

135 FERC ¶ 61,177
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

San Diego Gas & Electric Company

v.

Docket No. EL00-95-000, *et al.*

Sellers of Energy and Ancillary Services

Investigation of Practices of the
California Independent System Operator
and the California Power Exchange

Docket No. EL00-98-000, *et al.*

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

v.

Docket No. EL02-71-000, *et al.*

British Columbia Power Exchange Corp., *et al.*

Puget Sound Energy, Inc.

v.

Docket No. EL01-10-000, *et al.*

Sellers of Energy and Ancillary Services

State of California *ex rel.* Jerry Brown,
Attorney General for the State of California

v.

Docket No. EL09-56-000

Powerex Corp. (f/k/a British Columbia
Power Exchange Corp.), *et al.*

(Not Consolidated)

ORDER DENYING CALIFORNIA PARTIES' AND SEA-TAC'S MOTIONS
REQUESTING CONSOLIDATION, SUMMARY DISPOSITION, OR IN THE
ALTERNATIVE, HEARING AND SETTLEMENT PROCEDURES

(Issued May 24, 2011)

1. In this order, the Commission denies two separate pairs of motions filed with respect to various pending non-consolidated dockets that address the Western Energy Crisis of 2000-2001 (also referred to as the California Energy Crisis in the California proceedings). First, we deny motions by the California Parties¹ seeking: (1) the consolidation of specified proceedings;² (2) summary disposition, or in the alternative; (3) settlement procedures and an evidentiary hearing in the consolidated proceedings. We find that the California Parties have failed to show that consolidation and summary disposition are appropriate in the four separate proceedings, and therefore, we also find that there is no need for establishing hearing and settlement procedures. For similar reasons, we also deny motions by the City of Tacoma, Washington and Port of Seattle, Washington (SEA-TAC) seeking: (1) summary disposition as to market manipulation in the Pacific Northwest; (2) the grant of market-wide refund remedy, or, in the alternative; (3) institution of and evidentiary hearing and procedures in a consolidated or stand-alone *Port of Seattle* remand. We find SEA-TAC's requests for hearing procedures in a stand-alone *Port of Seattle* proceeding unnecessary as this case is already before the

¹ The California Parties are the People of the State of California *ex rel.* Edmund G. Brown, Jr., Attorney General, the Public Utilities Commission of the State of California, Pacific Gas and Electric Company (PG&E) and Southern California Edison Company (SCE).

² The California Parties seek to consolidate a complaint filed on May 22, 2009, *People of the State of California, ex rel. Edmund G. Brown Jr., Attorney General v. Powerex Corp. (f/k/a British Columbia Power Exchange Corp.)*, Docket No. EL09-56-000 (CERS Complaint), along with three ongoing "Remand Proceedings." The Remand Proceedings are: (1) the "*Lockyer* proceeding," *see Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004), *cert. denied*, 127 S. Ct. 2972 (2007) (*Lockyer*), *order on remand*, 122 FERC ¶ 61,260 (*Lockyer Order on Remand*), *clarified*, 123 FERC ¶ 61,042, *reh'g granted*, 125 FERC ¶ 61,016 (2008) (*Lockyer Order on Rehearing and Clarification*); (2) the "*CPUC* proceeding," *see Pub. Util. Comm'n of the State of Cal. v. FERC*, 462 F.3d 1027 (9th Cir. 2006) (*CPUC*), *order on remand*, 129 FERC ¶ 61,147 (2009) (*CPUC Order on Remand*); and (3) the "*Port of Seattle* proceeding," *see Port of Seattle, Washington v. FERC*, 499 F.3d 1016 (9th Cir. 2007) (*Port of Seattle*), *cert. denied*, 130 S. Ct. 1050 (2010).

Commission for its consideration in light of the U.S. Supreme Court's denial of certiorari of the Ninth Circuit court's decision.³

I. Background

2. A more detailed factual background for these proceedings is included in the concurrently issued CERS Complaint Order.⁴ In brief, California and the Western states experienced dramatically high wholesale electricity prices due to a combination of natural, economic and regulatory factors in 2000 and 2001.⁵ In response to the Western Energy Crisis, numerous proceedings were initiated at the Commission. In relevant part these include the *CPUC*, *Lockyer*, *Port of Seattle*, and *Morgan Stanley* proceedings.

3. In sum, the *CPUC* proceeding is focused on the appropriate refund to be paid by sellers for certain transactions in the California Independent System Operator Corporation (CAISO) and the California Power Exchange Corporation (CalPX) markets covered.⁶ The *Lockyer* proceeding centered on whether any seller's improper or untimely filing of its quarterly transaction reports masked an accumulation of market power.⁷ The *Port of Seattle* proceeding addresses potential refunds to wholesale buyers of electricity that purchased energy in the short-term supply market in the Pacific Northwest.⁸ The

³ *Port of Seattle*, 130 S. Ct. 1050.

⁴ *People of the State of California, ex rel. Edmund G. Brown, Jr. Attorney General of the State of California v. Powerex Corp. (f/ka British Columbia Power Exchange Corp.)*, *et al.*, 135 FERC ¶ 61,178 (2011) (CERS Complaint Order).

⁵ *See generally, Morgan Stanley Capital Group, Inc. v. Pub Util. Dist. No. 1 of Snohomish County*, 554 U.S. 527, 538 (2008) (*Morgan Stanley*), *order on remand*, 125 FERC ¶ 61,312 (2008) (*Morgan Stanley Order on Remand*).

⁶ *See CPUC*, 462 F.3d at 1035.

⁷ *See Lockyer Order on Remand*, 122 FERC ¶ 61,260 at P 23. The hearing in the *Lockyer* proceeding commenced on May 1, 2009, the Presiding ALJ issued an Initial Decision on Motions for Summary Disposition on March 18, 2010. *See Cal., ex rel. Bill Lockyer v. B.C. Power Exch. Corp.*, 130 FERC ¶ 63,017 (2010) (Initial Decision). The Commission affirmed the Initial Decision on May 4, 2011. *See Cal., ex rel. Bill Lockyer v. B.C. Power Exch. Corp.*, Opinion No. 512, 135 FERC ¶ 61,113 (2011) (Order Affirming Initial Decision).

⁸ *See Port of Seattle*, 499 F.3d at 1022.

