

157 FERC ¶ 61,026  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Puget Sound Energy, Inc.

Docket No. EL01-10-136

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. 552

ORDER ON REVISED PARTIAL INITIAL DECISION

(Issued October 18, 2016)

1. On January 8, 2016, the Presiding Administrative Law Judge (Presiding Judge) issued a Revised Partial Initial Decision (Revised Initial Decision) in the above-captioned proceeding.<sup>1</sup> The Revised Initial Decision was issued in response to the Commission's Opinion No. 537,<sup>2</sup> which reversed, in part, an earlier Initial Decision in this proceeding<sup>3</sup> and remanded for action consistent with Opinion No. 537. In this order, we reverse the Revised Initial Decision, as discussed herein. Given our findings in this order, it appears

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<sup>1</sup> *Puget Sound Energy, Inc.*, 154 FERC ¶ 63,004 (2016) (Revised Initial Decision).

<sup>2</sup> *Puget Sound Energy, Inc.*, 151 FERC ¶ 61,173 (2015) (Opinion No. 537), *reh'g denied*, 153 FERC ¶ 61,386 (2015) (Opinion No. 537-A).

<sup>3</sup> *Puget Sound Energy, Inc.*, 146 FERC ¶ 63,028 (2014) (Initial Decision).

that Phase II of the proceeding,<sup>4</sup> which is intended to address remedies, is no longer necessary.

## **I. Background**

2. A brief summary of the recent history in this proceeding, as it is relevant to this order, is provided here. Previous orders contain more detailed descriptions of the background and procedural history of this case.<sup>5</sup>

3. This case originated with a complaint filed by Puget Sound Energy, Inc. (Puget) under section 206 of the Federal Power Act (FPA)<sup>6</sup> 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>7</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>8</sup>

4. On August 24, 2007, the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) remanded this proceeding to the Commission specifically to reconsider:

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<sup>4</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 (Sept. 13, 2012) (Order Confirming Rulings from the September 6, 2012 Prehearing Conference).

<sup>5</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) (Remand Rehearing).

<sup>6</sup> 16 U.S.C. § 824e (2012).

<sup>7</sup> *See* October 31, 2000 Notice of Puget Complaint, Docket No. EL01-10-000.

<sup>8</sup> *Puget Sound Energy, Inc.*, 103 FERC ¶ 61,348, at PP 35, 53 (2003), *reh'g denied*, 105 FERC ¶ 61,183, at P 42 n.43, *reh'g denied*, 106 FERC ¶ 61,109, at PP 10-13 (2004).

(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>9</sup>

5. On October 3, 2011, the Commission issued an order establishing an evidentiary hearing to address the issues remanded by the Ninth Circuit.<sup>10</sup> The Commission specified that (1) the *Mobile-Sierra*<sup>11</sup> public interest presumption applies to the contracts at issue;<sup>12</sup> and (2) a market-wide remedy, such as the approach taken in the California Refund Proceeding<sup>13</sup> would not be appropriate here.<sup>14</sup> 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. The Commission noted that it would consider further steps to be taken upon review of the Presiding Judge's factual determinations.<sup>15</sup>

6. On March 28, 2014, the Presiding Judge issued the Initial Decision, which addressed Phase I of the proceeding. With regard to California Parties' claims, the Presiding Judge found that California Parties had presented evidence that as many as 166 of the contracts between CERS and Shell Energy North America (US), L.P., d/b/a Coral Power, L.L.C. (Shell or Coral) 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

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<sup>9</sup> *Port of Seattle*, 499 F.3d 1016, 1035 (9<sup>th</sup> Cir. 2007).

<sup>10</sup> Order on Remand, 137 FERC ¶ 61,001 at P 16.

<sup>11</sup> 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*).

<sup>12</sup> Order on Remand, 137 FERC ¶ 61,001 at P 20.

<sup>13</sup> The term "California Refund Proceeding" refers to litigation in Docket No. EL00-95.

<sup>14</sup> Order on Remand, 137 FERC ¶ 61,001 at P 24.

<sup>15</sup> *Id.* PP 23, 29.

proceeding. As to the remainder of California Parties' refund claims, the Presiding Judge found that California Parties had not demonstrated a basis to abrogate the contracts at issue.<sup>16</sup>

7. 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>17</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>18</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>19</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>20</sup> 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>21</sup>

8. 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

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<sup>16</sup> Initial Decision, 146 FERC ¶ 63,028 at PP 1384-1430, 1693-1710, 1727-1747.

<sup>17</sup> *Id.* P 1739.

<sup>18</sup> *Id.*

<sup>19</sup> Opinion No. 537, 151 FERC ¶ 61,173 at P 100.

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

<sup>21</sup> *Id.* P 101.

that Coral engaged in False Export activities or bad faith that directly affected the rates under specific contracts with CERS.<sup>22</sup>

9. On January 8, 2016, the Presiding Judge issued a revised partial initial decision, which found that (1) the Initial Decision intended to adopt the contract designation methodology propounded by California Parties; (2) California Parties presented a *prima facie* case that 47 of the 156 contracts at issue were affected by False Export activity committed by Coral; and (3) California Parties presented a *prima facie* case that 91 of the 156 contracts were affected by bad faith committed by Coral.<sup>23</sup> The Presiding Judge found that Shell had not rebutted either *prima facie* case.<sup>24</sup>

10. Shell and Commission Trial Staff (Trial Staff) filed timely briefs on exceptions to the Revised Initial Decision. On February 29, 2016, California Parties filed a brief opposing exceptions.<sup>25</sup>

11. On September 15, 2016, California Parties moved to lodge new relevant authority.<sup>26</sup> On September 30, 2016, Shell filed an answer objecting to California Parties' motion to lodge.

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<sup>22</sup> *Id.* P 105.

<sup>23</sup> Revised Initial Decision, 154 FERC ¶ 63,004 at PP 3, 11, 15-16, 24-33, 40-60.

<sup>24</sup> *Id.* PP 61-63.

<sup>25</sup> In addition to the briefs filed by parties to this proceeding, which will be addressed in this order, several non-parties, including the Western Power Trading Forum, the Electric Power Supply Association, AES U.S. Strategic Business Unit, and Western Systems Power Pool filed letters with the Commission regarding the Revised Initial Decision. California Parties and Shell filed letters in response to the non-party correspondence. We will not be further addressing this correspondence in this order.

<sup>26</sup> California Parties moved to lodge the September 8, 2016 Ninth Circuit decision that it believes supports its claims that Coral engaged in unlawful market activity. *MPS Merchant Services v. FERC*, No. 15-73803, 2016 WL 4698302 (9<sup>th</sup> Cir. Sept. 8, 2016).

## II. Discussion

### A. Procedural Matters

12. The Commission denies California Parties' motion to lodge the September 8, 2016 Ninth Circuit decision. The Commission can "take official notice of any judicial decision at any time, so there is no need to reopen the record for this purpose."<sup>27</sup>

### B. Contract Designation

#### 1. Revised Initial Decision

13. The Revised Initial Decision confirmed the Initial Decision's implicit adoption of California Parties' contract designation methodology, which grouped 1,703 energy transactions<sup>28</sup> into 156 contracts, as opposed to the 323 contracts identified by Shell.<sup>29</sup> The Revised Initial Decision found, based on an independent review of record evidence in this proceeding that California Parties' use of the groupings of transactions by CERS, each of which is identified by a unique line item number California exhibits (CERS ID), constitutes the correct method for identifying individual spot market contracts.<sup>30</sup> The Revised Initial Decision cited Exhibit CAT-28, an Excel spreadsheet in the record titled "Transaction Database of CERS Spot Market Purchases with Coral in PNW" as the basis for this conclusion. The Revised Initial Decision explained that this database reflects the

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<sup>27</sup> *Pacific Gas & Elec. Co.*, 109 FERC ¶ 61,205, at P 7 (2004). In any event, we find that the Ninth Circuit opinion, which concludes that certain respondents engaged in tariff violations that inflated market clearing prices in a number of trading hours during the summer of 2000 in the centralized energy markets administered by the California Independent System Operator Corporation (CAISO) and the California Power Exchange Corporation, is not relevant to the issues addressed herein.

<sup>28</sup> The Presiding Judge noted that California Parties and Shell agree that the record reflects 1,703 energy transactions. Revised Initial Decision, 154 FERC ¶ 63,004 at P 10 (citing California Parties September 11, 2015 Initial Brief At 23; Shell September 25, 2015 Reply Brief at 9 n.24).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* P 11.

