

135 FERC ¶ 61,113
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

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

v.

Docket No. EL02-71-017

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

OPINION NO. 512

ORDER AFFIRMING INITIAL DECISION

(Issued May 4, 2011)

1. In this order, the Commission affirms in all respects the Initial Decision issued in this case on March 18, 2010, in which the Presiding Administrative Law Judge (ALJ or

Presiding Judge) granted summary disposition in favor of respondent sellers.¹ The Commission denies the exceptions requested by the California Parties² and by Avista Utilities and Avista Energy (Avista).³

I. Procedural History and Background

A. Ninth Circuit Remand

2. On September 9, 2004, the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) issued a remand to the Commission.⁴ The Remand originated from a complaint filed by the State of California, *ex rel.* Bill Lockyer, Attorney General of the State of California (California AG) on March 20, 2002 against all generators and marketers selling power into markets operated by the California Independent System Operator Corporation (CAISO) and the California Power Exchange Corporation (CalPX).⁵ The complaint alleged, among other things, that generators and marketers selling power into markets operated by the CAISO and CalPX failed to report transaction-specific information about their sales and purchases at market-based rates in 2000, as required under the Commission's market-based rate program and that wholesale sellers failed to properly file quarterly transaction reports for spot market sales of energy to the California Energy Scheduling Resources Division of the California Department of Water Resources (CERS) in 2001.

¹ *State of California, ex rel. Bill Lockyer v. British Columbia Power Exchange Corp.*, 130 FERC ¶ 63,017 (2010) (Initial Decision).

² For purposes of this proceeding, the California Parties are the State of California, *ex rel.* Edmund G. Brown Jr., Attorney General, the California Public Utilities Commission, Pacific Gas and Electric Company, and Southern California Edison Company.

³ On March 11, 2011, Commissioner Cheryl A. LaFleur issued a memorandum to the file in sixty dockets, including Docket No. EL02-71, documenting her decision, based on a memorandum from the Office of General Counsel's General and Administrative Law section, dated February 18, 2011, not to recuse herself from considering matters in those dockets.

⁴ *State of California, ex rel. Bill Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004), *cert. denied*, *Coral Power, L.L.C. v. Cal. ex rel. Brown*, 551 U.S. 1140 (2007) (Ninth Circuit Remand).

⁵ *See State of California, ex rel. Bill Lockyer v. British Columbia Power Exchange Corp.*, 99 FERC ¶ 61,247, *order on reh'g*, 100 FERC ¶ 61,295 (2002).

3. The Ninth Circuit considered two main issues: (i) whether the Commission's market-based rate tariffs complied with the Federal Power Act (FPA), and if so, (ii) whether the Commission failed to administer the tariffs in accordance with the tariffs' terms and abused its discretion in limiting available remedies (such as refunds) for regulatory violations.⁶ The Ninth Circuit held that the Commission's authorization of market-based rate tariffs complied with the FPA, but that the Commission erred in ruling that it lacked authority to order refunds for violations of its reporting requirement and remanded the case for further refund proceedings.⁷ The Ninth Circuit did not order any refunds, leaving it to the Commission to consider the appropriate remedial options.⁸

B. The Commission's Remand Orders

1. The March 21 Order

4. In response to the Ninth Circuit Remand, the Commission issued its Order on Remand on March 21, 2008.⁹ The March 21 Order established a trial-type hearing before an 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."¹⁰

5. In defining the scope of the proceeding, the Commission permitted wholesale purchasers that made short-term, market-based rate purchases in the CAISO and CalPX markets, and those who made spot market purchases of energy through CERS, from January 1, 2000 to October 1, 2000, to present evidence that any seller that violated the quarterly reporting requirement failed to disclose an increased market share sufficient to give it the ability to exercise market power and, thus, cause its market-based rates to be unjust and unreasonable.¹¹ The Commission similarly permitted the sellers to present

⁶ See *State of California, ex rel. Bill Lockyer v. British Columbia Power Exchange Corp.*, 122 FERC ¶ 61,260, at P 9 (2008) (March 21 Order), *order on clarification*, 123 FERC ¶ 61,042 (2008), *order on reh'g and clarification*, 125 FERC ¶ 61,016 (2008), *order rejecting request for reh'g*, 129 FERC ¶ 61,276 (2009).

⁷ *Id.* P 1.

⁸ *Id.*

⁹ March 21 Order, 122 FERC ¶ 61,260.

¹⁰ *Id.* P 2.

¹¹ *Id.*

contrary evidence.¹² The Commission also directed the ALJ and parties to focus on the individual facts and circumstances relevant *to each individual seller*.¹³ The Commission determined that when it receives the factual determinations of the ALJ with respect to each seller, it will exercise its remedial discretion to determine whether a disgorgement of profits or other remedy is appropriate for a particular seller.¹⁴

6. Thus, in the March 21 Order, the Commission directed that the hearing was to focus solely on “whether, based on the facts and circumstances associated with each individual seller, that seller’s improper or untimely filing of its quarterly transaction reports masked an accumulation of market power such that the market rates were unjust and unreasonable.”¹⁵

7. In directing this hearing, the Commission reminded the parties that the proceeding was *not* to be one to address any tariff violations (such as gaming and anomalous bidding behavior that were raised in the *CPUC* remand case).¹⁶

8. The Commission allowed both buyers and sellers that made short-term purchases from and sales to the CAISO, CalPX, and CERS during 2000 and 2001, to present evidence on and directed the ALJ to make findings based on the individual facts and circumstances whether any seller that violated the quarterly reporting requirement did or did not gain an increased generation market share sufficient to give it the ability to exercise market power and cause market-based rates to be unjust and unreasonable as a

¹² *Id.*

¹³ *See id.* P 26 (“In considering our ‘broad remedial authority’ to determine appropriate remedies, if any, for sellers that violated our quarterly reporting requirement, we will weigh the equities for *each individual seller*.”) (emphasis added). The Commission then directed the presiding judge to make findings of fact with respect to these issues, for each seller, and submit those findings of fact to the Commission. *Id.* P 35.

