

139 FERC ¶ 61,210
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

People of the State of California, *ex rel.*
Edmund G. Brown, Jr. Attorney General
of the State of California
Complainant

v.

Docket No. EL09-56-013

Powerex Corp. (f/k/a British Columbia
Power Exchange Corp.)
Sempra Energy Trading, LLC (f/k/a Sempra
Energy Trading Corp.)
Allegheny Energy Supply Company, LLC
TransAlta Energy Marketing (US), Inc.
Public Service Company of New Mexico
MIECO, Inc.
Shell Energy North America (U.S.), L.P.
(successor by merger to Coral Power LLC)
Merrill Lynch Capital Services
TransCanada Energy Ltd. (f/k/a TransCanada
Power Corp.)
Commerce Energy Corp. (f/k/a Commonwealth
Energy Corp.)
Nevada Power Company
Tucson Electric Power Company
American Electric Power Service Corp.
Commission Federal de Electricidad
Sierra Pacific Power Company
Sierra Pacific Industries
Avista Corp. (f/k/a Washington Water Power Company)
Avista Energy, Inc.
Sempra Energy Solutions LLC
Respondents

ORDER DENYING REHEARING

(Issued June 13, 2012)

1. In this order, we deny the California Attorney General's¹ June 23, 2011 Request for Rehearing (Rehearing Request) of the Commission's May 24, 2011 order,² which dismissed the California AG's complaint that sought refunds on sales made by respondents 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 (the CERS Period).

I. Background

2. A more detailed factual background of these proceedings is included in the Dismissal Order. 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 2001.³ As discussed in the Dismissal Order, in response to the Western Energy Crisis, numerous proceedings were initiated at the Commission, including the *CPUC*,⁴ *Lockyer*,⁵ *Port of Seattle*,⁶ and *Morgan Stanley* proceedings.

¹ People of the State of California, *ex rel.* Kamala E. Harris, Attorney General (California AG).

² *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 or Complaint), *dismissed*, 135 FERC ¶ 61,178 (2011) (Dismissal Order).

³ *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).

⁴ *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), *reh'g granted in part and denied in part*, 135 FERC ¶ 61,183 (2011).

⁵ *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, *clarified*, 123 FERC ¶ 61,042 (2008), *order on reh'g and clarification*, 125 FERC ¶ 61,016 (2008), *initial decision*, 130 FERC ¶ 63,017 (2010), *order affirming initial decision*, Opinion No. 512, 135 FERC ¶ 61,113 (2011).

3. In summary, 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.⁷ The *Lockyer* proceeding centered on whether any seller's improper or untimely filing of its quarterly transaction reports masked an accumulation of market power that led to an unjust and unreasonable rate for that seller during the 2000-2001 period.⁸ 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.⁹ The *Morgan Stanley* proceeding involved buyers seeking to abrogate or reform contracts they signed during the Western Energy Crisis.¹⁰

4. In addition to these other proceedings, on May 22, 2009, the California AG filed a new complaint alleging that the respondents made short-term bilateral sales to CERS during the CERS Period at unjust and unreasonable prices. As summarized by the California AG, the CERS Complaint was filed pursuant to Federal Power Act (FPA) sections 205, 206, 306 and 309¹¹ and was predicated on two legal theories: (1) reporting

⁶ See *Port of Seattle, Washington v. FERC*, 499 F.3d 1016, 1022 (9th Cir. 2007) (*Port of Seattle*), cert. denied, 130 S. Ct. 1050 (2010), order on remand, 137 FERC 61,001 (2011).

⁷ See *CPUC*, 462 F.3d at 1035, *CPUC Order on Rehearing*, 135 FERC ¶ 61,183.

⁸ 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 *Lockyer Initial Decision*, 130 FERC ¶ 63,017. The Commission affirmed the Initial Decision on May 4, 2011. See Opinion No. 512, 135 FERC ¶ 61,113.

⁹ See *Port of Seattle*, 499 F.3d at 1022, order on remand 137 FERC ¶ 61,001.

¹⁰ 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).

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

deficiencies (by the sellers and/or the inadequacy of the reporting requirements *per se*), and (2) the respondents' alleged exercise of undue market power and tariff violations (including misreporting of transactions) and market manipulation.¹²

II. The Dismissal Order

5. The Dismissal Order rejected the CERS Complaint on a number of grounds. First, the Commission determined that the California AG sought a remedy that was not available, advanced legal theories that were not supportable and, to the extent that he raised a potentially supportable legal theory pursuant to FPA section 309, the California AG failed to sufficiently support his allegations.¹³ Next, the Commission was compelled to dismiss the complaint because the California AG failed to adequately plead or otherwise advance evidence sufficient to overcome the *Mobile-Sierra* presumption¹⁴ regarding contract modification.¹⁵ Finally, the Commission found that the Complaint was filed too late under the federal statute of limitations.¹⁶

III. Request for Rehearing

6. On June 23, 2011, the California AG filed her Request for Rehearing of the Dismissal Order, specifying thirteen errors (discussed *infra*). In the main, these specifications of error echo the previously-rejected arguments the California AG raised in the Complaint and other prior pleadings. We address these alleged errors seriatim.

¹² Rehearing Request at 2.

¹³ See Dismissal Order, 135 FERC ¶ 61,178 at PP 46-82.

¹⁴ *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Mobile-Sierra*).

¹⁵ Dismissal Order, 135 FERC ¶ 61,178 at PP 83-91.

¹⁶ Dismissal Order, 135 FERC ¶ 61,178 at PP 94-111.

IV. Specifications of Error

A. Adequacy of the Commission's Quarterly Reporting System

1. California AG's Argument

7. According to the California AG,¹⁷ the Dismissal Order fails entirely to adjudicate one of the complaint's main theories of recovery: that none of the rates charged to CERS by any of the respondents in short term bilateral transactions were "filed rates" under the FPA because the Commission's quarterly reporting system for Western Systems Power Pool (WSPP) transactions did not establish "sufficient post-approval reporting requirements" as required by the Ninth Circuit in *Lockyer*.¹⁸ The California AG states that the Complaint featured this claim as its first legal basis for recovery and was supported by expert testimony filed with the Complaint,¹⁹ but that the Commission failed to address it.

8. Further, the California AG argues that the Commission was incorrect when it found that it need not address claims about the inadequacy of seller quarterly reports in this proceeding²⁰ because it has chosen to address them in the *Lockyer* remand proceeding.²¹ The California AG disputes this finding and also argues that even if the

¹⁷ Rehearing Request at 6, 9-14.

¹⁸ Rehearing Request at 9 (citing *Lockyer*, 383 F.3d at 1013 ("FERC has affirmed in its presentation before us that it is not contending that approval of a market-based tariff based on market forces alone would comply with the FPA or the filed rate doctrine. Rather, the crucial difference between *MCI/Maislin* and the present circumstances is the dual requirement of an *ex ante* finding of the absence of market power *and* sufficient post-approval reporting requirements.")) (emphasis in original)).

¹⁹ Rehearing Request at 9 (citing Complaint at 30-36, summarizing the testimony of Dr. Peter Fox-Penner, Exhibit No. CAG- I (Part II) at 14-27).

²⁰ Dismissal Order, 135 FERC ¶ 61,178 at P 71 ("First, to the extent that the CERS Complaint is based on arguments that individual sellers' quarterly reporting violations potentially masked market power by these sellers resulting in unjust and unreasonable short-term bilateral sales to CERS during the CERS Period, those issues already are being addressed in the *Lockyer* remand proceeding, and we will not open a new complaint proceeding responding to the same issues.") (Footnote omitted).

²¹ See *Cal. ex rel. Lockyer v. B.C. Power Exch. Corp.*, Opinion No. 512, 135 FERC ¶ 61,113 (2011) (order affirming Initial Decision granting summary disposition and dismissing case).

Commission was correct in this respect, it does not explain or justify the Commission's failure to address the claim in the Complaint that the Commission's reporting requirements *themselves* were fatally flawed under *Lockyer*. In other words, the California AG here argues that the Commission failed to address the adequacy of the Commission's reporting requirement system itself, and its failure to provide protection to consumers against paying unjust and unreasonable rates as required by the FPA, was never set for hearing in the *Lockyer* remand proceeding.

2. Commission Ruling

9. In the Dismissal Order,²² we noted that the adjudication respecting reporting issues was confined to the *Lockyer* proceeding, which has already explored whether any individual 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 in the CAISO or CalPX markets during the 2000-2001 period, or to CERS during the CERS Period and whether remedies, if any,²³ against any particular seller respecting these reporting issues was warranted.²⁴ We stand by this holding and will not open a new complaint proceeding responding to the same issues.²⁵ The Commission

²² Dismissal Order, 135 FERC ¶ 61,178 at PP 71, 78.

²³ See *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) (“Finally, we observe that the breadth of agency discretion is, if anything, at its zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies and sanctions, including enforcement and voluntary compliance programs in order to arrive at maximum effectuation of Congressional objectives.”).

²⁴ See notes 5 and 8, *supra*.

