

143 FERC ¶ 61,020
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Puget Sound Energy, Inc.

Docket No. EL01-10-076

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
Systems Power Pool Agreement

ORDER ON REHEARING

(Issued April 5, 2013)

1. In this order we grant in part and deny in part requests for rehearing of an order on remand from the United States Court of Appeals for the Ninth Circuit (Ninth Circuit),¹ establishing an evidentiary, trial-type hearing before an administrative law judge (ALJ) and holding the hearing in abeyance pending settlement judge procedures.²

I. Background

2. This matter concerns bilateral wholesale energy contracts entered into in the Pacific Northwest spot market during 2000 and 2001, involving numerous Commission-jurisdictional and non-Commission-jurisdictional entities, including the California Energy Resources Scheduling (CERS) division of the California Department of Water Resources. The lengthy procedural history of the Pacific Northwest refund proceeding

¹ *Port of Seattle, Washington v. FERC*, 499 F.3d 1016 (9th Cir. 2007) (*Port of Seattle*).

² *Puget Sound Energy, Inc.*, 137 FERC ¶ 61,001 (2011) (Remand Order).

has been discussed in detail in the Remand Order, and in other proceedings,³ and will not be repeated here. The essential facts related to this order on rehearing are as follows.

3. The Ninth Circuit remanded this proceeding to the Commission to reconsider two substantive issues: (1) whether refunds are warranted for purchases of energy made by CERS in the Pacific Northwest spot market; and (2) new evidence of market manipulation that may affect the Commission's determination regarding the award or denial of refunds.⁴ The Ninth Circuit did not address the merits of the issues remanded to the Commission or appropriate remedies, if any.

4. In the Remand Order, the Commission found that additional procedures are needed to address possible unlawful activity that may have influenced prices in the Pacific Northwest spot market during the period from December 25, 2000 through June 20, 2001. Thus, the Commission set the remanded issues for an evidentiary, trial-type hearing before an ALJ and reopened the record to permit parties to present evidence of unlawful market activity during the relevant period.⁵ The fact that the Pacific Northwest spot market operated through bilateral contracts negotiated independently between buyers and sellers led the Commission to two determinations: (1) the *Mobile-Sierra* public interest presumption applies to the contracts at issue;⁶ and (2) a market-wide remedy, such as the approach taken in the California refund proceeding, would not be appropriate here.⁷ The Commission also delineated the scope of the hearing by prescribing the types of evidence that parties may submit to show that unlawful activity affected contract negotiations and resulted in unjust and unreasonable rates.⁸ The Commission directed the ALJ to determine which parties, if any, engaged in unlawful market activity and whether the identified unlawful activity directly affected the negotiation of specific bilateral contracts, resulting in unjust and unreasonable rates. The Commission also directed the ALJ to determine a refund methodology applicable to any

³ See, e.g., *Puget Sound Energy, Inc.*, 103 FERC ¶ 61,348 (2003) (June 25, 2003 Order), *reh'g denied*, 105 FERC ¶ 61,183 (2003) (November 10, 2003 Order).

⁴ *Port of Seattle*, 499 F.3d at 1035.

⁵ Remand Order, 137 FERC ¶ 61,001 at P 16.

⁶ *Id.* P 20.

⁷ *Id.* P 24.

⁸ *Id.* PP 17-19.

such contracts and calculate refunds. The Commission noted that it will consider further steps to be taken upon review of the ALJ's recommendations.⁹

5. California Parties (Cal Parties),¹⁰ Port of Seattle, Washington (Port),¹¹ the City of Tacoma, Washington (Tacoma), and the City of Seattle, Washington (Seattle) filed timely requests for rehearing and/or clarification of the Remand Order. Puget filed an answer.

