

141 FERC ¶ 61,248  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Puget Sound Energy, Inc.

Docket No. EL01-10-085

v.

All Jurisdictional Sellers of Energy and/or Capacity at  
Wholesale into Electric Energy and/or Capacity Markets  
in the Pacific Northwest, Including Parties to the  
Western System Power Pool Agreement

ORDER GRANTING INTERLOCUTORY APPEAL

(Issued December 21, 2012)

1. On December 6, 2012, the presiding administrative law judge (ALJ) in this proceeding issued an order<sup>1</sup> granting California Parties'<sup>2</sup> motion for interlocutory appeal of an order denying its requests for clarification or reconsideration of an October 23, 2012 order.<sup>3</sup> The issue on appeal is whether refund claimants in this proceeding may overcome the *Mobile-Sierra* presumption by presenting evidence that a particular contract rate imposes an excessive burden on consumers or seriously harms the public interest. For the reasons discussed below, the Commission finds that they may do so and the Commission grants California Parties' interlocutory appeal.

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<sup>1</sup> *Puget Sound Energy, Inc.*, Order Denying in Part and Granting in Part California Parties Motion for Clarification or Interlocutory Appeal (Dec. 6, 2012) (December 6, 2012 Order).

<sup>2</sup> California Parties are the People of the State of California *ex rel.* Kamala D. Harris, Attorney General (California AG), the Public Utilities Commission of the State of California (CPUC), and Southern California Edison Company.

<sup>3</sup> *Puget Sound Energy, Inc.*, 141 FERC ¶ 63,008 (2012) (October 23, 2012 Order).

## **Background**

2. This proceeding concerns bilateral wholesale energy contracts entered into in the Pacific Northwest spot market between December 25, 2000 and June 20, 2001. On October 26, 2000, Puget Sound Energy, Inc. (Puget) filed a complaint petitioning the Commission for an order setting a prospective cap on the prices at which sellers may sell energy or capacity into the Pacific Northwest wholesale power markets.<sup>4</sup> The Commission initially dismissed Puget's complaint,<sup>5</sup> but upon further consideration established a preliminary evidentiary hearing before an ALJ to facilitate development of a record on whether the rates for bilateral spot market sales, other than sales through the California markets, during the relevant period may have been unjust and unreasonable.<sup>6</sup>

3. Based upon the ALJ's findings, the Commission denied requests for refunds.<sup>7</sup> Governmental entities from the Pacific Northwest and various California state entities appealed the Commission's orders in the United States Court of Appeals for the Ninth Circuit (Ninth Circuit).

4. In its August 24, 2007 opinion, the Ninth Circuit required the Commission to further consider two issues.<sup>8</sup> First, the Ninth Circuit found that the Commission had abused its discretion in denying relief for transactions involving energy purchased in the Pacific Northwest that was ultimately consumed in California.<sup>9</sup> Second, the Ninth Circuit directed the Commission, on remand, to examine in detail the new evidence of market manipulation, submitted after the ALJ made factual findings, and account for such evidence in any future orders regarding the award or denial of refunds in this proceeding.<sup>10</sup>

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<sup>4</sup> *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 93 FERC ¶ 61,294, at 61,988 (2000) (December 15, 2000 Order).

<sup>5</sup> *Id.* at 62,019.

<sup>6</sup> *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 95 FERC ¶ 61,115, at 61,351, 61,365 (2001).

<sup>7</sup> *Puget Sound Energy, Inc.*, 103 FERC ¶ 61,348 (2003), *reh'g denied*, 105 FERC ¶ 61,183 (2003).

<sup>8</sup> *Port of Seattle, Washington v. FERC*, 499 F.3d 1016 (9<sup>th</sup> Cir. 2007) (*Port of Seattle*).

<sup>9</sup> *Id.* at 1035.