²⁵ See, e.g., *Lockyer Order on Rehearing and Clarification*, 125 FERC ¶ 61,016 at PP 17-19 (clarifying, at the California Parties' request, that the CERS transactions from January 2001 to June 2001 were to be included in the *Lockyer* hearing); see also California Parties, Docket No. EL00-95-000, *et al.* May 22, 2009 Motion to Consolidate at 20 (“On remand from *Lockyer*, California Parties will likewise present evidence of widespread misreporting, masking accumulations of market power that enabled massive market manipulation of other sorts.”).

controls its own dockets and has substantial discretion to manage its proceedings.²⁶ Nor will we entertain arguments about the appropriate scope of the *Lockyer* proceeding in this case.

10. Next, to the degree that the California AG again argues that rates charged to CERS were not filed rates because the Commission's flawed market-based rate program in effect at the time was unable to detect market power, the California AG raises the exact same issue that the Ninth Circuit already decided in *Lockyer*—that market-based tariffs are permissible under the FPA and FERC “has broad discretion to establish effective reporting requirements for administration of the tariff.”²⁷

11. The doctrine of issue preclusion, or collateral estoppel, prevents parties from reviving issues that were previously decided against them, or from raising new issues that should have been presented as part of a prior litigated claim. A decision is final for purposes of preclusion until reversal by an appellate court, and the pendency of an appeal does not defeat preclusion.²⁸ Preclusion “has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation.”²⁹ As the U.S. Supreme Court observed in *New Hampshire v. Maine*, “[i]ssue preclusion generally refers to the

²⁶ See *Mobil Oil Exploration & Producing Se. 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)); *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 366 (D.C. Cir. 2003) (administrative agencies enjoy broad discretion to manage their own dockets).

²⁷ *Lockyer*, 383 F.3d at 1013.

²⁸ Charles Alan Wright *et al.*, *Federal Practice and Procedure*: § 4432, at p. 61, § 4433, at p. 71 (2d ed. 2002) (“[I]t is likewise held in federal courts that the preclusive effects of a lower court judgment cannot be suspended simply by taking an appeal that remains undecided.”); *Cal. Dep’t of Social Servs. v. Thompson*, 321 F.3d 835, 846 (9th Cir. 2003) (finding that district court judgment precluded state from pursuing a second action against Department of Health and Human Services); *Stoll v. Gottlieb*, 305 U.S. 165, 170-171 (1938) (finding that the federal rule is that a judgment or order, once rendered, is final for purposes of *res judicata* until reversed on appeal or modified or set aside in the court of rendition).

²⁹ *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979).

effect of a prior judgment in foreclosing successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the final judgment, whether or not the issue arises on the same or a different claim.”³⁰ We find that such is the case here.³¹

12. In *Lockyer*, the Ninth Circuit reviewed the Commission’s denial of a section 206 complaint brought by the California AG alleging that “FERC’s market-based rate filing requirements violated the FPA and that, even if valid, the reports filed by electricity sellers did not contain the transaction-specific information the FPA requires.”³² Citing U.S. Supreme Court precedents interpreting other ratemaking statutes, the California AG contended that market-based rate tariffs were invalid *per se* because they allow for “unfiled, privately negotiated rates” rather than rates fixed in advance based on the cost of service and a fair return on capital.³³ The California AG also argued, in the alternative, that even if market-based rates were not *per se* inconsistent with the FPA, the Commission’s quarterly reporting requirements did not satisfy the statutory standard and that “different reporting requirements should have been established.”³⁴

13. The Ninth Circuit rejected these arguments, finding that the Commission’s market-based rate tariffs were consistent with the FPA because they did not rely on “market forces alone”³⁵ to ensure the justness and reasonableness of rates. After reviewing the Commission’s reporting requirements in detail, the Ninth Circuit further found that those requirements were sufficient for purposes of the FPA in light of the

³⁰ *New Hampshire v. Maine*, 532 U.S. 742, 748-749 (2001).

³¹ The Commission has embraced the doctrine of preclusion and applied it in appropriate cases. See, e.g., *Entergy Servs.*, 127 FERC ¶ 61,226, at P 10 (2009) (“The Commission applies *res judicata* and collateral estoppel in appropriate circumstances, and as a matter of policy, relitigation of issues already decided on the merits is not sound administrative practice.”) (citations omitted); *Exxon Co. U.S.A. v. Amerada Hess Pipeline Corp.*, 83 FERC ¶ 63,011, at 65,094 (1998) (“We have long favored application of the common-law doctrines of collateral estoppel (as to issues) and *res judicata* (as to claims) to those determinations of administrative bodies that attained finality.”) (quoting *Astoria Fed. S. & L. Ass’n v. Solimino*, 501 U.S. 104, 107 (1991)).

³² *Lockyer*, 383 F.3d at 1010.

³³ *Id.* at 1012.

³⁴ *Id.* at 1013.

³⁵ *Id.*

Commission's "broad discretion to establish effective reporting requirements for administration of the tariff."³⁶

14. The California AG nevertheless understands the Ninth Circuit's *Lockyer* opinion as an invitation to mount a renewed attack on the market monitoring requirements for sales to CERS, arguing that "the Commission's system for monitoring markets . . . did not work."³⁷ We disagree with the California AG's reading of *Lockyer*. As discussed above, the California AG has already argued the inadequacy of the market-based rate reporting requirements to the Commission and the Ninth Circuit, and the California AG failed to persuade either of his position. What is more, the Commission acknowledged as much in its *Lockyer Order on Remand*.³⁸

15. Even if the California AG wished to present new arguments to bolster his position on this issue, those arguments had to have been raised in the California AG's prior facial challenge. They were not. The validity of the Commission's market-based rate tariffs was squarely before the Commission and the Ninth Circuit in the proceedings leading up to *Lockyer*, and the California AG was obligated to present all arguments and evidence supporting his claims in those proceedings.³⁹ The California AG cannot now escape the adverse result in *Lockyer* by offering its evidence on that issue in this case.⁴⁰

³⁶ *Id.*

³⁷ Complaint at 43.

³⁸ *Lockyer Order on Remand*, 122 FERC ¶ 61,260 at P 10 ("Specifically, the [*Lockyer*] court held that the Commission's regulatory scheme consisting of 'the dual requirement of an *ex ante* finding of the absence of market power *and* sufficient post-approval reporting requirements' is consistent with the FPA In this case, the court noted, the Commission required the wholesale seller to file certain reports summarizing its transactions during the preceding three months Thus, the court concluded that the Commission's reporting oversight mechanism distinguished the Commission's market-based rate regulatory scheme from those previously prohibited by the Supreme Court in *MCI* and *Maislin* with respect to other regulated industries.") (emphasis in original and citations omitted).

³⁹ In the context of preclusion, a "claim" refers to all legal theories and demands for relief arising from the same transaction or occurrence, even those which were not explicitly raised before the court whose judgment is given preclusive effect. *See Commonwealth Oil Refining Co.*, 75 FERC ¶ 61,293, at 61,944 (1996).

⁴⁰ Charles Alan Wright *et al.*, *Federal Practice and Procedure*: § 4408, at 185 (2d ed. 2002). While it is true that the Commission has elected in appropriate

(continued...)

16. In short, the California AG failed to persuade the Ninth Circuit that “different reporting requirements should have been established,”⁴¹ and he failed to persuade the Commission in the *Lockyer* remand that reporting violations automatically establish unjust and unreasonable rates.⁴² We therefore find that the California AG thus is collaterally estopped from raising these same issues again in this proceeding.

17. Even assuming, *arguendo*, the California AG were not precluded from re-raising this issue, since the filing of the Rehearing Request, the Ninth Circuit has had an opportunity to revisit its decision in *Lockyer* and has removed any lingering doubt with respect to its view of the legitimacy of market-based rates under the FPA in general, and the adequacy of the Commission’s reporting requirements in particular.⁴³

circumstances, not to apply preclusion principles to ratemaking cases where “new evidence” or “changed circumstances” are presented, *Pac. Gas & Elec. Co.*, 121 FERC ¶ 61,065, at PP 39-40 (2007), the Commission has provided this exception in order to allow parties to challenge previously-approved rates where “new facts” or new arguments show that “the rates . . . may *no longer* be just and reasonable.” *San Diego Gas & Elec. Co. v. Pub. Serv. Co. of N.M.*, 86 FERC ¶ 61,253, at 61,912 (1999) (emphasis added).

But this exception does not apply here. First, this is not a traditional ratemaking case in which the Commission seeks to establish a prospectively just and reasonable rate. Rather, this is a complaint seeking retroactive refunds of allegedly unjust electricity sales during a particular past period—an action that lends itself more readily to traditional application of preclusion principles. Second, the California AG has not alleged a change in circumstances or new evidence that was previously unavailable. Instead, the California AG rehashed expert testimony about historical market conditions in early 2001, based on data that was readily available in the *Lockyer* proceeding. “[R]elitigation of issues merely for the sake of ‘trying again’ is not permitted . . . it is no exception to either collateral estoppel or the Commission’s policy against unnecessary duplication of litigation to claim that the same issue was wrongly decided in the prior docket because old evidence in that record was not properly considered.” *Gaviota Terminal Co.*, 75 FERC ¶ 63,008, at 65,028 (1996).

⁴¹ *Lockyer*, 383 F.3d at 1013.

⁴² *Lockyer Order on Remand*, 122 FERC ¶ 61,260 at P 31 (“The court did not say that failure to comply with the Commission’s quarterly reporting requirements automatically makes the rate charged by a particular customer unjust and unreasonable.”).