California Department of Water Resources' contemporaneous records of its spot market transactions with Coral, with each contract assigned a CERS ID number.<sup>31</sup>

14. The Revised Initial Decision noted that Shell's proposed contract designation methodology was premised in Exhibit SNA-14, which had originally been developed to show that Coral's transactions with CERS were legitimate back-to-back sales. However, the Revised Initial Decision stated that the Initial Decision found flaws in this analysis because it did not demonstrate that each transaction was in fact back-to-back and therefore concluded that these same flaws negate the basis for Shell's contract designation argument.<sup>32</sup>

## 2. **Brief on Exceptions**

15. Shell argues that the Revised Initial Decision erred by adopting California Parties' contract designation methodology. Shell contends that, under the WSPP Agreement, parties negotiate and agree orally or in writing to the terms of a purchase and sale in a Confirmation Agreement. Thus, Shell asserts that a Confirmation Agreement is what creates and memorializes an enforceable contract.<sup>33</sup> Shell objects that the California Parties' contract designation system improperly aggregates separately negotiated contracts and fails to identify any Confirmation Agreements between Coral and CERS. Further, Shell claims that the Revised Initial Decision incorrectly relied on Exhibit CAT-028 as the basis for accepting California Parties' contract designations because this database was a bookkeeping database that was not meant to reflect actual contracts.<sup>34</sup> Shell provides the example of a single CERS ID number listed in Exhibit CAT-408 that comprises three separately negotiated transactions between Coral and CERS, as identified by separate Confirmation Agreements, to illustrate the alleged flaws in California Parties' contract designation methodology.<sup>35</sup>

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<sup>31</sup> *Id.* P 15.

<sup>32</sup> *Id.* P 16.

<sup>33</sup> Shell Brief on Exceptions at 22 (citing Black's Law Dictionary, 10<sup>th</sup> ed. 2014, defining a "contract" as the "agreement between two or more parties creating obligations that are legally enforceable.").

<sup>34</sup> *Id.* at 27-82 (citing Tr. at 1035:3-13 (Lee)).

<sup>35</sup> *Id.* at 28-30.

16. Shell also argues that the Revised Initial Decision erroneously rejected Exhibit SNA-14, which Shell claims reflects the actual contracts negotiated between Coral and CERS. Shell asserts that whether Exhibit SNA-14 could be relied upon to determine the source of the power sold by Coral to CERS is irrelevant to the question of what constitutes a contract.<sup>36</sup>

### **3. Brief Opposing Exceptions**

17. California Parties assert that the Revised Initial Decision appropriately and independently adopted the CERS contract designation methodology based on record evidence and provided a clear and rational explanation for doing so.<sup>37</sup>

18. California Parties maintain that the CERS contract designations are reasonable in the circumstances of this case and are consistent with the legal definition of a contract. California Parties assert that, because the terms of a transaction agreed to early in the day were frequently modified as the day progressed, the only reasonable way to understand the transactions was to aggregate each set of trades at the end of the day.<sup>38</sup> California Parties contend that a contract can be properly defined as a “promise or set of promises,” or “any legal set of duties not imposed by the law of tort,”<sup>39</sup> and assert that the contract designations used by CERS are consistent with this legal definition. California Parties also claim that section 35 of the WSPP Agreement provides for the inclusion of multiple Confirmation Agreements in a single contract.<sup>40</sup> Further, California Parties assert that the WSPP Agreement neither requires written Confirmation Agreements nor supports the view that the Confirmation Agreements are the sole basis for defining a contract.<sup>41</sup>

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<sup>36</sup> *Id.* at 30-32.

<sup>37</sup> California Parties Brief Opposing Exceptions at 19-20.

<sup>38</sup> *Id.* at 13 (quoting Ex. CAT-289 at 146).

<sup>39</sup> *Id.* at 15 (quoting Black’s Law Dictionary (10<sup>th</sup> ed. 2014)).

<sup>40</sup> *Id.* at 15-16 (quoting WSPP Agreement, Section 35 (“The Parties acknowledge and agree that all of their transactions, together with this Agreement and the related Confirmation Agreement(s) form a single, integrated agreement ... ”)).

<sup>41</sup> *Id.* at 16-17 (citing WSPP Agreement, Section 32).

Rather, California Parties argue that the WSPP Agreement provides considerable flexibility for determining what constitutes a contract.<sup>42</sup>

19. California Parties contend that the Revised Initial Decision correctly rejected Shell's proposed contract designations. California Parties observe that Exhibit SNA-14, upon which Shell relied for its proffered contract designation methodology, was rejected by both the Initial Decision and Revised Initial Decision because it failed to demonstrate that each transaction included in the exhibit was, in fact, a back-to-back transaction.<sup>43</sup> California Parties argue that the existence of upstream transactions that were not captured in Exhibit SNA-14 demonstrates that this exhibit is flawed and cannot be used for any substantive purpose in this proceeding.<sup>44</sup>

#### 4. Commission Determination

20. We reverse the Revised Initial Decision's findings regarding the correct method for identifying individual contracts, to which the *Mobile-Sierra* presumption applies. Throughout this proceeding, the Commission has emphasized the importance of evaluating the impact of unlawful market behavior, if any, on specific contracts. In the Order on Remand, the Commission specified that, in order to demonstrate that the *Mobile-Sierra* presumption should not apply to a contract, "parties seeking refunds must submit evidence not only on whether unlawful market activity occurred, but must also demonstrate a connection between unlawful activity by a seller and unjust and unreasonable rates *under a specific contract*."<sup>45</sup> On rehearing, the Commission reiterated that it "must evaluate each seller's conduct in relation to *specific contract negotiations* . . ."<sup>46</sup> Thus, in Opinion No. 537, the Commission found that "the question of contract designation is a threshold issue in this proceeding because the *Mobile-Sierra* presumption attaches to individual contracts," and "could have profound implications for the finding of violations . . ."<sup>47</sup> The Commission also found in Opinion No. 537 that the Initial

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<sup>42</sup> *Id.* at 17.

<sup>43</sup> *Id.* at 20 (citing Initial Decision, 146 FERC ¶ 63,028 at 1412; Revised Initial Decision, 154 FERC ¶ 63,004 at P 16).

<sup>44</sup> *Id.* at 20-22.

<sup>45</sup> Order on Remand, 137 FERC ¶ 61,001 at P 21 (emphasis added).

<sup>46</sup> Remand Rehearing, 143 FERC ¶ 61,020 at P 30 (emphasis added).

<sup>47</sup> Opinion No. 537, 151 FERC ¶ 61,173 at P 105. The Commission affirmed this finding on rehearing. Opinion No. 537-A, 153 FERC ¶ 61,386 at P 73.

Decision did not expressly address the issue of the correct contract designation methodology.<sup>48</sup> To resolve this question, the Commission remanded the issue to the Presiding Judge to “make findings in the revised partial Initial Decision on what constitutes an individual contract and to apply that definition consistently” to the evidence presented by California Parties against Coral.<sup>49</sup>

21. Given the benefit of additional briefing and argument on this issue that resulted from the Commission’s partial remand in Opinion No. 537, we find that the Revised Initial Decision erred by concluding that California Parties’ methodology is the correct way to identify individual contracts for purposes of the *Mobile-Sierra* analysis. Since the Commission first addressed the question of whether the *Mobile-Sierra* presumption attaches to contracts entered into under the WSPP Agreement, the focus has been on transactions that are memorialized in Confirmation Agreements.<sup>50</sup> The Commission has characterized the WSPP Agreement as an umbrella agreement that sets forth the generic terms pursuant to which members enter into bilateral transactions, and the transaction-specific details such as price, quantity, delivery point, etc., are documented in a separate Confirmation Agreement. Thus, the terms and conditions of both the individual Confirmation Agreement and the umbrella WSPP Agreement determine contractual standards of performance.<sup>51</sup> Contracting parties could (and the contracting parties here did) enter into separate Confirmation Agreements, each of which provides for specific, individualized key terms, such as price and quantity, and each of which incorporate the terms and conditions of the umbrella WSPP Agreement. Further, California Parties’ arguments in this proceeding are premised on their position that CERS paid unjust and unreasonable prices in its contractual arrangements with Coral. As just discussed, it is the individual Confirmation Agreement between the contracting parties that provides the

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *PacifiCorp v. Reliant Energy Servs., Inc.*, 105 FERC ¶ 61,184, at P 11 (2003) (“The contracts are one page confirmations that incorporate by reference the terms of one of two master agreements that were developed by Edison Electric Institute (a trade association of investor-owned electric utilities) (EEL) and [WSPP].”); *see also Nev. Power Co. v. Enron Power Mktg., Inc.*, 101 FERC ¶ 63,031, at P 23 (2002), *aff’d*, 103 FERC ¶ 61,353 (2003), *order on reh’g*, 105 FERC ¶ 61,185 (2003) (*Nevada Power*).