Morgan Stanley proceeding involved buyers seeking to abrogate or reform contracts they signed during the Western Energy Crisis.⁹

4. Contemporaneous with the filing of the first motion herein considered, the California Attorney General (California AG) filed his CERS Complaint against the various entities that made short-term bilateral sales to the California Energy Resources Scheduling Division (CERS) of the California Department of Water Resources (DWR) during the period January 18, 2001 to June 20, 2001. We address the CERS Complaint in a separate order.¹⁰

5. In the past, the Commission has denied the California Parties' attempts to consolidate various proceedings relating to the Western Energy Crisis. For example, on December 10, 2007, the California Parties¹¹ filed a motion requesting that the Commission hold the *Lockyer* proceeding in abeyance until the Ninth Circuit Court of Appeals (Ninth Circuit) issued its mandates in *CPUC* and *Port of Seattle*.¹² The California Parties stated that they planned to seek partial consolidation of these proceedings once the Ninth Circuit issued the mandates because the proceedings involved many of the same parties, sellers, customers, transactions, overlapping time periods and evidence.¹³ Similarly, on April 29, 2003, the California Parties¹⁴ filed a motion

⁹ See *Morgan Stanley*, 554 U.S. at 540-42. The *Morgan Stanley* proceeding has since been resolved by settlement. A related case, the "CDWR" proceeding, remains pending before the Commission on remand from the 9th Circuit. See *Pub. Util. Comm'n of the State of Cal. v. Sellers of Long Term Contracts to the Cal. Dep't of Water Res.; Cal. Oversight Bd. v. Sellers of Energy and Capacity Under Long-Term Contracts with the Cal. Dep't of Water Res.*, 103 FERC ¶ 61,354 (order on initial decision), *reh'g denied*, 105 FERC ¶ 61,182 (2003), *remanded sub nom. Pub. Util. Comm'n of the State of Cal. v. FERC*, 474 F.3d 587 (9th Cir. 2006), *vacated and remanded*, 554 U.S. 527 (2008), *remanded*, 530 F.3d 767 (9th Cir. 2009).

¹⁰ See CERS Complaint Order, 135 FERC ¶ 61,178.

¹¹ The California Parties in the *Lockyer* remand proceeding included one additional entity, the California Electricity Oversight Board (CEOB).

¹² California Parties, Motion to Hold *Lockyer* Remand Proceeding in Abeyance Pending Issuance of the Mandates in *CPUC* and *Port of Seattle*, Docket No. EL02-71-000, *et al.*, at 2 (filed Dec. 12, 2007).

¹³ *Id.* at 4, 10.

¹⁴ The California Parties in this proceeding also included the CEOB.

requesting that the Commission institute a single consolidated proceeding to calculate damages and relief arising from market manipulation impacting the California spot markets during the period January 1, 2000 through June 20, 2001.¹⁵ The California Parties argued that the damages calculations for market manipulation involved overlapping and intertwined calculations and should be accommodated in a single proceeding.¹⁶ In both instances the Commission denied the California Parties' motions, finding that the nature and scope of the proceedings remained distinct.^{17 18}

II. California Parties' Motions, SEA-TAC's Motions and Responsive Pleadings

A. California Parties' Motions

6. On May 22, 2009, the California Parties filed a motion and supporting testimony seeking the consolidation of several proceedings into one proceeding to address all claims related to short-term sales during the California Energy Crisis. Their motion was filed pursuant to Federal Power Act (FPA) sections 205, 206, and 309,¹⁹ and the Rules 212 and 217 of the Commission's Rules of Practice and Procedure.²⁰ The California Parties also move for summary disposition, in the consolidated proceeding, that the rates charged for various transactions were unjust and unreasonable or otherwise unlawful. The California Parties seek an order resetting the prices for all sales based on the mitigated market clearing price (MMCP) methodology already approved by the Commission with

¹⁵ California Parties, Motion for Institution of Consolidated Proceeding to Address Remedy and Damage Issues and for Common Protective Order, Docket No. EL00-95-000 *et al.*, at 2, 15 (filed Apr. 29, 2003).

¹⁶ *Id.* at 2-3.

¹⁷ See *Lockyer Order on Remand*, 122 FERC ¶ 61,260 at P 23, *Lockyer Order on Rehearing and Clarification*, 125 FERC ¶ 61,016 at P 41; *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 103 FERC ¶ 61,359, at P 11 (2003) (*SDG&E Order Denying Consolidation and Granting Protective Order*).

¹⁸ On March 11, 2011, Commissioner Cheryl A. LaFleur issued a memorandum to the file in sixty dockets, including Docket No. EL00-95, 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.

¹⁹ 16 U.S.C. §§ 824d, 824e and 825h (2006).

²⁰ 18 C.F.R. §§ 385.212 and 385.217 (2011).

respect to certain transactions in the CAISO and CalPX markets.²¹ In the event that the Commission denies summary disposition as to any of the above-claims, the California Parties request that settlement and hearing procedures be instituted.

7. On August 4, 2009, timely answers to the California Parties' motion were filed by: Competitive Supplier Group (CSG);²² Transaction Finality Group (TFG);²³ PPL Montana, LLC; MIECO Inc.; Powerex Corp.; TransCanada Energy Ltd.; Indicated Sellers;²⁴ Aquila Merchant Services, Inc.; Portland General Electric Company; Cities of

²¹ See *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 96 FERC ¶ 61,120, at 61,506-11 (*SDG&E July 25, 2001 Order*), *order on clarification and reh'g*, 97 FERC ¶ 61,275 (2001).

²² CSG consists of the following parties: American Electric Power Services Corp., Avista Corporation d/b/a Avista Utilities and Avista Energy, Inc. (Avista), Commerce Energy, Inc. (f/k/a Commonwealth Energy Corp.), Koch Energy Trading, Inc., Merrill Lynch Capital Services, Inc., MPS Merchant Services, Inc. (f/k/a Aquila Merchant Services, Inc.), PPL Montana, LLC, Powerex Corp. (f/k/a British Columbia Power Exchange Corporation), Public Service Company of New Mexico (PNM), Sempra Energy Trading LLC and Sempra Energy Solutions LLC (Sempra), Shell Energy North America (US), L.P. (f/k/a Coral Power, L.L.C.) (herein Shell Energy), TransAlta Energy Marketing (US) Inc., TransCanada Energy Ltd., and Tucson Electric Power Co. The following CSG members filed separate supplemental responses addressing company-specific issues: Avista, MPS Merchant Services, PPL Montana, Powerex, and TransCanada.

²³ TFG includes Portland General Electric Company, PPL Montana, LLC, Sempra Energy Trading LLC, IDACORP Energy L.P. and Idaho Power Company, MPS Merchant Services, Inc. (f/k/a Aquila Merchant Services, Inc.), TransCanada Energy Ltd., Constellation Energy Commodities Group, Inc., Puget Sound Energy, Inc., Avista Corporation (d/b/a Avista Utilities, and Avista Energy, Inc.), Powerex Corp., Public Utility District No. 1 of Benton County, Washington, Public Utility District No. 1 of Franklin County, Washington, and Public Utility District No. 2 of Grant County, Washington.