⁴³ See *Montana Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *petition for cert. filed* (U.S. Feb. 10, 2012) (No. 11-1009).

Notwithstanding the California AG's arguments that the Commission purportedly "conceded in a Ninth Circuit oral argument on June 8, 2011 that the Commission failed to perfect the crucial second step of the market-based rate filing process through necessary market monitoring,"⁴⁴ the Ninth Circuit rejected a facial challenge to the validity of Order No. 697,⁴⁵ which codified the Commission's existing limited market-based rate policy (along with certain enhancements). As the court made clear in the "Reporting Requirements" portion of its order:

Petitioners contend that FERC's plan to monitor transactions through regular reports filed by market-rate sellers is "much less stringent than the *Lockyer* court understood." In our opinion in *Lockyer*, we assumed that FERC would require authorized market-rate sellers to file a market-power analysis every four months. 383 F.3d at 1013. Petitioners assert, and FERC concedes, that authorized sellers will instead file an updated market-power analysis only every three years. Additionally, Petitioners note that FERC will exempt from market-power analysis Category 1 sellers, who control less than 500 MW of generation and meet other criteria. Apart from these two matters, Petitioners have not pointed to any action taken by FERC that loosens reporting requirements from those contemplated by our holding in *Lockyer*. **Because we approved of the requirements in *Lockyer*, the question before us here is whether these two changes—pertaining to frequency of evaluating market power and exempting Category 1 sellers—are sufficient cause for us to invalidate the market-based rates policy that we otherwise approved in our prior *Lockyer* holding.** They are not.⁴⁶

18. For all the foregoing reasons, we deny rehearing on this issue.

⁴⁴ Rehearing Request at 13.

⁴⁵ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, 73 Fed. Reg. 25,832 (May 7, 2008), FERC Stats. & Regs. ¶ 31,268, *order on reh'g and clarification*, 124 FERC ¶ 61,055 (2008).

⁴⁶ *Montana Consumer Counsel*, 659 F.3d at 917-18 (emphasis added).

B. Sellers Without Market-Based Rate Authority**1. California AG's Argument**

19. Next, the California AG states⁴⁷ the Dismissal Order failed to adjudicate the California Attorney General's claim⁴⁸ that respondents Comision Federal de Electricidad (CFE), Nevada Power and Sierra Pacific Power made market-based rate sales to CERS even though they lacked market-based rate authority. The California AG notes that while the Commission was aware of the claim,⁴⁹ it failed to address it and should not have dismissed the Complaint vis-à-vis these respondents.

2. Commission Ruling

20. As the California AG notes in her Rehearing Request,⁵⁰ the California Parties have settled all claims for refunds from CFE, including those arising in this proceeding, and the Commission has accepted the settlement.⁵¹ Accordingly, this issue is moot as to CFE. A similar joint offer of settlement between the California Parties and Nevada Power Company and Sierra Pacific Power Company d/b/a NV Energy, Inc. (NV Energy) was filed with the Commission, on September 1, 2011, and accepted on February 2, 2012.⁵² Therefore this issue is moot as to NV Energy as well and no further action is required on this issue.

C. Inadequate Quarterly Reporting**1. California AG's Argument**

21. Next, the California AG again argues the Dismissal Order improperly refused to adjudicate the claim that because the sellers who made bilateral sales to CERS failed to

⁴⁷ Rehearing Request at 6, 14-17.

⁴⁸ See Complaint at 45-47.

⁴⁹ Rehearing Request at 14 n.35 (citing Dismissal Order, 135 FERC ¶ 61,178 at P 70).

⁵⁰ *Id.* at 14 n.32.

⁵¹ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 129 FERC ¶ 61,256 (2009), *order on reh'g*, 130 FERC ¶ 61,199 (2010).

⁵² *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 138 FERC ¶ 61,084 (2012).

provide WSPP Agreement quarterly transaction reports that complied with the Commission's reporting requirements, the rates they charged to CERS were not "filed rates" under the FPA, and thus are subject to refund.⁵³ The California AG does not accept the Dismissal Order's reasoning that any issue associated with the claim has been relegated to the *Lockyer* proceeding and that the Commission controls its own dockets and has substantial discretion to manage its proceedings.⁵⁴ The California AG argues the error in the Commission's reasoning is not that the Commission lacks the discretion to determine how best to manage its own dockets, but rather that it has chosen to improperly manage the *Lockyer* docket, this docket, and the *CPUC* docket. The California AG further argues that this improper docket management has led to the Commission's failure to monitor the market as required in *Lockyer* and enable the Commission to turn a "blind eye" towards the tariff violations, market manipulation, and market power abuse by sellers that made bilateral sales to CERS. In reaching this conclusion, the California AG specifically criticized the scope of issues set for hearing in the *Lockyer* docket.⁵⁵

2. Commission Ruling

22. As we have explained, while there may be some overlap of issues, the various Western Energy Crisis proceedings address different parties, markets, time periods and legal issues; and it is not proper to attempt to "lump" them all together for adjudication.⁵⁶ We have made it clear that the *Lockyer* proceeding (not this one) was established to focus on sellers' alleged reporting failures.⁵⁷ In *Lockyer*, the Commission established a trial-type hearing to address whether any individual public utility seller's violation of the Commission's market-based rate quarterly reporting requirement masked an accumulation of market power that led to an unjust and unreasonable rate for that seller during the 2000-2001 period.⁵⁸ Breaking up the proceeding in this manner is logical, efficient and entirely within the Commission's discretion.⁵⁹ To the degree the California

⁵³ Rehearing Request at 17-20.

⁵⁴ *Id.* 17 (citing Dismissal Order, 135 FERC ¶ 61,178 at P 71).

⁵⁵ Rehearing Request at 18.

⁵⁶ *See, e.g., San Diego Gas & Elec. Co.*, 135 FERC ¶ 61,177 (2011) (Order Denying Consolidation).

⁵⁷ *See* Dismissal Order, 135 FERC ¶ 61,178 at P 3 & n.7.

⁵⁸ *Lockyer Order on Remand*, 122 FERC ¶ 61,260 at P 2; *Lockyer Initial Decision*, 130 FERC ¶ 63,017 at P 6; *Lockyer Order Affirming Initial Decision*, 135 FERC ¶ 61,113 at P 4.

AG believes that the Commission “improperly managed” the *Lockyer* docket (or any other for that matter) or is dissatisfied with the outcome of that proceeding, it is within her rights to raise those arguments in that particular docket – not this one. Therefore, we will not entertain this improper collateral attack on our *Lockyer* orders in this case.⁶⁰

D. Alleged Tariff Violations Under FPA Sections 206 and 309

1. California AG’s Argument

23. The California AG next argues that the Dismissal Order fundamentally misunderstands the claim that respondents failed to charge their filed rates because they committed tariff violations and engaged in market manipulation, including misreporting and nonreporting of transactions with CERS.⁶¹ The California AG states that even assuming the rates charged to CERS were lawfully filed rates, the Complaint sought enforcement of those filed rates, which respondents failed to charge because they exercised market power and engaged in tariff violations and market manipulation. While acknowledging that FPA section 206 does not expressly provide for this form of relief for a tariff violation, the California AG argues such authority has been interpreted by the courts in the rate filing provisions of section 205, the complaint provisions of sections 206 and 306, and the language of section 309 that gives FERC the necessary and appropriate authority to carry out the purposes of the FPA.⁶²

24. Next, the California AG argues that the claims in the CERS Complaint are based primarily on the “universal tariff violations” that impacted those bilateral transactions, that the Complaint and supporting testimony and exhibits documented massive wrongdoing, including: (a) exercise of undue market power; (b) manipulative market strategies; (c) withholding; and (d) reporting violations, but that the Dismissal Order “ignored” the California AG’s evidence.⁶³

25. Finally, the California AG argues that notwithstanding the Dismissal Order’s finding that the absence of tariff violation evidence against particular respondents to the Complaint (in part because the Commission refusal to consider transaction reporting

⁵⁹ See footnote 26, *supra*.

⁶⁰ See Dismissal Order, 135 FERC ¶ 61,178 at P 71 & nn.100, 101.

⁶¹ Rehearing Request at 20-26.

⁶² *Id.* at 21 & n.21 (citing *CPUC*, 462 F.3d at 1048-49).

⁶³ Rehearing Request at 26-31.

violations in this proceeding) the Commission should have granted relief because these respondents benefited from the “pricing umbrella” created by the other respondents that exercised undue market power and engaged in tariff violations and market manipulation.⁶⁴

2. Commission Ruling

26. The California AG’s FPA legal theory ignores a fundamental precept underlying all of the FPA – notice:

[T]he FPA is generally premised on notice to sellers and customers as to when rates may be subject to change, whether they are rate increases or potential refunds. . . [W]ith respect to violations of the FPA section 205 filed rate requirements, public utilities are charged with following Commission rules, regulations and orders and are always “on notice” that they are subject to disgorgement or penalties *if they violate the law or their filed rate tariff*. While sellers are on notice that they will be subject to penalties *for their own violations, they are not on notice (absent a notice of possible prospective refunds under section 206 of the FPA) that they will be subject to penalties for someone else’s violations of their filing requirements* 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.⁶⁵

27. Given this foundation, the Commission, in the Dismissal Order went on to explain that a remedy under FPA section 205 was unavailable to the California AG because the section 205 allegations were coupled with alleged violation of sellers’ reporting requirements and thus, as explained *supra*, those allegations would be confined to the *Lockyer* proceeding.⁶⁶ Next, the Dismissal Order explained why FPA section 306 was to no avail in that it contains no provision for retroactive refunds for the CERS sales.⁶⁷

⁶⁴ *Id.* at 23.