¹⁴ *Id.* P 2.

¹⁵ *Id.* P 32.

¹⁶ *Id.* P 33 & n.65 (referencing *Public Utilities Commission of California v. FERC*, 462 F.3d 1027 (9th Cir. 2006), *reh’g denied* (*CPUC*), Docket Nos. EL00-95-000, *et al.* (with EL00-98)).

result.¹⁷ The relevant period of time was from January 1, 2000 until October 1, 2000 (Summer Period).¹⁸

9. The Commission directed the participants to apply the hub-and-spoke test to determine if the sellers gained market power subsequent to the Commission's original grant of market-based rate authority:

We find that issues of material fact exist with respect to the question of whether, based on the facts and circumstances associated with each individual seller, that seller's improper or untimely filing of its quarterly transaction reports masked an accumulation of market power (*as defined by the Commission's test for approving market-based rates in effect at the time of the transaction*) such that the market rates were unjust and unreasonable.¹⁹

In order to make the appropriate determination, the Commission directed the application of:

the analysis that was in effect at the time of the transactions in this proceeding. The Commission's market-based rate program that was in place at the time generally relied on a 20 percent market share threshold and looked at additional market power factors if the 20 percent threshold was reached by a particular seller.²⁰

10. Thus, the relevant inquiry for hearing was whether a seller who improperly or untimely filed its quarterly transaction reports gained the ability to exercise market power after the Commission approved the seller's market-based rates.²¹ In examining whether an individual seller had market power under the hub-and-spoke analysis, the Commission instructed that the ALJ and the parties should first address whether the seller at any point

¹⁷ *Id.* P 33.

¹⁸ *Id.* P 34. The Commission also allowed inclusion of sales to CERS from January 18, 2001 until June 20, 2001. See *State of California, ex rel. Bill Lockyer v. British Columbia Power Exchange Corp.*, 125 FERC ¶ 61,016, at P 19 (2008).

¹⁹ *Id.* P 35 (emphasis added).

²⁰ *Id.* P 25 & n.45 (emphasis added).

²¹ *Id.* P 35.

reached a twenty percent generation market share threshold.²² If the seller did reach a twenty percent market share, the ALJ was instructed to determine whether other factors were present to indicate that the seller did not have the ability to exercise market power.²³

2. The April 15 Order

11. On March 28, 2008, the California Parties filed an expedited request for limited rehearing of the March 21 Order asserting that (i) the March 21 Order erroneously excluded from the remand proceeding sales to CERS during the period from January 18, 2001 until June 20, 2001, and (ii) the March 21 Order failed to direct the sellers to provide corrected quarterly reports for the Summer Period.²⁴

12. On April 15, 2008, the Commission issued an Order on Clarification addressing the California Parties' request for clarification and expedited rehearing (April 15 Order).²⁵ First, the Commission postponed a determination of whether to include in the proceeding sales made to CERS from January 18, 2001 until June 20, 2001.²⁶ Second, the Commission clarified that, in its March 21 Order, it intended that the parties submit for the hearing record copies of both their original, previously-filed quarterly transaction reports, as well as new, corrected quarterly transaction reports for all purchases or sales through the CAISO and CalPX markets for the Summer Period.²⁷ Finally, the Commission clarified that certain settling parties were dismissed from this proceeding.²⁸

²² *Id.*

²³ *Id.* See also *id.* n.68 (providing a nonexclusive list of factors that indicate whether a seller had the ability to exercise market power).

²⁴ See *State of California, ex rel. Bill Lockyer v. British Columbia Power Exchange Corp.*, 123 FERC ¶ 61,042, at P 4 (2008) (April 15 Order).

²⁵ April 15 Order, 123 FERC ¶ 61,042 (2008).

²⁶ *Id.* P 7.

²⁷ *Id.* P 10.

²⁸ *Id.* P 13.

3. The October 6 Order

13. On October 6, 2008, the Commission issued an Order on Rehearing and Clarification.²⁹ The October 6 Order addressed the California Parties' request for clarification and rehearing filed in response to the March 21 Order and issues not resolved in the April 15 Order.³⁰

14. The California Parties again argued that the Commission erred by excluding sales to CERS from this proceeding by limiting the scope of the issue to sales made to CERS during the Summer Period, a time during which CERS did not exist.³¹ The California Parties therefore requested that the Commission include in this proceeding sales made to CERS from January 18, 2001 through June 20, 2001 (CERS Period).³² The California Parties also requested that the Commission require sellers to submit original and corrected quarterly transaction reports for all spot market bilateral sales to CERS, including reports for sales to CERS that sellers made under the Western System Power Pool Agreement (WSPP Agreement).³³

15. The Commission allowed limited inclusion of sales made to CERS during the CERS Period.³⁴ Specifically, the Commission permitted the California Parties to present evidence that any public utility seller who violated its quarterly reporting requirement failed to disclose an increased market share during the CERS Period sufficient to give it the ability to exercise market power, thus causing its market-based rates to be unjust and unreasonable.³⁵ The Commission also required sellers who sold to CERS pursuant to the WSPP Agreement during the CERS Period to file quarterly transaction reports consistent with the Commission's reporting requirements.³⁶ Accordingly, the Commission ruled

²⁹ *State of California, ex rel. Bill Lockyer v. British Columbia Power Exchange Corp.*, 125 FERC ¶ 61,016 (2008) (October 6 Order).