²⁴ Indicated Sellers consists of the following parties: American Electric Power Service Corp., Commerce Energy, Inc., Koch Energy Trading, Inc., Merrill Lynch Capital Services, Inc., MPS Merchant Service, Inc. (f/k/a Aquila Merchant Services, Inc.), Sempra Energy Trading LLC and Sempra Energy Solutions LLC, TransAlta Energy Marketing (US) Inc., and TransCanada Energy Ltd.

Santa Clara and Redding California (Redding)²⁵ and the Modesto Irrigation District (Modesto) (collectively Cities/MID);²⁶ Western Area Power Administration and Bonneville Power Administration; Arizona Electric Power Cooperative, Inc.; Northern California Power Agency; NV Energy; Allegheny Energy Supply Company, LLC; SEA-TAC; Constellation NewEnergy, Inc., and Californians for Renewable Energy, Inc. (CARE).²⁷

8. On August 19, 2009, SEA-TAC filed a motion for leave to answer and an answer responding to the answers filed by TFG and CSG.

9. On September 18, 2009, the California Parties filed a motion for leave to respond, response to the answers that opposed the California Parties' motion and response to the motions to dismiss and answers to the CERS Complaint.

²⁵ Redding also filed an Answer and Supplemental Answer and Motion to Lodge. Redding seeks to lodge the August 29, 2003 Explanatory Statement, Agreement and Stipulation, and Redding Affidavit regarding alleged gaming transactions involving Redding as well as the Commission's January 22, 2004 order approving the settlement in, *City of Redding, California*, Docket Nos. EL03-149-000 and EL03-182-000 (not consolidated). Redding asserts that once the Commission grants its motion to lodge, it can then consider its evidence that there are discrepancies between the California Parties' allegations and the record evidence accepted by the Commission. It contends that not rejecting the California Parties' request for summary disposition will subject Redding to refund calculations or liability six years after it reached a comprehensive settlement of these very issues, thus, setting a disruptive precedent and calling into question the binding nature of all Commission-approved settlements.

²⁶ Modesto also filed a Supplemental Answer in Opposition (with supporting testimony of Roger VanHoy) and a Motion to Lodge the Testimony and Exhibits it filed in the "100-Days Discovery," on March 20, 2003, the Testimony and Exhibits of Roger VanHoy in Partnership Proceedings, submitted October 3, 2003, *Modesto Irrigation District*, Docket No. EL03-193-000 as well as an affidavit of Blair Jackson contesting some of the California Parties' claims.

²⁷ We note that the Commission has accepted settlements resolving claims against PNM, Tucson Electric and Sempra arising from events and transactions during the Western energy crisis in 2000 and 2001. *See San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 131 FERC ¶ 61,082 (2010); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.* 131 FERC ¶ 61,259 (2010); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.* 133 FERC ¶ 61,249 (2010).

10. On April 19, 2010, the California Parties filed a renewed motion to consolidate these proceedings, incorporating its arguments from its May 22, 2009 motion to consolidate.

11. Timely answers in opposition to the California Parties' renewed motion to consolidate were filed by Cities/MID, Constellation NewEnergy, Inc., CSG, NV Energy, and the Settled Parties.²⁸

B. SEA-TAC's Motions

12. Simultaneous with its filing of its answer to the original California Parties' motion in these non-consolidated dockets, on August 4, 2009, SEA-TAC also submitted its own motion seeking summary disposition as to market manipulation and the resulting unjust and unreasonable rates in the Pacific Northwest and grant of market-wide refund remedy, or, in the alternative, institution of an evidentiary hearing and procedures in a consolidated or stand-alone *Port of Seattle* remand, along with its accompanying testimony of Robert F. McCullough.

13. Timely answers to SEA-TAC's August 4, 2009 motion were filed by the California Parties, Cities/MID, NV Energy, Shell Energy and TFG.

14. On April 30, 2010, SEA-TAC filed an answer to the California Parties' renewed motion to consolidate as well as its own renewed motion for consolidation, incorporating its arguments from its August 4, 2009 motion to consolidate. Also on April 30, 2010, CARE filed its answer supporting the California Parties' renewed motion to consolidate and incorporating its previously-filed comments. On July 21, 2010, SEA-TAC reiterated its request in a motion for a Commission order on the pending dispositive motions or for a hearing. On August 5, 2010, the California Parties filed an answer to SEA-TAC's motion. Also on August 5, 2010, CSG filed a response to the California Parties' answer.

III. Procedural Matters

15. Pursuant to Rule 213(a)(4) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(a)(4) (2011), the timely answers to both motions are hereby

²⁸ Settled Parties for purposes of this answer include Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc., the Dynegy Companies (Dynegy Power Marketing, Inc., West Coast Power, LLC, El Segundo Power LLC, Long Beach Generation LLC, Cabrillo Power I LLC, and Cabrillo Power II LLC), IDACORP and Idaho Power Company, Pinnacle West Capital Corporation and APS Energy Services Company, Portland General Electric Company, Public Service Company of Colorado, and Puget Sound Energy Company.

accepted. We will also accept the supplemental answers and motions to lodge of Redding and Modesto in that they contain information that assisted us in our decision-making process.

16. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept either SEA-TAC's August 19, 2009 answer or the California Parties' September 18, 2009 answer and will, therefore, reject them. Similarly, we find SEA-TAC's July 21, 2010 motion as well as the responses to it duplicative and we reject them.

IV. DISCUSSION

A. California Parties' Motions

1. Motions to Consolidate

17. In their motions, the California Parties argue that consolidation will allow the Commission to address, in a single proceeding, the California Parties' claims with regard to short-term sales made in the markets operated by the CAISO and the CalPX and short-term bilateral power sales made to CERS. According to the California Parties, these short-term sales include all the sales made in the CAISO and CalPX markets between May 1, 2000 – October 1, 2000; multi-day transactions²⁹ and energy exchange transactions³⁰ between October 2, 2000 – June 21, 2001; and the bilateral sales to CERS between January 18, 2001 – June 20, 2001.

18. The California Parties raise several arguments in favor of consolidation. They contend that the consolidation of these four proceedings is necessary because they address closely-related claims from all sellers that made short-term sales during the Western Energy Crisis, involve common issues of law, substantially similar parties, overlapping time periods, similar subject matter and the same request for relief.

²⁹ Multi-day transactions are sales through the CAISO or the CalPX of greater than twenty-four hours duration or sales that are made prior to the day before the transaction. *See CPUC*, 462 F.3d at 1057-58.

³⁰ In an energy exchange transaction, the selling party provides energy in a certain period and agrees to receive payment in the form of a return of energy at a later date. In order to reflect normal profit margin considerations, in virtually all cases the amount of energy returned to the seller exceeds the amount of energy that was initially supplied. *See CPUC*, 462 F.3d at 1059.