⁶⁵ *Lockyer Order on Rehearing and Clarification*, 125 FERC ¶ 61,016 at P 38 (emphasis added).

⁶⁶ Dismissal Order, 135 FERC ¶ 61,178 at PP 71, 78.

⁶⁷ *Id.* P 72 & n.102.

Next, the Dismissal Order correctly explained that FPA section 206 only provides for prospective relief.⁶⁸

28. The Dismissal Order then addressed the California AG's remaining legal theory – FPA section 309. However, due to the inadequacy of the Complaint, the Commission appropriately rejected the FPA section 309 claim as well.⁶⁹ As the Commission explained, FPA section 309 is not itself an independent grant of authority.⁷⁰ We have previously stated that FPA section 309 “is designed to fill in gaps where the FPA is silent, not to rewrite the explicit congressional delegations of authority and explicit limitations on that authority.”⁷¹ In *CPUC*, the Ninth Circuit stated that FPA section 309 provides the Commission with authority to act on “statutory or tariff violations.”⁷² Thus, the California AG can only attain the relief requested under FPA section 309 (if at all) by pleading a specific violation by a specific seller of a substantive provision of the FPA or a tariff, compliance with which the Commission can enforce by taking actions “necessary and appropriate.”⁷³ Consequently, the California AG had the burden to demonstrate that: (1) individual sellers violated the FPA or their filed tariffs, (2) that such violations resulted in an unjust and unreasonable contract, and (3) the remedy, if any, would be for

⁶⁸ *Id.* PP 73-74.

⁶⁹ Dismissal Order, 135 FERC ¶ 61,178 at PP 75-82.

⁷⁰ *See Towns of Concord v. FERC*, 955 F.2d 67, 73 (D.C. Cir. 1992) (finding that the Commission's authority to order refunds for violations of a regulated entity's filed rate under section 309 must be based within a substantive statutory provision of the FPA); *Mobil Oil Corp*, 483 F.2d 1238, 1257 (D.C. Cir. 1973) (stating that the Commission's enforcement actions “cannot enlarge the choice of permissible procedures beyond those that may fairly be implied from the substantive sections and the functions there defined.”); 16 U.S.C. § 825h (2006) (“to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act.”).

⁷¹ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 96 FERC ¶ 61,120 at 61,509 (2001) (July 25, 2001 Order).

⁷² *See CPUC*, 462 F.3d at 1048.

⁷³ *See CPUC*, 462 F.3d at 1058 (FPA section 309 empowers the Commission to enforce against violators' compliance with the FPA and regulatory requirements unconstrained by FPA section 206 refund effective date).

any seller found to have committed such a violation to disgorge its unjust profits.⁷⁴ The California AG simply failed to make these showings.

29. In the CERS Complaint, the California AG first attempted to prove that individual sellers violated the FPA and/or their filed tariffs by failing to comply with their reporting requirements. As discussed above, such reporting violations are the subject of a separate proceeding and will not be considered here. Alternatively, to the extent the Complaint was based on the a theory of other tariff violations and market manipulation by various sellers, the Dismissal Order found the California AG failed to provide sufficient evidence demonstrating that specific sellers engaged in specific tariff or statutory violations, and that those violations resulted in unjust and unreasonable rates for the short-term bilateral sales to CERS that need to be remedied.⁷⁵

30. As the Dismissal Order explained,⁷⁶ for all the thousands of pages presented, both in the Complaint itself and in the supporting testimony, the California AG offered little more than vague, generalized and unsupported allegations. For instance, allegations that during the Western Energy Crisis, “virtually all sellers” – both tariff violators as well as “situational beneficiaries” – reaped unjust and unreasonable windfalls from such alleged violations did not satisfy the specificity required to invoke FPA section 309 remedial action. Neither did general allegations against “sellers,” “other suppliers,” “key sellers,” “numerous sellers,” and “certain sellers.” The Complaint described some wrongdoings of Enron and others at length – but alleged *virtually no specific links between the specific respondents and specific bad acts affecting specific bilateral contracts.*

31. The Rehearing Request (pages 26-31) marshals the evidence the Commission purportedly “ignored.” However, the Commission did not ignore this evidence; it merely sifted through it in light of the requirements of the FPA, the Commission’s regulations and the California AG’s burden of proof, and found that the California AG failed to satisfy its burden.⁷⁷ The Commission continues to find on rehearing that the California AG did not satisfy its burden.

⁷⁴ Dismissal Order, 135 FERC ¶ 61,178 at PP 76-77.

⁷⁵ *Id.*

⁷⁶ *Id.* PP 80-81.

⁷⁷ *See* 16 U.S.C. § 824e (2006); 18 C.F.R. § 385.206(b) (2011) (The requirement that a complaint should identify particular actions or inactions by specific sellers alleged to violate applicable FPA standards or regulatory requirements.). This rule is intended to “ensure that the Commission and all parties to a dispute have as much information as early in the complaint process as possible to evaluate their respective positions.”

32. The Dismissal Order did in fact highlight the few instances where the California AG made more specific charges of tariff violations. For example, the Dismissal Order cited the California AG's allegation that Powerex and Sempra were pivotal suppliers that exercised market power in violation of their market-based rate tariffs; PNM improperly provided parking services; Powerex, Sempra, Coral, and TransAlta engaged in false exports, parking and various other manipulative gaming strategies in violation of the Monitoring and Information Protocol (MMIP) and the scheduling and bidding provisions of the CAISO tariff and their market-based rate tariffs.⁷⁸ For all of this, the Commission still correctly found that these allegations were insufficient to sustain the Complaint, even when accepted as true. The California AG failed to demonstrate the critical nexus between these alleged violations and the prices charged under any specific short-term bilateral contract with CERS. In these circumstances, the Commission could not reasonably ascertain the relationship of those alleged bad acts to any particular bilateral agreement. Thus, the Complaint was properly dismissed as insufficient.

33. Finally, we reiterate that we cannot accept the California AG's unsupported theory of vicarious liability under FPA section 309 under the premise of a "pricing umbrella." Without allegations of specific violations affecting specific bilateral contracts, we are left with no necessary or appropriate actions for the Commission to take under FPA section 309 to carry out the provisions of the FPA, and (as discussed in paragraph - 15 -26 *supra*) non-offending market participants are deprived of adequate notice.

34. In sum, the California AG attempted to obtain retroactive refunds on a market-wide basis by conflating Commission authority under a hybrid combination of FPA sections 206 and 309. As we have explained, FPA section 309 is not in itself an independent grant of authority and we do not read into *CPUC* a mandate that section 309

Complaint Procedures, Order No. 602, FERC Stats. & Regs. ¶ 31,071, at 30,756 (1999). See also *Citizens' Alliance v. Nat'l Fuel Gas Co.*, 26 FERC ¶ 61,386, at 61,862 (1984) (dismissing a complaint that was "vague and insufficiently supported by specific factual allegations to warrant an investigation"); *Regulations Implementing Refund Procedures Under Subpart K of Part 271 for Production-Related Costs*, Order No. 333, FERC Stats. & Regs., Regulations Preambles 1982-1985 ¶ 30,494, at 30,664 (1983) ("If a person or party wishes to file a complaint with the Commission, [then] the complaint should be specific and supportable with regard to the facts"); *Union Elec. Co., d/b/a/ AmerenUE*, 93 FERC ¶ 61,158, at 61,529 (2000) ("[w]hile trial-type procedural measures may be used to develop a record and resolve issues of fact, they are not intended to be used as a cure for a complaint that fails to inform the Commission completely and clearly as to the issues and factual disputes").

⁷⁸ See Dismissal Order, 135 FERC ¶ 61,178 at P 81 & n.118.

obviates the remaining provisions of the FPA.⁷⁹ The California AG cannot circumvent the temporal limitation of FPA section 206 by seeking relief under FPA section 309.⁸⁰ Rather, each of these FPA sections contains its own requirements. Accordingly, we deny rehearing on this issue.

E. The Mobile-Sierra Presumption

35. The Dismissal Order⁸¹ found that to the extent the California AG claimed that the short-term bilateral sales contracts were unjust and unreasonable, he did not adequately plead or otherwise advance evidence sufficient to address the *Mobile-Sierra* presumption regarding contract modification.⁸² We noted that the CERS purchases were made bilaterally under the framework of the WSPP agreement, which contains a *Mobile-Sierra* clause.⁸³ The Commission found that the short-term bilateral sales contracts at issue here were a type of agreement to which the Supreme Court has found that the *Mobile-Sierra*

⁷⁹ See *New England Power Co. v. FPC*, 467 F.2d 425, 430-31 (D.C. Cir. 1972), *aff'd*, 415 U.S. 345 (1974) (FPA section 309 does not “confer independent authority to act”) and *Mobil Oil v. FPC*, 483 F.2d at 1257 (parallel section of Natural Gas Act is implementary of other substantive provisions, but not independent source of authority). See also *Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010) (parallel section (4(i)) of Communications Act of 1934 (47 U.S.C. § 154(i)), authorizing the FCC to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions,” is not a sufficient mandate for FCC to regulate certain internet practices over which FCC has no other express statutory authority).