⁹ *Id.* PP 23, 29. The Commission has considerable discretion in establishing an appropriate remedy for any violations that may have occurred. *E.g.*, *Towns of Concord v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992) (citing *Moss v. Civil Aeronautics Board*, 521 F.2d 298, 308-09 (D.C. Cir. 1975) (“Because the ‘equitable aspects of refunding past rates are ... inextricably entwined with the [agency’s] normal regulatory responsibility,’ ... absent some conflict with the explicit requirements or core purposes of a statute, we have refused to constrain agency discretion by imposing a presumption in favor of refunds.”)); *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (“Finally, we observe that the breadth of agency discretion is, if anything, at 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.”) (D.C. Cir. 1967); *see also Consol. Edison Co. of N.Y., Inc. v. FERC*, 510 F.3d 333 (D.C. Cir. 2007); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 462 F.3d at 1027, 1053 (9th Cir. 2006) (*CPUC*); *Connecticut Valley Elec. Co. v. FERC*, 208 F.3d 1037, 1043 (D.C. Cir. 2000); *La. Pub. Serv. Comm’n. v. FERC*, 174 F.3d 218, 225 (D.C. Cir. 1999).

¹⁰ For purposes of this proceeding, Cal Parties are the State of California ex rel. Kamala D. Harris, Attorney General, and the Public Utilities Commission of the State of California.

¹¹ On September 17, 2012, Port filed with the Commission notice of its withdrawal from this proceeding and release of all claims against Puget arising out of or related to the transactions at issue here. Port September 17, 2012 Notice of Withdrawal and Release of Claims, Docket Nos. EL01-10-26 and EL01-10-85. Due to this withdrawal and release of claims, we will not address Port’s requests for rehearing of the Remand Order.

II. Discussion

A. Procedural Issues

6. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2012), prohibits answers to a request for rehearing. Therefore, we will reject Puget's answer.

B. Applicability of *Mobile-Sierra*

7. Cal Parties, Tacoma, and Seattle¹² argue that the Commission erred in finding that the *Mobile-Sierra* public interest presumption applies to the transactions at issue. As best we understand their arguments, they are asserting that the *Mobile-Sierra* public interest presumption cannot apply to the transactions at issue here because the Puget Complaint put parties on notice that prices for sales after December 25, 2000 were subject to being reset under FPA section 206 under the ordinary "just and reasonable" standard.¹³ Cal Parties argue that the Commission's standard practice of setting market rates for investigation, subject to refund, would have to be revised if the *Mobile-Sierra* public interest presumption applied to transactions entered into after the refund effective date of a section 206 complaint.¹⁴

8. Cal Parties and Seattle also argue that the refund date established by the Puget Complaint implicates a provision in the WSPP Agreement that effectively contracts out of *Mobile-Sierra* and allows rates to be changed for any sales made subsequent to the

¹² Seattle notes that, in addition to the arguments made in their own rehearing request, it also requests rehearing of the Commission's decision to apply *Mobile-Sierra* on the grounds set forth in Cal Parties Rehearing Request and incorporates those arguments by reference. Seattle Rehearing Request at fn.19.

¹³ Cal Parties November 2, 2011 Rehearing Request at 11 (Cal Parties Rehearing Request); Tacoma November 2, 2011 Rehearing Request at 29 (Tacoma Rehearing Request); Seattle November 2, 2011 Rehearing Request at 16 (Seattle Rehearing Request) (all citing *Westar Energy Inc.*, 568 F.3d 985, 989 (2009) (upholding a Commission order awarding refunds from the refund effective date for bilateral sales under a market-based rate tariff that was the subject of a section 206 proceeding) (*Westar*)).

¹⁴ Cal Parties Rehearing Request at 12.

filing of a section 206 complaint if those rates are found to be unjust and unreasonable.¹⁵ Cal Parties and Seattle assert that sections 38.1 and 38.2 of the then-effective WSPP Agreement provide that parties may seek and be bound by amendments to the WSPP Agreement and that any such amendments “shall apply only to new transactions entered into or agreed to on or after the effective date of the amendment.” Cal Parties and Seattle contend that for transactions covered by the Puget complaint, the effective date of any rate modifications is December 25, 2000, the refund effective date under FPA section 206, meaning that rates for transactions after that date may be modified under the ordinary just and reasonable standard.¹⁶