Otherwise, they assert, separate proceedings pose a substantial risk of redundancy and wasted resources.

19. The California Parties recognize that such a consolidation will require the Commission to alter its decision to permit the *Lockyer* hearing to proceed on a separate track, but they argue that such reconsideration is warranted in light of the issuance of the mandates by the Ninth Circuit in *CPUC* and the *Port of Seattle*. Thus, they argue that the Commission's earlier argument that it did want to delay the *Lockyer* hearing for the pending mandates,³¹ is no longer valid.

20. To support their argument that these proceedings have overlapping time periods, California Parties argue that the Ninth Circuit in *Lockyer* and *CPUC* expanded the temporal scope of the Commission's refund proceeding to address remedies for market manipulation, tariff violations, and unjust prices that occurred prior to October 2, 2000.³² They continue that the short-term CERS sales not only also occurred during the Western Energy Crisis, but are simply, the other side of the transactions already mitigated in the refund proceeding.³³

21. According to the California Parties, the four proceedings involve the same subject matter, that is, the sellers' exercise of undue market power, market manipulation, and tariff violations in the context of inadequate reporting thwarting market monitoring, resulting in California ratepayers being forced to pay excessive and unlawful rates.³⁴ They argue that evidence adduced in each of these proceedings is relevant to the others, and consolidation will enable the Commission to review a complete record regarding the impact of the Western Energy Crisis on the short-term markets, to then consider the same relief—refunds—for the California ratepayers.

³¹ California Parties' May 22, 2009 Motion at 13 (citing *Lockyer Order on Remand*, 122 FERC ¶ 61,260).

³² *Id.* at 18 (citing *Lockyer*, 383 F.3d at 1015-16; *CPUC*, 462 F.3d at 1045-51).

³³ The California Parties argue the CERS sales were, in effect, the same type of transactions already mitigated in the Refund Period, as evidenced by the fact that all of the power that CERS purchased was ultimately transferred to the CAISO for sale to the same ultimate customers in the CAISO and CalPX markets. California Parties argue that the Ninth Circuit held that the fact that some power was delivered at Pacific Northwest delivery points is irrelevant. *Id.* at 18-19 (citing *Port of Seattle*, 499 F.3d at 1032-33).

³⁴ *Id.* at 19 (citing *Lockyer*, 383 F.3d at 1015-16; *CPUC*, 462 F.3d at 1064; *Port of Seattle*, 499 F.3d at 1035-36; and allegations in the CERS Complaint, EL09-56-000).

22. On the other hand, they contend that separate proceedings create a risk that: (1) evidence or issues may not be addressed because they “fall through the cracks” among the separate cases; (2) there is duplication of evidence; (3) there are inconsistent rulings; (4) there is a redundant review of the same conduct by the same sellers; (5) there is unnecessary litigation expense; and (6) parties would find it difficult to discuss global settlements as an alternative to this already-protracted litigation.

23. While asking for consolidation of the four proceedings, the California Parties seek to sever for separate disposition the claims in the *Port of Seattle* proceeding regarding electricity purchases by entities other than CERS. The California Parties state that those sales involve different purchasers serving different customers, barring a few exceptions that can be easily resolved in the consolidated proceeding. The California Parties contend that consolidation of the non-CERS Pacific Northwest purchases with the California-related proceedings will delay achieving a just result and consume the Commission’s resources and time.

2. Motion for Summary Disposition, or, in the Alternative, a Hearing

24. The California Parties move for summary disposition in the consolidated proceeding arguing that their evidence confirms that no genuine issues of material fact exist. They claim that their evidence establishes that because effective market monitoring did not exist during the Crisis, sellers exercised undue market power and engaged in pervasive violations of Commission rules and tariffs and other market manipulation that resulted in high prices for the short-term sales that were unjust and unreasonable or otherwise unlawful. If however, the Commission determines that there are genuine issues of material fact, the California Parties request a consolidated evidentiary hearing to adjudicate the merits of, and challenges to, their evidence.

25. Regarding sales in the CAISO and CalPX markets during the May 1, 2000 – October 1, 2000 period, the California Parties claim that their evidence supports the summary grant of market-wide price corrections and refunds based on a MMCP methodology on two interrelated legal grounds. First, claim the California Parties, prices charged under the CAISO and CalPX tariffs are subject to refund pursuant to the just and reasonable standard of FPA section 205 because those prices are based on sales by sellers that violated reporting requirements that the Ninth Circuit held were a fundamental and essential part of the sellers’ market-based tariffs, in violation of the principles expressed by the Ninth Circuit in *Lockyer*.³⁵ Second, the California Parties allege that prices

³⁵ California Parties’ May 22, 2009 Motion at 25 (citing *Lockyer*, 383 F.3d at 1014) (“several major wholesalers failed to include the transaction-specific data through which the agency at least theoretically could have monitored the California energy market. . . .”).

charged under the CAISO and CalPX Tariffs are subject to correction pursuant to FPA section 309 because sellers violated those tariffs and other tariffs and market rules;³⁶ such price corrections are required to restore prices to the lawful, competitive levels that the tariffs would have produced in a competitive market, absent the violations, citing *CPUC*.³⁷

26. The California Parties contend that the myriad violations of the Commission's rules or tariffs was quite high for sustained periods, reached a level of pervasiveness such that the frequency of violations and the number of sellers taking part made it impossible to gauge the impact of any particular transaction on the market and, as a result, the impact can be assessed and remedied only at the market level, and the prices must be reset based on the MMCP methodology for the sales made during the May 1, 2000 – October 1, 2000 period in the CAISO and CalPX markets.

27. The California Parties note that *CPUC* rejected the Commission's earlier finding and found that multi-day and energy exchange transactions with the CAISO during the October 2, 2000 – June 21, 2001 period are subject to price correction and refunds.³⁸ Therefore, California Parties conclude that the Commission should correct the prices on all such transactions and order jurisdictional sellers to refund charges above the MMCP for all of these sales.

28. With regard to short-term sales made to CERS during the January 18, 2001 - June 20, 2001 period, the California Parties request that the Commission order price corrections and refunds for all such sales made at rates that exceed just and reasonable or otherwise unlawful levels, as measured by the MMCP methodology similar to that the Commission has already approved.

³⁶ According to the California Parties, the governing tariffs and market rules prohibited sellers' fraudulent, deceptive, and manipulative conduct. The California Parties allege that such conduct included: (a) misreporting; (b) anticompetitive withholding of generation; (c) Ricochet/False Export/Megawatt Laundering; (d) Fat Boy/Inc-ing Load; (e) Death Star, cut schedules, and load shift; (f) Get Shorty; (g) collusive behavior; and (h) gas market manipulation. The California Parties provide their definitions for these terms in their May 22, 2009 Motion at 37-42.