⁸⁰ See *CPUC*, 462 F.3d at 1045, 1048 (“Unlike refund proceedings commenced under § 206, no time limits apply to remedial actions filed pursuant to § 309.”) Our discussion here that FPA section 309 does not broaden FPA section 206 does not run afoul of the court’s concern that the Commission might be attempting to apply the time limits of FPA section 206 to FPA section 309 proceedings. *Id.* at 1049. The Commission is not attempting to apply FPA section 206 time limits to a section 309 proceeding; rather, the Commission is simply requiring the California AG to adequately plead its case under either FPA provision, which was not done in this proceeding.

⁸¹ Dismissal Order, 135 FERC ¶ 61,178 at P 83-91.

⁸² See footnote 14 *supra*.

⁸³ Dismissal Order, 135 FERC ¶ 61,178 at P 83 & n.122.

presumption generally applies, absent language therein to the contrary.⁸⁴ Thus, the rates set in those contracts were to be presumed just and reasonable, and that presumption could be overcome only if the Commission concluded that the contract seriously harms the public interest.⁸⁵ However, as the Supreme Court has made clear, general allegations of market dysfunction, like those made in the Complaint, were not a sufficient basis to overcome the *Mobile-Sierra* presumption or to find that it is inapplicable.⁸⁶

36. In the Rehearing Request, the California AG counters that contrary to the Commission's finding, the Complaint does not make a claim that the Commission should treat the rates charged to CERS as filed rates that should be modified because they are not "just and reasonable." Rather, argues the California AG, the Complaint argued on the basis of several theories that the rates were not filed rates at all and that, alternatively, if the Commission deems the rates to have been filed rates, the Commission should find, based on the evidence, that those filed rates were not followed because sellers committed tariff violations.⁸⁷

1. Mobile-Sierra and the Adequacy of Reporting

a. California AG's Argument

37. First, the California AG states that the *Mobile-Sierra* presumption does not apply here because, as previously argued, the rates charged were not "filed rates" under FPA section 205 because: (1) the Commission's reporting requirements were themselves deficient, and (2) regardless of the adequacy of the reporting requirements, the sellers failed to provide accurate and complete information.

⁸⁴ See *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 544-48 (2008) (*Morgan Stanley*).

⁸⁵ See, e.g., *NRG Power Mktg., LLC v. Me. PUC*, 130 S. Ct. 693 (2010).

⁸⁶ *Morgan Stanley*, 554 U.S. at 547 ("The mere fact that the market is imperfect, or even chaotic, is no reason to undermine the stabilizing force of contracts that the FPA embraced as an alternative to purely tariff-based regulation.")

⁸⁷ Rehearing Request at 33-41.

b. Commission Ruling

38. As the Dismissal Order found,⁸⁸ while the Complaint presented arguments about sellers' alleged reporting failures, the California AG did not provide information sufficient to demonstrate that specific tariff or statutory violations occurred, nor did the California AG make any specific allegations as to how such failures or violations may have improperly affected the contract rates at issue here. In light of *Morgan Stanley*, the Commission explained that complainants must present evidence demonstrating "that a particular seller engaged in unlawful manipulation in the spot market *and* that such manipulation directly affected the particular contract or contracts to which the seller was a party."⁸⁹ The California AG simply did not demonstrate such a nexus with respect to the short-term bilateral sales to CERS. Moreover, for all of the reasons discussed *supra*, this argument amounts to an impermissible collateral attack on the *Lockyer* proceedings, and we deny rehearing on all issues addressing the adequacy of reporting in this case.

2. Mobile-Sierra and Short Term Bilateral Sales

a. California AG's Argument

39. Next, argues the California AG, the Commission erred in concluding that the *Mobile-Sierra* presumption applies to short term bilateral contracts.⁹⁰ Here, the California AG argues that all of the sales at issue were short-term transactions of twenty-four hours or less, not long-term contracts as dealt with in *Morgan Stanley*.

b. Commission Ruling

40. Notwithstanding the California AG's argument, the California AG has ignored one critical fact—the CERS purchases at issue were made bilaterally under the framework of the WSPP agreement, and the Commission has found that the WSPP agreement contains a *Mobile-Sierra* clause.⁹¹ The California AG has presented no evidence or argument as to why this WSPP *Mobile-Sierra* provision should be read out of the contracts involved.

⁸⁸ Dismissal Order, 135 FERC ¶ 61,178 at P 89.

⁸⁹ *Nevada Power Co.*, 125 FERC ¶ 61,312, at P 28 (2008) (emphasis in original).

⁹⁰ *See* Dismissal Order, 135 FERC ¶ 61,178 at P 87.

⁹¹ *See* Sec. 6.1 WSPP Agreement, which provides that the parties to the contract may make "joint application" to the Commission under section 205 of the FPA to change the rates agreed upon in the contract; *PacifiCorp. v. Reliant Energy Servs., Inc.*, 103 FERC ¶ 61,355, at P 29, *reh'g denied*, 105 FERC ¶ 61,184 (2003) (finding that

3. Mobile-Sierra and Market Manipulation

a. California AG's Argument

41. The California AG reiterates the argument that the *Mobile-Sierra* presumption does not apply at all if the “dysfunctional” market conditions under which a contract was formed were caused by the illegal action of one of the parties to the contract.⁹² The California AG asserts that it presented very specific evidence about specific respondents, linking tariff violations by those respondents to market dysfunction generally and to increased prices to CERS in particular. Accordingly, argues the California AG, the *Mobile-Sierra* presumption could not apply to respondents such as Powerex, Coral and TransAlta, as to which the Complaint detailed specific evidence linking manipulative behavior to the prices they forced CERS to pay.⁹³ Based on this, the California AG asserts that these were not otherwise lawfully-filed rates and that the *Mobile-Sierra* presumption simply does not apply.

b. Commission Ruling

42. As the Commission stated,⁹⁴ the Complaint focused on the alleged duplicity of sellers as a whole (as well as the alleged lack of oversight by the Commission).⁹⁵ We appropriately found that these general arguments were insufficient to overcome the *Mobile-Sierra* presumption. While the Court in *Morgan Stanley* held that a contract formed through the wrongdoing of one of the *signatories* enjoys no presumption of

contracts entered into pursuant to the terms and conditions set forth in the WSPP Agreement are subject to the *Mobile-Sierra* clause); *Nevada Power Co. v. Enron Power Mktg., Inc.*, 103 FERC ¶ 61,353, at P 36, *reh'g denied*, 105 FERC ¶ 61,185 (2003), *rev'd sub nom. Pub. Util. Dist. No. 1 v. FERC*, 471 F.3d 1053 (9th Cir. 2006), *rev'd sub nom. Morgan Stanley*, 554 U.S. 527 (9th Cir. 2006).

⁹² Rehearing Request at 36 (citing Dismissal Order, 135 FERC ¶ 61,178 at P 88 n.131).

⁹³ See Rehearing Request at 26-31.

⁹⁴ Dismissal Order, 135 FERC ¶ 61,178 at P 88.

⁹⁵ See, e.g., Complaint at 4 (“The above actions of sellers and the Commission dramatically increased the prices of virtually all spot market electricity sales made to CERS.”).

validity,⁹⁶ the Court did not adopt the approach espoused by the California AG here — that generalized allegations of wrongdoing of “virtually all sellers” should strip each and every seller of the presumption that its contract rates were just and reasonable in a specific case. Indeed, the Court indicated that there must be a specific causal connection between the unlawful activity of one party and the contract rate.⁹⁷

43. The California AG asserts that the Complaint detailed specific evidence linking manipulative behavior by respondents Powerex, Coral and TransAlta to the overall prices they forced CERS to pay. Nevertheless, as discussed above, the California AG failed to demonstrate the critical nexus between these alleged violations and the prices charged under any specific short-term bilateral contract with CERS. In light of *Morgan Stanley*, the Commission explained that the California AG had to present evidence demonstrating “that a particular seller engaged in unlawful manipulation in the spot market *and* that such manipulation directly affected the particular contract or contracts to which the seller was a party.”⁹⁸

4. *Mobile-Sierra and Port of Seattle* “Notice”

a. California AG’s Argument

44. Next, the California AG states that most of the short term bilateral sales to CERS cited in the Complaint⁹⁹ are also the subject of the pending section 206 proceeding in Docket No. EL01-10 pursuant to the Ninth Circuit’s remand to the Commission in the *Port of Seattle* case. The California AG maintains that the *Mobile-Sierra* presumption does not apply to the portion of the Complaint transactions that are also encompassed by the *Port of Seattle* section 206 refund proceeding because those transactions occurred

⁹⁶ *Morgan Stanley*, 554 U.S. at 547 (“if the ‘dysfunctional’ market conditions under which the contract was formed were caused by illegal action of one of the parties, FERC should not apply the *Mobile-Sierra* presumption”).

