

157 FERC ¶ 61,023
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

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

v.

Docket No. EL02-71-052

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 REHEARING

(Issued October 13, 2016)

1. In this order, we grant in part and deny in part California Parties'¹ request for rehearing of the Commission's March 1, 2016 order in this proceeding.²

Background

2. The United States Court of Appeals for the Ninth Circuit (Ninth Circuit) previously remanded this proceeding, which involves issues related to violations of the Commission's market-based rate quarterly reporting requirements, to the Commission.³ The Ninth Circuit found that the Commission had erred in its earlier decisions in limiting the scope of the inquiry to consideration of only market-share evidence.⁴ 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.⁵ The court also stated that the Commission must determine whether the California Parties' claims have been resolved in other proceedings.⁶

3. On November 3, 2015, in response to the Ninth Circuit's remand, the Commission issued an order⁷ that 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

¹ For purposes of this order, California Parties are 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.

² *State of Cal., ex rel. Bill Lockyer v. British Columbia Power Exch. Corp.*, 154 FERC ¶ 61,154 (2016) (Order on Clarification).

³ *State of Cal., ex rel. Kamala D. Harris v. FERC*, 784 F.3d 1267 (9th Cir. 2015) (*Harris Remand*).

⁴ *Id.* at 1274-75.

⁵ *Id.* at 1275.

⁶ *Id.* at 1276.

⁷ *State of Cal., ex rel. Bill Lockyer v. British Columbia Power Exch. Corp.*, 153 FERC ¶ 61,137 (2015) (Remand Order).

test; rather, consistent with the instructions from the *Harris* Remand, they are permitted to present alternative market power analyses.⁸

4. In the Order on Clarification, the Commission clarified the scope of evidence that may be presented at hearing. The Commission found that California Parties may present evidence on market manipulation and other evidence to the extent such evidence is relevant to the issue of whether reporting deficiencies masked manipulative conduct that led to unjust and unreasonable prices.⁹ The Commission also clarified that parties that have previously settled in this proceeding may be subject to subpoenas, evidence production, and data requests, and parties may present evidence involving the settled parties' conduct to the extent such evidence is relevant to the scope of the hearing.¹⁰ However, the Commission found that California Parties may not present evidence regarding issues that have been the subject of a final Commission order.¹¹ In particular, the Commission found that California Parties may not re-litigate the issue of vicarious liability,¹² which was previously rejected by the Commission.¹³ Finally, the Commission reiterated that "quarterly reporting violations, by themselves, are insufficient to avoid application of the *Mobile-Sierra*¹⁴ presumption."¹⁵

⁸ *Id.* P 4.

⁹ Order on Clarification, 154 FERC ¶ 61,154 at P 12.

¹⁰ *Id.* P 13.

¹¹ *Id.* PP 14-15.

¹² This theory of refund liability is also referred as the "pricing umbrella" theory, according to which a large seller's exercise of market power enables other sellers to raise prices.

¹³ Order on Clarification, 154 FERC ¶ 61,154 at P 14 (citing *State of California, ex rel. Edmund G. Brown, Jr. v. Powerex Corp.*, 135 FERC ¶ 61,178, at PP 32-34 (2011) (*Brown*), order denying reh'g, 139 FERC ¶ 61,210 (2012)).

¹⁴ See *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 344 (1956) (*Mobile*); *Federal Power Comm'n v. Sierra Pacific Power Co.*, 350 U.S. 348, 335 (1956) (*Sierra*).

¹⁵ Order on Clarification, 154 FERC ¶ 61,154 at P 16 (citing *Puget Sound Energy, Inc.*, 143 FERC ¶ 61,020, at P 24 (2013) (*Puget*)).