<sup>51</sup> For example, section 21.3 of the WSPP Agreement states, with respect to non-performance damages, “[t]he damages under this Section 21.3 apply to a Party’s failure to deliver or receive (or make available in the case of capacity) capacity and/or energy in violation of the terms of the Agreement and any Confirmation.”

price component for the specific transaction, not the umbrella WSPP Agreement itself or some aggregation of Confirmation Agreements. Given the foregoing, we find that the individual Confirmation Agreements, read in conjunction with the WSPP Agreement's generic terms and conditions, represent the contracts at issue here.

22. We find that California Parties' reliance on section 35 of the WSPP Agreement for the proposition that a single contract can include multiple Confirmation Agreements is misplaced. The Commission has interpreted section 35 to affirm that the specific rates, terms, and conditions set forth in the Confirmation Agreements, are also governed by the terms and conditions of the umbrella WSPP Agreement.<sup>52</sup> The Commission has not found previously that multiple Confirmation Agreements can be considered a single contract. Moreover, we note that California Parties' own witness, Ms. Susan Lee, acknowledged at hearing that the grouping of the transactions under CERS IDs was unrelated to whether those sales were pursuant to the same contract or different contracts.<sup>53</sup> In short, California Parties have not advanced any reasonable ground for their proposition that a single contract can be comprised of multiple Confirmation Agreements. Indeed, we find that the most reasonable approach is that each individual Confirmation Agreement – with its specific price, quantity, delivery point, and other transaction-specific terms – are in fact individual contracts, as discussed above.

23. We also disagree with the Revised Initial Decision's rationale for rejecting Shell's contract designation methodology. Whether Exhibit SNA-14 shows Coral's upstream purchases, or can be relied upon to identify the source of energy sold to CERS, has no bearing on whether this database accurately identifies Coral's contracts with CERS. Likewise, the question of whether all of Coral's sales to CERS were legitimate back-to-back transactions is unrelated to the issue of contract designation. The existence of upstream transactions that are not shown in Exhibit SNA-14 does not discredit Exhibit SNA-14 for the purpose of accurately identifying Confirmation Agreements for Coral's sales to CERS. Thus, we find that the Confirmation Agreements identified in Exhibit SNA-14 represent an appropriate way to identify the contracts at issue here.

24. We find that, because California Parties focused on aggregated transactions, rather than individual contracts, California Parties failed to meet their burden to avoid application of the *Mobile-Sierra* presumption to the contracts at issue. Moreover, even if we were to find that the CERS IDs constitute a reasonable means for identifying contracts for purposes of this proceeding, we would still find, as discussed below, that

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<sup>52</sup> See *Nevada Power*, 101 FERC ¶ 63,031 at PP 186-187, *aff'd*, *Nevada Power*, 103 FERC ¶ 61,353 at PP 27, 36.

<sup>53</sup> Tr. at 1035:3-3-13 (Lee).

California Parties have not satisfied their burden to demonstrate that unlawful activity directly affected the negotiation of specific contracts.

**C. False Export Allegations**

**1. Revised Initial Decision**

25. The Revised Initial Decision found that, despite statements in paragraphs 1414 and 1739 of the Initial Decision,<sup>54</sup> no significant issues of fact or law remain to be resolved, and the Initial Decision should not be interpreted as affording Shell the opportunity to rebut California Parties' case in Phase II of this proceeding. Further, the Revised Initial Decision found that an independent review of the record evidence confirms that California Parties made a *prima facie* showing regarding their False Export allegations against Coral and that Shell failed to rebut these allegations. In particular, the Revised Initial Decision found that the *Mobile-Sierra* database compiled by California Parties' witness Mr. Taylor<sup>55</sup> "provides a firm basis to find that Shell engaged in [F]alse [E]xport activity that affected 47 contracts."<sup>56</sup>

26. The Revised Initial Decision also noted that, in Opinion No. 537, the Commission requested a discussion of the causal link between False Export activity and specific contract rates.<sup>57</sup> The Revised Initial Decision cited several pieces of evidence to demonstrate this link: (1) a table in Exhibit CAT-41 that compares real time and day ahead peak prices during the CERS period, showing an average \$281 price differential in January 2001,<sup>58</sup> and (2) a column in Exhibit CAT-408 that shows the weighted average premium that Coral charged to CERS relative to what it could charge other buyers, in which high premiums often accompany alleged False Export activities.<sup>59</sup> Also, the Revised Initial Decision found that the record substantiates Coral's misrepresentations to

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<sup>54</sup> In the Initial Decision, the Presiding Judge found that "there remain significant questions of fact and law with respect to these transactions that must be resolved in Phase II of this proceeding." Initial Decision, 146 FERC ¶ 63,028 at PP 1414, 1739.

<sup>55</sup> Ex. CAT-408.

<sup>56</sup> Revised Initial Decision, 154 FERC ¶ 63,004 at P 28.

<sup>57</sup> Opinion No. 537, 151 FERC ¶ 61,173 at P 120.

<sup>58</sup> Revised Initial Decision, 154 FERC ¶ 63,004 at P 29.

<sup>59</sup> *Id.* P 30.

CERS regarding the source of energy being sold, as well as the overall manipulative strategy and its relationship to contract prices.<sup>60</sup> Finally, the Revised Initial Decision discussed the reliability implications of False Export activities, which served to reduce available supply in the day-ahead market, thereby creating shortage signals and increasing Coral's leverage to extract high prices in real time.<sup>61</sup>

27. The Revised Initial Decision concurred with the finding in the Initial Decision that Shell failed to substantiate its claims that all of Coral's sales to CERS were legitimate back-to-back transactions because Shell's back-to-back analysis omits consideration of fraudulent upstream transactions where Coral sold power out of California to a third party and then bought it back. Thus, the Revised Initial Decision found that California Parties made a *prima facie* case that 47 of CERS' contracts with Coral were directly affected by False Export activities, and that Shell failed to rebut California Parties' False Export allegations.<sup>62</sup>

## 2. Briefs on Exceptions

28. Shell and Trial Staff contend that the Revised Initial Decision erred by finding that California Parties made a *prima facie* case that Coral engaged in False Export activities that directly affected contract rates. Shell argues that, even if California Parties' contract designations were correct, the Revised Initial Decision's findings regarding False Exports are unsupported. Shell asserts that the Revised Initial Decision does not discuss any evidence of the crucial elements of False Export and claims there is no such evidence in the record. Shell notes that the Revised Initial Decision accepted California Parties' definition of False Exports as a manipulative trading strategy that "involves a misrepresentation as to the source of the energy that is the subject of the transaction" and also requires a "fictional export-import parking transaction."<sup>63</sup> Shell contends that the Revised Initial Decision finds no evidence of an instance where Coral misrepresented the

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<sup>60</sup> *Id.* (citing Ex. CAT-668a at 8:18-9:12 (a dialogue between a Coral supervisor and Coral trader that discusses a False Export scheme); Ex. CAT-706 (Coral trader discussing multi-party loop transaction); Tr. at 3955:24-3956:14 (Tranen); Ex. CAT-123 and Ex. CAT-113 (documenting Coral's relationship with the City of Glendale and related trading practices)).

<sup>61</sup> *Id.* (citing Ex. CAT-41 at 91:8-92:8).

<sup>62</sup> *Id.* PP 31-33.