³⁰ *Id.* P 1.

³¹ *Id.* P 17.

³² *Id.*

³³ *Id.*

³⁴ *Id.* P 19.

³⁵ *Id.*

³⁶ *Id.* P 20.

that the relevant time periods for this proceeding were the Summer Period, January 1, 2000 through October 1, 2000, and the CERS Period, January 18, 2001 through June 20, 2001 (collectively, the “relevant time period”).³⁷

16. The California Parties then argued that the purpose of the quarterly reporting requirement was to ensure that sellers’ market-based rates were just and reasonable, rather than to measure market shares.³⁸ They further argued that (i) the hub-and-spoke analysis was an inadequate market power screen, (ii) the Commission had recognized use of the pivotal supplier test in bilateral sales markets, such as sales to CERS, and (iii) the Commission had recognized that the dysfunction of the single-price auction used in California had adversely affected the bilateral sales markets.³⁹

17. In response, the Commission denied the California Parties’ request for rehearing on all counts.⁴⁰ The Commission found that the California Parties’ challenge to the directive to evaluate the quarterly reports to determine whether the reports indicate a possible increase in market share amounted to a collateral attack on the Commission’s market power analysis.⁴¹ The Commission ruled that the principal purpose of the quarterly transaction reporting requirement is to assist it in monitoring market-based rates through an ongoing measurement of market shares, which in turn determine market power.⁴² The Commission reaffirmed that such market power review is an appropriate means to determine whether rates are just and reasonable.⁴³

18. The Commission also rejected the California Parties’ argument that its twenty percent hub-and-spoke test is an inappropriate market power screen for the Commission to use in this proceeding.⁴⁴ The Commission held that it must use the standards for

³⁷ *Id.* P 19; March 21 Order, 122 FERC ¶ 61,260 at P 34.

³⁸ October 6 Order, 125 FERC ¶ 61,016 at P 22.

³⁹ *Id.* P 23.

⁴⁰ *Id.* P 24.

⁴¹ “[T]he Commission’s primary criterion for determining just and reasonable rates at the time of these transactions was whether a seller had market power, and it did this by evaluating the seller’s market share.” *Id.* (footnote omitted).

⁴² *Id.* P 24, 29.

⁴³ *Id.* P 24.

⁴⁴ *Id.* P 30.

assessing market power of market-based rate sellers that were in effect at the time the transactions occurred:

While the Commission has refined its market power screen and analysis over time, the Commission cannot retroactively apply that test to transactions that took place eight years ago....Doing so, would violate the requirement that all jurisdictional sellers be on notice as to what test will be applied to them....Further, courts strongly disfavor the retroactive establishment of agency rules and tests, and nothing in the Ninth Circuit Remand Decision requires the Commission to do so.⁴⁵

Thus, the Commission reaffirmed the use of the hub-and-spoke test to measure sellers' market power during the relevant time period.

19. The California Parties also sought permission to file all customary analyses of market power and market function that use data collected in the quarterly reports as a means of investigating the nexus between reporting, market function, and market power accumulation.⁴⁶ The Commission denied the California Parties' request, reiterating that the March 21 Order made clear that this proceeding focuses solely on violations of the quarterly transaction reports as a basis for potential refund liability.⁴⁷

20. Finally, the California Parties argued that the Commission erred in the March 21 Order to the extent that it limited any monetary remedy to seller-specific disgorgement of unjust profits relating only to reporting violations by that seller, and precluded market-wide refunds as a remedy for market-wide unjust and unreasonable rates.⁴⁸ The Commission also denied rehearing on this issue.⁴⁹ The Commission noted that while sellers are on notice that they will be subject to penalties for their own violations, they are

⁴⁵ *Id.* (citations omitted).

⁴⁶ *Id.* P 32.

⁴⁷ *Id.*

⁴⁸ *Id.* P 33.

⁴⁹ *Id.* P 36.

not on notice that they will be subject to penalties for someone else's violations of filing requirements.⁵⁰

4. The December 28 Order

21. On November 5, 2009, the California Parties filed a request for rehearing and clarification of the October 6 Order.⁵¹ Specifically, they sought rehearing of paragraph 32 of the October 6 Order, which excluded from this proceeding evidence of market manipulation and tariff violations related to bilateral sales to CERS on the grounds that these issues are addressed in the *CPUC*⁵² proceeding on remand.⁵³ The California Parties argued that the best evidence of market power is direct evidence of its existence in supplier conduct.⁵⁴ They therefore requested the Commission to permit evidence of market manipulation and tariff violations with respect to CERS bilateral transactions.⁵⁵

22. In response, the Commission issued its Order Rejecting Request for Rehearing on December 28, 2009 (December 28 Order).⁵⁶ The Commission rejected the California Parties' request to include evidence of market manipulation and tariff violations related to bilateral sales to CERS.⁵⁷ The Commission reiterated that the purpose of this proceeding is to focus exclusively on violations of quarterly transaction reporting requirements as a basis for potential refund liability, not other potential tariff violations such as gaming and

⁵⁰ *Id.* P 38 (“To require refunds of a seller that obeyed the orders, rules and regulations and had no notice that sales would be subject to potential refunds runs counter to fundamental notice provisions of the FPA.”).

⁵¹ See *State of California, ex rel. Bill Lockyer v. British Columbia Power Exchange Corp.*, 129 FERC ¶ 61,276, at P 6 (2009) (December 28 Order).

⁵² *Pub. Util. Comm'n of Cal. v. FERC*, 462 F.3d 1027 (9th Cir. 2006).

⁵³ December 28 Order, 129 FERC ¶ 61,276 at P 6, 7.

⁵⁴ *Id.* P 7.