5. California Parties filed a timely request for rehearing. TransCanada Energy Ltd. (TransCanada) and Allegheny Energy Supply Company, LLC (Allegheny) filed answers to California Parties' rehearing request.¹⁶

Rehearing Request

6. California Parties argue that sellers' failure to file compliant quarterly reports renders the contracts at issue unlawful and, as such, the *Mobile-Sierra* presumption that the contract rates are just and reasonable cannot apply. Further, California Parties state that the Commission held for the first time in the Order on Clarification that quarterly reporting violations, by themselves, are insufficient to avoid the *Mobile-Sierra* presumption. California Parties recognize that the Commission came to this same conclusion in the Pacific Northwest Refund Proceeding,¹⁷ but characterize the Commission's prior statements on this question as *dicta* that is not binding here.¹⁸ California Parties deny that the *Harris* Remand holds that the *Mobile-Sierra* presumption applies notwithstanding the unlawfulness of the contracts, but instead stated that this issue is most appropriately addressed by the Commission in the first instance.¹⁹

7. California Parties also argue that "pricing umbrella" evidence should be permitted because it is relevant to the question of whether sellers that misreported received unjust and unreasonable rates. Further, California Parties claim that barring this evidence from hearing violates the Ninth Circuit's remand instructions.²⁰ California Parties contend that the pricing umbrella theory is not an attempt to establish vicarious liability because only those sellers that misreported are at risk for refunds in this case. California Parties maintain that third party market power that was harder to detect because of misreporting had a pricing umbrella effect that the Commission cannot ignore when examining the

¹⁶ We note that, on August 24, 2016, the California Parties filed settlements with several suppliers in this and other Western energy crisis-related proceedings, including Allegheny, Mico, Inc., Commerce Energy, Inc., and Illinova Corporation. Those settlements are pending before the Commission.

¹⁷ The term "Pacific Northwest Refund Proceeding" refers to the litigation in Docket No. EL01-10.

¹⁸ California Parties Rehearing Request at n.23 (citing *Puget*, 143 FERC ¶ 61,020 at P 24).

¹⁹ *Id.* at 8-12.

²⁰ *Id.* at 5.

nexus between a seller's misreporting and unjust and unreasonable rates. Thus, California Parties assert that the "pricing umbrella evidence simply provides greater context and depth to the examination of what went wrong that enabled sellers to charge unjust and unreasonable rates."²¹

Discussion

Procedural Matters

8. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2016), prohibits answers to a request for rehearing. Accordingly, we will reject the answers filed by TransCanada and Allegheny.

Commission Determination

9. We grant in part and deny in part California Parties' request for rehearing. The purpose of this remand, as stated by the Ninth Circuit, is to resolve the question of whether "reporting deficiencies fostered the subtle accumulation of market power and resulted in an excessive rate."²² The Ninth Circuit found that the Commission had erred by focusing its earlier inquiry solely on whether a seller had accumulated market power based on the hub-and-spoke analysis.²³ The Ninth Circuit instructed the Commission to structure its proceedings to examine the nexus between reporting deficiencies, market power, and market outcomes, including evidence of how reporting deficiencies may have masked manipulative behavior by sellers.²⁴ Thus, we find that the *Harris* Remand does not support California Parties' position that evidence of reporting violations, in itself, renders the contracts at issue here unlawful for purposes of avoiding the *Mobile-Sierra* presumption of just and reasonable rates.

²¹ *Id.* at 15.

²² *Harris Remand*, 784 F.3d at 1276.

²³ *Id.* at 1274. On remand, the Commission established an evidentiary hearing to supplement the existing record and explained the scope of that hearing. Remand Order, 153 FERC ¶ 61,137 at P 10. The Order on Clarification provided further clarifications regarding the scope of the hearing, including the evidence that purchasers could advance in support of their arguments. Order on Clarification, 154 FERC ¶ 61,154 at PP 12-13.

²⁴ *Harris Remand*, 784 F.3d at 1275-76.

