because the 19 hours of multi-party transactions are not included within the 47 contracts identified by California Parties and found by the Presiding Judge to involve False Exports. Nevertheless, California Parties assert that this evidence is highly probative of Coral's deceptive practices in its sales to CERS and, as such, the Presiding Judge should be permitted to consider this evidence on remand.<sup>126</sup>

68. Finally, California Parties argue that the Commission erred by remanding these issues back to a new Presiding Judge who did not have the benefit of observing live testimony, nor listening to trader call recordings that were submitted into evidence at the hearing.<sup>127</sup> California Parties claim that expecting a replacement judge to make reasoned findings on the remanded issues is unworkable and highly prejudicial to California Parties.<sup>128</sup>

**c. Shell Rehearing Request**

69. Shell argues that the Commission erred by remanding these proceedings to the Presiding Judge for a revised Initial Decision because California Parties failed to produce contract-specific evidence with regard to Coral's sales to CERS and, as a result, the Presiding Judge was not able to make the contract-specific findings necessary to abrogate the contracts at issue. Shell asserts that all of the evidence for the alleged taints of bad faith and False Export are the product of Mr. Taylor's False Export data screen.

---

<sup>125</sup> *Id.* at 180-183.

<sup>126</sup> *Id.* at 138-143.

<sup>127</sup> On June 23, 2015, Judge Philip C. Baten was designated as the replacement for Judge Bobbie J. McCartney, who retired from the Commission in April 2015, as the Presiding Judge in this proceeding. *Puget Sound Energy, Inc.*, Docket No. EL01-10-136, at P 2 (Jun. 23, 2015) (Order of Chief Judge Designating Presiding Administrative Law Judge).

<sup>128</sup> *Id.* at 182-183.

However, Shell contends that Mr. Taylor acknowledged that his screen does not identify contracts alleged to have been affected by unlawful activity, but only hours in which “a supplier: (1) submitted a day-ahead or day-of export schedule to the [California] ISO that was not a wheel-through or circulation transaction; and (2) made a real-time sale in the same hour to CERS.”<sup>129</sup> Shell argues that Trial Staff witness Dr. Savitski presented testimony that Mr. Taylor’s analysis “is not systematically linked to any particular contract.”<sup>130</sup> Given the alleged deficiencies of Mr. Taylor’s screen, Shell asserts that a remand cannot cure California Parties’ failure to make the necessary contract-specific showing.<sup>131</sup>

70. Shell again objects that bad faith is not a basis for challenging the lawful formation of Coral’s contracts with CERS. Shell states that, under the WSPF Agreement, all of the challenged contracts are governed by Utah law, which does not recognize bad faith as a ground for challenging contract formation. Shell recognizes the Supreme Court’s reference in *Morgan Stanley* to “traditional grounds for the abrogation of a contract,”<sup>132</sup> and asserts that the “traditional ground” at issue here is the same Utah law that does not include bad faith among the grounds for challenging contract formation. Thus, Shell contends that permitting claims of bad faith in order to avoid application of the *Mobile-Sierra* presumption, the purpose of which is contract abrogation or modification, contravenes the controlling Utah law.<sup>133</sup>

71. Further, Shell argues that the Commission erred by adopting the definition of “bad faith” in *Valcarce v. Fitzgerald*,<sup>134</sup> which did not involve traditional grounds for challenging a contract, but rather the interpretation of a Utah statute permitting the award of attorney’s fees when a legal action is brought without merit and not brought in good faith. Even if the *Valcarce* standard were correct, Shell argues that a remand on this issue would be pointless because the Initial Decision does not make any “bad faith” findings specific to any contracts between Coral and CERS. Shell argues that the Initial Decision

---

<sup>129</sup> Shell Rehearing Request at 5-6 (citing Initial Decision, 146 FERC ¶ 63,028 at PP 1005, 1406; Taylor Testimony, Ex. CAT-041 at 93:18-94:21).

<sup>130</sup> *Id.* at 6 (citing Ex. S-13 at 5:22-6:2).

<sup>131</sup> *Id.* at 6-7.

<sup>132</sup> *Id.* at 8 (citing *Morgan Stanley*, 554 U.S. at 547).

<sup>133</sup> *Id.* at 8-10.

<sup>134</sup> 961 P.2d 305, 316 (Utah 1998) (*Valcarce*).

made only generalized findings that exporting power and selling to CERS in the same hour is deceptive but fails to show how an export and concurrent sale to CERS affected the rate in any of the challenged contracts.<sup>135</sup>

72. Finally, Shell asserts that no remand or revised initial decision can cure the inconsistencies and fundamental illogic of the Initial Decision. Shell notes that, with respect to TransCanada, the Commission affirmed the Presiding Judge's rejection of Mr. Taylor's *Power Markets Week* plus \$75/MWh benchmark analysis as a method for proving fraud, duress or bad faith because *Morgan Stanley* makes clear that bilateral contracts should not be voided on the basis of gross margins alone.<sup>136</sup> Shell asserts that, despite this finding with regard to TransCanada, the Presiding Judge relied on this same screen to find that California Parties made a *prima facie* case against Coral on this issue.<sup>137</sup> Further, Shell claims that California Parties never alleged bad faith alone, but only presented a composite claim of duress, fraud, and bad faith. Shell argues that even if bad faith were allowed as a stand-alone claim, there is no way to use Mr. Taylor's benchmark screen to distinguish between duress, fraud, or bad faith for any given transaction. Thus, Shell contends that it is impossible, given the evidence proffered by California Parties, to perform a contract-specific analysis of bad faith.<sup>138</sup>

**d. Commission Determination**

73. We deny rehearing on the arguments raised by California Parties and Shell. We reject California Parties' claim that the Commission erred by remanding the issue of what constitutes a contract for revised findings. As the Commission explained in Opinion No. 537, "the question of contract designation is a threshold issue in this proceeding because the *Mobile-Sierra* presumption attaches to individual contracts."<sup>139</sup> As such, the manner in which a contract is defined could have profound implications on whether unlawful activity directly affected a contract rate. We disagree with California Parties that this question can be addressed during the Phase II remedy proceeding, because the question of whether a remedy is warranted is dependent upon whether the *Mobile-Sierra*

---

<sup>135</sup> Shell Rehearing Request at 10-11.

<sup>136</sup> *Id.* at 11-12 (citing Opinion No. 537, 151 FERC ¶ 61,173 at P 88 (citing Initial Decision, 146 FERC ¶ 63,028 at P 1700 (quoting *Morgan Stanley*, 554 U.S. at 550))).

<sup>137</sup> *Id.* at 12 (citing Opinion No. 537, 151 FERC ¶ 61,173 at P 150).

<sup>138</sup> *Id.* at 12-13.

<sup>139</sup> Opinion No. 537, 151 FERC ¶ 61,173 at P 105.

presumption has been avoided or overcome for the contracts at issue. That question cannot be answered without establishing a standard for defining what a contract is. Further, we find that California Parties' assertion on rehearing that the Presiding Judge uniformly adopted the definition proffered by California Parties is at odds with the inconsistencies noted in Opinion No. 537<sup>140</sup> that necessitated the remand. Specifically, Opinion No. 537 listed several examples of such inconsistencies, including the fact that California Parties alleged that 36 of CERS' contracts with Coral were affected by False Export activities, yet the Presiding Judge found that at least 47 of CERS' contracts with Coral were tainted by bad faith. Further, Opinion No. 537 noted that the Presiding Judges' finding regarding these 47 contracts with CERS was, without explanation, apparently derived from evidence purporting to show that Coral falsely exported 2,798 MWh across 139 individual hours. Thus, the Commission found that the question of what the Presiding Judge considered to be a contract created ambiguity with respect to her findings regarding the number of contracts affected by unlawful activity.<sup>141</sup>

74. We continue to find that remanding the foregoing issues for further clarification was necessary and appropriate. The Initial Decision did not specify what "significant questions of law and fact" remained with respect to the transactions allegedly tainted by bad faith or False Exports.<sup>142</sup> If California Parties failed to present evidence that would permit the Presiding Judge to engage in the required contract-specific analysis required under *Mobile-Sierra*, California Parties should not be allowed to do so in Phase II of the proceeding, which deals solely with remedies.<sup>143</sup> Similarly, if the questions of law and fact pertain to Shell's failure to present credible rebuttal evidence, Shell should not be permitted to submit new evidence or re-litigate these issues in Phase II. However, without further clarification on the Presiding Judge's findings, we cannot affirm or reject those findings.<sup>144</sup>

---

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* PP 1414, 1422, 1739.

<sup>143</sup> *See* Initial Decision, 146 FERC ¶ 63,028 at P 25.

<sup>144</sup> We find no merit in California Parties' claims concerning the change in Presiding Judge as the partial remand is nevertheless necessary to clarify ambiguity in the Initial Decision, as discussed herein.

75. Specifically, we affirm the Commission's prior finding that it is unclear how the Presiding Judge segregated California Parties' claims of bad faith against Coral from claims of fraud or duress. As explained in Opinion No. 537, with regard to TransCanada, the Presiding Judge correctly found that California Parties are required to allege duress, fraud, and bad faith separately, and to apply the facts of this case to those separate legal definitions.<sup>145</sup> Opinion No. 537 also noted that the Presiding Judge, while acknowledging that California Parties also failed to distinguish between claims of fraud, duress, and bad faith with regard to Coral, proceeded to find distinct instances of bad faith.<sup>146</sup> Further, it remains unclear how the same evidence that allegedly supports a finding of at least 47 instances of False Export also supports a finding of as many as 119 contracts tainted by bad faith. The mere use of the qualifying phrases "at least" and "as many as" suggests an uncertainty as to how many contracts were actually affected by any unlawful activities. We continue to reject California Parties' contention that Mr. Taylor's *Power Markets Week* high price + \$75 screen, in itself, demonstrates bad faith. Evidence of a high price alone says nothing about Coral's behavior during contract negotiations. We also note that, while Opinion No. 537 pointed out inconsistencies between the Presiding Judge's finding that Coral had special knowledge of CERS' predicament and her separate finding that CERS' vulnerability was widely known,<sup>147</sup> this contradiction was just one of many examples of the types of inconsistencies and ambiguities that necessitated the remand on the issue of bad faith. Thus, we find no reversible error in the Commission's observation on this point.

76. Also, as noted in Opinion No. 537, the Commission acknowledged that California Parties had presented evidence that Coral engaged in False Export activity, but could not determine from the Initial Decision the Presiding Judge's basis for finding a causal connection between instances of False Export by Coral and each of the 47 contracts at issue.<sup>148</sup> We find that, on rehearing, California Parties essentially recite the same arguments already considered and rejected by the Commission in Opinion No. 537 and do not offer any new arguments that would persuade us to reconsider the decision to reverse and remand to the Presiding Judge on these issues. We also affirm the Commission's decision to preclude the Presiding Judge from considering, on remand, evidence of Coral's 19 hours of multi-party transactions. As noted above, California

---

<sup>145</sup> Opinion No. 537, 151 FERC ¶ 61,173 at P 145.

<sup>146</sup> *Id.* P 150.

<sup>147</sup> *Id.* P 151.

<sup>148</sup> *Id.* P 118.

Parties concede that these transactions do not fit the definition of False Export.<sup>149</sup> Thus, we find that these transactions are not relevant, even for the purpose of demonstrating Coral's alleged deceptive practices.

77. We reject Shell's repeated arguments that bad faith is not a valid basis for challenging Coral's contracts with CERS. We maintain that a bad faith challenge to a contract under state contract law is distinguishable from a bad faith challenge to the applicability of the *Mobile-Sierra* presumption. The Commission has held that evidence of unfairness, bad faith, or duress "could be relevant to the conditions present at the time of contract formation and whether the Commission should uphold or modify the challenged contracts."<sup>150</sup> The very foundation of the *Mobile-Sierra* presumption is the arm's length negotiation between "two sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a just and reasonable rate as between the two of them."<sup>151</sup> Thus, the Supreme Court held in *Morgan Stanley* that the Commission "has ample authority to set aside a contract where there is unfair dealing at the contract formation stage."<sup>152</sup> The Supreme Court did not address the issue of whether the traditional types of unfair dealing, such as fraud and duress, need be independent statutory causes of action under state contract law, and Shell has not provided any arguments supporting its restrictive interpretation of *Morgan Stanley*.

78. We also reject Shell's contention that the Commission erred by adopting the *Valcarce* standard of bad faith. In Opinion No. 537, the Commission acknowledged that *Valcarce* did not involve traditional grounds for challenging a contract, but explained that "the three types of behavior identified by the [*Valcarce*] test amount to the same type of

---

<sup>149</sup> California Parties Rehearing Request at 138.

<sup>150</sup> *Pub. Util. Comm'n of the State of Cal. v. Sellers of Long Term Contracts to the Cal. Dep't. of Water Res.*, 105 FERC ¶ 61,182, at P 87 (2003); *see also Nevada Power*, 103 FERC ¶ 61,353 at P 110 ("because there is no evidence of unfairness, bad faith, or duress in the original contract negotiations, the Complainants are not entitled to change their bargains."); *Potomac Elec. Power Co. v. FERC*, 210 F.3d 403, 410 (D.C. Cir. 2000) ("absent any claim, much less evidence, of unfairness or bad faith in the original negotiations, it is reasonable for FERC to require parties to live with their bargains ....") (internal quotes omitted)).

<sup>151</sup> *Morgan Stanley*, 554 U.S. at 545 (quoting *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 479 (2002)).

<sup>152</sup> *Id.*

behavior that would result in unfair dealing at the contract formation stage.”<sup>153</sup> We find the Commission’s reasoning to be consistent with *Morgan Stanley’s* instruction that the Commission can set aside contracts “where there is unfair dealing at the contract formation stage,”<sup>154</sup> and find the Commission’s adoption of this standard to be appropriate. However, we agree with Shell that, in order to show bad faith, California Parties would be required to make the *Valcarce* findings with respect to specific contracts between Coral and CERS and expect that, on remand, the Presiding Judge will analyze California Parties’ evidence in this context.

## 2. Applicability of the *Mobile-Sierra* Presumption

### a. Opinion No. 537

79. With regard to the merit of California Parties’ arguments that the *Mobile-Sierra* presumption should not apply to the remainder of the contracts at issue, the Commission affirmed the Presiding Judge’s finding that California Parties had not demonstrated that TransCanada had engaged in fraud, bad faith, or duress. The Commission agreed with the Presiding Judge’s conclusion that California Parties are required to allege duress, fraud, and bad faith separately, as opposed to alleging all three together without articulating the legal standard for each and evaluating how each distinct body of law applied to the facts of this case.

80. Further, even assuming *arguendo* that California Parties did properly allege bad faith, the Commission found numerous flaws in California Parties’ attempt to use this theory to avoid application of the *Mobile-Sierra* presumption. The Commission agreed that the Presiding Judge correctly found that California Parties’ principal evidence in support of its composite theory of fraud, duress, and bad faith was Mr. Taylor’s *Power Markets Week* + \$75/MWh test, and that this screen did not demonstrate bad faith. The Commission found that, regardless of whether Mr. Taylor’s benchmark is a reasonable proxy for the prevailing Pacific Northwest market price, evidence of a high price charged to CERS does not demonstrate any unfair dealing at the contract formation stage.<sup>155</sup> The

---

<sup>153</sup> Opinion No. 537, 151 FERC ¶ 61,173 at P 144. To prove that a party acted in bad faith, *Valcarce* requires a showing of one or more the following factors: (i) the 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. *Id.*

<sup>154</sup> *Morgan Stanley*, 554 U.S. at 545.

<sup>155</sup> Opinion No. 537, 151 FERC ¶ 61,173 at PP 145-148.

Commission also concurred with the Presiding Judge's rejection of California Parties' "unconscionable margin" theory of bad faith or duress, explaining that, pursuant to *Morgan Stanley*, "bilateral, market-based contracts should not be voided on the basis of gross margins as that would be 'a reinstatement of cost-based rather than contract-based regulation.'"<sup>156</sup>

81. The Commission also affirmed that California Parties had not shown that either TransCanada or Coral engaged in undue discrimination against CERS. The Commission found that the Presiding Judge conscientiously weighed the evidence 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 Commission concurred with the Presiding Judge that CERS was uniquely situated in a number of material ways including "the requirement for CERS to obtain the energy critical to reliable [CAISO] operation, credit risk issues, and the sheer volume of the energy purchases, factors which can legitimately impact prices."<sup>157</sup> Further, the Commission found that Dr. Fox-Penner's statistical analyses, offered in support of California Parties' undue discrimination arguments, did not sufficiently control for the differences between buyers or account for other critical factors that could affect price. Thus, the Commission affirmed that these analyses do not show undue discrimination, but only that different sellers charged different amounts to different buyers.<sup>158</sup>

82. In addition, the Commission affirmed the Presiding Judge's finding that California Parties had not demonstrated that Coral possessed or exercised market power. The Commission found that Dr. Reynolds' analyses were not seller specific and did not identify specific contracts that were directly affected by an exercise of market power. The Commission explained that 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*, the Commission found that the Presiding Judge's conclusions regarding the hub-and-spoke test are not

---

<sup>156</sup> Initial Decision, 146 FERC ¶ 63,028 at P 1700 (quoting *Morgan Stanley*, 554 U.S. at 550).

<sup>157</sup> Opinion No. 537, 151 FERC ¶ 61,173 at P 185 (citing Initial Decision, 146 FERC ¶ 63,028 at P 1424).

<sup>158</sup> *Id.* PP 185-189.

relevant to the question of whether California Parties presented evidence sufficient to show that the *Mobile-Sierra* presumption should not apply.<sup>159</sup>

**b. California Parties Rehearing Request**

83. California Parties challenge the Commission's rejection of their argument that TransCanada engaged in bad faith.<sup>160</sup> California Parties dispute the Commission's finding that California Parties did not allege bad faith separately from its allegations of duress and fraud. California Parties assert that its testimony and briefs clearly demonstrate that California Parties were alleging only bad faith.<sup>161</sup> California Parties argue that, for purposes of avoiding the *Mobile-Sierra* presumption, the Utah law definition of bad faith, which was adopted by the Commission, includes the intention by one party to take unconscionable advantage of others. California Parties aver that they demonstrated that TransCanada took unconscionable advantage of CERS by extracting unreasonable contract terms when TransCanada knew that CERS had no meaningful alternative.<sup>162</sup>

84. California Parties defend the *Power Markets Week\_high price + \$75* screen used by Mr. Taylor to show that TransCanada's contracts with CERS were tainted by bad faith. California Parties dispute the Commission's finding that this screen was simply about identifying high prices and claim that it is a price comparison that can discern exploitive conduct. California Parties assert that, because the screen identified only those prices charged to CERS that were higher than the already inflated prevailing market prices, the screen showed that TransCanada took advantage of CERS by charging a price that TransCanada knew CERS could not reject. Further, California Parties argue that the Commission ignored the impact that the continuing threat of blackouts exerted on CERS in its dealings with TransCanada. California Parties contend that their evidence

---

<sup>159</sup> *Id.* PP 165-167. The Commission also noted 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 declined to make additional findings on this issue. *Id.* P 168.

<sup>160</sup> California Parties Rehearing Request at 92.

<sup>161</sup> *Id.* at 93.

<sup>162</sup> *Id.* at 94-95.

demonstrated that TransCanada took advantage of CERS' position by parking day-ahead energy and holding it for real time to increase its price leverage over CERS.<sup>163</sup>

85. California Parties argue that the Commission erred by rejecting California Parties' calculation that TransCanada's gross margins averaged nearly 400 percent. California Parties reiterate their prior argument that all one needs to know to calculate margin is overhead, which does not vary with price. As such, California Parties claims that a price of \$50/MWh would have easily covered the overhead of a typical marketer, whereas they allege that TransCanada's average sales price to CERS was \$322/MWh. Further, California Parties assert that TransCanada's prices to CERS cannot be justified on the basis of opportunity costs because, during the relevant period, TransCanada sold in excess of 150,000 MWh to CERS, but less than 2,500 MWh to any other single buyer, thereby demonstrating that if any other buyer had been willing to pay more than CERS, TransCanada would have sold the power to the other buyer instead of CERS. Additionally, California Parties contend that record evidence demonstrates that TransCanada deliberately concealed from Canadian counterparties the fact that it was selling to CERS in order to "keep from diluting the rich opportunity."<sup>164</sup> California Parties also argue that the Commission was wrong to conclude that TransCanada could not have been acting in bad faith because it sometimes sold at a loss. California Parties maintain that the evidence showed that TransCanada only sold at a loss a handful of times but otherwise reaped excessive margins from its sales to CERS.<sup>165</sup>

86. California Parties disagree with the Commission's interpretation of *Morgan Stanley* and argue that *Morgan Stanley* does not stand for the proposition that an excessive contract price may never be the basis for a finding of bad faith in contract negotiation. According to California Parties, the Supreme Court's statement in *Morgan Stanley* that, "[a] presumption of validity that disappears when the rate is above marginal cost is not presumption of validity at all, but a reinstatement of cost-based rather than contract based regulation,"<sup>166</sup> means merely that a contract price exceeding marginal cost is not, by itself, proof that the *Mobile-Sierra* presumption is inapplicable. California

---

<sup>163</sup> *Id.* at 95-101.

<sup>164</sup> *Id.* at 104 (citing Ex. CAT-699 at 12, recounting a conversation in which a TransCanada trader asks a Portland General Electric Company trader to "retain the confidentiality of where [the energy] is actually going," because she wanted "it to look like it's delivering to [Portland General's] system.").

<sup>165</sup> *Id.* at 102-105.

<sup>166</sup> *Morgan Stanley*, 554 U.S. at 550.

Parties insist that the focus of Mr. Taylor's analysis was not the prices themselves, but was intended to show that margins were so excessive that they can only be attributed to the seller's intent and ability to take unconscionable advantage of a buyer with no reasonable alternative.<sup>167</sup>

87. California Parties also dispute the Commission's affirmation of the Presiding Judge's finding that Coral did not exercise market power because the Commission failed to consider all of the evidence in the record. California Parties maintain that, contrary to the Commission's findings,<sup>168</sup> Dr. Reynolds' regression analysis did provide seller-specific evidence concerning Coral's possession and exercise of market power. California Parties argue that Dr. Reynolds' conclusion that Coral's realization of higher prices for larger quantities sold was consistent with the exercise of market power cannot be dismissed as general conclusions about price trends because Dr. Reynolds' analysis was based on the volumes and prices of Coral's actual sales to CERS. Further, California Parties argue that the Commission ignored evidence presented by Mr. Taylor and Dr. Fox-Penner, which California Parties claim demonstrated that market power played a role in the prices paid by CERS in the Pacific Northwest, and that market dysfunction further enhanced seller market power.<sup>169</sup>

88. California Parties recognize that the Commission did not rely on California Parties' failure to perform a "hub-and-spoke" analysis as part of its market power allegations.<sup>170</sup> However, California Parties note that the Presiding Judge did rely on California Parties' failure to perform this analysis as the basis for rejecting California Parties' market power arguments.<sup>171</sup> California Parties assert that, because it is unclear whether the Commission still regards the hub-and-spoke test as a necessary predicate for showing market power in this proceeding, California Parties contend that any reliance on the hub-and-spoke test must take into account the Ninth Circuit's remand in *Harris*. California Parties state that in *Harris*, the Ninth Circuit explained that, in considering the issue of refund liability for quarterly reporting violations, the Commission must "consider claims and evidence beyond the hub-and-spoke analysis."<sup>172</sup> As a result of the Ninth

---

<sup>167</sup> California Parties Rehearing Request at 106-107.

<sup>168</sup> *Id.* at 144 (citing Opinion No. 537, 151 FERC ¶ 61,173 at PP 1386, 1428-30).

<sup>169</sup> *Id.* at 143-147.

<sup>170</sup> *Id.* at 147 (citing Opinion No. 537, 151 FERC ¶ 61,173 at P 165).

<sup>171</sup> *Id.* (citing Initial Decision, 146 FERC ¶ 63,028 at PP 1429-30).

<sup>172</sup> *Id.* at 148 (citing *Harris*, 784 F.3d at 1275).

Circuit's holding, California Parties assert that the Presiding Judge's reliance on the hub-and-spoke test must be reversed on rehearing. California Parties request that, on rehearing, the Commission confirm that: (1) California Parties' market power claims are not dependent on whether they have performed a hub-and-spoke analysis; and (2) direct evidence can be used to prove Coral's exercise of market power.<sup>173</sup>

89. California Parties also question the Commission's finding that California Parties' argument that the Presiding Judge improperly conflated market fundamentals with legitimate business behavior is irrelevant.<sup>174</sup> First, California Parties state that they did not intend to limit their evidence and testimony regarding market fundamentals to just market power claims. Next, California Parties argue that this evidence is relevant because the Presiding Judge cited Mr. Hogan's "market fundamentals" analysis in finding that California Parties had not demonstrated unlawful market activity by TransCanada, and only limited unlawful market activity by Coral. Lastly, California Parties contend that the Commission took Respondents' market fundamentals claims at face value without sufficiently addressing the California Parties' countervailing arguments and evidence.<sup>175</sup>

90. In addition, California Parties argue that the Commission erred by affirming the Presiding Judge's finding that Coral and TransCanada did not unduly discriminate against CERS. California Parties claim that Opinion No. 537 ignores evidence that unequivocally demonstrates undue price discrimination and gives undue weight to claims that this discrimination was justified by credit or regulatory risk. California Parties assert that the Commission's conclusion that discrimination in this case can be justified due to CERS' uniqueness ignores the reality that it was CERS' uniqueness that made it possible to engage in the discrimination in the first place. California Parties contend that the Commission's traditional standard for evaluating price discrimination is less well suited for market-based rates than cost-based rates because, in a market-based rate environment, such discrimination would be more difficult to detect. Thus, California Parties argue that new tools, such as Dr. Fox-Penner's matching and standard deviation analyses are required for analyzing the existence of undue discrimination.<sup>176</sup>

---

<sup>173</sup> *Id.* at 149.

<sup>174</sup> *Id.* (citing Opinion No. 537, 151 FERC ¶ 61,173 at P 167).

<sup>175</sup> *Id.* at 149-151.

<sup>176</sup> *Id.* at 151-152.

91. California Parties argue that, in concluding that Coral did not engage in undue discrimination against CERS, Opinion No. 537 does not reach evidence of Coral's actual prices. California Parties assert that evidence showed that Coral charged an average premium of \$211/MWh more than it charged other purchasers for short-term, day-of energy. California Parties claim that the Commission erred by relying on a threshold judgment that CERS was uniquely situated because, according to California Parties, CERS was similarly situated to every other buyer with the exception that it was more vulnerable as a buyer of last resort. Further, California Parties argue that the Commission erred in its concurrence with the Initial Decision that Dr. Fox-Penner's analysis failed to control for critical factors. California Parties aver that Dr. Fox-Penner presented a detailed analysis of the following attributes of the CERS and non-CERS transactions that he compared to reach his conclusions: (1) the analysis compared the same products – hourly energy purchased in the day-of market under the WSPP Agreement; (2) quantity of purchases, which showed that Coral charged CERS a higher price for a given quantity, whereas larger transaction sizes were related to higher prices charged to all counterparties; (3) times of transaction, which, according to Dr. Fox-Penner, had little practical consequence; (4) duration of the transaction, which were often comparable;<sup>177</sup> (5) credit risk, which Dr. Fox-Penner denied could justify the price differentials observed; and (6) location, which compared sales at different locations by adding a factor for congestion. California Parties argue that this analysis demonstrates that in at least 595 hours, Coral charged CERS a price well beyond what Coral was charging other buyers or well beyond the prevailing market prices for that day. California Parties contend that the prices charged by Coral to CERS cannot be justified by non-cost considerations.<sup>178</sup>

92. California Parties also argue, for the same reasons discussed above with respect to Coral, that the Commission erred by finding that TransCanada did not unduly discriminate against CERS. In addition, California Parties contend that the Commission incorrectly rejected Dr. Fox-Penner's standard deviation analysis as applicable to TransCanada. California Parties recognize that the use of this type of standard deviation analysis to show undue price discrimination presents an issue of first impression for the Commission. California Parties aver that this analysis shows that in a short-term, bilateral market where there may be a limited number of matched transactions by a given seller, the price charged to one buyer should be compared to all the market prices charged to the same class of buyers in order to determine whether undue discrimination existed.

---

<sup>177</sup> *Id.* at 163 (citing Fox-Penner Rebuttal Testimony, Ex. No. CAT-413 at 19, demonstrating that 65 percent of the matching hours included at least one exact match or a match of comparable durations).

<sup>178</sup> *Id.* at 157-168.

California Parties contend that, under this analysis, a transaction can be compared against the entire relevant market, and would be found discriminatory only if it were significantly outside of the expected price distribution for the same product.<sup>179</sup>

93. In addition, California Parties defend the matching methodology used by Dr. Fox-Penner. California Parties describe the matching methodology employed by Dr. Fox-Penner to compare sales by Respondents to CERS and non-CERS buyers and determine a “CERS premium,” which is the difference between matched CERS and non-CERS transactions. In cases where Dr. Fox-Penner could not find an exact match, California Parties assert that Dr. Fox-Penner made appropriate adjustments to account for factors such as different locations to ensure comparability between the transactions. California Parties explain that Dr. Fox-Penner used a \$50/MWh threshold for the CERS premium to identify instances of undue discrimination. California Parties argue that the Commission’s insistence on a strict matching approach would make it nearly impossible to detect price discrimination in short-term, bilateral markets.<sup>180</sup>

94. California Parties argue that the Commission erred by rejecting the regression analysis and long-run marginal cost analysis performed by Dr. Fox-Penner. California Parties note that these analyses were intended to corroborate the results of the standard deviation and matching analyses, and not as a stand-alone measure of undue discrimination. California Parties contend that these analyses showed that the price differentials identified by Dr. Fox-Penner through the other analyses could not be explained by Respondents’ costs or justified on economic efficiency grounds. California Parties assert that none of the opposing testimony cited in the Initial Decision, and affirmed by Commission,<sup>181</sup> undertook independent analysis comparable to Dr. Fox-Penner’s and therefore deserve little weight.<sup>182</sup>

**c. Commission Determination**

95. We deny rehearing. With the exception of the contracts between Coral and CERS that are the subject of the Commission’s remand to the Presiding Judge, as discussed above, we continue to find California Parties failed to demonstrate unlawful activity that

---

<sup>179</sup> *Id.* at 171-173.

<sup>180</sup> *Id.* at 174-176.

<sup>181</sup> *Id.* at 179 (citing Initial Decision, 146 FERC ¶ 63,028 at P 1426; Opinion No. 537, 151 FERC ¶ 61,173 at PP 185-89).

<sup>182</sup> *Id.* at 176-179.

directly affected the contract rate for the remainder of contracts at issue here between CERS and Respondents. As a result, the *Mobile-Sierra* presumption of just and reasonable rates applies to these contracts.

96. We affirm the Commission's prior finding that California Parties failed to show that TransCanada engaged in bad faith negotiations with CERS. We reject California Parties' contention that they clearly alleged bad faith separately from fraud or duress. Mr. Taylor's *Power Markets Week* high price + \$75 screen, the primary evidence offered in support of this theory of liability, made no attempt to distinguish between fraud, bad faith, or duress. Moreover, the evidence from testimony and briefings, cited by California Parties in their rehearing requests to demonstrate that they were independently alleging bad faith, consists of a mere three statements.<sup>183</sup> Even if these three statements constitute separate allegations of bad faith, California Parties made no effort to show how any of TransCanada's behavior satisfied the factors identified in the *Valcarce* test, as discussed above. With respect to the two clear allegations of bad faith identified in the Initial Decision, the Presiding Judge explained that TransCanada presented un rebutted evidence that these transactions were consistent with TransCanada's typical business practices and did not constitute an attempt to defraud CERS.<sup>184</sup>

97. Further, we are not persuaded by California Parties' defense of Mr. Taylor's screen as being about more than high prices. As noted in Opinion No. 537, simply showing that prices charged to CERS exceeded a certain benchmark, or alleging that TransCanada earned excessive margins on those sales, "ignores critical factual circumstances surrounding the transactions between CERS and TransCanada, and also fails to reflect the market volatility of prices at that time."<sup>185</sup> California Parties' attempt to impute nefarious intent to the prices shown by Mr. Taylor's screen also fails because the Presiding Judge reviewed the trader tapes, submitted by TransCanada, for every

---

<sup>183</sup> *Id.* at 93 (citing Tr. 2441:14-18 ("to the degree that TransCanada was charging a price in excess of ... the benchmark ... that's evidence at least of bad faith"); California Parties, December 16, 2013 Initial Brief, Docket No. EL01-10-85, at 40 ("Given the unconscionable margins that TransCanada was earning in its sales to CERS, it would be unreasonable to classify TransCanada's behavior as anything short of bad faith"); California Parties, January 28, 2014 Reply Brief, Docket No. EL01-10-85, at 27 ("price gouging at this level constitutes bad faith").

<sup>184</sup> Opinion No. 537, 151 FERC ¶ 61,173 at P 147 (citing Initial Decision, 146 FERC ¶ 63,028 at PP 1392-1393).

<sup>185</sup> *Id.* P 148.

TransCanada transaction with CERS during the relevant period and found no evidence that contract negotiations were tainted by fraud, bad faith, or duress.<sup>186</sup>

98. For similar reasons, we remain unpersuaded by California Parties' emphasis on the margins earned by TransCanada. Thus, even if California Parties' calculation of TransCanada's average margins were accurate, this evidence does not, by itself, demonstrate that TransCanada negotiated in bad faith with CERS. California Parties concede that *Morgan Stanley* stands for the proposition that a contract price that exceeds marginal cost is not, by itself, sufficient to avoid the *Mobile-Sierra* presumption. Therefore, because California Parties have offered evidence of nothing more than the prices charged to CERS and the margins earned by TransCanada, we find that California Parties have not shown that TransCanada engaged in bad faith.

99. We continue to find that California Parties failed to show that Coral exercised market power. Contrary to California Parties' claims that the Commission did not consider all the evidence in the record, both the Presiding Judge and the Commission considered Dr. Reynolds' regression analyses and concluded that these tests did not provide seller-specific evidence that Coral possessed or exercised market power.<sup>187</sup> As the Presiding Judge explained, the regression analyses included market participants who never were or who are no longer parties to this proceeding. Thus, we find that Dr. Reynolds' analysis relied on data that was not limited to Coral's market behavior. Further, we find that California Parties' continued reliance on Dr. Reynolds' testimony that Coral charged higher prices for higher volumes is misplaced. Even taking into account that Dr. Reynolds' conclusions are based on Coral's actual sales volumes and prices, we agree with the Commission's finding in Opinion No. 537 that this testimony amounts to little more than "general conclusions about price trends,"<sup>188</sup> and does not constitute direct evidence of market power.

100. Although Opinion No. 537 did not mention by name the testimonies of Mr. Taylor and Dr. Fox-Penner on the issue of market power, the Commission did expressly reject California Parties' argument that the market structures and rules at the time provided opportunities for the exercise of market power.<sup>189</sup> The testimonies of Mr. Taylor and

---

<sup>186</sup> *Id.* P 147.

<sup>187</sup> Initial Decision, 146 FERC ¶ 63,028 at PP 1428-1429; Opinion No. 537, 151 FERC ¶ 61,173 at PP 165-66

<sup>188</sup> Opinion No. 537, 151 FERC ¶ 61,173 at P 165.

<sup>189</sup> *Id.* P 166.

Dr. Fox-Penner dealt primarily with this type of market dysfunction, and we continue to find that the Presiding Judge appropriately gave this evidence no weight for the purpose of demonstrating that Coral exercised market power. As the Commission explained in Opinion No. 537, “[t]he *Mobile-Sierra* inquiry is not about whether market dysfunction exists that would provide opportunities for unlawful activity, but whether a specific seller actually did engage in unlawful activity that directly affected a contract rate.”<sup>190</sup> Thus, we affirm the Commission’s conclusion that California Parties failed to demonstrate that Coral exercised market power in its dealings with CERS.

101. We find no need to further clarify, in this proceeding, whether California Parties’ market power claims were dependent on a hub-and-spoke analysis or whether direct evidence can be used to show the exercise of market power. California Parties were afforded the opportunity to prove the exercise of market power through direct evidence, but simply failed to do so because “Dr. Reynolds’ analyses were not seller specific and did not identify specific contracts that were directly affected by the exercise of market power.”<sup>191</sup> Moreover, in its repeated statements as to the reasons for excluding evidence of quarterly reporting violations, the Commission expressly affirmed that if “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.”<sup>192</sup> Thus, there can be no question that a refund claimant can use direct evidence to prove the exercise of market power. As such, we will not further address the continuing relevance of the hub-and-spoke analysis in light of the Ninth Circuit’s *Harris* decision.<sup>193</sup>

102. Regarding California Parties’ market fundamentals arguments, we continue to find that, even if California Parties did not intend to limit this evidence to its market power claims, the evidence they offered to show that market fundamentals were not the primary cause of high prices does not support a contract-specific analysis of whether any unlawful market activity by either Coral or TransCanada directly affected their contracts with CERS. Further, specifically in reference to California Parties’ market power allegations, Respondents were not required to show legitimate business reasons for their behavior

---

<sup>190</sup> *Id.* P 166 (quoting *Morgan Stanley*, 554 U.S. at 547).

<sup>191</sup> *Id.* P 165.

<sup>192</sup> *Id.* P 44 (citing Order on Rehearing, 143 FERC ¶ 61,020 at P 24).

<sup>193</sup> As noted above, since the issuance of Opinion No. 537, the Commission has issued an order establishing hearing and settlement judge procedures in response to the Ninth Circuit’s remand.

because California Parties failed to present any seller-specific analysis or other direct evidence that either Respondent possessed or exercised market power.<sup>194</sup>

103. We continue to find that California Parties failed to prove that Coral or TransCanada engaged in undue price discrimination in their contracts with CERS. California Parties maintain the untenable position that CERS was, at the same time, both unique and similarly situated to other buyers in the Pacific Northwest spot market. As explained in Opinion No. 537, California Parties' position overlooks critical differences between CERS and other buyers. Most notably, California Parties refuse to acknowledge the abundant record evidence showing that transacting with CERS involved a significant actual or perceived credit risk, which was not accounted for in Dr. Fox-Penner's hindsight analysis of credit risk.<sup>195</sup> The Commission also noted record evidence showing that CERS was uniquely situated in a number of other material ways, including the fact that CERS was required to procure the energy critical to reliable CAISO operations and the sheer volume of CERS' energy purchases.<sup>196</sup> We affirm the Commission's conclusions regarding these important differences and find that California Parties have not produced any arguments on rehearing to rebut these conclusions.

104. We are not persuaded by California Parties' repeated arguments that the Commission's current standards and tests are inadequate for detecting undue price discrimination in the context of market-based rates. California Parties provide no support for their argument that new tools are necessary, other than a speculative and unsupported claim that "the forms of discrimination may be more invidious and ... difficult to detect" in the context of market-based rates.<sup>197</sup> Moreover, we find that the Commission expressly considered and properly rejected Dr. Fox-Penner's various statistical analyses because they showed "only that different sellers charged different amounts to different buyers."<sup>198</sup> The Commission correctly found that these analyses did not control for important variables that could justify differences in prices. For example, as noted in Opinion No. 537, Dr. Fox-Penner acknowledged that he did not consider risks such as the

---

<sup>194</sup> We note that this reasoning applies with equal force to California Parties' allegations of undue discrimination against Coral and TransCanada, as well as California Parties allegations of bad faith against TransCanada.

<sup>195</sup> See Opinion No. 537, 151 FERC ¶ 61,173 at P 186.

<sup>196</sup> *Id.* PP 185-186.

<sup>197</sup> California Parties Rehearing Request at 152.

<sup>198</sup> Opinion No. 537, 151 FERC ¶ 61,173 at P 187.

time between when an agreement was reached and when energy was delivered.<sup>199</sup> We find that the Commission did not err by not addressing Coral's actual prices because, due to the indicated flaws in Dr. Fox-Penner's "matching" methodology and standard deviation analysis, California Parties failed to prove that price differences could not be justified by other factors. On rehearing, California Parties do not offer any persuasive arguments that Dr. Fox-Penner's analyses did control for critical factors such as duration of transaction or credit risk, but generally repeat arguments from their brief on exceptions that the Commission has already considered and rejected.

105. Further, we find that California Parties continue to ignore that Dr. Fox-Penner's standard deviation methodology cannot, by definition, show that TransCanada treated similarly situated classes of customers differently. Rather than rebutting the Commission's finding that the standard deviation methodology "(1) compares TransCanada sales to CERS to sales made by parties other than TransCanada, and (2) it does not compare similar products,"<sup>200</sup> California Parties advocate for the suitability of the standard deviation methodology for evaluating discrimination in the context of short-term, bilateral markets due to the limited number of matched transactions by any given seller. However, even assuming *arguendo* that we accepted California Parties' arguments in favor of the matching and standard deviation methodologies, California Parties simply fail to offer compelling evidence that the so-called "matched" transactions represent valid and unbiased comparisons that account for all relevant factors. As noted above, in identifying "matched" transactions, Dr. Fox-Penner did not control for important variables such as the duration of the transactions, the timing of the agreements, and credit risk. Thus, price differences between the transactions that were compared do not, by themselves, support a finding of undue discrimination.

106. We disagree with California Parties' contention that the Commission erred by rejecting Dr. Fox-Penner's regression and long-run marginal cost analyses. As acknowledged by California Parties in their rehearing request, Dr. Fox-Penner's regression analysis was designed to account for factors that influence a seller's costs.<sup>201</sup> However, as the Presiding Judge found, and the Commission affirmed, factors other than the seller's costs, such as the duration of the transaction, the time between agreement and delivery, and credit risk, can justify price differences. California Parties have not presented any compelling evidence to demonstrate that Dr. Fox-Penner's regression

---

<sup>199</sup> *Id.* P 187 (citing Ex. TRC-77 at 7:7-8:17; Ex. TRC-79 at 2-3, 5-8).

<sup>200</sup> *Id.* P 188.

<sup>201</sup> *See* California Parties Rehearing Request at 177 (citing Fox-Penner Rebuttal Testimony, Ex. CAT-413 at 38).

analysis accounted for factors other than the seller's costs and therefore we find that the Commission correctly rejected this test as corroborating evidence that Respondents unduly discriminated against CERS. Dr. Fox-Penner's marginal cost comparisons fail for similar reasons. The Commission fully understood that California Parties offered the marginal cost analysis to corroborate their undue discrimination claims, but nevertheless found that: (1) this evidence was discredited by other witnesses; and (2) comparing a contract price to this benchmark shows merely that prices charged to CERS exceeded sellers' marginal costs.<sup>202</sup> We continue to find that the marginal cost analyses do not corroborate California Parties' undue discrimination claims because they do not compare prices charged by a seller to different buyers and do not account for non-cost factors that could justify price differences.

**3. Excessive Burden/Serious Harm to the Public Interest**

**a. Opinion No. 537**

107. The Commission affirmed 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, and therefore did not satisfy their burden to overcome the *Mobile-Sierra* presumption. The Commission rejected 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 Commission found that California Parties' reliance on an aggregate estimate of harm amounts to little more than a generalized claim that prices were too high, and emphasized that the Commission had expressly rejected this approach.<sup>203</sup>

---

<sup>202</sup> Opinion No. 537, 151 FERC ¶ 61,173 at P 189.

<sup>203</sup> *Id.* PP 215-218 (citing 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.”); April 5 Rehearing Order, 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*.”)).

108. Additionally, the Commission found that the Presiding Judge did not misapply or misunderstand the purpose of the MMCP evidence proffered by California Parties. The Commission explained, for the same reasons articulated in response to Seattle's MMCP evidence,<sup>204</sup> that the MMCP is simply not an appropriate benchmark for just and reasonable rates in this proceeding. Further, the Commission found that 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.<sup>205</sup>

**b. California Parties Rehearing Request**

109. California Parties argue that the Commission erred by finding that California Parties failed to overcome the *Mobile-Sierra* presumption and contend that they proved that the contract rates adversely affected the public interest. California Parties catalog the evidence previously submitted, and noted in the Initial Decision, which shows that the Western Energy Crisis had far-reaching adverse impacts. California Parties estimate that the burden on consumers would have been \$4.97 billion if the State had immediately passed through the cost of CERS' electricity costs to consumers instead of issuing bonds to pay for these purchases. California Parties note that the Presiding Judge acknowledged that spreading these costs over 20 years through the bond issuance "did not eliminate the economic burden to consumers, but merely mitigated it."<sup>206</sup>

110. California Parties aver that record evidence in this proceeding shows that the burden to consumers must be analyzed by examining the overall impact of the Western Energy Crisis, instead of focusing on specific contracts between CERS and Respondents. Specifically, California Parties point to testimony by Professor Berck, in which he argued that it is not economically or logically reasonable to attempt to disaggregate the harm and then find that any one seller's contribution to the harm is too small to consider. California Parties assert that Professor Berck's testimony was unrebutted and claim that the Commission ignored this evidence in Opinion No. 537.<sup>207</sup>

---

<sup>204</sup> *Id.* PP 73-76.

<sup>205</sup> *Id.* P 219.

<sup>206</sup> California Parties Rehearing Request at 37-38 (quoting Initial Decision, 146 FERC ¶ 63,028 at P 1728).

<sup>207</sup> *Id.* at 39-41.

111. California Parties contend that *Morgan Stanley*, contrary to the Commission's interpretation, did not speak to the issue of how to measure harm to the public interest from a large number of short term contracts between a buyer and a group of sellers. Thus, California Parties argue that the Commission misread *Morgan Stanley* and attempted to make it stand for an issue the Supreme Court never decided. California Parties assert that considering the impact of each spot contract in isolation makes no sense because they were not entered into in isolation nor was their impact felt in isolation. California Parties note that the Presiding Judge recognized, and the Commission did not refute, that the Western Energy Crisis imposed an enormous burden on consumers. California Parties contend that this admission is inseparable from the conclusion that rates charged during the Crisis imposed an enormous burden. Further, California Parties reiterate that a contract-by-contract approach would ensure that no matter how severe the harm to the public interest, the Commission could never find the presumption overcome in the context of short-term contracts.<sup>208</sup>

112. California Parties argue that the Commission ignored the FPA's mandate that all rates and charges, even aggregated rates, must be just and reasonable, as well as decades of *Mobile-Sierra* case law that demonstrates that aggregate harm from contracts can overcome the *Mobile-Sierra* presumption. California Parties assert that, in cases like this, where the harm was to third-party consumers, the Commission must analyze harm to consumers in a manner that allows it to protect consumers.<sup>209</sup> California Parties again cite cases, including *Texaco Inc.*, *TAPS*, *Arizona Corp. Commission*, and *ISO New England Inc.*,<sup>210</sup> for the proposition that the *Mobile-Sierra* presumption may be overcome based upon a showing of overall and/or generalized harm of many different types. California Parties argue that here, like the contracts at issue in *TAPS* and *Arizona Corp. Commission*, the CERS contracts were all affected by the intervening circumstances of the Western Energy Crisis. Thus, California Parties maintain that the *Mobile-Sierra* doctrine permits generalized findings of public interest for purposes of overcoming the presumption.<sup>211</sup>

---

<sup>208</sup> *Id.* at 42-48.

<sup>209</sup> *Id.* at 48-50 (citing *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 175 (2010) (explaining that the *Mobile-Sierra* doctrine “does not overlook third-party interests; it is framed with a view to their protection ... .”)).

<sup>210</sup> 143 FERC ¶ 61,150, at PP 160-98 (2014) (*ISO New England*).

<sup>211</sup> California Parties Rehearing Request at 50-57.

113. California Parties assert that the Commission mistakenly found in Opinion No. 537 that those cases are inapplicable here because they involve public interest findings made in the context of rulemaking proceedings. California Parties contend that *Texaco* does not stand for the proposition that there are different standards for overcoming the *Mobile-Sierra* presumption for rulemakings and adjudicatory proceedings. Further, California Parties assert that in *Texaco*, the finding that a group of contracts would harm the public interest was sufficient to overcome the presumption.<sup>212</sup> California Parties also emphasize that the Commission was not required to examine whether individual contracts, standing alone, could threaten the public interest, because intervening circumstances affected an entire class of contracts in the same manner.<sup>213</sup> Similarly, California Parties argue that in *ISO New England*, the Commission modified, under the public interest standard, a contract based upon generic findings in Order No. 1000<sup>214</sup> concerning the overall impact that rights of first refusal could have on public utility customers.<sup>215</sup> California Parties assert that on rehearing of *ISO New England*, the Commission rejected arguments that the Commission failed to provide the particularized findings required to override a private contract.<sup>216</sup> Thus, California Parties claim that *ISO New England* shows that the Commission may conduct an analysis of harm to the public based on the impact of a group of contracts in either a rulemaking or adjudicatory proceeding.<sup>217</sup>

---

<sup>212</sup> *Id.* at 58-60 (citing *Texaco*, 148 F.3d at 1097).

<sup>213</sup> *Id.* (citing *TAPS*, 225 F.3d at 710-11; *Arizona Corp. Comm'n*, 397 F.3d at 954-56).

<sup>214</sup> *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

<sup>215</sup> California Parties Rehearing Request at 61-62 (quoting *ISO New England*, 143 FERC ¶ 61,150 at PP 174, 181).

<sup>216</sup> *Id.* at 62-63 (quoting *ISO New England Inc.*, 150 FERC ¶ 61,209, at PP 199, 202, 204).

<sup>217</sup> *Id.* at 61-63.

114. California Parties dispute the Commission's finding that California Parties' aggregate estimate of harm amounts to a generalized claim that prices were too high. California Parties point to the Supreme Court's finding in *Morgan Stanley* that the disparity between the contract rate and the rates consumers would have paid down the line can be so high as to amount to an excessive burden to argue that its aggregate estimate of harm is relevant to overcoming the *Mobile-Sierra* presumption.<sup>218</sup> Moreover, California Parties deny that they merely made generalized claims, and argue they presented particularized and largely unrefuted evidence that those rates harmed consumers, including evidence that California was required to take the unprecedented step of spreading those costs out over twenty years through the issuance of bonds. California Parties repeat their estimates of the aggregate harm that would have ensued if the State immediately passed through all sellers' alleged overcharges instead of issuing bonds.<sup>219</sup> Specifically, as noted above, California Parties estimate aggregate harm in the amount of \$4.97 billion. California Parties allege that, had this amount been passed through to consumers, personal income would have been reduced by \$15.19 billion, representing a loss of approximately 105,000 jobs. California Parties note that, when the analysis is limited to charges associated only with CERS' purchases in the Pacific Northwest, the aggregate harm would have been approximately \$2.11 billion, personal income would have been reduced by \$6.31 billion, representing a loss of approximately 44,300 jobs.<sup>220</sup>

115. California Parties also argue that the Commission erred by finding that the Supreme Court's statement in *Morgan Stanley* about exogenous circumstances<sup>221</sup> provides no basis for examining harm on an aggregate basis. California Parties assert that, to the extent a natural disaster or market manipulation by a third party impacted prices, it likely impacted all spot contracts similarly, supporting an analysis of overall harm. Further, California Parties claim that they did not rely on the exogenous circumstances reference for the proposition that the correct measure of harm is the aggregate harm from spot contracts. Rather, California Parties insist that they supported

---

<sup>218</sup> *Id.* at 64-65 (quoting *Morgan Stanley*, 554 U.S. at 552-53).

<sup>219</sup> *Id.* at 64-66.

<sup>220</sup> *Id.* at 66 (citing Berck Direct Testimony, Ex. CAT-267 at 4-5).

<sup>221</sup> *See Morgan Stanley*, 554 U.S. at 549 n.4 (explaining that "circumstances exogenous to contract negotiations, including natural disasters and market manipulation by entities not parties to the challenged contract" are relevant to whether the contracts impose an excessive burden).

the aggregate harm theory based on evidence submitted,<sup>222</sup> *Mobile-Sierra* precedent, and their analysis of the effect of a contract-by-contract analysis. However, California Parties assert that the Commission's refusal to permit California Parties to introduce evidence of market manipulation by third parties directly violates the Supreme Court's exogenous circumstances discussion. Finally, California Parties deny that the Commission's Long-Term Contracts Order,<sup>223</sup> which also addressed how exogenous circumstances factor into the *Mobile-Sierra* analysis, cannot provide any basis for refusing to consider the harm caused by the CERS' contracts as a whole.<sup>224</sup>

116. California Parties also argue that the Commission erred by finding that the Presiding Judge did not rely on irrelevant factors in her evaluation of harm. First, California Parties contend that it is irrelevant that the rates charged by other sellers to CERS were higher than those charged by Respondents. California Parties aver that the *Mobile-Sierra* doctrine requires only that the Commission consider whether the rates at issue burdened consumers and not whether the burden is higher or lower than that imposed by other sellers' rates. Second, California Parties assert that the rates charged by Respondents to other buyers are not relevant here because the impact on consumers that are not parties to this proceeding was not set for hearing, and the only relevant inquiry under *Mobile-Sierra* is whether the rates unjustly burdened the consumers who brought the complaint. Third, California Parties argue it is irrelevant that their \$4.97 billion estimate of aggregate harm includes harm caused by sellers, such as municipalities or federal utilities, that have never been subject to claims by California Parties of unlawful activity. To the contrary, California Parties emphasize that they have vigorously pursued claims against all the municipal utilities that sold power to California during the crisis. Also, California Parties note that they do not ask that Respondents refund amounts that other sellers charged. Fourth, California Parties argue that it is irrelevant whether other sellers caused some of the harm included in the aggregate figure because each of Respondent's contracts would only be modified by the amount they contributed to the overall harm. Thus, California Parties deny that considering aggregate harm would unfairly penalize Respondents for harm caused by others. Finally, California Parties argue that the Presiding Judge's consideration of these factors constitutes a violation of

---

<sup>222</sup> California Parties Rehearing Request at 67-68 (citing Florio Direct Testimony, Ex. CAT-001 at 4:6-9:23; Berck Direct Testimony, Ex. CAT-267 at 5:1-6:3).

<sup>223</sup> *Pub. Utils. Comm'n of Cal. v. Sellers of Long Term Contracts to the Cal. Dep't of Water Res.*, 150 FERC ¶ 61,079, at P 14 (2015) (Long-Term Contracts Order).

<sup>224</sup> California Parties Rehearing Request at 68.

due process because the Presiding Judge applied these new standards only after the hearing was over.<sup>225</sup>

117. Similar to arguments made by Seattle, California Parties argue that the Commission erred by finding that the MMCP is not an appropriate benchmark for just and reasonable rates in the Pacific Northwest. California Parties contend that, once the *Mobile-Sierra* presumption is overcome, then the Commission must determine whether the rates at issue are just and reasonable under the “normal” just and reasonable standard. California Parties claim that, with the presumption overcome, they presented compelling evidence through the use of the MMCP that Respondents’ contract rates were unjust and unreasonable. California Parties assert that it presented evidence that when CERS sold power purchased in the Pacific Northwest, at cost, to CAISO, the Commission found those rates to be unjust and reasonable and ordered refunds down to the MMCP.<sup>226</sup> California Parties assert that its witness, Dr. Berry, established that it makes sense to use the Commission-established MMCP to determine whether rates in the Pacific Northwest were unjust and unreasonable because, when the Commission applied a prospective West-wide cap, which was similar to the MMCP on prices, and gave sellers an opportunity to cost-justify higher prices, none did so. Further, California Parties again raise the issue of CAISO out-of-market purchases that were subsequently mitigated down to the MMCP and aver that these purchases were essentially the same as the purchases made by CERS. Thus, California Parties argue that they have demonstrated that Respondents’ sales to CERS were unjust and unreasonable if they exceeded the MMCP. California Parties contend that, because remedies are an issue for Phase II of the proceeding, that it would violate California Parties’ due process rights for the Commission to make any remedy determination at this point, including the determination that application of the MMCP to Respondents’ sales is an inappropriate remedy.<sup>227</sup>

**c. Commission Determination**

118. We deny rehearing. We continue to find that California Parties did not show that Respondents’ contracts with CERS imposed an excessive burden or seriously harmed the public interest, as required to overcome the *Mobile-Sierra* presumption.

---

<sup>225</sup> *Id.* at 68-76.

<sup>226</sup> *Id.* at 77 (citing Berry Direct Testimony, Ex. CAT-213 at 18-23 (citing July 25, 2001 Order, 96 FERC at 61,512)).

<sup>227</sup> *Id.* at 76-81.

119. Regardless of how harm is analyzed, California Parties have not presented evidence of actual harm. Rather, they offered a hypothetical analysis of the harm that would have occurred but for the bond program.<sup>228</sup> The Commission has previously specified that parties seeking refunds from contract rates that are protected by the *Mobile-Sierra* presumption “should submit actual data and not speculative modeling when presenting evidence”<sup>229</sup> about the “down the line” burdens imposed by the contracts at issue. Here, California Parties have only presented simulations about what would have happened had all of CERS’ energy purchase costs been immediately passed through to consumers, but their analysis provided no data about the actual cost to consumers of Respondents’ sales to CERS. Further, while California Parties presented evidence regarding hardships associated with the Western Energy Crisis, such as blackouts, they have not demonstrated that Respondents’ sales to CERS are responsible for causing those hardships. Thus, we reject California Parties’ claims that Opinion No. 537 ignored the evidence presented regarding harm to the public interest. To the contrary, Opinion No. 537 considered this evidence and concluded that it was insufficient to satisfy California Parties’ burden on this issue.<sup>230</sup>

120. We are not persuaded by California Parties’ repeated claims that they have demonstrated that the burden to consumers must be analyzed based on the overall impact of the Western Energy Crisis. While California Parties are correct that no Respondent witness rebutted Professor Berck’s testimony that the proper focus of the harm inquiry is the total amount of overcharges to CERS, California Parties ignore that their aggregate harm theory is inconsistent with the relevant *Mobile-Sierra* precedent. We reject California Parties’ contention that the Commission misinterpreted *Morgan Stanley* by extending *Morgan Stanley*’s contract-specific approach to analyzing the burden imposed by a long-term contract to the spot market context. The Ninth Circuit recently confirmed that “[t]he mere short-term nature of these spot sale contracts does render [the

---

<sup>228</sup> See, e.g., California Parties Rehearing Request at 37-38 (“In fact, Professor Berck determined the enormous impact on personal income and employment *had the State immediately passed through to consumers the \$4.97 billion full cost of CERS’ electricity purchases.*”; “Professor Berck testified that the immediate pass through of the overcharges *would have substantially harmed the California economy ...*”) (emphasis added).

<sup>229</sup> *Nev. Power Co.*, 125 FERC ¶ 61,312, at P 23 (2008).

<sup>230</sup> Opinion No. 537, 151 FERC ¶ 61,173 at P 215.

Commission's] application of the *Mobile-Sierra* doctrine unreasonable.”<sup>231</sup> Moreover, as discussed above,<sup>232</sup> when a party seeks unilaterally to reform a bilaterally negotiated contract that is subject to the *Mobile-Sierra* presumption, the focus of the *Mobile-Sierra* inquiry is the contract rate negotiated between that buyer and a seller, and not the cumulative impact of the prices paid by one buyer to multiple sellers.<sup>233</sup> The Commission has consistently rejected a cumulative impact approach in this proceeding.<sup>234</sup>

121. We also reject California Parties' interpretation of cases such as *Texaco*, *TAPS*, *Arizona Corp. Commission*, and *ISO New England* as permitting the abrogation of the contracts at issue here based on aggregate harm. As explained above in reference to Seattle's excessive burden arguments,<sup>235</sup> these cases are simply inapposite as to the question of excessive burden or serious harm to the public interest in this context.

122. We affirm the Commission's prior finding that “California Parties' reliance on an aggregate estimate of harm amounts to little more than a generalized claim that prices were too high.”<sup>236</sup> We agree with California Parties that *Morgan Stanley* recognizes situations where the disparity between the contract rate and the rates consumers would have paid down the line but for the contract can be so high as to amount to an excessive burden.<sup>237</sup> However, as discussed above, we find that California Parties have not demonstrated that consumers were actually subject to such a burden under the circumstances here, but instead presented testimony about what would have happened had CERS' energy purchase costs been immediately passed through, rather than being spread over 20 years through the bond issuance. Moreover, California Parties' simulation

---

<sup>231</sup> *People of the State of Cal., ex rel., Kamala D. Harris v. FERC*, No. 13-71276, at 18 (9<sup>th</sup> Cir. 2015).

<sup>232</sup> *Supra* at P 48.

<sup>233</sup> *See Morgan Stanley*, 554 U.S. at 545.

<sup>234</sup> Opinion No. 537, 151 FERC ¶ 61,173 at PP 57-58, 215; *see also* 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 at P 30.

<sup>235</sup> *Supra* PP 49-52.

<sup>236</sup> Opinion No. 537, 151 FERC ¶ 61,173 at P 215.

<sup>237</sup> *Morgan Stanley*, 554 U.S. at 552-53.

of the hypothetical harm improperly includes sales to CERS by sellers other than Respondents and therefore presents distorted estimates of harm. Even so, as Trial Staff witness Ms. Radel testified, each California resident is paying \$0.27 per month for the aggregate alleged overcharges to CERS.<sup>238</sup> When the actual impact of the bond issuance is limited to the alleged overcharges by Respondents to CERS, that figure drops to \$0.069 per month.<sup>239</sup> We find that, even if the aggregate impact of the bond issuance is considered, the down the line burden imposed by the contracts is not of an excessive burden sufficient to overcome the *Mobile-Sierra* presumption.

123. We affirm the Commission's decision in Opinion No. 537 that exogenous circumstances do not provide a basis for evaluating harm on an aggregate basis and we reiterate the Commission's position that consideration of exogenous circumstances also does not eliminate the need to look at the burden imposed by specific contract rates.<sup>240</sup> Moreover, as the Commission clearly and consistently explained in this proceeding, generalized allegations of market dysfunction are not sufficient for overcoming the *Mobile-Sierra* presumption.<sup>241</sup> We therefore find that California Parties' reliance on exogenous circumstances for the proposition that the Commission was required to permit evidence of third-party market manipulation to demonstrate excessive burden is misplaced.

124. We continue to find that the Presiding Judge did not rely on irrelevant factors in her evaluation of whether California Parties had demonstrated excessive burden or serious harm to the public interest. As a threshold matter, we emphasize that the Presiding Judge's finding, and the basis for the Commission's affirmation of that finding, was California Parties' reliance on an aggregate estimate of harm, instead of providing evidence of the actual impact of specific contract rates.<sup>242</sup> The Commission has clearly articulated the burden California Parties must satisfy to overcome the *Mobile-Sierra*

---

<sup>238</sup> Initial Decision, 146 FERC ¶ 63,028 at P 1497 (citing Ex. S-15 at 21:17-22:8).

<sup>239</sup> *Id.*

<sup>240</sup> Opinion No. 537, 151 FERC ¶ 61,173 at P 216 (citing Long-Term Contracts Order, 150 FERC ¶ 61,079 at P 14).

<sup>241</sup> *See, e.g.*, Order on Remand, 137 FERC ¶ 61,001 at P 21 (“[G]eneral allegations of market dysfunction in the Pacific Northwest are an insufficient bases for overcoming the *Mobile-Sierra* presumption or finding it inapplicable.”).

<sup>242</sup> *See* Opinion No. 537, 151 FERC ¶ 61,173 at PP 215, 220.



presumption.<sup>243</sup> As stated in Opinion No. 537, “California Parties simply failed to make the required, contract-specific showings with respect to either Respondent.”<sup>244</sup> The Commission provided ample notice of the standard that would be applied and California Parties opted to take a different approach. Thus, we find that any consideration by the Presiding Judge of other factors related to the excessive burden question could not constitute a violation of California Parties’ due process rights. Further, due to California Parties’ erroneous reliance on a cumulative harm theory of burden, the Presiding Judge need not have made supplemental findings to justify the rates charged by TransCanada to CERS. Nevertheless, we continue to find that factors such as TransCanada’s volume of sales to CERS are relevant to the question of burden or harm, as stated in Opinion No. 537.<sup>245</sup>

125. We reject California Parties’ arguments related to use of the MMCP as a proxy for just and reasonable rates in the bilateral Pacific Northwest spot market. California Parties’ argument on rehearing is fundamentally flawed because California Parties did not overcome the *Mobile-Sierra* presumption, as discussed above. As acknowledged in Opinion No. 537, California Parties were not attempting to use the MMCP evidence to argue that the *Mobile-Sierra* presumption had been overcome.<sup>246</sup> Rather, California Parties started from the assumption that the *Mobile-Sierra* presumption had been overcome, and then offered the MMCP evidence to demonstrate that the rates were unjust and unreasonable under the “ordinary” just and reasonable standard.<sup>247</sup> However, because the Commission affirmed the Presiding Judge’s finding that California Parties had not overcome the *Mobile-Sierra* presumption, evidence about whether the rates

---

<sup>243</sup> Order Granting Interlocutory Appeal, 141 FERC ¶ 61,248 at P 15 (“In attempting to overcome the *Mobile-Sierra* presumption, any relevant evidence may be considered, including evidence that specific contract rates imposed an excessive burden on consumers.”); Order on Rehearing, 143 FERC ¶ 61,020 at P 30 (“the Commission must evaluate each seller’s conduct in relation to specific contract negotiations and/or whether the contract imposes an excessive burden on consumers. Moreover, we find that Cal Parties’ claims of uniformly higher prices amount to little more than a variation on claims of general market dysfunction, which have been previously rejected by the Supreme Court as a basis for overcoming *Mobile-Sierra*.”).

<sup>244</sup> Opinion No. 537, 151 FERC ¶ 61,173 at P 220.

<sup>245</sup> *Id.* P 218.

<sup>246</sup> *Id.* P 194.

<sup>247</sup> *Id.*

violated the “ordinary” just and reasonable standard is irrelevant.<sup>248</sup> In addition, for the same reasons discussed above in reference to Seattle’s MMCP arguments,<sup>249</sup> we reject California Parties’ repeated contention that the MMCP is an appropriate benchmark for just and reasonable rates in the Pacific Northwest.

126. Finally, we reject any suggestion by California Parties that the Commission violated their due process rights by making a remedy determination during Phase I of this proceeding. The Commission expressly stated in Opinion No. 537 that the determination of what constitutes a just and reasonable rate in the Pacific Northwest spot market would be a Phase II remedy issue, to the extent Phase II is necessary.<sup>250</sup> However, for all the reasons explained throughout this proceeding, we maintain that applying the MMCP to Respondents’ contracts with CERS is not an appropriate remedy.<sup>251</sup>

The Commission orders:

The requests for rehearing are hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

---

<sup>248</sup> We do not address whether California Parties are correct in their argument that after overcoming the *Mobile-Sierra* presumption the “ordinary” application of the just and reasonable standard applies.

<sup>249</sup> *Supra* PP 58-59.

<sup>250</sup> Opinion No. 537, 151 FERC ¶ 61,173 at P 219.

<sup>251</sup> *See* Order on Rehearing, 143 FERC ¶ 61,020 at P 30 (finding that claims of general market dysfunction cannot serve as the basis for a market-wide remedy in this case); *see also* Opinion No. 537, 151 FERC ¶ 61,173 at PP 73-76, 219.