<sup>63</sup> Shell Brief on Exceptions at 33 (citing Revised Initial Decision, 154 FERC ¶ 63,004 at P 25).

source of its power in any contract sale to CERS. However, Shell claims that this lack of evidence is not surprising because neither the WSPP nor CAISO scheduling requirements require a seller to state the origin of the electricity it sells. Shell and Trial Staff also assert that the Revised Initial Decision fails to identify a single parking transaction.<sup>64</sup>

29. Shell and Trial Staff argue that the Revised Initial Decision erred by adopting Mr. Taylor's False Export screen here on the basis that is the same False Export screen that was previously adopted in the California Refund Proceeding. Shell and Trial Staff emphasize that the California Refund Proceeding did not involve bilateral contract negotiations. Trial Staff avers that the Commission has clearly recognized the distinction between the Pacific Northwest bilateral spot market sales at issue here and the sales that were the subject of the California Refund Proceeding.<sup>65</sup> Shell and Trial Staff continue to challenge Mr. Taylor's evaluation of transactions on an hourly basis, arguing that this methodology ignores the reality of multi-hour contracts and overstates the extent of False Export transactions.<sup>66</sup>

30. Shell also notes, and as the Revised Initial Decision recognizes, the Commission has found False Export to be objectionable in the context of sales out of and into the centralized California markets because the import and export cancel each other out so that no power actually flowed.<sup>67</sup> Shell claims that there is no evidence that Mr. Taylor's False Export screen demonstrates any such effect in this case. As such, Shell argues that the Revised Initial Decision's acceptance of Exhibit CAT-408 as evidence supporting California Parties' False Export allegations is illogical. Shell argues that the following deficiencies in Exhibit CAT-408 demonstrate that California Parties failed to make the contract specific showing necessary to avoid the *Mobile-Sierra* presumption due to (1) the lack of locational controls in Mr. Taylor's screening methodology, (2) the finding of False Exports during hours in which Coral made no sales to CERS, (3) the absence of an explanation as to how False Exports in a single hour affected contracts in other hours

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<sup>64</sup> *Id.* at 33-35; Trial Staff Brief on Exceptions at 18.

<sup>65</sup> Trial Staff Brief on Exceptions at 21-22 (citing Order on Remand, 137 FERC ¶ 61,001 at P 24).

<sup>66</sup> Shell Brief on Exceptions at 35-37; Trial Staff Brief on Exceptions at 16-17.

<sup>67</sup> Shell Brief on Exceptions at 37 (citing Revised Initial Decision, 154 FERC ¶ 63,004 at P 25; Ex. CAT-41 at 88:8-17).

with no False Export activity, and (4) mismatches between MW sold to CERS and identified False Export quantities.<sup>68</sup>

31. Shell contends that it offered un rebutted evidence at hearing that the overlap between exports and imports identified by Mr. Taylor's screen was mere statistical noise and that a random distribution would produce more hours of False Export than those alleged.<sup>69</sup> Shell notes that Mr. Taylor conceded this point at hearing,<sup>70</sup> but argues that the Revised Initial Decision failed to address Shell's un rebutted record evidence on this point.<sup>71</sup> Trial Staff likewise contends that Mr. Taylor's pairings of exports and imports are incorrectly based on pure coincidence, rather than causation.<sup>72</sup>

32. Shell and Trial Staff also argue that the Revised Initial Decision does not explain any causal connection between a False Export and the negotiation of any Coral contract with CERS. Indeed, Shell notes that Mr. Taylor confirmed at hearing that he did no analysis to demonstrate the price effect of the alleged False Export activities.<sup>73</sup> Shell asserts that the Revised Initial Decision erred by using evidence of high prices to demonstrate a connection between the alleged unlawful activity and a specific contract rate despite the Commission's instruction that a party cannot "use the contract price as both the unlawful activity itself and evidence of the causal connection . . . ."<sup>74</sup> Shell and Trial Staff contend that the Revised Initial Decision's reliance on Exhibit CAT-41 is misplaced because that table provides data regarding monthly averages of prices, which do not demonstrate the effect of a False Export on a specific contract rate.<sup>75</sup>

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<sup>68</sup> *Id.* at 37-41.

<sup>69</sup> *Id.* at 43 (citing Ex. S-13 at 6:2-5).

<sup>70</sup> *Id.* at 42-43 (citing Tr. 2581:9-2583:1, 2594:15-2595:11, and 2596:9-2597:6 (Taylor)).

<sup>71</sup> *Id.*

<sup>72</sup> Trial Staff Brief on Exceptions at 17-18.

<sup>73</sup> Shell Brief on Exceptions at 47 (citing Tr. at 2613:18-2614:1, 2576:14-17 (Taylor)).

<sup>74</sup> Opinion No. 537-A, 153 FERC ¶ 61,386 at P 45.

<sup>75</sup> Shell Brief on Exceptions at 44.

33. Further, Shell and Trial Staff object to the Revised Initial Decision's reliance on the weighted average price premium data in Exhibit CAT-408 because this evidence proffered by California Parties to demonstrate undue discrimination, a theory that was rejected by the Commission.<sup>76</sup> Moreover, Shell asserts that the weighted average premium data is replete with instances where California Parties have alleged a False Export against Coral yet there is no associated price premium. Thus, Shell contends that linking this data to False Exports makes no sense legally or factually.<sup>77</sup> Trial Staff argues that there has been no demonstration that the purported high premiums are the result of the alleged False Export activity.<sup>78</sup>

34. Shell disputes that the trader tapes cited by the Revised Initial Decision serve as further evidence of a causal link between False Exports and specific contract rates because these tapes and other documents involve discussions of general or hypothetical trading strategies and include no mention of specific contracts with CERS.<sup>79</sup> Similarly, Trial Staff contends that the documents identified as supporting Mr. Taylor's False Export analysis are not contract specific and therefore Mr. Taylor's analysis cannot be sufficient to avoid application of the *Mobile-Sierra* presumption to these transactions.<sup>80</sup>

### 3. Brief Opposing Exceptions

35. California Parties argue that Shell and Trial Staff's attempts to refute the Revised Initial Decision's finding that False Exports by Coral affected 47 contracts with CERS are without merit. California Parties contend that the distinctions between the California Refund Proceeding and this proceeding are irrelevant because Mr. Taylor specifically adapted and applied his False Export screen and methodology to identify 139 hours of False Export sales by Coral to CERS and to map these 139 hours to specific CERS IDs, thereby providing the necessary contract specific analysis. Thus, California Parties'

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<sup>76</sup> *Id.* at 45 (citing Opinion No. 537, 151 FERC ¶61,173 at P 185; Opinion No. 537-A, 153 FERC ¶ 61,386 at P 103).

<sup>77</sup> *Id.* at 45-46.

<sup>78</sup> Trial Staff Brief on Exceptions at 24-25.

<sup>79</sup> Shell Brief on Exceptions at 46-47. Shell notes that the only piece of evidence that concerns a specific transaction, Exhibit CAT-706, references a multi-party transaction, not a False Export, and the allegations of multi-party transactions were withdrawn by California Parties. *Id.* at 47.

<sup>80</sup> Trial Staff Brief on Exceptions at 19-21.

dispute Trial Staff's argument that Mr. Taylor used the wrong unit of analysis. California Parties insist that attempts by Shell and Trial Staff to discredit this methodology as non-contract specific have already been rejected, either in the California Refund Proceeding or in Opinion No. 537.<sup>81</sup>

36. California Parties argue that transactional data to demonstrate the parking element of False Export is not necessary here to demonstrate False Export activity because the screen used by Mr. Taylor, and approved by the Commission in the California Refund Proceeding, also omitted parking data. California Parties assert that, in the California Refund Proceeding, all that the Commission required was evidence that the False Exporter simultaneously exported out of, and sold back into, CAISO in the same hour, coupled with other evidence showing that the False Exporter exhibited a practice of arranging for the use of fraudulent false sinks to facilitate the strategy.<sup>82</sup> Nevertheless, California Parties contend that record evidence demonstrates that Coral's use of false sinks was part of Coral's standard operating procedure.<sup>83</sup>

37. California Parties dispute Shell's claim that the record lacks any evidence of misrepresentation by Coral in its sales to CERS. To the contrary, California Parties assert that evidence shows that Coral consistently pulled power out of California to sell it back to CERS, recognized the illegal character of that activity, actively concealed these schemes from transmission providers that would not have otherwise permitted it, and actively concealed these activities from CAISO and CERS.<sup>84</sup>

38. Additionally, California Parties argue that the Revised Initial Decision correctly identified the causal link between False Export activities and their effect on specific contracts. California Parties claim that False Exports were not isolated incidents, but instead had intertemporal effects on market, including other hours of the contracts in question, and other hours in other contemporaneous contracts. Thus, California Parties deny that Mr. Taylor's analysis failed to account for multi-hour sales. California Parties argue that, because Coral had sole control over how it provisioned the sales it made to CERS, it could and did supply some, but not always all, hours of multi-hour contracts

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<sup>81</sup> California Parties Brief Opposing Exceptions at 24-29, 42-43.