9. Cal Parties and Tacoma argue that the Commission also erred by applying the *Mobile-Sierra* public interest presumption to the types of contracts at issue in this proceeding. Cal Parties assert that the Commission should treat this case as one involving revisions to the WSPP Agreement, the master tariff that governed the contracts at issue, rather than modifications of the individual buyers’ contracts. Cal Parties argue that *Mobile-Sierra* does not apply to generally applicable tariffs, such as the WSPP Agreement.¹⁷ Even if this is a case about contract modification, Cal Parties and Tacoma assert that the Commission’s decision to apply the *Mobile-Sierra* public interest presumption here relies on an incorrect interpretation of *Morgan Stanley*.¹⁸ They contend that *Morgan Stanley* focused solely on after-the-fact challenges of long-term contracts and did not specify that the presumption also applies to spot market contracts.¹⁹ Tacoma contends that the spot market contracts at issue here served to reflect and perpetuate the

¹⁵ *Id.* at 12; Seattle Rehearing Request at 18 (both citing *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Div.*, 358 U.S. 103, 110-113 (1958) (holding that parties could contract out of the *Mobile-Sierra* presumption by specifying in their contracts that a new rate filed with the Commission would supersede the contract rate)).

¹⁶ Cal Parties Rehearing Request at 12-13; Seattle Rehearing Request at 18-19.

¹⁷ Cal Parties Rehearing Request at 16 (citing *Devon Power LLC*, 137 FERC ¶ 61,073 (2011) (*Devon Power*)).

¹⁸ *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1 of Snohomish County*, 554 U.S. 527 (2008) (*Morgan Stanley*).

¹⁹ Cal Parties Rehearing Request at 17 (quoting Remand Order, 137 FERC ¶ 61,001 at P 20); Tacoma Rehearing Request at 21-22.

volatility of the spot market and, as such, are at odds with the rationale of *Morgan Stanley*.²⁰

10. Cal Parties, Tacoma, and Seattle also argue that the *Mobile-Sierra* public interest presumption should not apply because the sales at issue were not transacted lawfully pursuant to filed rates, due to sellers' failure to comply with quarterly reporting requirements. Cal Parties and Tacoma assert that the Ninth Circuit's decision in *Lockyer*²¹ stands for the proposition that when sellers fail to report or misreport their transactions, the rates they charge are not filed rates and, therefore, are not enforceable under section 205 of the FPA.²² Cal Parties and Seattle contend that they have provided detailed evidence in this and other proceedings that no seller complied with reporting requirements, thereby proving that the transactions at issue were unlawful and not protected by the *Mobile-Sierra* public interest presumption.²³

11. Tacoma argues that the Commission erred by applying the *Mobile-Sierra* public interest presumption without first determining that the parties to the contracts enjoyed equal bargaining power. Tacoma contends that the *Mobile-Sierra* public interest presumption itself is grounded in the presumption that parties to an agreement negotiate from positions of equal bargaining power. However, Tacoma asserts that load-serving entities did not have equal bargaining power, and had little choice but to accept sellers' unjust and unreasonable charges due to their statutory obligations as load-serving entities.²⁴

²⁰ Tacoma Rehearing Request at 21-22.

²¹ *State of Cal., ex rel Bill Lockyer*, 383 F.3d 1006 (9th Cir. 2004) (*Lockyer*).

²² Cal Parties Rehearing Request at 13-14; Tacoma Rehearing Request at 25-27 (both citing *Lockyer*, 383 F.3d at 1014-16 (“Without the required filings, neither FERC nor any affected party may challenge the rate. Pragmatically, under such circumstances, there is no filed tariff in place at all.”)).

²³ Cal Parties Rehearing Request at 14 (citing Testimony of Dr. Carolyn A. Berry, Docket No. EL02-71-000, Ex. CLP-1 at 36 (filed July 1, 2009)); Seattle Rehearing Request at 17-18.

²⁴ Tacoma Rehearing Request at 22-24.