⁹⁷ *See id.*; *see also id.* at 554-55 (“We **emphasize** that the mere fact of a party's engaging in unlawful activity in the spot market does not deprive its forward contracts of the benefit of the *Mobile-Sierra* presumption. There is no reason why FERC should be able to abrogate a contract on these grounds without finding a causal connection between unlawful activity and the contract rate.”) (Emphasis in original).

⁹⁸ *Nevada Power Co.*, 125 FERC ¶ 61,312, at P 28 (2008) (emphasis in original).

⁹⁹ Rehearing Request at 37 (citing Complaint at 9 & n.31).

after the filing of the *Port of Seattle* complaint¹⁰⁰ and are statutorily subject to mitigation under a just and reasonable standard.¹⁰¹ According to the California AG, sellers in the Pacific Northwest, including respondents here, were on notice when they sold to CERS that the prices they charged under the WSPP Agreement were being investigated and that refunds could be ordered.

45. The California AG contends that the Commission erred in concluding that *Morgan Stanley* stands for the proposition that the *Mobile-Sierra* presumption applies in contracts entered into after a pending FPA section 206 action has placed parties on notice that the transactions subject to the section 206 inquiry are subject to refund.¹⁰² The California AG acknowledges that *Morgan Stanley* did not address this issue, but contends that the Commission and the courts have done so, citing *Westar Energy, Inc. v. FERC*, 568 F.3d 985 (D.C. Cir. 2009) (*Westar Energy*). According to the California AG *Westar Energy* stands for the proposition that, to the extent the *Mobile-Sierra* presumption even applies to short-term bilateral contracts, the parties are not entitled to rely on it where a pending section 206 proceeding has put them on notice that the rates being investigated could result in retroactive adjustments.

b. Commission Ruling

46. We maintain our finding that the California AG must address the *Mobile-Sierra* presumption and disagree that the sellers to CERS were “on notice” that the contract rates were subject to mitigation based on a “just and reasonable” standard by virtue of a pending FPA section 206 action.

47. Even if parties were on notice of potential refunds with regard to many of the Complaint transactions, given the FPA section 206 complaint filed in the *Port of Seattle* proceeding, the Commission has already found that the transactions in the *Port of Seattle*

¹⁰⁰ The California AG notes that the Commission misinterpreted the California AG’s argument to mean that the section 206 proceeding that is pending in Docket No. EL00-95 somehow put sellers on notice concerning the potential for refunds on CERS bilateral transactions. Rehearing Request at 37 n.129 (citing Dismissal Order, 135 FERC ¶ 61,178 at P 90). The California AG clarifies that this reference was not to Docket No. EL00-95, but rather was referring to the pending section 206 complaint in Docket No. EL01-10.

¹⁰¹ Rehearing Request at 37 n.130 (citing *CPUC*, 462 F.3d at 1063; *Port of Seattle*, 499 F.3d at 1023).

¹⁰² Rehearing Request at 37 (citing Dismissal Order, 135 FERC ¶ 61,178 at P 90).

proceeding are subject to *Mobile-Sierra* review.¹⁰³ Thus, to the extent that transactions in the Complaint proceeding overlap with transactions in the *Port of Seattle* proceeding, the same finding from that case that the *Mobile-Sierra* presumption applies, would still apply here.¹⁰⁴

¹⁰³ As we recently confirmed this point in the *Port of Seattle* Order on Remand:

The Supreme Court has previously determined that “the mere fact of a party’s engaging in unlawful activity in the spot market does not deprive its forward contracts of the benefit of the *Mobile-Sierra* presumption. ... Where, however, causality has been established, the *Mobile-Sierra* presumption should not apply. [*Morgan Stanley*, 554 U.S. at 544-55.] Thus, parties seeking refunds must submit evidence not only on whether unlawful market activity occurred, but must also demonstrate a connection between unlawful activity by a seller and unjust and unreasonable rates under a specific contract. [*See, e.g., Nevada Power*, 125 FERC ¶ 61,312 at P 24.] With regard to this showing of a causal connection, a party seeking refunds must submit evidence that demonstrates that the seller’s behavior “directly affect[ed]” contract negotiations. [*See, e.g., Morgan Stanley*, 554 U.S. at 554; Dismissal Order, 135 FERC ¶ 61,178 at P 77; *Nevada Power*, 125 FERC ¶ 61,312 at P 28.] Thus, buyers presenting such evidence must demonstrate that a particular seller engaged in unlawful market activity in the spot market and that such unlawful activity directly affected the particular contract or contracts to which the seller was a party. ... Similarly, general allegations of market dysfunction ... are an insufficient basis for overcoming the *Mobile-Sierra* presumption. [Dismissal Order, 135 FERC ¶ 61,178 at P 87 (citing *Morgan Stanley*, 554 U.S. at 547-48 (“[T]he mere fact that the market is imperfect, or even chaotic, is no reason to undermine the stabilizing force of contracts that the FPA embraced as an alternative to purely tariff-based regulation.”))] *Puget Sound Energy, Inc.*, 137 FERC ¶ 61,001 at P 21.

¹⁰⁴ Even with particular regard to the CERS transactions within the *Port of Seattle* case we likewise held:

The CERS purchases, like other spot market purchases in the Pacific Northwest, were made bilaterally under the framework of the WSPP agreement. Therefore, as discussed above, the *Mobile-Sierra* presumption applies and the rates set in the CERS contracts are presumed to be just and reasonable. [Dismissal Order, 135 FERC ¶ 61,178 at P 87 (citing *NRG Power Mktg., LLC v. Me. PUC*, 130 S. Ct. 693 (2010).)] Thus, as discussed

(continued...)

48. The California AG reads too much into *Westar Energy*. The case does not address a contract containing a *Mobile-Sierra* provision. The case merely stands for the proposition that from the time a seller files a tariff at the Commission and the Commission formally accepts the same, the Commission may impose refund liability retroactively to the refund effective date without impermissibly upsetting settled expectations.¹⁰⁵ The *Mobile-Sierra* presumption is mentioned nowhere in the opinion and it is inapposite regarding any *Mobile-Sierra* analysis.

49. The California AG simply has not demonstrated the required a nexus under *Morgan Stanley* with respect to any specific short-term bilateral CERS contract and accordingly, we deny rehearing in this issue.

5. *Mobile-Sierra* and the Circumstances of the CERS Sales

a. California AG's Argument

50. The California AG's final *Mobile-Sierra* argument is that the Commission erroneously found that "general allegations of market dysfunction are an insufficient basis to overcome the *Mobile-Sierra* presumption."¹⁰⁶ The California AG states that the Commission here conflated evidence that would tend to demonstrate that the *Mobile-Sierra* presumption may not be applied (i.e., because sellers improperly manipulated the contract price) with evidence that would tend to prove that the *Mobile-Sierra* presumption of justness and reasonableness is overcome (i.e., because the contract "seriously harms the public interest").¹⁰⁷

51. The California AG cites *Mobile-Sierra* as identifying three factors that could form the basis for setting aside a contract because it would be in the public interest to do so: "where a [rate] might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory."¹⁰⁸

above, parties seeking refunds must submit evidence demonstrating that specific unlawful market activity occurred, and must demonstrate that such activity directly affected the contract rates at issue. *Puget Sound Energy, Inc.*, 137 FERC ¶ 61,001 at P 28.

¹⁰⁵ *Westar Energy*, 568 F.3d at 989.

¹⁰⁶ Rehearing Request at 39 (citing Dismissal Order, 135 FERC ¶ 61,178 at P 87).

¹⁰⁷ *Id.*

¹⁰⁸ Rehearing Request at 39 (citing *Morgan Stanley*, 554 U.S. at 533 (quoting *Mobile-Sierra*, 350 U.S. at 355)).

While acknowledging that the Commission and the courts have recognized that these three factors are not precisely applicable to a high-rate challenge by a purchaser, and are “in any event not the exclusive components of the public interest,”¹⁰⁹ the test requires a demonstration of “excessive burden” that implicates the public interest and refers “to something more than a small dent in the consumer’s pocket.”¹¹⁰

52. By the California AG’s calculation, California consumers were forced to pay \$3.5 billion more than they should have as a result of sellers’ “unlawful overcharges to CERS.”¹¹¹ The California AG contends that even assuming the *Mobile-Sierra* presumption applied here, the magnitude of the alleged overcharges alone should have compelled the Commission to find that the presumption had been overcome.

b. Commission Ruling

53. As the complainant, the California AG carried the burden of coming forward with a *prima facie* case against the respondent sellers. As explained in the Dismissal Order and herein *supra*, the complainant must submit evidence demonstrating that specific unlawful market activity occurred, and must demonstrate that such activity directly affected the specific contract rates at issue. Instead, the Complaint contained generalized allegations of market dysfunction – insufficient proof both in the context of the FPA generally as well as in the context of a *Mobile-Sierra* analysis. In the Rehearing Request, the California AG now asks the Commission to accept the argument that the sellers’ “unlawful overcharges” led to an “excessive burden” in the form of high CERS contract prices; and, it is obvious that the CERS sales were necessarily “unlawful” because the contract prices were too high. California AG presented insufficient evidence and the Commission appropriately dismissed the Complaint. We deny rehearing on this issue.