<sup>10</sup> *Id.*

5. On October 3, 2011, the Commission issued an Order on Remand establishing an evidentiary hearing.<sup>11</sup> Specifically, the Commission directed the ALJ to: (1) establish which parties engaged in unlawful market activity without a legitimate business reason during the relevant period, and whether the identified unlawful market activity directly affected the negotiation of specific bilateral contracts, resulting in unjust and unreasonable rates; (2) determine, if necessary, a refund methodology applicable to any such contracts and to calculate refunds; and (3) determine which of the California Energy Resources Scheduling transactions, if any, include unjust and unreasonable rates that are the product of unlawful market activity by the seller, and to calculate refunds.<sup>12</sup>

6. On October 2, 2012, PPL Parties<sup>13</sup> filed a motion for summary disposition requesting that the ALJ issue a partial initial decision summarily disposing of all claims against them by the City of Seattle, Washington (Seattle). California Parties opposed PPL's motion, arguing that it was based on an incorrect interpretation of controlling law and the Order on Remand because PPL focused solely on Seattle's failure to present evidence that PPL had engaged in unlawful conduct, but ignored issues pertaining to whether the *Mobile-Sierra* presumption could be overcome because the contract places an excessive burden on consumers.<sup>14</sup>

7. California Parties argued that under *Morgan Stanley*,<sup>15</sup> parties are entitled to overcome the *Mobile-Sierra* presumption by presenting any relevant evidence that demonstrates that the transactions impose an excessive burden on consumers. California Parties acknowledged that the Order on Remand discussed evidence of market manipulation as an example of evidence that could be used to avoid the *Mobile-Sierra* presumption. However, California Parties maintained that the Commission had not intended to limit the ways that parties could overcome the *Mobile-Sierra* presumption. Rather, California Parties asserted that the Order on Remand "merely reflected the general state of the law as summarized in *Morgan Stanley*: the *Mobile-Sierra* presumption may be (a) avoided through a sufficient showing of fraud, duress, or

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<sup>11</sup> *Puget Sound Energy, Inc.*, 137 FERC ¶ 61,001 (2011) (Order on Remand).

<sup>12</sup> *Id.*

<sup>13</sup> PPL Parties are PPL Montana, LLC and PPL EnergyPlus, LLC.

<sup>14</sup> California Parties October 17, 2012 Answer at 1-2.

<sup>15</sup> *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1 of Snohomish County*, 554 U.S. 527 (2008) (*Morgan Stanley*).

unlawful activity associated with the particular contract; or (b) overcome through a sufficient showing that the contract creates an excessive burden.”<sup>16</sup>

8. On October 23, 2012, the presiding judge issued an order denying PPL Parties motion for summary disposition without prejudice to re-file the motion after the discovery period in this proceeding has closed if appropriate.<sup>17</sup> The October 23 Order also rejected California Parties’ argument that claimants may overcome the *Mobile-Sierra* presumption in this proceeding solely by demonstrating that the subject transactions imposed an excessive burden on consumers, without the need to identify specific unlawful activity that affected the negotiation of specific bilateral contracts.<sup>18</sup> The October 23 Order stated that this argument “fails to address the specific litigation history of the issues in dispute [in this proceeding] as well as the express language of the Commission’s mandate regarding the scope of these proceedings as set forth in the Order on Remand.”<sup>19</sup>

9. On November 7, 2012, California Parties filed a motion that sought clarification, reconsideration, or interlocutory appeal of the portion of the October 23, 2012 Order that rejected California Parties, argument regarding the burden of proof in this proceeding. California Parties again argued that there is no basis for concluding that refund claimants in this proceeding are precluded from submitting evidence that a transaction imposes an excessive burden on consumers in order to overcome the *Mobile-Sierra* presumption.<sup>20</sup>

10. If their requests for clarification or reconsideration were rejected, California Parties argued that extraordinary circumstances justify an interlocutory appeal. First, California Parties noted that the rejection of its position occurred in an order issued after the filing of initial testimony, which includes testimony on the excessive burden issue. Second, California Parties argued that prompt action is required to resolve an apparent contradiction between the issues established for hearing and the ruling in the October 23, 2012 Order. Third, California Parties contended that failure to clarify this issue at this time will result in future appeals.<sup>21</sup>

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<sup>16</sup> *Id.* at 4 (citing *Morgan Stanley*, 554 U.S. at 547, 549).

<sup>17</sup> *Puget Sound Energy, Inc.*, 141 FERC ¶ 63,008 (2012) (October 23 Order).

<sup>18</sup> *Id.* P 31.

<sup>19</sup> *Id.*

<sup>20</sup> California Parties November 7, 2012 Motion for Clarification, Reconsideration, or Interlocutory Appeal at 4-8.

<sup>21</sup> *Id.* at 8-9.