12. Cal Parties contends that if the Commission grants rehearing and reverses itself on the *Mobile-Sierra* issue, it should also clarify that a showing of unlawful activity is not necessary to secure an award of refunds.²⁵

Commission Determination

13. We deny rehearing and continue to find that the *Mobile-Sierra* public interest presumption applies to the contract rates at issue in this proceeding, unless buyers can overcome or avoid the presumption. As stated in the Remand Order, because the Commission has previously determined that the *Mobile-Sierra* public interest presumption applies to short-term bilateral power sales contracts like those at issue here, including those transacted pursuant to the WSPP Agreement, and therefore, “the rates set forth in those contracts are presumed just and reasonable, except ... where it can be shown that one party to a contract engaged in such extensive unlawful market manipulation as to alter the playing field for contract negotiations.”²⁶

14. We are not persuaded by the parties’ section 206 notice argument. The notice established when a section 206 complaint is filed is not relevant to the question of whether the *Mobile-Sierra* public interest presumption applies to the rates being challenged in the complaint. If the challenged rates are “contract rates,” the presumption applies, unless buyers can overcome or avoid the presumption. In *Morgan Stanley* the Supreme Court identified only two circumstances that can strip contracts of the protection generally afforded by the presumption: (1) if the Commission concludes that the contract seriously harms the public interest; and (2) if the Commission finds that unfair dealing at the contract formation stage directly influenced the contract rate.²⁷ The mere filing of a complaint that alleges unreasonably high contract rates across an entire market fits into neither of these categories. Thus, we find that the Remand Order properly applied the *Mobile-Sierra* public interest presumption, as set forth in *Morgan Stanley*.

15. We find that parties misconstrue *Westar*, which does not address contract rates like those present here. The *Mobile-Sierra* presumption is mentioned nowhere in the *Westar* opinion, and it is inapposite regarding any *Mobile-Sierra* analysis because *Westar* dealt with tariff rates, which are not automatically subject to the *Mobile-Sierra* public

²⁵ Cal Parties Rehearing Request at 18-19. As discussed below, we are not granting rehearing on this issue, so we need not address Cal Parties’ request for clarification on this point.

²⁶ Remand Order, 137 FERC ¶ 61,001 at P 20.

²⁷ See *Morgan Stanley*, 554 U.S. at 545-48.

interest presumption. For similar reasons, we find that parties' reliance on *Western Systems Power Pool, Inc.*²⁸ is misplaced because *WSPP*, like *Westar*, involved a generally applicable tariff provision and did not involve the modification of contract rates like those present here.²⁹

16. We disagree with the parties' characterization of sections 38.1 and 38.2 of the then-effective *WSPP* Agreement as a "Memphis" clause that avoids the *Mobile-Sierra* public interest presumption.³⁰ We find that parties ignore the plain meaning of section 6.1 of the *WSPP* Agreement, which states that parties may "jointly make application to [the Commission] for a change in the rates and charges, classification, service, terms, or conditions affecting *WSPP* transactions" The Commission has previously determined that "the most reasonable reading of [s]ection 6.1 is that it intended to exclude all unilateral filings."³¹ Thus, we find that before the effective date clause of section 38.2 can take effect, parties must jointly seek to change the contract rate pursuant to section 6.1. Here, parties are unilaterally seeking to modify contract rates, so section 38.2 does not come into play. Further, we reject parties' interpretation of section 38.1. If section 38.1, which provides that the *WSPP* Agreement "may be amended upon the submission to [the Commission] and acceptance by [the Commission] of that amendment," means, as suggested by Cal Parties, that parties can unilaterally seek changes to the rates specified in contracts negotiated under the *WSPP* Agreement, such an interpretation would render the joint filing clause in section 6.1 meaningless.

17. We also find that attempts to distinguish between long-term and spot market contracts cannot be supported under *Morgan Stanley*. Nothing in *Morgan Stanley* limits application of the *Mobile-Sierra* public interest presumption to long-term contracts. Further, as discussed in the Remand Order, the Commission has confirmed in other

²⁸ *Western System Power Pool Inc.*, 129 FERC ¶ 61,055 (2009) (*WSPP*).

²⁹ In *WSPP*, the Commission instituted the section 206 proceeding to determine whether a rate cap specified in the *WSPP* Agreement (i.e., a generally applicable tariff provision) continued to be just and reasonable. *Id.* at 1.