⁵⁵ *Id.*

⁵⁶ The March 21 Order, the April 15 Order, the October 6 Order, and the December 28 Order are, collectively, the “remand orders.”

⁵⁷ December 28 Order, 129 FERC ¶ 61,276 at P 8.

anomalous bidding behavior.⁵⁸ The Commission stated that this purpose has been the focus of this proceeding since its inception.⁵⁹

C. The Administrative Proceedings Before the ALJ

23. The California Parties filed their direct testimony on July 1, 2009.⁶⁰ The testimony did not provide an analysis under the hub-and-spoke test. California Parties instead relied on a reference price, supplier margin and market share analyses in an effort to demonstrate an accumulation of market power.⁶¹ Trial Staff and respondents filed answering testimony on September 17, 2009. On November 5, 2009, certain parties filed cross-answering testimony. On December 17, 2009, the California Parties filed rebuttal testimony, which also failed to provide a hub-and-spoke market power analysis.

24. Respondent sellers then filed eighteen separate motions for summary disposition and two supplemental motions for summary disposition.⁶²

⁵⁸ *Id.*

⁵⁹ *Id.* P 12.

⁶⁰ A detailed description of the procedural history before the ALJ can be found in the Initial Decision, 130 FERC ¶ 63,017, at P 22-34.

⁶¹ *See* Initial Decision, 130 FERC ¶ 63,017 at P 188 & nn. 716-721.

⁶² Motions for summary disposition were filed by the following respondent sellers: Allegheny Energy Supply Company, LLC (Allegheny); Mico; NV Energy, Illinova Energy Partners, Inc. (Illinova); Hafslund Energy Trading, LLC (Hafslund); and the Competitive Supplier Group (CSG). For purposes of this motion, CSG included the following entities: American Electric Power Service Corp. (AEP), Avista Corporation, *d/b/a* Avista Utilities and Avista Energy, Inc., Citizens Power Sales, LLC, Commerce Energy, Inc., Edison Mission Marketing & Trading, Inc., Koch Energy Trading, Inc., Merrill Lynch Capital Services, Inc., MPS Merchant Services, Inc., PPL Montana, LLC, Powerex Corp., Sempra Energy Trading LLC and Sempra Energy Solutions LLC, Shell Energy North America (US), L.P., TransAlta Energy Marketing (U.S.), Inc., TransCanada Energy Ltd., and Tucson Electric Power Company (Tucson).

Certain CSG members also filed separate motions for summary disposition. These entities included: Edison Mission Marketing & Trading, Inc. (Edison) and Citizens Power Sales, LLC (Citizens Power), which filed jointly; Sempra Energy Trading, LLC (SET) and Sempra Energy Solutions, LLC (SES) (collectively, Sempra Marketers); Shell Energy North America (US), L.P. (Shell Energy), *f/k/a* Coral Power, L.L.C.; TransAlta
(continue...)

D. The Initial Decision

25. The Presiding Judge found that under section 206 of the FPA, the California Parties, as the complainant, bore the burden of proof to establish a *prima facie* case against the respondent sellers.⁶³ She framed the central issue in this proceeding:

[W]hether, based on the facts and circumstances associated with each individual seller, that seller's improper or untimely filing of its quarterly transaction reports masked an accumulation of market power such that the market rates were unjust and unreasonable.⁶⁴

26. To establish a *prima facie* case, pursuant to the Commission's statement of the central issue, the Presiding Judge found the California Parties must present evidence in their direct testimony (i) that the sellers improperly or untimely filed or failed to file their quarterly transaction reports, (ii) that the sellers individually accumulated market power as measured by the test that the Commission used at the time when the alleged reporting violations occurred, and (iii) that a nexus existed between the sellers improper or untimely quarterly transaction reports and their individual accumulation of market power.⁶⁵ The ALJ also found that in order to establish a *prima facie* case, the California Parties' direct testimony must make a showing as to all three elements.⁶⁶

27. The Presiding Judge then ruled that due to the California Parties' inability (or refusal) to establish that sellers individually accumulated market power as measured by

Energy Marketing (US), Inc. (TEMUS), on behalf of itself and its affiliate TransAlta Energy Marketing (California), Inc. (TEMCAL) (collectively, "TransAlta"); Merrill Lynch Capital Services, Inc. (Merrill Lynch); Commerce Energy, Inc. (Commerce Energy), *f/k/a* Commonwealth Energy Corp.; TransCanada Energy, Ltd. (TransCanada); MPS Merchant Services, Inc. (MPS); Powerex Corp. (Powerex); Avista Corporation, *d/b/a* Avista Utilities and Avista Energy (Avista Companies); Koch Energy Trading, Inc. (Koch); and PPL Montana, LLC (PPL Montana).

⁶³ *See id.* P 36 & n.106, P 217.

⁶⁴ *Id.* P 36 (citing March 21 Order, 122 FERC ¶ 61,260 at Ordering Paragraph (B)).

⁶⁵ *Id.* P 36.

⁶⁶ *Id.*

the hub-and-spoke test, they failed to establish a *prima facie* case; consequently, she granted the motions for summary judgment.⁶⁷

II. Discussion

28. Preliminarily, the California Parties argue that the Initial Decision should be reversed because the California Parties' evidence established a *prima facie* case against each respondent seller in that its evidence demonstrated that all respondents misreported. The California Parties then raise four exceptions to the Initial Decision. First, California Parties assert that the ALJ erred in finding that the Commission's hearing orders required application of the twenty percent generation capacity share, hub-and-spoke market power test to individual sellers in this proceeding. Also, they claim that the ALJ erred in requiring them to show that each individual respondent seller possessed generation market power, rather than just a few sellers who might have set the market-clearing price. Second, the California Parties complain that the Presiding Judge erroneously interpreted the nexus standard in the hearing orders, in that she improperly rejected California Parties' "umbrella" pricing theory. Third, California Parties argue the Initial Decision misinterpreted the *Lockyer* remand orders in finding that each Respondent's reporting deficiencies are immaterial in the absence of a showing that the Respondent accumulated market power as measured under the twenty percent generation hub-and-spoke test. Finally, California Parties take exception to the finding of the Presiding Judge that any proffered evidence of tariff violations and unauthorized sales of energy and ancillary services was outside the scope of the hearing Initial Decision.