³⁷ California Parties' May 22, 2009 Motion at 29 (citing *CPUC*, 462 F.3d at 1045).

³⁸ *Id.* at 49 (citing *CPUC*, 462 F.3d at 1060, 1065).

29. The California Parties³⁹ aver that three distinct legal standards justify a full correction of prices and ordering of refunds for sales to CERS: (1) the FPA section 206 just and reasonable standard articulated in *Port of Seattle*; (2) the FPA section 205 just and reasonable standard articulated in *Lockyer*; and (3) the FPA section 309 standard articulated in *CPUC*, which applies to all sales to CERS by virtue of the CERS Complaint. They contend that prices should be corrected and refunds ordered for CERS Pacific Northwest purchases under all three statutory provisions, and that the prices should be corrected and refunds ordered for the purchases CERS made outside the Pacific Northwest under the latter two statutory provisions.

30. The California Parties state that in *Port of Seattle*, the Ninth Circuit ruled that sales to CERS delivered at the California-Oregon border and other Pacific Northwest delivery points were made in the Pacific Northwest and that it was error for the Commission to exclude those sales from the Pacific Northwest refund proceeding.⁴⁰ The California Parties state that the prices in the Pacific Northwest were not just and reasonable due to various sellers' reporting violations and their participation in various manipulative practices.

31. Next, the California Parties posit that sellers comprehensively violated their reporting requirements with respect to their sales to CERS and others. California Parties argue that *Lockyer* requires the Commission to apply a just and reasonable standard to all sales affected by misreporting, and the California Parties' evidence shows that misreporting undermined market competition and drove prices above just and reasonable levels.⁴¹ They assert that because seller misreporting was virtually universal, the just and reasonable standard applies for all CERS purchases.

32. Finally, the California Parties state that all sales to CERS, regardless of delivery point, are subject to correction and refund under FPA section 309 as recognized in *CPUC* and discussed in the CERS Complaint. The California Parties argue that *CPUC* holds the Commission has the power to order retroactive relief under FPA section 309 if the prices charged were unlawful as the result of tariff violations.⁴² The California Parties then

³⁹ PG&E and SCE state that they are not participating in the portion of the motion seeking market-wide price corrections and refunds for all sales to CERS since CERS, and not the utilities, was the buyer of power during the CERS period. California Parties' May 22, 2009 Motion at 52 n.235.

⁴⁰ California Parties' May 22, 2009 Motion at 53 (citing *Port of Seattle*, 499 F.3d at 1033).

⁴¹ *Id.* at 57-57 (citing *Lockyer*, 383 F.3d at 1013).

⁴² *Id.* at 59 (citing *CPUC*, 462 F.3d at 1046).

allege that in making bilateral sales to CERS, a broad range of sellers repeatedly violated various tariffs in a number of interrelated and overlapping ways. Such tariffs included the CAISO tariff, the sellers' own individual market-based rate tariffs, the Western Systems Power Pool Agreement, and sellers' open access transmission tariffs.

33. Once again, the California Parties argue that prices should be corrected and refunds ordered because sales to CERS were tainted by sellers' rampant exercise of undue market power, violation of reporting requirements and tariffs, perpetration of market gaming and manipulation schemes, and the failure of the Commission to detect that behavior. Thus, argue the California Parties, use of the MMCP methodology is the appropriate means by which to reset prices and calculate refunds for CERS purchases.⁴³

34. The California Parties argue that according to its application of the MMCP methodology, the California consumers have been charged an excess of: \$2.5 billion for sales in the CAISO/CalPX for the May 1, 2000 – October 1, 2000; \$3 billion for sales in the CAISO/CalPX for the October 2, 2000 – June 21, 2001; and \$3.5 billion for the short-term sales (sales of thirty days or less) to CERS during the January 18, 2001 – June 20, 2001 period.

35. The California Parties acknowledge that the Commission has ordered market-wide MMCP relief only for October 2, 2000 – June 21, 2001 sales in the CAISO/CalPX (excluding various Energy Exchange Transactions and Multi-Day Transactions in the CAISO/CalPX). They also note that a number of settlements have been reached between the California Parties and various sellers resolving a portion of the above claims for all three periods, but allege that a substantial portion of the overcharges remains unresolved.

3. Motion for Hearing or Settlement Procedures

36. The California Parties request, in the alternative, that if the Commission concludes that there are material issues of fact precluding a summary disposition in favor of the California Parties, then it must institute full evidentiary hearing, with the opportunity for full discovery and traditional hearing procedures before an administrative law judge. If the Commission institutes a hearing, the California Parties propose that the Commission allow a period of 60 days for settlement negotiations before a settlement judge.

⁴³ California Parties state that in the case of jurisdictional sellers that made market-based rate sales without authorization to do so, the Commission should reset or correct prices charged by these unauthorized sellers using a cost-based rate methodology if use of such methodology produces a refund greater than the MMCP methodology.

B. Answers to California Parties' Motions

37. With the exception of SEA-TAC and CARE, all other parties oppose the California Parties' motions for consolidation. Generally, they make the following arguments as to why the Commission should deny the California Parties' motions.

38. Their initial argument is that the Commission has twice previously rejected essentially identical requests by the California Parties to consolidate the Remand Proceedings. They emphasize that the four proceedings (the three Remand Proceedings and the CERS Complaint) that the California Parties seek to consolidate here are distinct proceedings, each of which has case-specific factual and legal issues. Thus, they claim that consolidation is inappropriate because these proceedings involve different transactions, sellers, buyers, periods of time, markets, and alleged wrongdoing or misconduct. Moreover, they contend that consolidation is inappropriate where liability is ostensibly premised on misconduct by some, but not all of the parties named as respondents. This being so, they assert that consolidation will not ultimately result in greater administrative efficiency. Accordingly, they claim that maintaining separate proceedings for the three Remand Proceedings is more administratively manageable, will permit the Commission to focus on the case-specific factual and legal issues appropriate to each proceeding, and will also facilitate the selection of the most appropriate procedures for each distinct matter.

39. SEA-TAC and CARE support the California Parties' motions to consolidate, echoing the reasons of the California Parties. However, SEA-TAC, CARE (as well as NV Energy) strongly oppose the motion to sever the CERS transactions from the other Pacific Northwest transactions, claiming there is no discernable difference between them. SEA-TAC also supports the motion for summary disposition for the reasons cited by the California Parties. Similarly, CARE also supports summary disposition or, alternatively, settlement procedures that include the ratepayers and evidentiary hearings in the requested consolidated proceedings, but only on the condition that any Commission approval thereof is expanded to incorporate all of the Western Energy Crisis-related proceedings including the Pacific Northwest transactions.