³⁰ The "Memphis" clause derives its name from the Supreme Court's decision in *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103 (1958), and is a specific contract provision that gives parties the unilateral right to seek revisions to the contract.

³¹ *PacifiCorp v. Reliant Energy Servs. Inc.*, 105 FERC ¶ 61,184, at P 41 (2003).

proceedings that the *Mobile-Sierra* public interest presumption applies to the short-term contracts at issue here, unless buyers can overcome or avoid the presumption.³²

18. Finally, we reject arguments that the *Mobile-Sierra* public interest presumption should not apply because the sales at issue were not transacted lawfully due to sellers' failure to comply with quarterly reporting requirements. As discussed below, evidence of quarterly reporting violations, by itself, would not demonstrate the causal connection between unlawful activity and contract rates. Moreover, the question of whether the sales were transacted lawfully is a matter to be addressed on hearing.³³ Similarly, we reject Tacoma's arguments regarding equal bargaining power. The question of whether any seller engaged in unlawful activity that resulted in unequal bargaining power is also an issue to be determined in the hearing. In the Remand Order, the Commission clearly established that buyers would have the opportunity in the hearing to present evidence to demonstrate that sellers' unlawful market manipulation directly affected contract negotiations and the resulting contract rate.³⁴

C. Permissible Evidence

19. Even assuming that the *Mobile-Sierra* public interest presumption applies, Cal Parties and Seattle argue that the Commission erred by limiting the categories of evidence that parties can present to overcome or escape the *Mobile-Sierra* public interest presumption. Cal Parties contend that buyers should be permitted to present any relevant evidence, including evidence of unfairness, bad faith, fraud, or duress, as well as evidence of market manipulation by entities that are not parties to the contracts at issue.³⁵ Seattle asserts that the Remand Order conflicts with the December 19, 2002 Order, which established the initial hearing in this proceeding, and also with the 9th Circuit's holding in *Port of Seattle*, neither of which provide for limitations on the types of evidence that may

³² *State of Cal., ex rel. Edmund G. Brown, Jr.*, 135 FERC ¶ 61,178, at P 77 (2011) (CERS Complaint Order), *reh'g denied*, 139 FERC ¶ 61,210, at P 40 (2012).

³³ Remand Order, 137 FERC ¶ 61,001 at PP 16-19.

³⁴ *Id.* P 21 (“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.”).

³⁵ Cal Parties Rehearing Request at 20-21.

be presented.³⁶ Cal Parties, Seattle, and Tacoma also argue that due process requires that parties be permitted to present all relevant evidence in this case.³⁷

20. Cal Parties contend that evidence involving violations of state law good faith and fair dealing obligations found in the Uniform Commercial Code (UCC), the Utah Commercial Code, and the California Commercial Code should be permitted.³⁸ Cal Parties assert that courts and the Commission have held that these codes apply to wholesale power transactions such as those at issue here.³⁹ Further, Cal Parties argue that the Commission should permit parties to present evidence in support of a “generic finding” that all Pacific Northwest spot market purchases escape or overcome application of the *Mobile-Sierra* public interest presumption. To the extent that a generic showing is not permitted, Cal Parties argue that the Commission should clarify that evidence of the same unlawful conduct may be used to show an affect on prices during multiple transaction periods.⁴⁰

21. Cal Parties, Tacoma, and Seattle also argue that the Commission erred by excluding evidence of quarterly reporting violations. Cal Parties assert that if the *Moblie-Sierra* public interest presumption applies to the sales to CERS, reporting violations are relevant because such evidence could play a role in determining whether the *Mobile-Sierra* public interest presumption can be overcome or avoided. Cal Parties contend that this issue was not addressed in the *Lockyer* proceeding.⁴¹ Tacoma and Seattle argue the

³⁶ Seattle Rehearing Request at 12-13.

³⁷ Cal Parties Rehearing Request at 22; Seattle Rehearing Request at 13.