<sup>82</sup> *Id.* at 37 (citing *San Diego Gas & Elect. Co.*, Opinion No. 536, 149 FERC ¶ 61,116, at PP 123, 130-131 (2014); *order on reh'g*, 153 FERC ¶ 61,144 at PP 59-73).

<sup>83</sup> *Id.* at 37-39 (citing Ex. CAT-104, Ex. CAT-706 and Ex. CAT-668a).

<sup>84</sup> *Id.* at 39-40 (citing Ex. CAT-668a, Ex. CAT-123, Ex. CAT-113, Ex. CAT-104, Ex. CAT-672, and Ex. CAT-706).

with energy that was falsely exported. California Parties also assert that the Revised Initial Decision properly considered the circumstances surrounding contract negotiations. Specifically, California Parties contend that the Revised Initial Decision recognized that False Exports served to create shortage signals, which increased Coral's ability to demand high prices from CERS.<sup>85</sup>

39. California Parties dispute Shell and Trial Staff's contention that Exhibit CAT-408 does not demonstrate the necessary causal link between False Exports and specific contract rates. California Parties aver that the evidence in Exhibit CAT-408, as well as other trader recordings and emails that were adduced at hearing, demonstrate Coral's intent to execute False Exports, confirm a pattern of behavior, and show how this behavior affected the contracts at issue. Further, California Parties argue that the Revised Initial Decision properly relied evidence pertaining to a multi-party transaction, despite the Commission's ruling in Opinion No. 537-A that the Presiding Judge was precluded from considering evidence of Coral's 19 hours of multi-party transactions.<sup>86</sup> California Parties assert that this evidence is no less probative of Coral's pattern of engaging in False Exports just because it involves multi-party, rather than single party transactions.<sup>87</sup>

40. Finally, California Parties argue that the Revised Initial Decision correctly found that False Exports raised prices in the identified contracts. First, California Parties assert that the Revised Initial Decision properly relies on Mr. Taylor's testimony that Coral exploited price differentials between the southern and northern zones by using False Export to purchase energy at lower prices in the southern zone and then sell it to CERS at a higher price by misrepresenting the power originated in the Pacific Northwest. Next, California Parties defend the Revised Initial Decision's reliance on the price information contained in Exhibit CAT-408, particularly the weighted average premiums that Coral was able to charge to CERS relative to other buyers. California Parties argue that this data is more than just evidence of high prices; rather, it shows that when Coral engaged in False Exports, it was able to charge extreme prices to CERS in comparison to what it was charging other buyers.<sup>88</sup>

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<sup>85</sup> *Id.* at 44-49.

<sup>86</sup> Opinion No. 537-A, 153 FERC ¶ 61,386 at P 76.

<sup>87</sup> California Parties Brief Opposing Exceptions at 50-53.

<sup>88</sup> *Id.* at 54-58.

41. California Parties aver that the weighted average premium data has always been part of Exhibit CAT-408 and has been previously associated with False Exports.<sup>89</sup> In addition, California Parties assert that, even though the Commission found that the weighted average premiums did not demonstrate undue discrimination, this evidence is still probative of the fact that False Exports had a price effect. Further, California Parties contend that the Revised Initial Decision properly relied on other record evidence that showed how False Exports increased prices by degrading reliability, Coral's intent to profit from these transactions, and the increase in prices attributable to the use of false sinks to park laundered energy.<sup>90</sup> California Parties contend that Shell's reliance on Mr. Taylor's failure to conduct a quantitative analysis to demonstrate a price effect is misplaced. California Parties argue that this type of analysis would only be possible in a situation involving a centrally cleared market, like that in the California Refund Proceeding, because the Pacific Northwest spot market involved tens of thousands of individually negotiated contracts rather than any sort of formal structure or pricing mechanism.<sup>91</sup>

#### 4. Commission Determination

42. We reverse the Revised Initial Decision's finding that California Parties made a *prima facie* case that Coral engaged in False Exports that directly affected specific contract rates. As discussed above, even assuming *arguendo* that California Parties correctly identified individual contracts (which, as discussed above, they did not), we still find that California Parties failed to present contract specific evidence to demonstrate a causal nexus between False Export activities by Coral and the negotiation of the individual spot market contracts between Coral and CERS.<sup>92</sup>

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<sup>89</sup> *Id.* at 58 (citing California Parties Supplemental Brief at 14).

<sup>90</sup> *Id.* at 59 (citing Revised Initial Decision, 154 FERC ¶ 63,004 at P 30, n.71).

<sup>91</sup> *Id.* at 60-62.

<sup>92</sup> As explained in Opinion No. 537, only if California Parties presented a *prima facie* case would the burden shift to Coral to provide rebuttal evidence. Opinion No. 537, 151 FERC ¶ 61,173 at P 99. Because we find that California Parties have not presented a *prima facie* case on the issue of False Exports, we need not address any defects in Coral's Exhibit SNA-14, for the purpose of demonstrating that the sales at issue were back-to-back transactions.

43. We begin by noting that the extensive arguments regarding potential deficiencies in Mr. Taylor's False Export screen<sup>93</sup> are not relevant to the narrow issue on remand, which was whether California Parties demonstrated that False Exports affected the rates in particular contracts, not whether Coral engaged in False Export activity.<sup>94</sup> The U.S. Supreme Court in *Morgan Stanley* made clear that a causal connection between unlawful activity and a contract rate is a prerequisite to the Commission abrogating a bilaterally negotiated contract in circumstances like those presented here.<sup>95</sup> Mr. Taylor's screen may identify instances of False Exports, but does not establish the necessary causal connection between False Exports and the negotiation of specific contracts. Thus, we will not further address arguments regarding the potential deficiencies in Mr. Taylor's methodology. Similarly, arguments related to whether evidence of specific parking transactions is necessary to demonstrate that a False Export has occurred do not speak to the narrow issue on remand, and we will not address these arguments here.

44. We find that the Revised Initial Decision incorrectly relied upon the table in Exhibit CAT-041 in concluding that California Parties had demonstrated a causal connection between False Exports and specific contract rates. According to Mr. Taylor's testimony, this table reflects "the weighted average price paid by CERS *over all its suppliers* during peak periods . . . ."<sup>96</sup> Not only does this evidence fail to single out specific contracts between CERS and Coral, it also does not isolate Coral's sales from those of other sellers. Thus, we find that these weighted average prices cannot demonstrate the necessary link between unlawful activity and specific contract rates, as required under *Morgan Stanley*. We find that Mr. Taylor's summary charts in Exhibit CAT-408 are equally unpersuasive. In particular, we reject the Revised Initial Decision's reliance on the "weighted average premium" data that was prepared to demonstrate undue

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<sup>93</sup> This screen identified instances of False Export by examining (1) whether in "any given hour a supplier submitted a day ahead or hour ahead export schedule to CAISO that was not a wheel through or circulation transaction, and (2) in real time made a simultaneous sale in the same hour to CERS. Revised Initial Decision, 154 FERC ¶ 63,004 at P 26.

<sup>94</sup> In Opinion No. 537, the Commission found that California Parties had presented evidence that Coral engaged in False Export activity. Opinion No. 537, 151 FERC ¶ 61,173 at P 118. Thus, this was not at issue before the Presiding Judge on partial remand.

<sup>95</sup> *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 554-555 (2008) (*Morgan Stanley*).

<sup>96</sup> Ex. CAT-041 at 97 (emphasis added).

discrimination. In rejecting California Parties' undue discrimination claims in Opinion No. 537, the Commission explained that Dr. Fox-Penner's analysis showed only that "different sellers charged different amounts to different buyers."<sup>97</sup> Further, the Commission found that the prices charged to CERS could be justified by "important variables including the duration of transactions, the timing of agreements, and credit risk."<sup>98</sup> Thus, we find California Parties' claim that evidence of high prices demonstrates that False Exports enabled Coral to extract excessive contract prices from CERS to be unsupported by record evidence.

45. In addition, we find that the trader tapes and other documents referenced by the Revised Initial Decision do not demonstrate a causal connection between False Exports and specific contract rates. None of these documents reference specific contracts. Even if this evidence shows that Coral discussed False Export strategies, there is no evidence to link these general trading strategies to the negotiation of specific contracts. Indeed, the majority of the documents do not even mention Coral, let alone specific contracts between CERS and Coral.<sup>99</sup> Other trader tapes and emails involve Coral traders and/or specific sales by Coral to CERS, but are not linked to any of the specific False Export transactions identified by California Parties in Exhibit CAT-408.<sup>100</sup>

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<sup>97</sup> Opinion No. 537, 151 FERC ¶ 61,173 at 187.