40. Except for SEA-TAC and CARE, the remaining parties oppose the California Parties' request for summary disposition or, in the alternative, a hearing and settlement procedures. Generally, the opposing parties make the following arguments.

41. First, they argue that the California Parties' request for summary disposition was not ripe when filed (particularly since comments on the CERS Complaint had not yet been filed). They claim that the summary disposition of any omnibus consolidated proceeding is precluded by the substantial number of disputed issues of fact in the underlying dockets, for example, the Commission in the *Lockyer* proceeding found that

“issues of material fact exist” that require an evidentiary hearing.⁴⁴ They next argue the court in *CPUC* did not direct that multi-day sales be mitigated; instead, the court directed the Commission to provide a “reasonable explanation” on remand for its decision not to mitigate those sales.⁴⁵ They also contend that the California Parties’ request for summary approval of its request for refunds of multi-day sales must be rejected because they have failed to show that there are no undisputed issues of material fact surrounding this matter. Finally, they argue, if the Commission does not consolidate the proceedings, the motion for summary disposition fails because, as pleaded, it only applies to a consolidated proceeding.

42. Second, these parties also criticize the California Parties’ motion on procedural grounds. They argue that the motion is based on virtually the same evidence that has been previously heard by the Commission without concrete results and granting the motion would undermine the purpose of prior investigations, adjudications, and settlements in the Gaming and Partnership Orders.⁴⁶ Also, they argue that subjecting parties to refund calculations or liability years after they reached a comprehensive settlement of these same issues would set a disruptive precedent, calling into question the binding nature of all Commission-approved settlements. Further, they argue that due process and the rule against hearsay require the Commission to disregard the California Parties’ references to the Staff Report in Docket No. PA02-2.⁴⁷ Also, they claim that the arguments in the motion that were resolved in prior Show Cause proceedings or are now at issue in the *Lockyer* proceeding should not be considered on remand of *CPUC* under collateral estoppel principles. They stress that if the Commission proceedings stemming from the Western Energy Crisis are to ever be resolved, it is in the best interest of all parties, and in the public interest, not to revisit settled issues every time the California Parties seek relief based on alternative legal theories.

⁴⁴ See *Lockyer Order on Remand*, 122 FERC ¶ 61,260 at P 35.

⁴⁵ See *CPUC*, 462 F.3d at 1058.

⁴⁶ *Am. Elec. Power Serv. Corp.*, 103 FERC ¶ 61,345 (2003) (Gaming Show Cause Order) and *Enron Power Mktg. and Enron Energy Servs., Inc.*, 103 FERC ¶ 61,346 (2003) (Partnership Order) (collectively Show Cause Orders). Rehearing for the Show Cause Orders was denied by a single order, *Am. Elec. Power Serv. Corp.*, 106 FERC ¶ 61,020 (2004).

⁴⁷ *Final Report on Price Manipulation in Western Markets: Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, Docket No. PA02-2-000 (March 26, 2003).

43. Third, these parties argue that in any case, market-wide relief is not appropriate. They argue that there are significant weaknesses in the California Parties' pleadings arguing that they contain little credible evidence directed at specific parties. Next, they assert that a market-wide remedy is inappropriate because not all sellers: (1) engaged in market manipulation; (2) were under the Commission's jurisdiction; (3) operated pursuant to market-based rates; or (4) were under a reporting obligation. Further, they argue that market-wide refund remedies prior to the statutory refund-effective date, would diminish market stability, leaving market participants with little ability to rely on current price signals to direct their behavior. Such relief, they argue, would violate the concepts of notice and fairness underlying the FPA, the time limits restricting remedies thereunder, and the equitable considerations underlying Commission remedies. Finally, they state that opening yet another proceeding will start a wave of ripple claims against other market participants that could engulf the entire Pacific Northwest in additional market-wide litigation.

44. Fourth, they argue that mandatory settlement procedures are inappropriate. They note that substantial efforts have been devoted to large-scale settlement efforts before, but have accomplished relatively little. They acknowledge that voluntary settlement discussions can certainly proceed, with the Commission's assistance if requested, but there is no need and little prospect of achieving a universal, or even particularly broad, settlement, especially so long as the California Parties insist on a market-wide remedy that cannot be provided.

C. Commission Determination

1. Consolidation and Severance Requests

45. The Commission's practice is to consolidate matters where there are common issues of law or fact and consolidation will ultimately result in greater administrative efficiency.⁴⁸ The California Parties have not shown that consolidation of the CERS Complaint, *Lockyer*, *CPUC*, and *Port of Seattle* proceedings is appropriate.

46. The Commission has heard and rejected virtually identical arguments regarding these proceedings before. For instance, the Commission has already ruled with respect to the *Lockyer*, *CPUC*, and *Port of Seattle* proceedings that despite some common parties and overlapping time periods, the nature and scope of the proceedings remain distinct and ought not be consolidated.⁴⁹ The Commission explained that the three proceedings were

⁴⁸ See e.g., *Sw. Power Pool, Inc.*, 125 FERC ¶ 61,001, at P 26 (2008); *Startrans IO L.L.C.*, 122 FERC ¶ 61,306, at P 64 (2008); *PP&L Resources, Inc.*, 90 FERC ¶ 61,203, at 61,653 (2000).

⁴⁹ *Lockyer Order on Rehearing and Clarification*, 125 FERC ¶ 61,016 at P 41.

focused on different issues and that precedent established that the Commission retained control over the scope of its proceedings.⁵⁰ In addition, as early as June 2003, the Commission rejected a similar motion by the California Parties to consolidate the various western matters, emphasizing that “a massive single proceeding on the scale that the California Parties propose would create more problems than it would solve and would create unnecessary administrative problems for Commission staff and resources.”⁵¹

47. The Commission reiterates that there are also significant differences in these proceedings that warrant separate treatment, including differences in the parties, markets, time periods and legal issues. In addition, each one of the four proceedings is at a different stage procedurally. For the *CPUC* and *Lockyer* proceedings, the Commission has already instituted hearing procedures and established the scope of those proceedings.⁵² The scope of the *CPUC* proceeding now includes potential refunds for spot market sales (24 hours or less), block forward market transactions (more than 24 hours in length) and energy exchange transactions (energy in exchange for more energy at a later time) in the CAISO and CalPX markets from October 2, 2000 to June 20, 2001 (Refund Period), in addition to considering tariff violations that affected the market clearing price prior to October 2, 2000.⁵³ The scope of the *Lockyer* proceeding included whether any 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.⁵⁴ Indeed, the *Locker* Initial Decision has already been issued by the Presiding Judge (granting summary disposition in favor of respondent sellers) and

⁵⁰ *Id.*

⁵¹ *SDG&E Order Denying Consolidation and Granting Protective Order*, 103 FERC ¶ 61,359 at P 11.