10. We affirm the Commission's prior finding that quarterly reporting violations, by themselves, are insufficient to avoid application of the *Mobile-Sierra* presumption. We find that California Parties mischaracterize as *dicta* the Commission's prior findings on this issue. To the contrary, in the Pacific Northwest Refund Proceeding, the Commission justified its exclusion of evidence of reporting violations on the rationale that, even if California Parties presented evidence of quarterly reporting violations, they would still need to show that those violations masked an exercise of market power or other overt manipulation in order to demonstrate the required nexus between an unlawful act and an unjust and unreasonable rate.²⁵ This reasoning applies with equal force in this proceeding. That misreporting by itself constitutes a tariff violation is inapposite for purposes of this inquiry, because the *Mobile-Sierra* analysis requires more than just an unlawful act. As the Supreme Court has stated:

the mere fact of a party's engaging in unlawful activity in the spot market does not deprive its forward contracts of the benefit of the *Mobile-Sierra* presumption. There is no reason [the Commission] should be able to abrogate a contract on these grounds without finding a causal connection between unlawful activity and the contract rate.²⁶

11. We find that California Parties' argument, if accepted, would require us to abrogate the contracts at issue based solely on an unlawful act itself (i.e., the misreporting), without the required causal connection between an unlawful act and an unjust and unreasonable rate, as required by the Supreme Court. We therefore reject this argument. We continue to find that requiring a causal nexus is consistent with both the Ninth Circuit's directives in the *Harris Remand*²⁷ and the Ninth Circuit's holding in the Pacific Northwest Refund Proceeding that misreporting by itself does not automatically strip a bilaterally negotiated contract of its *Mobile-Sierra* protection.²⁸

²⁵ *Puget*, 143 FERC ¶ 61,020 at P 24.

²⁶ *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1 of Snohomish County*, 554 U.S. 527, 554-555 (2008) (*Morgan Stanley*).

²⁷ *Harris Remand*, 784 F.3d at 1276 (directing the Commission to "evaluate reporting deficiencies and related market-based rates to determine whether they were unjust and unreasonable in light of the California Parties' nexus claims.").

²⁸ *See State of Cal., ex rel. Kamala D. Harris v. FERC*, 809 F.3d 491, 502 (2015) (finding that previous 9th Cir. orders regarding quarterly reporting violations "stopped short of establishing that sellers who fail to meet reporting requirements have automatically charged unlawful prices so as to defeat the presumption.").

12. We continue to find that evidence of unlawful activity by third parties is not relevant to the showing required by *Morgan Stanley* to avoid application of the *Mobile-Sierra* presumption. Under *Morgan Stanley*, the focus of the *Mobile-Sierra* inquiry must remain on the conduct of the seller and whether that conduct directly affected contract prices.²⁹ Thus, even if the misreporting of large sellers contributed to a pricing umbrella under which smaller misreporting sellers could more easily mask their unlawful market behavior, California Parties must still demonstrate the necessary connection between a seller's reporting violation and an unjust and unreasonable contract rate in order to avoid application of the *Mobile-Sierra* presumption. On rehearing, California Parties have not offered any convincing arguments as to how evidence of third party misconduct is relevant to satisfying that burden.

13. However, upon reconsideration, we grant the California Parties' request for rehearing regarding its pricing umbrella argument and provide some clarification. We agree with California Parties that evidence regarding a pricing umbrella theory could be relevant to the Ninth Circuit's instructions on remand to examine the nexus between reporting deficiencies, market power, and market outcomes, including evidence of how reporting deficiencies may have masked manipulative behavior by sellers. We will therefore permit such evidence to be introduced at hearing. However, we emphasize that evidence supporting a pricing umbrella argument cannot in and of itself establish liability for any respondent. As we noted in the Order on Clarification, the Commission has previously established that there was no basis for liability on a pricing umbrella theory in this proceeding.³⁰ As California Parties note, the evidence could "provide greater context and depth to the examination of what went wrong that enabled sellers to charge unjust and unreasonable rates."³¹

²⁹ See *Morgan Stanley*, 554 U.S. at 554-555.

³⁰ Order on Clarification, 154 FERC ¶ 61,154 at P 14 (citing *State of Cal., ex rel., Bill Lockyer*, 135 FERC ¶ 61,113 at PP 1, 49).

³¹ California Parties Rehearing Request at 15.

The Commission orders:

California Parties' request for rehearing is hereby granted in part and denied in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.