

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Puget Sound Energy, Inc.

Docket No. EL01-10-011

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 DENYING REHEARING

(Issued November 10, 2003)

1. In this order, we deny requests for rehearing of our June 25, 2003 Order¹ (June 25 Order) in which we terminated the Pacific Northwest refund proceeding, which was an outgrowth of a complaint for a regional price cap filed by Puget Sound Energy, Inc. (Puget).

Background

A. Procedural History

2. On October 26, 2000, Puget filed a complaint petitioning the Commission for an order capping the prices at which sellers subject to Commission jurisdiction, including sellers of energy or capacity under the Western Systems Power Pool (WSPP) Agreement, may sell energy or capacity into the Pacific Northwest's wholesale power markets.

3. The Commission dismissed Puget's complaint in a December 15, 2000 Order.² Subsequently, in consideration of certain parties that were seeking settlement of claims related to sales in the Pacific Northwest, the Commission set the matter for a preliminary evidentiary hearing before an Administrative Law Judge (ALJ) to “explore whether there

¹ Puget Sound Energy, Inc. v. All Jurisdictional Sellers, et al., 103 FERC ