

154 FERC ¶ 61,154  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

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

v.

Docket No. EL02-71-051

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

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

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

ORDER ON CLARIFICATION AND REHEARING

(Issued March 1, 2016)

1. In this order, we grant requests for clarification and clarify the scope of the evidentiary, trial-type hearing established in an order on remand<sup>1</sup> from the United States Court of Appeals for the Ninth Circuit (Ninth Circuit).<sup>2</sup> We also dismiss the alternative requests for rehearing as moot.

### **Background**

2. In the *Harris* Remand, the Ninth Circuit found that the Commission erred in limiting the scope of the inquiry to consideration of only market-share evidence.<sup>3</sup> The court stated that “[t]o fully consider whether a reported rate was just and reasonable, the agency must consider claims and evidence beyond the hub-and-spoke” market power screen.<sup>4</sup> The court also stated that the Commission must determine whether the California Parties’ claims have been resolved in other proceedings.

3. The Remand Order re-established a trial-type hearing before an administrative law judge (ALJ) to address whether any individual public utility seller’s violation of the Commission’s market-based rate quarterly reporting requirement led to an unjust and unreasonable rate for that particular seller in California during the 2000-2001 period. In the Remand Order, the Commission instructed that parties are not limited to presenting claims and evidence of market concentration based exclusively on the hub-and-spoke test; rather, consistent with the instructions from the *Harris* Remand, they are permitted to present alternative market power analyses.<sup>5</sup>

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<sup>1</sup> *State of Cal., ex rel. Bill Lockyer v. B.C. Power Exch. Corp.*, 153 FERC ¶ 61,137 (2015) (Remand Order).

<sup>2</sup> *People of the State of Cal., ex rel. Harris v. FERC*, 784 F.3d 1267 (9th Cir. 2015) (*Harris* Remand).

<sup>3</sup> *Id.* at 1274-75.

<sup>4</sup> *Id.* at 1275.

<sup>5</sup> Remand Order, 153 FERC ¶ 61,137 at P 4.

**Rehearing Requests**

4. The following parties filed requests for rehearing and clarification: the California Parties,<sup>6</sup> Mico Inc. (Mico), Allegheny Energy Supply Company, LLC (Allegheny), and TransCanada Energy Ltd. (TransCanada). TransCanada, Indicated Respondents,<sup>7</sup> and the California Parties filed answers.

5. In their rehearing request, the California Parties state that they are seeking clarification to, or in the alternative rehearing of, the scope of the hearing established in the Remand Order. The California Parties request that the Commission clarify that they are not limited to showing that individual violating sellers accumulated market power. The California Parties argue that pursuant to the Ninth Circuit mandate, the Commission is required to consider, in addition to the evidence of market power accumulation, market manipulation and other relevant evidence.<sup>8</sup> According to the California Parties, the Ninth Circuit required the Commission to consider any and all evidence, regardless of whether it relates to the possession of market power by the violating sellers.<sup>9</sup>

6. Further, the California Parties seek clarification that the evidence of market manipulation by settled sellers can be considered when evaluating relief from non-settled sellers.<sup>10</sup> The California Parties explain that although they do not seek additional relief from the settled sellers, the manipulation in which those parties engaged affected the market clearing price that all sellers received and therefore bears directly on the level of

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<sup>6</sup> The California Parties include the People of the State of California, ex rel. Kamala D. Harris, Attorney General, the Public Utilities Commission of the State of California, Pacific Gas and Electric Company, and Southern California Edison Company.

<sup>7</sup> The Indicated Respondents include MPS Merchant Services, Inc., Commerce Energy, Inc., Illinova Energy Partners, Inc., Shell North America (U.S.), L.P., TransCanada, Hafslund Energy Trading LLC, Mico, and Merrill Lynch Capital Services, Inc.

<sup>8</sup> California Parties at 7-8.

<sup>9</sup> *Id.* at 9.

<sup>10</sup> *Id.* at 10.

unlawful revenues that violating sellers obtained.<sup>11</sup> The California Parties argue that failing to consider such evidence would improperly reward sellers that violated their tariffs and failed to properly file quarterly reports, and could potentially allow such sellers to retain ill-gotten gains.<sup>12</sup>

7. On rehearing, TransCanada argues that, in Opinion No. 537,<sup>13</sup> the Commission expressly rejected the California Parties' attempts to avoid or overcome application of the *Mobile-Sierra* presumption to TransCanada's contracts with the California Energy Resources Scheduling Division of the California Department of Water Resources (CERS). Thus, TransCanada argues that the California Parties have fully litigated, in Docket No. EL01-10, their claims that TransCanada engaged in misconduct in the formation of its contracts with CERS and that TransCanada's contracts with CERS imposed an excessive burden on the public. TransCanada avers that the Commission's findings in Opinion No. 537 are final and, therefore, California Parties are precluded from re-litigating any of those issues here based upon the doctrines of *res judicata* or collateral estoppel.<sup>14</sup>

8. Further, TransCanada, Mico, and Allegheny argue that the Commission erred to the extent that paragraph 12 of the Remand Order exposes sellers in bilateral sales to CERS to potential refund liability based upon the misconduct of other sellers.<sup>15</sup> TransCanada observes that there is no suggestion in any of the relevant precedent that a bilateral contract protected by the *Mobile-Sierra* presumption can be overcome or avoided based upon the misconduct of an unaffiliated third party.<sup>16</sup> TransCanada argues that the *Harris* Remand distinguished between "clearinghouse sales" and bilaterally

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<sup>11</sup> *Id.* at 11.

<sup>12</sup> *Id.* at 12.

<sup>13</sup> *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity at Wholesale into Electric Energy and/or Capacity Markets in the Pacific Northwest, Including Parties to the Western Systems Power Pool Agreement*, Opinion No. 537, 151 FERC ¶ 61,173 (2015).

<sup>14</sup> TransCanada at 19-22.

<sup>15</sup> TransCanada at 10; Mico at 12 (citing Remand Order, 153 FERC ¶ 61,137 at P 12).

<sup>16</sup> TransCanada at 17-18.

negotiated sales pursuant to the Supreme Court's guidance in *Morgan Stanley*<sup>17</sup> concerning the limited avenues for overcoming or avoiding the protections afforded bilateral contracts under the *Mobile-Sierra* doctrine. TransCanada asserts that the Ninth Circuit limited its instruction that the Commission should examine the potential for refunds by sellers who benefitted from the misconduct of others to "clearinghouse sales" because an expansion of that ruling to bilateral contracts would contradict *Morgan Stanley*.<sup>18</sup>

9. Similarly, Mico and Allegheny contend that the presentation of evidence in support of vicarious liability or pricing umbrella theories would violate the doctrines of *res judicata* and collateral estoppel because the Commission has repeatedly rejected these types of claims by the California Parties. Mico and Allegheny note that, in an earlier phase of this proceeding, the California Parties presented a theory of refund liability under which sellers who did not manipulate the market would be held vicariously liable for the actions of the wrongdoers. Mico and Allegheny assert that the Presiding Judge's initial decision rejected this theory and concluded that "[t]he anticompetitive behavior of a seller cannot justify refunds against other sellers who did not engage in anticompetitive behavior, but nevertheless benefitted from the behavior."<sup>19</sup> Mico asserts that, while California Parties filed briefs on exceptions regarding these findings, the Commission affirmed the Initial Decision in all respects<sup>20</sup> and the California Parties did not seek rehearing. Thus, Mico contends that resolution of this issue is final.<sup>21</sup>

10. Mico and Allegheny also assert that the Commission rejected the California Parties' theory of vicarious liability in the context of bilateral contracts in *People of the State of California, ex rel. Edmund G. Brown v. Powerex Corp.*<sup>22</sup> Mico and Allegheny state that, in *Brown*, the Commission noted, and rejected, the California Attorney

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<sup>17</sup> *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1 of Snohomish County*, 554 U.S. 527 (2008) (Morgan Stanley).

<sup>18</sup> TransCanada at 14-16.

<sup>19</sup> Mico at 18 (quoting *State of Cal. ex rel. Lockyer v. Brit. Colom. Power Exch. Corp.*, 130 FERC ¶ 63,017, at P 215 (2010); Allegheny at 11.

<sup>20</sup> Mico at 19 (citing *State of Cal. ex rel. Lockyer v. Brit. Colom. Power Exch. Corp.*, 135 FERC ¶ 61,113, at PP 1, 49 (2011)).

<sup>21</sup> *Id.* at 18-19.

<sup>22</sup> 135 FERC ¶ 61,178, at PP 32-34 (2011) (*Brown*); *order denying reh'g*, 139 FERC ¶ 61,210 (2012).

General's contention that "sellers to CERS either possessed and exercised undue market power or were able to charge excessive rates to CERS under the 'pricing umbrella' created by sellers who did."<sup>23</sup> Further, Mico states that the Commission has also rejected the claim that the *Mobile-Sierra* presumption should not apply when the seller at issue failed to comply with quarterly reporting requirements.<sup>24</sup> Mico and Allegheny contend that these are final rulings and, as such, preclude further litigation under a vicarious liability or pricing umbrella theory.<sup>25</sup> Further, Mico asserts that, even if the *res judicata* and collateral estoppel doctrines did not apply here, the Commission's policy against relitigation of issues would bar consideration of the Commission's earlier rulings on this issue.<sup>26</sup>

## **Discussion**

### **Procedural Matters**

11. 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 PG&E, TransCanada, the Indicated Respondents, and California Parties.

### **Commission Determination**

12. First, we address the California Parties' requests to clarify the scope of the hearing. We clarify that the California Parties may present evidence on market manipulation and other evidence to the extent such evidence is relevant to the issue of "whether a just and reasonable price was charged by each seller, with specific attention to

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<sup>23</sup> Mico at 19-20; Allegheny at 9 (both quoting *Brown*, 135 FERC ¶ 61,178 at PP 59, 80).

<sup>24</sup> Mico at 20 (quoting *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity at Wholesale into Electric Energy and/or Capacity Markets in the Pacific Northwest, Including Parties to the Western Systems Power Pool Agreement*, 143 FERC ¶ 61,020, at P 18 (2013)) (*Puget Sound Energy II*).

<sup>25</sup> Mico at 21; Allegheny at 14.

<sup>26</sup> Mico at 21-22 (quoting *Pacific Gas & Elec. Co.*, 121 FERC ¶ 61,065, at P 40 (2007) ("in the absence of new or changed circumstances requiring a different result, it is contrary to sound administrative practice and a waste of resources to relitigate issues in succeeding cases once those issues have been finally determined.")).

whether reporting deficiencies masked manipulation or accumulation of market power.”<sup>27</sup> We reiterate that such evidence must be specific and the California Parties must clearly demonstrate the nexus between reporting deficiencies and manipulative conduct.<sup>28</sup>

13. We also clarify that the settled parties may be subpoenaed to testify as witnesses and may be subject to evidence production and data requests. Each such request will be subject to the Commission’s rules of discovery and evidence applicable to the ALJ proceedings.<sup>29</sup> In addition, the California Parties and other parties are not precluded from offering evidence involving the settled parties’ market behavior, provided such evidentiary submissions are relevant to the scope of the hearing and meet other applicable rules of evidence.<sup>30</sup>

14. With regard to the requests for rehearing filed by TransCanada, Mico, and Allegheny, we clarify that the Remand Order was not intended to re-open any issue that has already been the subject of a final Commission order. The Commission’s prior rulings rejecting the California Parties’ pricing umbrella theory are final<sup>31</sup> and therefore the Presiding Judge should not consider additional testimony or evidence on this theory of refund liability. Similarly, the Commission has determined that bilateral contracts entered into under the Western Systems Power Pool (WSPP) Agreement, such as the sales by TransCanada, Mico, and Allegheny to CERS, are protected by the *Mobile-Sierra* presumption.<sup>32</sup> Thus, in order to obtain refunds, the California Parties must show

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<sup>27</sup> *Harris Remand*, 784 F.3d at 1277; *see also* Remand Order, 153 FERC ¶ 61,137 at P 10.

<sup>28</sup> Remand Order, 153 FERC ¶ 61,137 at P 11.

<sup>29</sup> 18 C.F.R. §§ 385.401-.510 (2015).

<sup>30</sup> *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Servs.*, 135 FERC ¶ 61,183, at P 11 (2011).

<sup>31</sup> *See Cal. ex rel. Lockyer v. Brit. Colom. Power Exch. Corp.*, 130 FERC ¶ 63,017 at P 215; *Cal. ex rel. Lockyer v. Brit. Colom. Power Exch. Corp.*, 135 FERC ¶ 61,113 at PP 1, 49.

<sup>32</sup> *See, e.g., State of Cal., ex rel. Kamala D. Harris v. FERC*, 809 F.3d 491 (9<sup>th</sup> Cir. 2015), at 502, *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity at Wholesale into Electric Energy and/or Capacity Markets in the Pacific Northwest, Including Parties to the Western Systems Power Pool Agreement*, 137 FERC ¶ 61,001, at P 20 (2011) (*Puget Sound Energy, Inc. I*); *Brown*, 135 FERC ¶ 61,178 at P 77.

either that a seller (1) engaged in unlawful market behavior that directly affected a particular contract rate, or (2) that the contract rate imposed an excessive burden on consumers or seriously harmed the public interest.<sup>33</sup> Due to the contract-specific nature of the *Mobile-Sierra* analysis, the Commission has rejected the California Parties' attempts to obtain refunds for these bilateral contracts using a theory of vicarious liability.<sup>34</sup> As such, we will not permit the California Parties to relitigate the issue of vicarious liability in this proceeding. However, we emphasize that the California Parties may present any other legal theories and evidence to demonstrate that sellers who did not engage in manipulation were able, as a result of reporting deficiencies, to benefit from other sellers' manipulation, so long as any such issues have not been finally decided by the Commission in any related proceeding.