⁵² *See CPUC Order on Remand*, 129 FERC ¶ 61,147 and *Lockyer Order on Remand*, 122 FERC ¶ 61,260. We note that on November 13, 2009, the California Parties filed a motion for a stay of the *Lockyer* proceeding pending the Commission’s ruling on the instant California Parties’ motion to consolidate. The California Parties’ motion to stay is being addressed in a concurrent order in Docket No. EL02-71-010.

⁵³ *See CPUC Order on Remand*, 129 FERC ¶ 61,147 at P 1 (order on remand expanding the scope of the proceeding); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 96 FERC ¶ 61,120, at 61,499, 61,516-7 (2001) (describing the initial scope of the *CPUC* proceeding).

⁵⁴ *Lockyer Order on Rehearing and Clarification*, 125 FERC ¶ 61,016 at P 3, 18-19.

affirmed by the Commission.⁵⁵ *Port of Seattle* involves whether there were unjust and unreasonable charges for bilateral sales, including to CERS,⁵⁶ into the Pacific Northwest from December 25, 2000 to June 20, 2001.⁵⁷ The CERS Complaint seeks market-wide refunds for short-term bilateral sales to CERS from January 18, 2001 to June 20, 2001. The Ninth Circuit observed that these bilateral CERS transactions were beyond the scope of the *CPUC* proceeding.⁵⁸ A concurrent order dismisses the CERS Complaint.⁵⁹

48. Aside from the objective factual and legal differences in these proceedings, it is also impractical to consolidate all of these matters. There are an estimated 125,000 pages of testimony and exhibits filed with the motion to consolidate alone (more workpapers were filed on July 9, 2009). There are another approximately 10,000 pages of testimony and exhibits filed with the new CERS Complaint. In keeping with our prior decisions, we recognize that a massive single proceeding on the scale that the California Parties propose would not lead to increased efficiency in the resolution of issues because it would delay the more advanced proceedings and create significant administrative problems for Commission staff and resources.⁶⁰ Precedent and prudence dictates that these cases remain unconsolidated.

49. Therefore, we again reject the California Parties' latest attempt to consolidate these cases.⁶¹ As we previously found, there are distinct legal and factual issues and only partial overlap of parties and time periods. The Commission has broad discretion in how

⁵⁵ See P 3 & note 7, *supra*.

⁵⁶ See *Port of Seattle*, 499 F.3d at 1034 (the Ninth Circuit directed the Commission to include "CERS transactions when it determines whether refunds are warranted for sales in the Pacific Northwest spot market;" the Commission has not yet issued an order on remand.).

⁵⁷ *SDG&E July 25, 2001 Order*, 96 FERC ¶ 61,120 at 61,520.

⁵⁸ *CPUC*, 462 F.3d at 1048.

⁵⁹ CERS Complaint Order, 135FERC ¶ 61,178.

⁶⁰ *SDG&E Order Denying Consolidation and Granting Protective Order*, 103 FERC ¶ 61,359 at P 11.

⁶¹ While we deny the California Parties' motion to consolidate, we do not intend to imply that any settlement discussions the parties may have pursuant to Commission order or otherwise should be conducted on an unconsolidated basis. The Commission continues to encourage settlement on these matters and does not herein (or in any other proceeding) establish any limitations on the scope of any settlement discussions.

it chooses to structure its proceedings.⁶² We again find that maintaining separate proceedings is more administratively manageable and will permit the Commission to focus on the case-specific issues and the selection of the most appropriate procedures for each distinct matter.

50. Given our decision rejecting consolidation of the various proceedings, the motion to sever is moot and we need not address this issue further.

2. Summary Disposition Request

51. The California Parties have moved for “[s]ummary disposition, *in this consolidated proceeding*”⁶³ That is to say, by its very terms, the motion acknowledges that the granting of the motion to consolidate is a precondition to our consideration of the motion for summary disposition. As we have denied consolidation of the various proceedings, *supra*, the motion for summary disposition necessarily fails on this procedural ground alone and we therefore deny it. Accordingly, we need not address the California Parties’ request for market-wide relief based on the MMCP methodology in this order. Any relief ordered by the Commission will be addressed in each individual case as the Commission may appropriately determine.

52. Even assuming, *arguendo*, that the motion for summary disposition remained ripe for our consideration, we would nonetheless deny it as it fails to meet the standard for granting such motions.

53. The Commission may grant summary disposition only where “there is no genuine issue of fact material to the decision of a proceeding.”⁶⁴ Where there are significant

⁶² See *Mobil Oil Exploration & Producing South East, Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230-31 (1991) (“An agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities . . . an agency need not solve every problem before it in the same proceeding. This applies even where the initial solution to one problem has adverse consequences for another area that the agency was addressing.” (internal citations omitted)).

⁶³ California Parties’ May 22, 2009 Motion at 2 (emphasis added).

⁶⁴ 18 C.F.R. § 385.217(b); see also *Iroquois Gas Trans. Sys., L.P.*, 68 FERC ¶ 61,048, at 61,164 (1994) (“under Rule 217 of the Commission’s Rules of Practice and Procedure summary disposition may be appropriate only if there are no genuine issues of material fact in dispute”).

material facts in dispute, “summary disposition is not appropriate.”⁶⁵ In reviewing the California Parties’ motion, “the inferences to be drawn from the evidence must be viewed in the light most favorable to the participants opposing the motion.”⁶⁶ In this instance the opposing participants benefit from this presumption. As previously stated, with the exception of SEA-TAC and CARE, all the remaining commenters oppose the motion for summary disposition, denying virtually every allegation of the California Parties. Several of these opposing parties also offered their own testimony and exhibits rebutting the California Parties’ claims and evidence in detail.⁶⁷

54. Thus, under our standard of review, the California Parties’ request for summary disposition would have to be denied because genuine issues of material fact exist in the Remand Proceedings. Of the three Remand Proceedings, the Commission has completed the hearings of one, set another for hearing, with the third pending before the Commission on remand.⁶⁸ Since these three of the four have been (and continue to be) separate cases before this Commission and the courts for the last eight years, we find that summary disposition as to the three Remand Proceedings would constitute an impermissible collateral attack. With regard to the fourth proceeding, the Commission is concurrently issuing an order dismissing the CERS Complaint.⁶⁹

55. For these reasons, we deny California Parties’ request for summary disposition.

⁶⁵ *BP Pipelines (Alaska) Inc.*, 127 FERC ¶ 61,047, at P 44 (2009); *Blumenthal v. NRG Power Mktg., Inc.*, 103 FERC ¶ 61,344, at P 69 (2003) (“if an issue of material fact is in dispute, then summary disposition is not appropriate”).