F. Statute of Limitations

54. In final portion of the Dismissal Order,¹¹² the Commission found the Complaint was time-barred by the federal “catchall” statute of limitations that requires actions seeking penalties or forfeitures to be brought within five years.¹¹³ In finding that the

¹⁰⁹ Rehearing Request at 39 (citing *Morgan Stanley*, 554 U.S. at 533).

¹¹⁰ Rehearing Request at 39 (citing *Morgan Stanley*, 554 U.S. at 551 n.6).

¹¹¹ Rehearing Request at 39 (citing Complaint at 37).

¹¹² Dismissal Order, 135 FERC ¶ 61,178 at PP 94-111.

¹¹³ 28 U.S.C. § 2462 (2006).

relief, especially the market-wide refunds the California AG sought, would lead to punitive results, we found that the federal statute of limitations applied and that the Complaint was filed too late. Even when we assumed that the five-year statute of limitations was subject to equitable tolling during the pendency of the *CPUC* appeal, we nevertheless found that under applicable law, any tolling would have expired one year from the 2006 issuance of the *CPUC* opinion. Therefore, even under the most generous time calculation, the California AG was at least one and one-half years too late in bringing this action.

55. In the Rehearing Request,¹¹⁴ the California AG argues that the Commission erred because: (1) no statute of limitations should have been applied; (2) if a statute of limitation does apply, the Commission ignored the parties' contractual choice of law agreement that would invoke a Utah statute; and (3) the Commission failed to appropriately apply Utah's "savings" clause for the period during which the *CPUC* appeal was pending in the Ninth Circuit.

1. Statute of Limitations Under the FPA

a. California AG's Argument

56. The California AG first notes that it is not disputed that the FPA itself does not contain a statute of limitations.¹¹⁵ The California AG then states that it was error for the Commission to nevertheless apply a federal five-year "catchall" statute to dismiss the Complaint as untimely, as the Commission based its conclusion on the erroneous premise that the Complaint seeks a "penalty." Thus, the Commission's reliance on the § 2462 is likewise wrong. States the California AG, even if the federal five-year statute of limitations in § 2462 applies in situations in which the Commission is permitted to impose fines, it is not applicable here because the relief sought by the Complaint is not a "penalty" under the statute as it must be construed. Rather, the California AG describes the Complaint as remedial rather than punitive.

57. Next, the California AG posits that it was likewise error for the Commission to default to the application of a state statute of limitations to bar the Complaint because in so doing, the Commission frustrated the national policy of consumer protection that underlies the FPA.¹¹⁶

¹¹⁴ Rehearing Request at 41-47.

¹¹⁵ Rehearing Request at 41 (citing Dismissal Order, 135 FERC ¶ 61,178 at P 98).

¹¹⁶ Rehearing Request at 43-44 (citing *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717 (Temp. Emerg. Ct. App. 1982) *cert. denied*, 459

b. Commission Ruling

58. In an earlier pleading, the California AG did not disagree with the general premise that a statute of limitations of some sort applies to the Complaint; instead the California AG (as a member of the California Parties) stated that “[t]he Complaint is timely as a matter of law under potentially applicable statutes.”¹¹⁷ Therefore, the California AG is now precluded from arguing that no statute of limitations could be applied.

59. Next, as we stated the Dismissal Order,¹¹⁸ we concur that neither FPA section 205 nor 309 contain an express statute of limitations;¹¹⁹ nevertheless, where a federal statute is silent on the issue of the applicable statute of limitations, the statute of limitations is implied from other law. See *Bowdry v. United Air Lines, Inc.*, 956 F.2d 999, 1004 (10th Cir. 1992) (where Congress is silent, either a state or federal law statute of limitations will be implied). The Commission has already incorporated a statute of limitations for FPA actions involving civil penalties. See 28 U.S.C. § 2462 (2006); *Prohibition of Energy Market Manipulation*, 114 FERC ¶ 61,300 at P 62 (stating that the five-year statute of limitations applies to FERC action seeking civil penalties). In other contexts, when federal law is silent regarding a statute of limitations, the Supreme Court has urged courts to select the state statute of limitations “most analogous” and “most appropriate” to the particular federal action, so long as the chosen limitations period was consistent with federal law and policy. *Owens v. Okure*, 488 U.S. 235, 239 (1989).

60. Under the circumstances presented, we believe that the five-year federal statute of limitations provides the most analogous and most appropriate statute of limitations to be applied to the Complaint.¹²⁰ As we discussed, notwithstanding the California AG’s

U.S. 877 (1982) (“*Citronelle*”) (state one-year limitations period not borrowed where court found its application was inconsistent underlying policies of federal statute)).

¹¹⁷ California Parties’ September 18, 2009 Response at 36.

¹¹⁸ Dismissal Order, 135 FERC ¶ 61,178 at P 98.

¹¹⁹ See 16 U.S.C. §§ 824d and 825h; see also *Prohibition of Energy Market Manipulation*, 114 FERC ¶ 61,300, at P 62 (2006) (noting that “no statute of limitations of general applicability appears in the NGA or FPA”). One would not expect section 206 to contain a statute of limitations since, as discussed *infra*, it operates prospectively only.

¹²⁰ See 28 U.S.C. § 2462 (2006) (federal statute of limitations) (five-year limit for “an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise”); see also *Prohibition of Energy Market Manipulation*, 114 FERC ¶ 61,300 at P 62 (stating that the five-year statute of limitations applies to FERC action seeking civil penalties).

repeated claims, we believe the Complaint's demand is potentially confiscatory and punitive in that it would affect all of the sellers to CERS regardless of culpability.¹²¹

61. Even assuming, for the sake of argument, that the Complaint were considered remedial rather than punitive, we nevertheless would apply the five-year statute because the policy behind its enactment is persuasive when assessing the most analogous and appropriate statute of limitations.¹²² Moreover, if we did not apply the five-year federal statute of limitations, based on federal practice, we would be compelled to invoke the state four-year statute of limitations¹²³ as the most analogous and appropriate. Unlike the one-year statute of limitations rejected in *Citronelle*, we find that neither the four-year Utah, nor the five-year federal statutes of limitations “frustrate or interfere with implementation of [a] national polic[y].”¹²⁴ As previously noted, we have specifically adopted a five-year statute in other contexts.¹²⁵ We deny rehearing on this issue.

2. Tolling Under Utah Savings Clause

a. California AG's Argument

62. The California AG next submits that even if a statute of limitations applied to this proceeding, the Dismissal Order fails to correctly apply controlling provisions of Utah law and its “savings” statutes, and further, erroneously concludes that “the ultimate issuance of the mandate [in *CPUC*] in April 2009 was irrelevant for purposes of tolling.”¹²⁶ The California AG argues that the Complaint was timely when filed on May 22, 2009, since any applicable statute of limitations was tolled during the pendency of the *CPUC* appeal in the Ninth Circuit, and that appeal did not conclude until the Court issued its mandate remanding the matter to the Commission on April 15, 2009. The California AG believes that it is clear under Utah law that statutes of limitation in contract actions

¹²¹ Dismissal Order, 135 FERC ¶ 61,178 at PP 100-103.

¹²² See Dismissal Order, 135 FERC ¶ 61,178 at PP 97-98, 104.

¹²³ Utah Code Ann. § 70A-2-725(1) (incorporated by reference into the WSPP Agreement).

¹²⁴ Rehearing Request at 41 (citing *Citronelle*, 669 F.2d at 721).

¹²⁵ See *Prohibition of Energy Market Manipulation*, 114 FERC ¶ 61,300 at P 62.

¹²⁶ Rehearing Request at 41 (citing Dismissal Order, 135 FERC ¶ 61,178 at P 110).

are tolled during the pendency of appeals that are not resolved until after the applicable periods of limitation have run.¹²⁷

63. Next, argues the California AG, the Commission's conclusion that "the limitations clock would have restarted on the day the *CPUC* decision was entered — August 2, 2006"¹²⁸ — ignores long-standing principles of federal appellate procedure providing that a decision on appeal does not become final, and the court retains jurisdiction, until such time as the mandate is finally issued. In this case, states the California AG, the *CPUC* decision did not become final, and the clock did not restart with respect to the statute of limitations, until the Court relinquished its jurisdiction and remanded the case back to the Commission when it issued the mandate on April 15, 2009.¹²⁹ The California AG argues that the Commission itself has acknowledged that it is powerless to act on a matter pending on appeal in the Ninth Circuit until the court issues its mandate: "because the Court has not issued a mandate enabling the Commission to act on remand, the Commission cannot at this time revisit its final orders concerning the refund methodology."¹³⁰

b. Commission Ruling

64. As we stated in the Dismissal Order, the California AG had knowledge of a potential claim as far back at 2001 when the Commission rejected adding the CERS transactions to the scope of the EL00-95 refund proceeding.¹³¹ The California AG was not only aware of alleged deficiencies in quarterly reports no later than 2002, but the California AG also joined in the complaint the California Parties filed in Docket No. EL02-71 seeking relief because of those alleged deficiencies. The California AG further

¹²⁷ Rehearing Request at 45 (citing *Madsen v. Borthick*, 769 P.2d 245, 254 (Utah 1988) ("One purpose [of the general savings provision] is to assure that claimants are not deprived of potentially valid suits by appeals that are not resolved until after the applicable periods of limitation run.")).