³⁸ Cal Parties Rehearing Request at 23 (citing UCC § 103(1)(b); Utah Code 70A-2-103(b); CA COML §1201(b)(20)).

³⁹ *Id.* (citing *Puget Sound Energy, Inc. v. Pac. Gas & Elec. Co.*, 271 B.R. 626,640 (Bankr. N.D. Cal. 2002) (under California law, the UCC applies to sales and exchanges of electricity); *Minnesota Power & Light Co.*, 52 FPC 617 (1974) (applying UCC standards to the interpretation of contracts for the sale of electricity); *Golden Spread Electric Coop. Inc. v. Southwestern Public Serv. Co.*, 123 FERC ¶ 61,047, at n.273 (2008) (applying the UCC to interpret a settlement agreement).

⁴⁰ *Id.* at 28-29.

⁴¹ *Id.* at 21-22.

Lockyer proceeding has been limited in such a way as to effectively deprive some claimants any opportunity to present evidence on reporting violations.⁴²

22. Cal Parties and Tacoma assert that the Commission erred in the sense that the Remand Order permits evidence only for the purpose of demonstrating that the *Mobile-Sierra* public interest presumption is inapplicable, but fails to specify evidence that may be submitted for purposes of overcoming the presumption, in the event that it applies. To that end, Tacoma requests that the Commission grant rehearing and allow discovery and evidence of an excessive burden on customers.⁴³

Commission Determination

23. We deny rehearing on this issue. When the Ninth Circuit decided *Port of Seattle*, the Commission had not yet determined the applicable legal standard for determining whether rates in the Pacific Northwest spot market were unjust and unreasonable.⁴⁴ The Ninth Circuit did not specify the applicable standard, instead it directed the Commission to “account for [the evidence] in any future orders regarding the award or denial of refunds” in this proceeding.⁴⁵ Thus, the Commission clarified in the Remand Order what refund claimants would have to show to demonstrate unlawful activity, based on the laws, regulations, orders, and tariffs in effect at that time, in order to avoid application of the *Mobile-Sierra* public interest presumption.⁴⁶ We find that this specification does not conflict with the Ninth Circuit’s holding in *Port of Seattle* or with prior Commission orders in this proceeding, because neither the court nor the Commission previously addressed the evidence of market manipulation in the *Mobile-Sierra* context.

24. We reject contentions that the Commission violated refund claimants’ due process rights by enumerating the permissible types of evidence, as well as arguments that the Commission erred by excluding evidence of quarterly reporting violations. The Commission controls its own dockets and has substantial discretion to manage its

⁴² Tacoma Rehearing Request at 8-17; Seattle Rehearing Request at 13-14.

⁴³ *Id.* at 30-31.

⁴⁴ Remand Order, 137 FERC ¶ 61,001 at P 20 (citing November 10, 2003 Order, 105 FERC ¶ 61,183 at P 29, n.27).

⁴⁵ *Port of Seattle*, 499 F.3d at 1036.

⁴⁶ Remand Order, 137 FERC ¶ 61,001 at PP 17-19.

proceedings.⁴⁷ This proceeding does not address the issue of whether sellers in the Pacific Northwest committed violations of their quarterly reporting requirements.⁴⁸ Moreover, evidence of such violations would not demonstrate the necessary connection between an unlawful act and an unjust and unreasonable contract rate, which is required to escape the *Mobile-Sierra* public interest presumption. If, on the other hand, a refund claimant has evidence of an overt act of manipulation that directly affected the contract rate, evidence of a reporting violation would be superfluous. Thus, we find that excluding evidence of quarterly reporting violations does not violate refund claimants' due process rights.

25. Similarly, we find that refund claimants' due process rights are not violated by the exclusion of evidence of violations of state good faith obligations because, as the Commission has explained in a separate proceeding, permitting such evidence would require us to interpret and apply state contract law.⁴⁹ The hearing established in the Remand Order is narrowly tailored to address the Ninth Circuit's directives to include the sales to CERS and account for the new evidence of market manipulation. We stand by the categories of evidence specified in the Remand Order, and continue to find that the categories of permissible evidence have been appropriately tailored to comply with the Ninth Circuit's directives. Further, we will not permit parties to re-litigate refund claims that have been extensively litigated and resolved in separate proceedings.⁵⁰

⁴⁷ 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).