⁶⁶ *Investigation of Certain Enron-Affiliated QFs and Colstrip Energy Ltd. Partnership*, 108 FERC ¶ 63,037, at P 34, n.57 (2004); *Transcontinental Gas Pipeline Corp.*, 76 FERC ¶ 63,009, at 65,039 (1996).

⁶⁷ *See, e.g.*, answers of CSG, Powerex Corp., TransCanada Energy Ltd., Constellation NewEnergy, and Allegheny Energy Supply Company, LLC; *see also* supplemental answers and motions to lodge of Redding and Modesto.

⁶⁸ *Lockyer Order on Remand*, 122 FERC ¶ 61,260 at P 35 (the Commission found that “issues of material fact exist” and that “[t]hese issues of material fact cannot be resolved on the record before us.”); *CPUC Order on Remand*, 129 FERC ¶ 61,147 at P 15 (“issues of material fact exist”); *Port of Seattle*, 499 F.3d 1016.

⁶⁹ CERS Complaint Order, 135 FERC ¶ 61,178.

3. Request for Hearing and Settlement Procedures

56. Given our decision to deny the motion for consolidation (and summary disposition), there is no need to address the California Parties' request for hearing and settlement procedures of the consolidated proceeding. In addition, we note that we have already addressed the CERS Complaint; and two of the three Remand Proceedings, *CPUC* and *Lockyer* are in hearing, with the third, *Port of Seattle*, pending before the Commission on remand.⁷⁰

57. We note that the Commission is always supportive of parties' efforts to settle disputed matters outside of litigation and should any of the parties decide to enter into voluntary settlement discussions in any of these matters, the Commission stands ready to offer its assistance.

D. SEA-TAC's Motion

58. In its August 4, 2009 motion, SEA-TAC requests that the Commission summarily find that the West-wide wholesale electricity market, including the Pacific Northwest, was affected by market manipulation and that, as a result, jurisdictional sellers' rates for Pacific Northwest refund claimants' previously-identified transactions exceeded just and reasonable levels throughout the Western Energy Crisis. It also asks the Commission to grant market-wide relief and order: (i) all jurisdictional sellers to refund to all purchasers amounts demanded, charged and collected in excess of the just and reasonable prices; and (ii) follow-up procedures to determine specific refunds applicable to specific sellers. Or, in the alternative, it asks that the Commission institute an evidentiary hearing and establish related procedures to address the remand proceedings in *Port of Seattle* or in any consolidated proceedings, as may be ordered in response to the California Parties' motion that may include the *Port of Seattle* remand.

59. SEA-TAC supports and adopts the arguments of the California Parties for consolidation and summary disposition (with the notable exception of the California Parties' proposal to sever the Pacific Northwest transitions from the remaining California proceedings). SEA-TAC then seeks to "supplement" testimony it had offered in 2003 in the *Port of Seattle* proceeding with newly-filed testimony.

E. Answers to SEA-TAC's Motion

60. While taking no position on the substance of SEA-TAC's arguments, the California Parties oppose the request the Commission consider SEA-TAC's Motion

⁷⁰ *Lockyer Order on Remand*, 122 FERC ¶ 61,260; *CPUC Order on Remand*, 129 FERC ¶ 61,147; *Port of Seattle*, 499 F.3d 1016.

together with, and in the same proceeding as, the California Parties, May 22, 2009 motion. The California Parties state that considering all these claims together would needlessly and inefficiently complicate the proceedings the California Parties seek to consolidate and would harm settlement efforts in the underlying proceedings. The California Parties state that there are significant and basic differences between these claims and that consolidation of the California and Pacific Northwest claims in one proceeding would create a “morass.”⁷¹

61. Cities/MID argue that the Commission has no jurisdiction to order refunds from governmental entities in this case. Next argues Cities/MID, SEA-TAC’s request for a market-wide remedy should be rejected because lack of notice, in that the Commission has never established a refund effective date apprising interest parties of the possibility of refunds for the transactions in the Pacific Northwest. Further, argues Cities/MID, such relief is not appropriate where the issue to be determined is whether individual sellers violated their market-based rate tariffs or engaged in market manipulation.

62. NV Energy also opposes the motion, claiming that SEA-TAC’s request seeks procedures and results that are “counter-productive, unwise, and probably illegal.”⁷² NV Energy states that summary disposition is inappropriate because the record is insufficient to support such result and because the parties lacked notice that such a remedy would be considered. In any case, NV Energy argues that the Commission should not establish proceedings concerning market-wide relief tailored to individualized interests of specific purchasers, i.e., NV Energy believes that the Western Interconnection in 2000-2001 was an integrated marketplace and that bilateral transactions should not be considered in separate proceedings.

63. Shell Energy and TFG argue that SEA-TAC’s motion should be summarily rejected because there are disputed issues of material fact. They state that all allegations of market power and manipulation are disputed in fact and theory. Further they argue that the Commission has already considered all of the evidence of alleged market manipulation in the *Port of Seattle* proceeding. NV Energy and TFG also challenge the legality of the requested relief in that SEA-TAC has failed to address adequately or

⁷¹ California Parties’ August 19, 2009 Answer at 4.

⁷² NV Energy’s October 4, 2009 Answer at 3.

otherwise advanced evidence sufficient to overcome the *Mobile-Sierra*⁷³ presumption regarding contract modification as set forth in *Morgan Stanley*.⁷⁴

F. Commission Determination

64. For the reasons set forth in paragraphs 45 to 50 *supra*, relating to the California Parties' motions to consolidate, we deny consolidation of the various proceedings as requested by SEA-TAC in its motions.⁷⁵ For reasons similar to those set forth in paragraphs 51 to 57 *supra*, relating to the California Parties' motion, we deny SEA-TAC's motion for summary disposition, the granting of market-wide relief or alternatively, the granting of evidentiary hearing and settlement procedures. To the extent SEA-TAC seeks hearing procedures in a stand-alone *Port of Seattle* proceeding, we will decide the need for a hearing when we address that case on remand.⁷⁶

65. As previously stated, the Commission is always supportive of parties' efforts to settle disputed matters outside of litigation and continues to encourage resolution through settlement if possible, and stands ready to offer its assistance in this regard.

The Commission orders:

(A) The California Parties' motions are hereby denied, as discussed in the body of this order.

(B) SEA-TAC's motions are hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁷³ *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956).

⁷⁴ *See Morgan Stanley*, 554 U.S. at 547-51.

⁷⁵ *See* SEA-TAC's August 4, 2009 Motion at 6.

⁷⁶ *See Port of Seattle*, 130 S. Ct. 1050.