11. In the December 6, 2012 Order, the presiding judge denied California Parties' requests for clarification or reconsideration. The presiding judge found that California Parties' assertion that they may overcome the *Mobile-Sierra* presumption solely on a showing of excessive burden on consumers conflicts with the Commission's directive regarding the scope of the hearing, as set forth in the Order on Remand. The presiding judge, therefore, granted California Parties' request to file an interlocutory appeal with the Commission regarding this issue.<sup>22</sup>

### Discussion

12. In *Morgan Stanley*, the Supreme Court stated:

“As the Ninth Circuit put it, ‘[i]t is entirely possible that rates had increased so high during the energy crisis because of dysfunction in the spot market that, even with the acknowledged decrease in rates, consumers still paid more under the forward contracts than they otherwise would have.’ If that is so, and if that increase is so great that, even taking into account the desirability of fostering market-stabilizing long-term contracts, the rates impose an excessive burden on consumers or otherwise seriously harm the public interest, the rates must be disallowed.”<sup>23</sup>

In addition, the Supreme Court explained that, where there is a finding of “causal connection between unlawful activity and the contract rate,” the presumption should not apply and the Commission has ample authority to set aside such contracts.<sup>24</sup> Thus, under *Morgan Stanley*, a party to a contract may try to overcome or avoid the *Mobile-Sierra* presumption by showing: (1) that the contract rate imposes an excessive burden on consumers or seriously harms the public interest, or (2) that there is a causal connection between unlawful activity and the contract rate, such that the Commission should not presume that the contract is just and reasonable.

13. The Order on Remand was not intended to alter the general state of law, as summarized in *Morgan Stanley*.<sup>25</sup> Rather, by providing examples regarding the types of

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<sup>22</sup> December 6, 2012 Order at PP 19-24.

<sup>23</sup> *Morgan Stanley*, 554 U.S. at 553 (internal citation omitted).

<sup>24</sup> *Id.* at 554-55.

<sup>25</sup> *Cf. Morgan Stanley*, 527 U.S. at 550-52 (“under the *Mobile-Sierra* presumption, setting aside a contract rate requires a finding of ‘unequivocal public necessity’ or ‘extraordinary circumstances’”, and not “the mere exceeding of marginal cost.” The Commission may look to “whether consumers’ rates increased immediately upon the

(continued...)

evidence that may be presented at hearing, the Order on Remand was intended to clarify, using examples, how the Ninth Circuit's directive to examine the evidence of market manipulation relates to the Commission's finding, in the Order on Remand, that the *Mobile-Sierra* presumption applies to the contracts at issue here.

14. Specifically, the Order on Remand explained that, in order to avoid the *Mobile-Sierra* presumption, "parties seeking refunds must submit evidence not only on whether unlawful market activity occurred, but must also demonstrate a connection between unlawful activity by a seller and unjust and unreasonable rates under a specific contract."<sup>26</sup> In making this statement, the Order on Remand did not expressly acknowledge the general rule that the presumption may be overcome by a showing that the contract rates at issue impose an excessive burden or seriously harm the public interest. The omission of such discussion in the Order on Remand has resulted in conflicting interpretations regarding the scope of evidence that may be presented at hearing.<sup>27</sup>

15. In the Order on Remand, the Commission found that "general allegations of market dysfunction in the Pacific Northwest are an insufficient basis for overcoming the *Mobile-Sierra* presumption or finding that it is inapplicable."<sup>28</sup> That finding refutes California's argument that simply identifying high prices should be sufficient to overcome or avoid the presumption. Rather, under *Morgan Stanley*, a party to a contract may try to overcome or avoid the *Mobile-Sierra* presumption by making either of the showings described above. In attempting to overcome the *Mobile-Sierra* presumption, any relevant evidence may be considered, including evidence that specific contract rates imposed an excessive burden on consumers.

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relevant contracts' going into effect," but must also consider whether "the contracts imposed an excessive burden on consumers 'down the line,' relative to the rates they could have obtained (but for the contracts) after elimination of the dysfunctional market.") (internal citations omitted).

<sup>26</sup> Order on Remand, 137 FERC ¶ 61,001 at P 21.

<sup>27</sup> We note that this issue was also raised in requests for rehearing of the Order on Remand by several parties in Docket No. EL01-10-76.

<sup>28</sup> Order on Remand, 137 FERC ¶ 61,001 at P 21.

16. Accordingly, for the above reasons, we grant California Parties' interlocutory appeal.

The Commission orders:

California Parties' interlocutory appeal is granted, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.