A. Preliminary Matters

1. Standard of Review

29. On review of an initial decision, the Commission reviews the entire record in the proceeding.⁶⁸ In undertaking such review, the Commission has all of the powers it would have in making the initial decision on its own, and it "may properly resolve an issue on grounds which differ from those upon which the ALJ relied."⁶⁹

⁶⁷ *Id.* P 37, 68, 212, 218, 229, 238.

⁶⁸ *Iroquois Gas Transmission Sys., L.P.*, 84 FERC ¶ 61,086, at 61,451 (1998).

⁶⁹ *Pennzoil Co. v. FERC*, 789 F.2d 1128, 1135 (5th Cir. 1986) (citing 5 U.S.C. § 557(b)).

2. Requirement to Establish a *Prima Facie* Case

30. Pursuant to section 206 of the FPA, the California Parties, as the complainant, bore the burden of proof to establish a *prima facie* case against the respondent sellers.⁷⁰

31. The Commission affirms the ALJ's framing of the central issue in this proceeding. Therefore, in order to establish a *prima facie* case the California Parties were required to present evidence in their direct testimony (i) that the sellers improperly or untimely filed or failed to file their quarterly transaction reports, (ii) that the sellers individually accumulated market power as measured by the test that the Commission used at the time when the alleged reporting violations occurred, i.e., the twenty percent hub-and-spoke market power screen and (iii) that a nexus existed between the sellers improper or untimely quarterly transaction reports and their individual accumulation of market power. The Commission also affirms that in order to establish a *prima facie* case, the California Parties were required to present evidence in their direct testimony as to all three elements.⁷¹

32. In deciding the motions for summary judgment, the ALJ was required to view the arguments and factual support in a light most favorable to the California Parties.⁷² For the reasons discussed below, we confirm that having followed this directive, the ALJ correctly concluded that the California Parties failed to establish that the sellers individually accumulated market power as measured by the hub-and-spoke test.⁷³ The Commission also affirms the ALJ's finding that the California Parties raised issues of fact regarding whether all or some of the sellers satisfied the Commission's reporting

⁷⁰ Initial Decision, 130 FERC ¶ 63,017 at P 35 & n.106; *see also S. Cal. Edison, Co.*, 50 FERC ¶ 63,012, at 65,065 (1990).

⁷¹ *Id.* P 36; *see Cerro Wire & Cable Co. v. FERC*, 677 F.2d 124, 129 (D.C. Cir. 1982) (“[m]ere allegations of disputed facts are insufficient” grounds to avoid summary disposition and reach a hearing; instead, “petitioners must make an adequate proffer of evidence to support them”); *see also Lizotte v. Praxair Inc.*, 2010 U.S. App. LEXIS 5681 at *4-5 (9th Cir. 2010) (holding that district court's grant of summary disposition to the defendant was proper where the plaintiff had failed to raise a genuine issue of material fact).

⁷² *Columbia Gulf Transmission Co.*, 79 FERC ¶ at 61,351, 61,501 (1997) (the Presiding Judge must view the arguments and facts in a light most favorable to the non-moving party).

⁷³ Initial Decision, 130 FERC ¶ 63,017 at P 37.

requirement.⁷⁴ However, without a showing that the sellers accumulated market power under the hub-and-spoke analysis, the California Parties cannot demonstrate that a nexus existed between the sellers' improper or untimely quarterly transaction reports and their individual accumulation of market power.⁷⁵

B. California Parties' Exceptions

1. The Hub-and-Spoke Market Power Test

a. California Parties' Arguments

33. First, the California Parties argue that Initial Decision "misinterprets" the remand orders to mean that proof of "an accumulation of market power" can be established only through evidence that each Respondent would have failed the twenty percent generation hub-and-spoke market power screen during the relevant period. Indeed, the California Parties argue that the Presiding Judge's finding that "any showing by the California Parties of sellers' alleged market power, as measured by analyses and methodologies other than the hub-and-spoke analysis, is outside the scope of this proceeding, and is therefore irrelevant to disposition of the central issue in this proceeding,"⁷⁶ makes it clear that, in the Presiding Judge's view, whether market power actually existed would be no consequence. California Parties posit that such a view directly contradicts both the remand orders' directive that the purpose of the proceeding was to determine whether sellers' improper or untimely filing of quarterly transaction reports "masked an accumulation of market power such that the market rates were unjust and unreasonable," as well as the Commission's recognition in those orders that quarterly reports were never intended to re-create or re-run the twenty percent generation hub-and-spoke screen.⁷⁷

34. The California Parties also argue that the Initial Decision is contrary to the Commission's stance since the outset of its market-based rate regime to require quarterly reporting, and its actual practice during the California Energy Crisis of attempting to discern the exercise of market power on an ongoing basis through the use of actual market data relating to sales, rather than through a re-run of capacity-based predictive tests. The California Parties argue that if the approach adopted in the Initial Decision

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ California Parties' April 4, 2010 Brief on Exceptions at 7 (citing Initial Decision, 130 FERC ¶ 63,017 at P 212).