<sup>98</sup> *See id.*

<sup>99</sup> Specifically, in Ex. CAT-408, California Parties list the following documents as corroborating evidence: (1) Ex. CAT-124 (WSPP Agreement); (2) Ex. CAT-060 (CERS purchasing guideline memo); (3) Ex. CAT-012 (Raymond D. Hart testimony discussing CERS' difficult circumstances); (4) Ex. CAT-022 (Ms. Susan T. Lee testimony, offering a general description of CERS' weak bargaining position); (5) Ex. CAT-138 (CERS emails discussing a seller decreasing CERS' credit limit, which led to a Stage 2 emergency); (6) Ex. CAT-113 (Coral/City of Glendale strategy sheet); (7) Ex. CAT-123 (Coral/City of Glendale alliance documents); (8) Ex. CAT-114 (February 2, 2001 email discussing purchases from two Canadian companies that were sold to CERS for large margin, does not mention Coral).

<sup>100</sup> (1) Ex. CAT-104 (January 26-27, 2001 emails by Coral traders citing CERS credit limit increase as opportunity to increase margins, but the dates and times of transactions discussed in emails do not match identified instances of False Export); (2) Ex. CAT-363 (trader tape involving negotiation between CERS and Coral trader that is not linked to False Export); (3) Ex. CAT-364 (trader tape in which CERS trader refuses energy at high price, not linked to specific False Export transaction); (4) Ex. CAT-668a (discussion between Coral traders regarding general False Export strategies, but not

(continued...)

46. Exhibit CAT-366 implicates a specific sale that matches the time and date of an instance of False Export identified in Exhibit CAT-408, but still fails to establish a causal connection between False Exports and a specific contract rate. Exhibit No. CAT-366 is a transcript of a trader tape involving the sale by Coral of 100 MW for \$300 for hour 7 on March 13, 2001 to CERS. In the transcript, the Coral trader appears to accurately represent to CERS that all 100 MW being sold are from Avista. There is no evidence offered to discredit this representation, yet California Parties identify 50 MW of False Export during this hour without any explanation of how the conversation in Exhibit CAT-366, which does not appear to misrepresent the source of the energy being sold, relates to the 50 MW of False Export listed in Exhibit CAT-408. Thus, we are not persuaded that Exhibit CAT-366 demonstrates a causal connection between False Exports and the rate for the contract that included hour 7 on March 13, 2001.

47. We likewise reject California Parties' "intertemporal effects" theory and find that it amounts to little more than a claim that these transactions occurred in a dysfunctional market. The Commission has emphasized several times in this proceeding that claims of general market dysfunction are insufficient to avoid application of the *Mobile-Sierra* presumption in the circumstances presented here.<sup>101</sup>

48. For the reasons discussed above, we find that California Parties have not made a *prima facie* case that Coral engaged in False Export activities that directly affected specific contract rates. As such, California Parties have not avoided *Mobile-Sierra* presumption with regard to these 47 contracts.

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mentioning any specific sales); (5) Ex. CAT-672 (transcript of trader conversation regarding a sale by Coral that does not match any identified instance of False Exports); (6) Ex. CAT-706 (transcript of recorded trader conversation that does not match any instances of False Exports).

<sup>101</sup> Opinion No. 537, 151 FERC ¶ 61,173 at P 216 (quoting 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.")); *see also* Remand 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*.").

## D. Bad Faith Allegations

### 1. Revised Initial Decision

49. The Revised Initial Decision found sufficient record evidence that 91 of the contracts between Coral and CERS were affected by bad faith on the part of Coral such that the *Mobile-Sierra* presumption is avoided. The Revised Initial Decision noted that parties are sharply divided over the weight to give the *Power Markets Week* + \$75 screen, which was offered by California Parties to support its allegations of bad faith. The Revised Initial Decision found that the Order on Remand does not prohibit use of this evidentiary screen, but limits its application to use only as corroborating evidence. Thus, Revised Initial Decision credited this screen as corroborating evidence to be weighed in conjunction with other record evidence. Based on a review of that evidence, the Revised Initial Decision confirmed the Initial Decision's finding that California Parties presented a *prima facie* case of bad faith, and also expanded on this finding to clarify that Coral's bad faith conduct falls into the following three categories: (1) False Export transactions - 47 contracts; (2) deceptive multi-party loop transactions - 9 contracts; and (3) stage emergency<sup>102</sup> sales contracts – 35 contracts.<sup>103</sup>

50. With regard to the allegations of bad faith based on Coral's False Export activities, the Revised Initial Decision found that False Export was a deceptive practice perpetrated by Coral to obtain higher contract prices. The Revised Initial Decision stated that, under the bad faith test adopted by the Commission for this proceeding,<sup>104</sup> only one of the three factors needed to be shown to make a *prima facie* case of bad faith. The Revised Initial Decision found that the presence of an "unconscionable advantage" was manifested in the

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<sup>102</sup> Stage emergencies refer to a hierarchy of emergency conditions designed by CAISO for operational purposes, with Stage 3 emergencies representing the most serious conditions. Revised Initial Decision, 154 FERC ¶ 63,004 at P 56.

<sup>103</sup> Revised Initial Decision, 154 FERC ¶ 63,004 at PP 43-46. The Revised Initial Decision rejected California Parties' allegations of bad faith based on undue discrimination, noting that the Commission had previously rejected the undue discrimination allegations. *Id.* PP 59-60.

<sup>104</sup> *Valcarce v. Fitzgerald*, 961 P.2d 305 (Utah 1998) (*Valcarce*). Under the *Valcarce* test, a finding of bad faith requires that one or more of the following factors existed: "(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 the activities in question would hinder, delay, or defraud others." *Id.* at 316.

record evidence by the dynamics of the energy marketplace at the time, in which CERS had a mandate to avoid blackouts and was forced to procure energy amidst a crisis atmosphere that was replete with unlawful trading strategies.<sup>105</sup>

51. The Revised Initial Decision found that deceptive multi-party loop transactions, while not fitting the technical definition of a False Export, involve a misrepresentation of the source of the energy at issue and therefore satisfy the test for bad faith. The Revised Initial Decision acknowledged that the Order on Remand foreclosed the use of this evidence for False Export determinations, but opined that Opinion No. 537 does not prohibit relying on such evidence to make a showing of bad faith. Further, the Revised Initial Decision found that, while California Parties withdrew the multi-party transactions evidence as specifically constituting False Exports, they did not withdraw it from the record entirely.<sup>106</sup>

52. The Revised Initial Decision also found that evidence of CAISO-declared stage emergencies is relevant to bad faith allegations because it demonstrates the absence of a meaningful choice on the part of CERS. The Revised Initial Decision found that California Parties presented a *prima facie* case of bad faith as to the 35 contracts entered into during a Stage 2 or Stage 3 emergency because during these conditions, Coral took advantage of CERS' lack of bargaining power to extract elevated contract prices.<sup>107</sup>

## **2. Briefs on Exceptions**

53. Shell and Trial Staff contend that the Revised Initial Decision erred by finding that California Parties made a *prima facie* case that 91 of Coral's contracts with CERS were tainted by bad faith. Shell and Trial Staff continue to argue that California Parties never separately alleged bad faith against Coral, but rather alleged a composite claim of duress, fraud, and bad faith. Shell contends that the *Mobile-Sierra* database presented by California Parties against Coral and co-Respondent TransCanada<sup>108</sup> contained the same columns representing various allegations, yet the Revised Initial Decision finds that California Parties separately alleged bad faith against Coral whereas the Commission

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<sup>105</sup> Revised Initial Decision, 154 FERC ¶ 63,004 at PP 48-49 (citing Ex. CAT-22 at 7-8, Ex. CAT-12 at 2, 9, 13).

<sup>106</sup> *Id.* PP 50-54.

<sup>107</sup> *Id.* PP 55-58.

