

158 FERC ¶ 61,018
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. EL02-71-058

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

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

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

ORDER ON CLARIFICATION

(Issued January 9, 2017)

1. In this order, we grant Indicated Respondents¹ request for clarification of the Commission's October 13, 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

3. On November 3, 2015, in response to the Ninth Circuit's remand, the Commission issued an order⁶ that re-established a trial-type hearing before an administrative law judge to address whether any individual public utility seller's violation of the Commission's market-based rate quarterly reporting requirement led to an unjust and unreasonable rate for that particular seller in California during the 2000-2001 period. In the Remand Order, the Commission instructed that parties are not limited to presenting claims and evidence of market concentration based exclusively on the hub-and-spoke test; rather, consistent with the instructions from the *Harris* Remand, they are permitted to present alternative market power analyses.⁷

¹ For purposes of this order, Independent Respondents are Shell Energy North America (US), L.P.; TransCanada Energy Ltd.; and Hafslund Energy Trading, L.L.C.

² *State of Cal., ex rel. Bill Lockyer v. Brit. Colom. Power Exch. Corp.*, 157 FERC ¶ 61,023 (2016) (Order on Rehearing).

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

⁴ *Id.* at 1274-75.

⁵ *Id.* at 1275.

⁶ *State of Cal., ex rel. Bill Lockyer v. Brit. Colom. Power Exch. Corp.*, 153 FERC ¶ 61,137 (2015) (Remand Order).

⁷ *Id.* P 4.

4. In an order issued March 1, 2016,⁸ the Commission clarified the scope of evidence that may be presented at hearing. As relevant here, 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 However, the Commission found that California Parties may not present evidence regarding issues that have been the subject of a final Commission order.¹⁰ In particular, the Commission found that California Parties may not re-litigate the issue of vicarious liability,¹¹ which was previously rejected by the Commission.¹² California Parties¹³ sought rehearing of the March 2016 Order.

5. In the Order on Rehearing, the Commission granted rehearing on the issue of pricing umbrella evidence and determined that parties can introduce this evidence at hearing for the sole purpose of providing “greater context and depth to the examination of what went wrong that enabled sellers to charge unjust and unreasonable rates.”¹⁴ However, the Commission cautioned that “evidence supporting a pricing umbrella argument cannot in and of itself establish liability for any respondent,” and there is “no basis for liability on a pricing umbrella theory in this proceeding.”¹⁵

⁸ *State of Cal., ex rel. Bill Lockyer v. Brit. Colom. Power Exch. Corp.*, 154 FERC ¶ 61,154 (2016) (March 2016 Order).

⁹ *Id.* P 12.

¹⁰ *Id.* PP 14-15.

¹¹ 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.

¹² March 2016 Order, 154 FERC ¶ 61,154 at P 14.

¹³ 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.

¹⁴ Order on Rehearing, 157 FERC ¶ 61,023 at P 13.

¹⁵ *Id.*

Request for Clarification

6. Indicated Respondents state that they interpret the pricing umbrella finding in the Order on Rehearing to mean that parties may introduce pricing umbrella evidence only for the purpose of providing context and depth to California Parties refund claims, but not as probative evidence. Thus, Indicated Respondents request clarification that pricing umbrella evidence cannot in and of itself alleviate California Parties' burden to demonstrate that a reporting deficiency "masked an exercise of market power or other overt manipulation [by a respondent] in order to demonstrate the required nexus between an unlawful act and an unjust and unreasonable rate."¹⁶

7. In the alternative, Indicated Respondents state that if the Commission intended, in the Order on Rehearing, to hold that pricing umbrella evidence, although insufficient on its own to establish liability, could be an evidentiary element on which a finding of refund liability may be based, this finding is error and Indicated Respondents seek rehearing.¹⁷

Discussion

8. We grant Indicated Respondents' request for clarification. The Commission has consistently emphasized that in order to avoid application of the *Mobile-Sierra* presumption, California Parties must demonstrate the necessary connection between a seller's reporting violation and an unjust and unreasonable rate.¹⁸ We continue to find that evidence of a third party's conduct is not relevant to this showing because the focus of the *Mobile-Sierra* inquiry is the conduct of the seller and whether that conduct directly affected contract prices.¹⁹ Further, we note that the pricing umbrella theory of refund liability is the subject of a final Commission order²⁰ and therefore cannot be re-litigated here. Thus, we clarify that, while we will permit the introduction of pricing umbrella evidence solely for the purpose of providing greater context and depth for probative,

¹⁶ Indicated Respondents Request for Clarification at 7 (quoting Order on Rehearing, 157 FERC ¶ 61,023 at P 10).

¹⁷ *Id.* at 7-8.

¹⁸ Order on Rehearing, 157 FERC ¶ 61,023 at P 12; March 2016 Order, 154 FERC ¶ 61,154 at P 16.

¹⁹ See *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dis. No. 1 of Snohomish County*, 554 U.S. 527, 554-555 (2008).

²⁰ See March 2016 Order, 154 FERC ¶ 61,154 at P 14.

seller-specific evidence, this evidence should not be treated as evidence that can be the basis of a finding of refund liability. We thus affirm that pricing umbrella evidence is not an element upon which a finding of refund liability may be based in this proceeding. For these reasons, we affirm the Commission's prior findings that there is no basis for liability on a pricing umbrella theory in this proceeding.²¹

9. Because we are granting Indicated Respondents' request for clarification, we dismiss as moot their alternate request for rehearing.

The Commission orders:

(A) Indicated Respondents' request for clarification is hereby granted, as discussed in the body of this order.

(B) Indicated Respondents' request for rehearing is hereby dismissed, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

²¹ Order on Rehearing, 157 FERC ¶ 61,023 at P 13; March 2016 Order, 154 FERC ¶ 61,154 at P 14 (citing *Cal. ex rel. Lockyer*, 135 FERC ¶ 61,113 at PP 1, 49).