⁷⁷ *Id.* (citing October 6 Order, 125 FERC ¶ 61,016 at P 27-28).

were correct, the inquiry in this case would be a “fool’s errand,”⁷⁸ because no Respondent seller would fail the twenty percent hub-and-spoke test when measuring generation market shares in California and interconnected regions and nothing in the quarterly transaction reports could ever lead the Commission to a conclusion about the presence of market power as measured by the hub-and-spoke test. The California Parties claim that by the Commission’s own intent and design, as recognized both at the time of the Crisis and most recently in its January 21, 2010 Notice of Inquiry related to desired changes to its market-based rate quarterly transaction reporting regulations,⁷⁹ *ex post* quarterly transaction reports perform a different regulatory function from predictive *ex ante* market power tests.⁸⁰ The California Parties argue that use of the hub-and-spoke test as the sole basis for attempting to detect the actual accumulation of market power on an ongoing basis would result in a finding that no seller had market power, even though the Commission has already acknowledged that market power existed and was exercised.⁸¹

b. Arguments Opposing Exceptions

35. The respondent sellers and Trial Staff (Opposing Parties) argue that the Presiding Judge scrupulously followed the Commission’s directions in proceedings leading up to the Initial Decision and in the Initial Decision itself. She amassed a voluminous evidentiary record and, based on that record, correctly found that the California Parties failed to meet the threshold inquiry that the Commission set for hearing based on the hub-and-spoke market power screen. That failure, she concluded, compelled summary disposition in favor of respondent sellers. According to the Opposing Parties, the California Parties’ exceptions do not challenge the Presiding Judge’s findings on substantive grounds; instead, they claim that the Initial Decision erroneously interpreted or misapplied the Commission’s directions, creating an inquiry the California Parties

⁷⁸ *Id.* at 8.

⁷⁹ *Id.* (citing *Elec. Mkt. Transparency Provisions of Section 220 of the Fed. Power Act*, Notice of Inquiry, FERC Statutes and Regulations ¶ 35,565, at P 10-12 & n.24 (2010) (explaining, in context of Notice of Inquiry concerning extending electric quarterly report filing requirements to non-jurisdictional sellers of electricity, that “the Commission’s market-based rate program does not rely on an *ex ante* finding [that a seller lacks market power] alone, but instead is dependent on a consistent review of transaction data to ensure that such rates are just and reasonable.”)).

⁸⁰ *Id.*

⁸¹ *See id.*

characterize as “a fool’s errand.”⁸² However, Opposing Parties state the Commission’s directions were unambiguous, were fully consistent with the Ninth Circuit Remand, and were followed in the Initial Decision. Opposing Parties also argue that three of the California Parties’ four exceptions reiterate arguments the Commission rejected in its two prior orders on rehearing. Opposing Parties argue that this collateral attack should be rejected.⁸³

c. Commission Ruling

36. The California Parties argue that the ALJ erred by requiring a showing of seller market power under the hub-and-spoke analysis, insisting that this requirement was a “misinterpretation” of the Commission’s remand orders. California Parties are incorrect. As fully supported by the record, we find that the Presiding Judge correctly interpreted the Commission’s directives in this proceeding.⁸⁴ The Initial Decision is consistent with the Commission’s unambiguous orders on remand that *specifically required* the ALJ and the parties to use the Commission’s hub-and-spoke analysis to determine whether, in the first instance, each supplier with alleged reporting deficiencies in 2000-2001 had accumulated market power. The Initial Decision followed the Commission’s explicit directives and correctly found that the California Parties did not follow these instructions and thus failed to provide this essential evidence. Therefore, the ALJ appropriately concluded that this failure alone is sufficient grounds to justify summary disposition as to all sellers.⁸⁵

⁸² CSG May 10, 2010 Brief Opposing Exceptions at 5 (citing California Parties’ Brief on Exceptions at 8).

⁸³ *See, e.g.*, Allegheny May 10, 2010 Brief Opposing Exceptions at 3, 7-10 (Allegheny also argues that even under the California Parties’ preferred “pivotal supplier analysis,” Allegheny did not have market power); CSG May 10, 2010 Brief Opposing Exceptions at 5-6, 15-35; Hafslund May 10, 2010 Brief Opposing Exceptions at 2-3, 7-10; Mico May 10, 2010 Brief Opposing Exceptions at 12, 14-19; MPS May 10, 2010 Brief Opposing Exceptions at 7 (MPS also argues that even under the California Parties’ preferred “pivotal supplier analysis,” Aquila did not have market power); NV Energy May 10, 2010 Brief Opposing Exceptions at 4, 7-13; Trial Staff May 10, 2010 Brief Opposing Exceptions at 3-4, 6-7, 9-14.

⁸⁴ *See generally* Initial Decision, 130 FERC ¶ 63,017 at P 200-213.

⁸⁵ *Id.* P 37, 203, 208.

37. The Commission was explicit in its prior orders. The March 21 Order required the Presiding Judge in this case:

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.⁸⁶

To enable the Presiding Judge to address that issue, the March 21 Order allowed the California Parties:

to present evidence that any seller that violated the quarterly reporting requirement failed to disclose an increased market share sufficient to *give it the ability to exercise market power* and thus *cause its market-based rates to be unjust and unreasonable . . .* Sellers similarly will be permitted to present evidence to the contrary. *The hearing will focus on the individual facts and circumstances relevant to each seller.*⁸⁷

38. Consistent with these directives, the Commission specified the central question in this remanded proceeding to be “whether, based on the facts and circumstances associated with each individual seller, the seller's improper or untimely filing of its quarterly transactions reports masked an accumulation of market power (as defined by the Commission's test for approving market based rates in effect at the time of the transaction)”⁸⁸ The Commission also explained that seller-specific market power evaluations were to be the threshold issue determined on remand, specifying that:

[i]n examining th[e] issue [of whether a seller gained the ability to exercise market power], the parties and the presiding judge should *first* address whether the seller at any point reached a 20 percent generation market share threshold,

⁸⁶ March 21 Order, 122 FERC ¶ 61,260 at P 2 (emphasis added).