<sup>108</sup> Ex. CAT-408 and Ex. CAT-412, respectively.

found that California Parties did not separately allege bad faith against TransCanada. Shell argues that these two disparate conclusions are irreconcilable.<sup>109</sup>

54. Shell also objects that the Presiding Judge permitted California Parties to submit new theories of bad faith despite the Commission's directive to "address only California Parties' actual allegations of bad faith" on remand.<sup>110</sup> Specifically, Shell asserts that on remand, California Parties alleged for the first time that 107 contracts, not 119, were affected by bad faith. Also, Shell argues that the new 107 number breaks down into four new allegations of bad faith based on False Export, bad faith based on multi-party loop transactions, bad faith based on sales made during CAISO declared stage emergencies, and bad faith based on undue price discrimination – allegations never made on the record below. Shell contends that permitting California Parties to present new theories as proof of bad faith violated Shell's due process rights and is contrary to the Commission's Rules of Practice and Procedure.<sup>111</sup>

55. Additionally, Shell argues that even if California Parties had separately alleged bad faith, and even if their new allegations of bad faith were not procedurally improper, these new allegations do not meet the applicable legal standards for proving bad faith. With regard to bad faith based on False Export, Shell asserts, as discussed above, that California Parties presented no evidence that Shell made misrepresentations to CERS or deceived CERS in anyway. With regard to the multi-party loop transactions, Shell maintains that these allegations were withdrawn and that the Revised Initial Decision's resurrection of these claims violates Shell's due process rights and conflicts with the Commission's instruction that "these transactions are not relevant, even for the purpose of demonstrating Coral's alleged deceptive practices."<sup>112</sup> Shell contends that the findings of bad faith based on sales made during CAISO-declared stage emergencies are irrational and must be rejected. Shell argues that according to this theory, any seller that made sales to CERS on any of the 69 days in which stage emergencies were declared during the relevant period would be acting in bad faith. In particular, Shell points out that TransCanada sold to CERS during declared stage emergencies but the Commission has rejected claims of bad faith against TransCanada.<sup>113</sup> Thus, Shell claims that the Revised

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<sup>109</sup> Shell Brief on Exceptions at 49-51.

<sup>110</sup> *Id.* at 51 (quoting Opinion No. 537, 151 FERC ¶ 61,173 at P 152).

<sup>111</sup> *Id.* at 51-53.

<sup>112</sup> *Id.* at 55 (quoting Opinion No. 537-A, 153 FERC ¶ 61,386 at P 76).

<sup>113</sup> Opinion No. 537-A, 153 FERC ¶ 61,386 at P 96.

Initial Decision's finding of bad faith based on stage emergencies is directly contradicted by the Commission's holding in Opinion No. 537-A. Further, Shell argues that finding bad faith under these circumstances would encourage sellers to withhold sales at precisely the times when CAISO needs the power most.<sup>114</sup>

56. Trial Staff also disputes that California Parties have satisfied their burden with regard to various categories of bad faith presented on remand. Trial Staff first contends that, because record does not support a finding by a preponderance of the evidence that Coral engaged in False Export activity that directed affected a specific contract rate, the Revised Initial Decision's rulings on False Exports cannot serve as the basis for a finding of bad faith. Further, Trial Staff argues that the only contentions by California Parties' witnesses addressing the presence of an unconscionable advantage by Coral or CERS' absence of meaningful choice are broad contentions that are not tied to any specific contract and therefore do not satisfy the contract specific analysis required under *Mobile-Sierra*.<sup>115</sup> Trial Staff also denies that record evidence shows that CERS was dealing from a weak bargaining position. To the contrary, Trial Staff points that the Commission has concluded elsewhere that CERS had options and its long-term contracts were not the product of unequal bargaining power.<sup>116</sup>

57. Trial Staff argues that the Revised Initial Decision's findings that the multi-party loop transactions are tainted by bad faith are supported by nothing other than an observation that all nine of these contracts exceed the Power Markets Week + \$75 benchmark, which is not, by itself, sufficient to demonstrate bad faith. Further, Trial Staff contends that the record does not even demonstrate that the multi-party loop transactions are unlawful activity. Moreover, Trial Staff notes that the Commission specifically precluded the Presiding Judge from considering these transactions on remand. In addition, Trial Staff disputes that evidence of high contract prices during CAISO-declared stage emergencies demonstrates that Coral intended to take unconscionable advantage of CERS.<sup>117</sup>

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<sup>114</sup> Shell Brief on Exceptions at 56.

<sup>115</sup> Trial Staff Brief on Exceptions at 30 (citing Ex. CAT-22 at 7-8, Ex. CAT-12 9, 13).

<sup>116</sup> *Id.* at 31 (citing *Pub. Utils. Comm'n of Cal. v. Sellers of Long Term Contracts to the California Dept. of Water Resources*, 103 FERC ¶ 61,354, at PP 42-60 (2003) (Long-Term Contracts Order), *order on reh'g*, 105 FERC ¶ 61,182 (2003)).

<sup>117</sup> *Id.* at 32-34.

58. Finally, Shell and Trial Staff contend that the causal connection between alleged bad faith and specific contract negotiations is an essential element of the *Mobile-Sierra* analysis. Shell and Trial Staff argue that the Revised Initial Decision made no findings as to how Coral's alleged bad faith directly affected the negotiation of any contract, but relies solely on the Power Markets Week + \$75 price screen as evidence of a causal connection. Shell and Trial Staff recognize that the screen may be evidence of high prices, but maintain that price alone says nothing about Coral's behavior during contract negotiations.<sup>118</sup>

### 3. Brief Opposing Exceptions

59. California Parties maintain that they sufficiently targeted bad faith as a separate claim against Coral and aver that the Revised Initial Decision applied the separate legal definition of bad faith, as set forth in *Valcarce* that the Commission adopted in Opinion No. 537.<sup>119</sup> In particular, California Parties contend that throughout this proceeding, they have argued that Coral acted in bad faith by taking unconscionable advantage of CERS. Additionally, California Parties assert that in his testimony and at hearing, Mr. Taylor made it clear that, whether any particular conduct matched the legal definitions of fraud or duress, they at least constituted bad faith.<sup>120</sup> California Parties also quote portions of their initial and reply briefs to evidence arguments targeted specifically at bad faith.<sup>121</sup>

60. California Parties argue that Shell is incorrect that California Parties' evidence of bad faith against Coral is identical to that against TransCanada, which was found to be insufficient to demonstrate bad faith.<sup>122</sup> California Parties acknowledge that the Commission found that the *Power Markets Week + \$75* screen, in itself, did not

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<sup>118</sup> Shell Brief on Exceptions at 57 (citing Opinion No. 537-A, 153 FERC ¶ 61,386 at P 75 (“Evidence of a high price alone says nothing about Coral's behavior during contract negotiations.”)); Trial Staff Brief on Exceptions at 30, 32, 34.

<sup>119</sup> Opinion No. 537, 151 FERC ¶ 61,173 at P 144.

<sup>120</sup> California Parties Brief Opposing Exceptions at 65-66 (citing Tr. 2441:16-17, 244:9-10, 2659:25-2660:5, 2954:4-10 (Taylor)).

<sup>121</sup> *Id.* at 66-67 (quoting California Parties December 16, 2013 Initial Brief, Docket No. EL01-10-85, at 15, 21-23, 28; California Parties January 28, 2014 Reply Brief, Docket No. EL01-10-85, at 18; California Parties June 16, 2014 Brief Opposing Exceptions at 95-96).

<sup>122</sup> See Opinion No. 537, 151 FERC ¶ 61,173 at P 145.

demonstrate TransCanada's bad faith,<sup>123</sup> but assert that the record is replete with corroborating evidence that in the majority of Coral's sales to CERS, CERS lacked a meaningful choice and the resulting contract terms were unreasonably favorable to Coral.<sup>124</sup>

61. California Parties deny that Shell's due process rights were violated by California Parties' introduction of new theories of bad faith on remand. California Parties assert that the evidence in question has been in the record all along and Shell was afforded three rounds of briefing to respond to the arguments that California Parties made on the basis of that evidence. Moreover, California Parties argue that new theories were not advanced on remand. California Parties contend that Mr. Taylor made his view clear on the record that False Export,<sup>125</sup> multi-party loops,<sup>126</sup> and CAISO stage emergency sales at excessive prices<sup>127</sup> all indicated bad faith by Coral. Further, because the Commission decided in Opinion No. 537 that the *Power Markets Week + \$75* screen cannot be the primary evidence of bad faith, California Parties argue that they are entitled, on remand, to point to other evidence in the record to show bad faith.<sup>128</sup>

62. California Parties argue that the Revised Initial Decision correctly found bad faith on the basis of False Exports. California Parties assert that Shell and Trial Staff are incorrect that there is no proof that Coral engaged in False Exports for the reasons stated in the False Exports section above.<sup>129</sup> Also, California Parties reiterate that they had previously connected bad faith to False Exports.<sup>130</sup> Lastly, California Parties contend

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<sup>123</sup> Opinion No. 537-A, 153 FERC ¶ 61,386 at P 75. California Parties note that they dispute this finding and are contesting it on appeal. California Parties Brief Opposing Exceptions at n.240.