⁴⁸ Issues involving quarterly reporting requirement violations were resolved in a separate proceeding. *State of Cal., ex rel. Bill Lockyer*, 135 FERC ¶ 61,113 (2011).

⁴⁹ May 26, 2011 Order, 135 FERC ¶ 61,183 at P 30 (citing *Prohibition of Energy Market Manipulation*, FERC Stats. & Regs. ¶ 31,202, at P 37 (2006) ("The Commission expects parties to continue to resolve most contract disputes, including those based on claims of fraud in the inducement, without the involvement of the Commission, relying on state and federal courts to apply contract law as appropriate.")).

⁵⁰ *State of Cal., ex rel. Bill Lockyer*, 135 FERC ¶ 61,113 (affirming ALJ's initial decision granting summary judgment in favor of the sellers based on Cal Parties' failure

(continued...)

26. We also reject Cal Parties' request to permit evidence of unlawful activity by a non-contracting party. Under *Morgan Stanley*, the primary focus of the inquiry, for purposes of determining whether a buyer can avoid application of the *Mobile-Sierra* public interest presumption, is individual contracts and the conduct of the seller as it relates to the formation of each contract.⁵¹

27. We find that requests for rehearing or clarification on the issue of permissible evidence on harm to the public interest are moot as a result of the Commission's December 21, 2012 order on interlocutory appeal.⁵² In the Interlocutory Appeal Order, the Commission clarified that the Remand Order was "not intended to alter the general state of law, as summarized in *Morgan Stanley*."⁵³ Thus, the Commission found that "[i]n 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."⁵⁴

to establish that individual sellers accumulated market power); *see also* May 26, 2011 Order, 135 FERC ¶ 61,183 at PP 29-30 (rejecting requests to address in the California refund proceeding violations of the Western Systems Coordinating Council reliability rules and the good faith obligation under California law).

⁵¹ We acknowledge the possibility that a single unlawful act by a seller may have directly affected more than one contract.

⁵² *Puget Sound Energy, Inc.*, 141 FERC ¶ 61,248 (2012) (Interlocutory Appeal Order).

⁵³ *Id.* P 13 (citing *Morgan Stanley*, 554 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 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).

⁵⁴ *Id.* P 15.

D. Market-Wide Remedy

28. Cal Parties, Tacoma and Seattle argue that the Commission erred by rejecting the option of a market-wide remedy before reviewing evidence on this issue.⁵⁵ Cal Parties assert that the Commission's determination ignores the fact that this case involves a section 206 complaint and relates to transactions entered into after the refund-effective date. Cal Parties contend that section 206 is "premised on the conclusion that prices need to be reformed generically to just and reasonable rate levels,"⁵⁶ and does not require an individualized review of the transactions at issue. Cal Parties maintain that although the rates received by individual sellers were not identical, they were uniformly above a just and reasonable rate. Thus, Cal Parties argue that the Commission should permit evidence that the rates, as a whole, imposed an undue burden on the public. Cal Parties suggest that concerns about so-called "ripple claims" could be easily eliminated by adopting the mitigated market clearing price adopted in the California refund proceeding, including the cost filing process.⁵⁷

29. Tacoma argues that the Commission has previously acknowledged that a market-wide remedy would be appropriate in a bilateral contract context if evidence demonstrated that all sellers had engaged in tariff violations and should, therefore, permit buyers to present such evidence here.⁵⁸ Further, Tacoma contends that the Commission's decision that a market-wide remedy is now inappropriate due to differences between the Pacific Northwest and California spot markets contravenes its 2001 determination to provide for price mitigation in California and throughout the West.⁵⁹

Commission Determination

30. We deny rehearing on this issue. As discussed above, the timing of the Puget Complaint does not affect the application of the *Mobile-Sierra* public interest

⁵⁵ Cal Parties Rehearing Request at 29-31; Tacoma Rehearing Request at 31-34; Seattle Rehearing Request at 19-20.