⁸⁷ *Id.* (emphasis added).

⁸⁸ *Id.* P 35.

and [if so], whether other factors were present to indicate that the seller did not have the ability to exercise market power.⁸⁹

The Commission also stated that for purposes of determining whether a particular wholesale seller had accumulated market power, “the relevant evidence is whether a seller “did or did not gain an increased generation market share sufficient to give it the ability to exercise market power,” and noting that the “Commission has long used a 20 percent generation market share as an indicator of potential generation market power.”⁹⁰

39. The Commission confirmed this determination on rehearing, “reject[ing] the California Parties’ argument that the Commission’s 20 percent hub-and-spoke analysis is an inappropriate market power screen for the Commission to use in this proceeding[,]” and explained that “[t]he Commission is required to use the standards for assessing the market power of market-based rate sellers ... in effect at the time the transactions took place,” because doing otherwise would “violate the requirement that all jurisdictional sellers be on notice as to what test will be applied to them” and would constitute the “retroactive establishment of agency rules and tests.”⁹¹

40. The Commission recognized that the California Parties, in challenging the Commission’s use of its hub-and-spoke analysis, sought “the application of a *different* ‘just and reasonable’ market power test (i.e., one not based on market share) when the Commission engages in market monitoring by evaluating the quarterly reports.”⁹² However, the Commission decided, for reasons of fairness and notice, that “it is reasonable to apply the same ‘just and reasonable’ test that was in effect at the time of the transactions reviewed” in order to determine on remand whether suppliers with reporting deficiencies in 2000-2001 nonetheless continued during that same period to qualify for the presumption that their market-based rates were just and reasonable.⁹³ The Commission also concluded that the California Parties’ challenge to the use of the hub-and-spoke test “amounts to a collateral attack on the Commission’s market power

⁸⁹ *Id.* (emphasis added).

⁹⁰ *Id.* P 35 & n.70.

⁹¹ October 6 Order, 125 FERC ¶ 61,016 at P 30; *see also id.* P 24 (denying the California Parties’ request for rehearing regarding the application of the 20 percent market share screen).

⁹² *Id.* P 26 (emphasis in original).

⁹³ *Id.* P 26.

analysis, used [at the time of the transactions] to determine the justness and reasonableness of rates”⁹⁴

41. We therefore affirm the Initial Decision’s finding that the California Parties’ failure to present a hub-and-spoke analysis for any seller justifies summary disposition as to all sellers.⁹⁵ The California Parties do not dispute the Initial Decision’s finding that “[t]he California Parties simply do not apply the hub-and-spoke analysis”⁹⁶ The record confirms this fact: “[The California Parties] primary witness on this subject testified that application of the hub-and-spoke analysis by other respondents demonstrates that the seller respondents pass the Commission’s threshold issue in this proceeding”⁹⁷ This same witness stated in his testimony that the “Commission has held in its order setting this proceeding for hearing, and in its rehearing order, that it will not entertain challenges here to its hub and spoke screening methodology.”⁹⁸

42. Given that the issue of whether suppliers accumulated market power was the threshold issue in this proceeding,⁹⁹ and given the California Parties’ failure to offer any evidence to demonstrate the accumulation of market power under the hub-and-spoke standard, summary disposition was appropriate. In addition, the Commission has already ruled on this issue in its remand orders, and California Parties’ exception here represents an impermissible collateral attack of these prior orders.

⁹⁴ *Id.* P 24.

⁹⁵ *See* Initial Decision, 130 FERC ¶ 63,017 at P 208.

⁹⁶ *Id.*

⁹⁷ *Id.* P 209 (citing Ex. No. CLP-10 at 13:18-21). *See also id.* n.804 (citing Ex. CLP-10 at 13:13-17 (“Q. Have you performed the Commission’s generation market share screen in your investigation of market power? A. No. This analytic exercise has already been undertaken by the suppliers or their consultants and the results approved by the Commission when each supplier with a tariff authorizing MBR [market-based rate] sought and obtained approval for its tariff.”)).

⁹⁸ *Id.* P 210 (citing Ex. CLP-10 at 16:8-10).

⁹⁹ *See* March 21 Order, 122 FERC ¶ 61,260 at P 35 (the 20 percent threshold under the hub-and-spoke test was the issue “the parties and presiding judge should first address”).

2. California Parties' Remaining Exceptions

43. The California Parties' remaining exceptions are that the Initial Decision misinterpreted the remand orders in that: (i) it required the demonstration of a requisite "nexus" between misreporting, market power, and unjust and unreasonable rates; (ii) it found alternative evidence of misreporting is "immaterial;" and (iii) it found that evidence of unauthorized sales of energy or ancillary services are outside the scope of this proceeding.

3. Commission Ruling

44. The Commission need not revisit these exceptions in detail as they are also impermissible collateral attacks on the Commission's specific findings expressed in the remand orders (discussed *supra*). The Commission affirms that the ALJ properly followed the directives of the Commission's remand orders. As previously discussed, the Presiding Judge never reached the merits of the nexus issue because she found the California Parties had failed to establish one of the essential elements – the accumulation of market power by a seller.¹⁰⁰ As to misreporting, the ALJ correctly concluded that "in the absence of a showing by the California Parties that any seller accumulated market power under the hub-and-spoke analysis, any seller's reporting deficiencies are immaterial to the resolution of their motions for summary disposition."¹⁰¹ Finally, as to the scope of the proceeding, the Presiding Judge faithfully followed the mandate of the Commission as articulated in the Commission's remand orders.¹⁰²

C. Avista's Exceptions

1. Avista's Arguments

45. Avista raises a single "limited" exception (or request for clarification) to the Initial Decision:

¹⁰⁰ Initial Decision, 130 FERC ¶ 63,017 at P 37.