15. The Commission has also issued a final order finding that the California Parties were not able to satisfy their *Mobile-Sierra* burden with respect to TransCanada's sales to CERS. Specifically, the Commission found that the California Parties had not demonstrated that TransCanada engaged in fraud, bad faith, duress,<sup>35</sup> or undue discrimination.<sup>36</sup> The Commission also noted that California Parties did not even allege that TransCanada exercised market power.<sup>37</sup> Finally, the Commission found that the California Parties had not shown that the rates in the contracts between TransCanada and CERS imposed an excessive burden on consumers or seriously harmed the public interest.<sup>38</sup> Accordingly, the Presiding Judge should not consider any new evidence on claims that were raised, or could have been raised, by the California Parties against TransCanada in the proceeding in Docket No. EL01-10.

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<sup>33</sup> *Morgan Stanley*, 554 U.S. at 547, 550-51.

<sup>34</sup> *Brown*, 135 FERC ¶ 61,178 at P 33.

<sup>35</sup> Opinion No. 537, 151 FERC ¶ 61,173 at PP 145-148; *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity at Wholesale into Electric Energy and/or Capacity Markets in the Pacific Northwest, Including Parties to the Western Systems Power Pool Agreement*, 153 FERC ¶ 61,386, Opinion No. 537-A, at PP 96-98 (2015).

<sup>36</sup> Opinion No. 537, 151 FERC ¶ 61,173 at PP 185-189; Opinion No. 537-A, 153 FERC ¶ 61,386 at PP 103-106.

<sup>37</sup> Opinion No. 537, 151 FERC ¶ 61,173 at P 168.

<sup>38</sup> *Id.* PP 215-219; Opinion No. 537-A, 153 FERC ¶ 61,386 at PP 118-126.

16. We recognize that the Commission expressly excluded evidence of quarterly reporting violations in the Docket No. EL01-10 proceeding.<sup>39</sup> In that proceeding, however, the Commission found that quarterly reporting violations, by themselves, are insufficient to avoid application of the *Mobile-Sierra* presumption. The Commission explained that “evidence of [quarterly reporting] violations would not demonstrate the necessary connection between an unlawful act and an unjust and unreasonable contract rate . . . . If, on the other hand, a refund claimant has evidence of an overt act of manipulation that directly affected the contract rate, evidence of a reporting violation would be superfluous.”<sup>40</sup> We find that, with respect to sellers’ bilateral contracts with CERS, this reasoning applies with equal force in carrying out the Ninth Circuit’s instruction in *Harris* to “evaluate reporting deficiencies and related market-based rates to determine whether they were unjust and unreasonable in light of the California Parties’ nexus claims.”<sup>41</sup> Indeed, the Ninth Circuit has recently confirmed that a seller’s failure to satisfy quarterly reporting requirements does not automatically strip a bilaterally negotiated contract of its *Mobile-Sierra* protection.<sup>42</sup> Thus, to the extent that the California Parties allege that the *Mobile-Sierra* presumption should not apply to a particular contract as a result of quarterly reporting violations, they must demonstrate the necessary connection between a seller’s reporting violation and an unjust and unreasonable contract rate.

17. Because we are providing the clarifications discussed above, we dismiss as moot the alternative requests for rehearing filed by the California Parties, TransCanada, Mico, and Allegheny.

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<sup>39</sup> E.g., Opinion No. 537, 151 FERC ¶ 61,173 at P 44; *Puget Sound Energy, Inc. II*, 143 FERC ¶ 61,020 at P 24; *Puget Sound Energy, Inc. I*, 137 FERC ¶ 61,001 at P 24.

<sup>40</sup> *Puget Sound Energy, Inc.*, 143 FERC ¶ 61,020 at P 24.

<sup>41</sup> *Harris Remand*, 784 F.3d at 1276.

<sup>42</sup> See *State of Cal., ex rel. Kamala D. Harris v. FERC*, 809 F.3d 491 (9<sup>th</sup> Cir. 2015) at 502 (finding that the California Parties “overstate *Lockyer*, which stopped short of establishing that sellers who fail to meet reporting requirements have automatically charged unlawful prices so as to defeat the presumption.”).

The Commission orders:

(A) Requests for clarification are hereby granted, as discussed in the body of this order.

(B) Requests for rehearing are hereby dismissed as moot, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.