<sup>124</sup> California Parties Brief Opposing Exceptions at 67-73.

<sup>125</sup> *Id.* at 76 (citing Tr. 2888:3-12 (Taylor)).

<sup>126</sup> *Id.* (citing Ex. CAT-289 at 129:4-16).

<sup>127</sup> *Id.* at 77 (citing Tr. 2954:1-10 (Taylor)).

<sup>128</sup> *Id.* at 77-78 (quoting Ex. CAT-012 at 8:18-23, 8:23-9:1, 10:21-11:3; Ex. CAT-022 at 7-12; Ex. CAT-161 at 76:10-88:3).

<sup>129</sup> *Supra* PP 34-40.

<sup>130</sup> California Parties Brief Opposing Exceptions at 81 (citing Tr. 2888:3-12 (Taylor)).

that Shell's reliance on the Commission's finding, in the context of long-term contracts, that CERS had options and did not have unequal bargaining power,<sup>131</sup> is misplaced. California Parties argue that the long-term contracts cases are inapposite as to the question of whether Coral took advantage of CERS in the spot market.<sup>132</sup>

63. With regard to multi-loop transactions, California Parties dispute Shell and Trial Staff's claim that the Revised Initial Decision erred by considering this evidence. California Parties contend that, even though Mr. Taylor withdrew his claim that these transactions were False Exports, he continued to press the claim that they constituted bad faith because these transactions involved misrepresentations to CERS in an effort to increase prices. California Parties claim that Shell and Trial Staff erroneously rely on "ambiguous language" in Opinion No. 537-A<sup>133</sup> that Shell and Trial Staff interpret as precluding consideration of this evidence because, as the Revised Initial Decision finds, "it is obvious that misrepresentations for profit of the type involved here ... fit the definition of bad faith."<sup>134</sup>

64. California Parties also contend that the Revised Initial Decision correctly found bad faith on the basis of sales during CAISO-declared stage emergencies. California Parties argue that Shell knew that CERS was in no position to bargain and consistently sold to CERS during Stage 3 emergencies at prices far above market, thereby capitalizing on CERS' absence of meaningful choice to extract higher prices.<sup>135</sup>

65. Finally, California Parties argue that Shell and Trial Staff are incorrect that the Revised Initial Decision failed to explain how Coral's bad faith affected contract negotiations. California Parties assert that the Revised Initial Decision clearly explains that bad faith was present at the formation of these contracts due to CERS' demonstrated lack of meaningful choice. Further, California Parties reiterate that the record is replete with evidence that Coral took advantage of CERS' lack of options to option contract terms unreasonably favorable to Coral.<sup>136</sup>

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<sup>131</sup> Long-Term Contracts Order, 103 FERC ¶ 61,354 at PP 42-60.

<sup>132</sup> California Parties Brief Opposing Exceptions at 81.

<sup>133</sup> Opinion No. 537-A, 153 FERC ¶ 61,386 at P 76.

<sup>134</sup> California Parties Brief Opposing Exceptions at 83.

<sup>135</sup> *Id.* at 83-85.

<sup>136</sup> *Id.* at 85-86 (citing Revised Initial Decision, 154 FERC ¶ 63,004 at PP 49, 57).

#### 4. Commission Determination

66. We find that the Revised Initial Decision erred in determining that 91 of the contracts between CERS and Coral were affected by bad faith and therefore reverse these findings. Despite California Parties' more granular allegations of bad faith, as opposed to fraud or duress, we find that California Parties failed to demonstrate that Coral transacted in bad faith that directly affected specific contract rates.

67. First, as discussed above,<sup>137</sup> California Parties' have not demonstrated that Coral engaged in False Exports that directly affected the rates in 47 contracts with CERS. Thus, False Exports cannot serve as the basis for a finding of bad faith.

68. Next, with regard to the multi-party loop transactions, we find that the Revised Initial Decision misinterpreted the Commission's instructions. In Opinion No. 537, the Commission stated that "[t]he Presiding Judge should exclude from consideration the evidence of 19 hours of 'multi-party' transactions that was subsequently withdrawn by California Parties."<sup>138</sup> In Opinion No. 537-A, the Commission unambiguously stated that "these transactions are not relevant, even for the purpose of demonstrating Coral's alleged deceptive practices."<sup>139</sup> California Parties claim that "Mr. Taylor continued to press the claim that [the multi-party loop transactions] constituted bad faith, because they involved Shell's flagrant misrepresentations to CERS . . . ."<sup>140</sup> but our review of the relevant evidence finds no such intention. At hearing, Mr. Taylor testified that "[w]hile technically, it's not false export, it does the same sort of thing that a false export does,"<sup>141</sup> but at no time alleged that these transactions constitute bad faith. In his rebuttal testimony, Mr. Taylor confirmed that he has dropped these transactions from the list of Coral's False Exports, but stated that he still believed that the *Mobile-Sierra* presumption should not apply to these sales because, "in each of these transactions, Dr. Fox-Penner found price discrimination."<sup>142</sup> In Opinion No. 537, the Commission rejected California Parties' price discrimination arguments.<sup>143</sup> Further, a footnote in Mr. Taylor's rebuttal

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<sup>137</sup> *Supra* PP 41-45.

<sup>138</sup> Opinion No. 537, 151 FERC ¶ 61,173 at P 120.

<sup>139</sup> Opinion No. 537-A, 153 FERC ¶ 61,386 at P 76.

<sup>140</sup> California Parties Brief Opposing Exceptions at 82.

<sup>141</sup> Tr. at 2573:6-2574:8.

<sup>142</sup> Ex. CAT-289 at 129.

testimony speculated that these transactions could still have involved “a potential element of duress.”<sup>144</sup> However, California Parties are no longer alleging duress, but have propounded a theory of bad faith as distinct from duress or fraud. As such, we find that the evidence of multi-party loop transactions is not relevant to any of California Parties’ remaining claims against Coral. Thus, the Presiding Judge erred by relying on the multi-party loop transaction evidence, even for the purpose of showing bad faith.

69. We find no merit in California Parties’ argument that Coral’s sales to CERS during CAISO-declared stage emergencies demonstrate bad faith. California Parties’ argument is premised in what they characterize as Coral’s “pattern and practice of exploiting CERS,” combined with CERS’ lack of meaningful choice.<sup>145</sup> The evidence allegedly demonstrating Coral’s “pattern and practice” of exploiting CERS is the same general evidence offered in support of their False Export allegations. As discussed above,<sup>146</sup> we find that this evidence is not contract-specific and, therefore, is not sufficient to avoid application of the *Mobile-Sierra* presumption in the circumstances presented here. Other than these non-contract specific trader tapes and documents, California Parties’ only other evidence to support its claims that Coral transacted in bad faith in its sales to CERS during stage emergencies are the prices charged by Coral to CERS. Not only has the Commission affirmed that the *Power Markets Week + \$75* screen does not, by itself, demonstrate bad faith,<sup>147</sup> but the Commission has also emphasized that “evidence of a high price charged to CERS does not demonstrate any unfair dealing at the contract formation stage.”<sup>148</sup> Thus, we find that the mere concurrence of high prices and stage emergencies is not sufficient to show unlawful activity that directly affected contract rates.

70. We reverse the Revised Initial Decision as to the foregoing issues. To the extent this order omits discussion of particular exceptions, they have been considered and are denied.

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<sup>143</sup> Opinion No. 537, 151 FERC ¶ 61,173 at PP 187-189.

<sup>144</sup> Ex. CAT-289 at n.276.

<sup>145</sup> California Parties Brief Opposing Exceptions at 84.

<sup>146</sup> *Supra* PP 42-44.

<sup>147</sup> Opinion No. 537, 151 FERC ¶ 61,173 at P 145; Opinion No. 537-A, 153 FERC ¶ 61,386 at P 75.

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

The Commission orders:

The Revised Initial Decision is hereby reversed, as discussed in the body of the Order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.