⁵⁶ Cal Parties Rehearing Request at 30.

⁵⁷ *Id.* at 30-31.

⁵⁸ Tacoma Rehearing Request at 31-32 (quoting CERS Complaint Order, 135 FERC ¶ 61,178, at P 77 (2011)).

⁵⁹ *Id.* at 32-34 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 95 FERC ¶ 61,418 (2001) (instituting uniform, prospective price mitigation in markets throughout the West)).

presumption to the contract rates at issue. Thus, we must presume that the rates set in each contract are just and reasonable unless buyers can overcome or avoid the presumption. Thus, the Commission must evaluate each seller's conduct in relation to specific contract negotiations and/or whether the contract imposes an excessive burden on consumers. Moreover, we find that Cal Parties' claims of uniformly higher prices amount to little more than a variation on claims of general market dysfunction, which have been previously rejected by the Supreme Court as a basis for overcoming *Mobile-Sierra*.⁶⁰ Therefore, we find that such claims cannot serve as the basis for a market-wide remedy in this case.

E. Applicable Period

31. Tacoma and Seattle request rehearing with respect to the relevant refund period for the hearing, arguing that the Remand Order conflicts with the Commission's December 19, 2002 Order, which expanded the scope of this proceeding to include transactions during the period from January 1, 2000 through December 24, 2000.⁶¹

Commission Determination

32. Consistent with the period specified in the December 19, 2002 Order and referenced by the Ninth Circuit in *Port of Seattle*, we will grant rehearing on this issue and permit parties to submit evidence on transactions during the period from January 1, 2000 through and including June 20, 2001. The refund effective date in this proceeding, as established by the Puget Complaint, is December 25, 2000, but the Commission may order refunds, if appropriate, for transactions between January 1, 2000 and December 24, 2000, under its FPA section 309 authority.⁶² However, courts have endorsed the Commission's reliance on FPA section 309 in two contexts: (1) where the wrongdoer violated a filed tariff or rate schedule (i.e., the filed rate doctrine);⁶³ and

⁶⁰ *Morgan Stanley*, 554 U.S. at 548.

⁶¹ Tacoma Rehearing Request at 18-20; Seattle Rehearing Request at 10 (citing December 19, 2002 Order, 101 FERC ¶ 61,304, at P 1 (2002)).

⁶² See *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 129 FERC ¶ 61,147, at PP 18-19 (2009) (invoking FPA section 309 to address alleged violations prior to a previously-established refund effective date).

⁶³ See, e.g., *New York Power Authority v. Consol. Edison Co. of New York*, 115 FERC ¶ 61,088, at P 15 (2006) (refunds ordered for amounts collected above filed rate); *Blue Ridge Power Agency v. Appalachian Power Co.*, 58 FERC ¶ 61,193, at 61,603 (1992) (whether cost of service was properly calculated in accordance with

(continued...)

(2) where the wrongdoer violated a statutory requirement other than a filed tariff or rate schedule.⁶⁴ Thus, refund claimants may attain the relief under FPA section 309 (if at all) by demonstrating a seller's specific violation of a substantive provision of the FPA or a tariff, compliance with which the Commission can enforce by taking actions "necessary and appropriate."⁶⁵

The Commission orders:

Rehearing is hereby denied in part and granted in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Interconnection Agreement, a filed rate schedule); *AES Southland, Inc. and Williams Energy Marketing and Trading Co.*, 94 FERC ¶ 61,248, at 61,875 (2001) (investigation into possible violations of filed tariff and contracts); *Wash. Water Power Co.*, 83 FERC ¶ 61,282, at 62,169 (1998) (violations of a market-based rate order).

⁶⁴ See, e.g., *Central Maine Power Co.*, 56 FERC ¶ 61,200, *reh'g denied*, 57 FERC ¶ 61,083 (1991) (rate agreements filed after service thereunder had already expired); *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, *clarified*, 65 FERC ¶ 61,081 (1993) (implementing 18 C.F.R. § 35.19a).

⁶⁵ 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).