¹⁰¹ *Id.* P 68. *See also Celotex Corp. v. Gatrett*, 477 U.S. 317, 322-23 (1986) (affirming that summary judgment is proper against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial" because the failure to establish even one essential element of the case "necessarily renders all other facts immaterial."); *see also, e.g., Parth v. Pomona Valley Hosp. Med. Ctr.*, 584 F.3d 794, 798 (9th Cir. 2009).

¹⁰² *Id.*

In paragraph 237 of the Initial Decision, the Presiding Administrative Law Judge (“ALJ”) states:

If the Commission accepts my findings concerning the respondents’ motions for summary disposition, it may still wish to direct a hearing specifically limited to those parties that deny any reporting violation or contest the alleged scope of their violations. Alternatively, the Commission may find that none of the disputed violations are sufficiently serious to warrant remedial action, particularly in light of the absence of a proper showing that any seller accumulated market power during the relevant time period under the hub-and-spoke analysis.¹⁰³

46. Avista states that it supports the finding in the Initial Decision that the California Parties failed to establish a *prima facie* case in this proceeding and that a hearing is not needed. However, Avista argues that it is not necessary or warranted for the Commission to “direct a hearing specifically limited to those parties that deny any reporting violation or contest the alleged scope of their violations.”¹⁰⁴ Avista states that for purposes of ruling on the motions for summary disposition, the ALJ accepted the allegations of the reporting violations as true, although some parties, including Avista, contest those allegations.¹⁰⁵ Avista states that while it would otherwise welcome a Commission finding on this matter in its favor, it opposes any suggestion that this proceeding be prolonged with a hearing on issues that are now completely irrelevant to this proceeding in light of the ALJ’s remaining findings. Avista avers there is simply no need for the Commission to prolong this proceeding with an evaluation of the contested reporting violations, because the central question—whether the alleged reporting violations masked an accumulation of market power—has been answered in the negative, even when the alleged reporting violations are accepted as true.¹⁰⁶

¹⁰³ Avista April 19, 2010 Brief on Exceptions at 4 (citing Initial Decision, 130 FERC ¶ 63,017 at P 237).

¹⁰⁴ *Id.* at 5 (citing Initial Decision, 130 FERC ¶ 63,017 at P 237).

¹⁰⁵ *Id.* (citing Initial Decision, 130 FERC ¶ 63,017 at P 66).

¹⁰⁶ *Id.* at 7.

2. Respondents' Arguments

47. The California Parties agree with Avista that, if the Commission adopts the Initial Decision's interpretation of the remand orders, holding a limited hearing for the sole purpose of determining whether particular sellers misreported would be "unnecessary and irrelevant."¹⁰⁷ However, California Parties reiterate their argument, from their original Brief on Exceptions, that the Initial Decision's interpretation and application of the Commission's remand orders is "wrong on all essential points."¹⁰⁸

48. Trial Staff notes that the Presiding Judge made no findings on violations by the sellers. Instead, states Trial Staff, she construed, for purposes of summary disposition, alleged facts about violations in the light most favorable to the California Parties.¹⁰⁹ She concluded that any alleged reporting violations are immaterial, given the failure of the California Parties to show that any seller possessed market power under the hub-and-spoke test.¹¹⁰ Trial Staff argues that Avista has not properly asserted any error of fact or law in the Initial Decision.¹¹¹ Rather, according to Trial Staff, Avista simply "bristles at the thought of any further proceedings in this docket."¹¹² Trial Staff indicates that the Presiding Judge took no position on what, if any, further proceedings the Commission may want to pursue on reporting violations in the wake of summary disposition. Trial Staff states that it likewise takes no position on whether additional hearings should be pursued on this issue.

3. Commission Ruling

49. The Commission agrees with Trial Staff that, because of the California Parties' failure to sustain its burden of proof, the Presiding Judge had no need to make, and therefore did not make, findings on violations by the sellers. The Commission also

¹⁰⁷ California Parties May 10 Brief Opposing Exceptions at 3.

¹⁰⁸ *Id.*

¹⁰⁹ Staff May 10, 2010 Brief Opposing Exceptions at 25 (citing Initial Decision, 130 FERC ¶ 63,017 at P 66).

¹¹⁰ *Id.* (citing Initial Decision, 130 FERC ¶ 63,017 at P 68).

¹¹¹ *Id.* (citing Rule 711(b)(2)(ii), 18 C.F.R. § 385.711(b)(2)(ii) (2010) (any brief on exceptions must include a list of numbered exceptions, including a specification of each error of fact or law)).

¹¹² *Id.* at 25.

agrees with Trial Staff that Avista has not raised a proper exception and we therefore deny it. However, given our affirming of the Initial Decision in all respects, as explained *supra*, we agree with Avista and the California Parties that holding a limited hearing for the sole purpose of determining whether particular sellers misreported would be unnecessary and irrelevant. We reject the California Parties' remaining arguments for reasons we have given before.

III. Conclusion

50. As discussed in the body of this Order, the Commission affirms that the ALJ correctly concluded that the California Parties failed to establish a *prima facie* case and therefore, the granting of the motions for summary disposition in the Initial Decision was warranted.

The Commission orders:

The Commission affirms the ALJ's decision, and denies the exceptions sought by California Parties and by Avista.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.