¹²⁸ Dismissal Order, 135 FERC ¶ 61,178 at P 109.

¹²⁹ Rehearing Request at 45-45 (citing FRAP 41(c) ("A court of appeals' judgment or order is not final until issuance of the mandate: at that time the parties' obligations become fixed.")).

¹³⁰ Rehearing Request at 47 (citing *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 115 ¶ 61,171, at P 60 (2006)).

¹³¹ Dismissal Order, 135 FERC ¶ 61,178 at P 107 (citing July 25, 2001 Order, 96 FERC ¶ 61,120 at 61,515).

had compiled evidence of alleged market manipulation by March 2003.¹³² Despite all of this, the California AG did not file the Complaint until May 22, 2009.

65. The Commission must look to applicable state law for tolling guidelines.¹³³ In this case, Utah would provide those principles, by contractual agreement. The sales to CERS were conducted under the auspices of the WSPP Agreement that included a Utah choice of law provision.¹³⁴ Utah courts have held that the statute of limitations will be tolled during an appeal of a case involving the right at issue.¹³⁵ Thus, assuming equitable tolling applies, the *CPUC* appeal may have stopped the running of the federal five-year statute of limitations as to any claims involving CERS' purchases from respondents. However, we stand by our holding that the limitations clock would have restarted on the day the *CPUC* decision was entered — August 2, 2006. With the issuance of the *CPUC* decision, the Ninth Circuit affirmed the Commission's exclusion of the CERS transactions from the scope of the *CPUC* refund proceedings. This constituted the "reversal of failure" under Utah law that started the one-year limitations clock.¹³⁶

66. Thus, we also stand by our holding that the ultimate issuance of the mandate in April 2009 was irrelevant for purposes of tolling.¹³⁷ The fact that the Commission did not regain jurisdiction over the *CPUC* remand until the mandate was issued on April 15, 2009, is not relevant to the consideration that as of August 2, 2006, the California AG was on notice that he had to commence a separate action related to CERS purchases. Under the Utah savings statute, the statute of limitations is not stopped during the period of the earlier suit; instead, the clock is reset to one year commencing with the adverse court decision. Specifically, the plaintiff may "commence a new action within one year

¹³² Dismissal Order, 135 FERC ¶ 61,178 at P 107 (citing California Parties' Supplemental Evidence of Market Manipulation by Sellers, Docket No. EL00-95 (filed March 3, 2003)).

¹³³ Dismissal Order, 135 FERC ¶ 61,178 at P 108 (citing *Johnson v. Railway Exp. Agency, Inc.*, 421 U.S. 454, 465 (1975) (stating that state tolling principles are the "primary guide" of federal courts)).

¹³⁴ See Dismissal Order, 135 FERC ¶ 61,178 at P 108 (citing WSPP Agreement ¶ 24).

¹³⁵ Dismissal Order, 135 FERC ¶ 61,178 at P 109 (citing *Sittner v. Schriever*, 22 P.3d 784, 788 (Utah App. 2001)).

¹³⁶ Utah Code § 78B-2-111 (2009).

¹³⁷ Dismissal Order, 135 FERC ¶ 61,178 at P 110.

after the reversal or failure.”¹³⁸ The California AG thus had until August 2, 2007, to file a complaint with the Commission. The California AG was over eighteen months too late.¹³⁹

67. The California AG’s argument that the Commission is powerless to act on a matter pending on appeal in the Ninth Circuit until the issuance of a mandate is of no moment. While it is true that the Commission could not act on the *CPUC* proceeding until the issuance of the Ninth Circuit mandate in that case on April 15, 2009, this fact is irrelevant as to whether the California AG was on notice, as of August 2, 2006, that he had encountered a “reversal or failure” and thus had one year to commence a new separate action based on the CERS purchases. The Commission’s hands were tied vis-à-vis the *CPUC* case – the California AG’s were not regarding the filing of a new complaint. Therefore, the statute of limitations for filing of a new complaint regarding CERS sales ran out after August 2, 2007.¹⁴⁰ We deny rehearing on this issue.

G. Market-Wide Remedy

1. California AG’s Argument

68. The California AG reiterates that the Brown Complaint advances two legal theories in the alternative: (1) that the rates charged by respondents to CERS were not filed rates; or (2) assuming they were filed rates, respondents failed to adhere to them by exercising market power and engaging in market manipulation and tariff violations. Under either theory, argues the California AG, a market-wide remedy is appropriate and the Commission’s rejection of a market-wide remedy was in error.¹⁴¹

2. Commission Ruling

69. This assignment of error duplicates assignments of error elaborated in sections A, C and D *supra*. For the reasons stated there, we deny rehearing.

¹³⁸ See footnote 136, *supra*.

¹³⁹ See Dismissal Order, 135 FERC ¶ 61,178 at P 110 & n.165 (If we were to apply the four-year Utah statute of limitations, the Complaint would be deemed twelve months tardier).

¹⁴⁰ If we were to apply the four-year Utah statute of limitations, the Complaint would be deemed twelve months tardier.

¹⁴¹ Rehearing Request at 47-48 (presumably assigning error to Dismissal Order, 135 FERC ¶ 61,178 at PP 2, 68).

H. Basis of Dismissal

1. California AG's Argument

70. The California AG again submits that the Commission ignored the evidence presented concerning the impact of the exercise of market power, tariff violations, and statutory violations presented in the Complaint and in the supporting testimony and exhibits and therefore improperly dismissed the Complaint because “the requested market-wide remedy is not available.”¹⁴² The California AG then argues in the alternative that, even if a market-wide remedy were not granted, the evidence of wrongdoing presented clearly justifies some relief, positing that a complaint cannot be dismissed “for failure to seek the technically appropriate remedy when the availability of some relief is readily apparent on the face of the complaint.”¹⁴³ Moreover, “it need not appear that the plaintiff can obtain the specific relief demanded as long as the court can ascertain from the face of the complaint that *some* relief can be granted.”¹⁴⁴ The California AG then states that if the Commission believed that a market-wide remedy was not legally available, it should have selected some lesser remedy instead without dismissing the Complaint.¹⁴⁵

2. Commission Ruling

71. For the reasons discussed *supra* in sections A, C and D, the California AG, as the complainant, bore both the burden of coming forward and of proof in this case. Consequently, under the FPA, the California AG had the burden to demonstrate in the Complaint that: (1) individual sellers violated the FPA or their filed tariffs, (2) that such violations resulted in an unjust and unreasonable contract, and (3) the remedy, if any, would be for any seller found to have committed such a violation to disgorge its unjust profits.¹⁴⁶ The California AG simply failed to make these showings, relying instead (for the most part) on vague, generalized and unsupported allegations. While there were a few instances in the Complaint where the California AG made more specific charges of

¹⁴² Rehearing Request at 48-49 (citing Dismissal Order, 135 FERC ¶ 61,178 at PP 2, 68).

¹⁴³ Rehearing Request at 49 (citing *DOE v. United States Department of Justice*, 753 F.2d 1092, 1104 (D.C. Cir. 1985)).

¹⁴⁴ *Id.* (emphasis in original).

¹⁴⁵ Rehearing Request at 49-50.

¹⁴⁶ Dismissal Order, 135 FERC ¶ 61,178 at PP 76-77.

tariff violations,¹⁴⁷ as discussed above they nevertheless were insufficient to sustain the Complaint. Further, as we explained, even if we were to accept as true, for the sake of argument, all of the California AG's allegations of tariff violations, the California AG nevertheless failed to demonstrate the critical nexus between these alleged violations and the prices charged under any specific short-term bilateral contract with CERS. The Complaint was therefore insufficient because the Commission could not reasonably ascertain the specific allegations of market manipulation against any particular respondent, and the relationship of those detailed bad acts to particular bilateral agreements. It is not within the Commission's purview to fill in the gaps of a deficiently pleaded complaint.

72. Moreover, the Commission would be wasting its limited resources were it to consider theoretical remedies where there has been no clear demonstration that a particular violation that resulted in the creation of a particular unjust and unreasonable contract. Finally, one of the primary bases for dismissal of the Complaint was that it was time-barred under the statute of limitations. In this circumstance, dismissal of the Complaint is the only appropriate action for the Commission to take – any suggestion of a lesser remedy is moot. In a footnote, the California AG states that the Commission seized upon the California AG's request for a market-wide remedy in an erroneous attempt to justify the conclusion that the Complaint is time-barred because, in the Commission's view, the request for a market-wide remedy is "punitive" as to certain sellers and thereby triggers a federal statute of limitations.¹⁴⁸ However, as we discussed in P 61 *supra*, even assuming, *arguendo*, that the Complaint were considered remedial rather than punitive, we nevertheless would apply the five-year statute because the policy behind its enactment is persuasive when assessing the most analogous and appropriate statute of limitations. Therefore dismissal of the Complaint was appropriate and we deny rehearing on this issue.

¹⁴⁷ See Dismissal Order, 135 FERC ¶ 61,178 at P 81 & n.118.

¹⁴⁸ Rehearing Request at 50 n.177 (citing Dismissal Order, 135 FERC ¶ 61,178 at PP 97-103; Rehearing Request at 41-47).

The Commission orders:

The California AG's Rehearing Request is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.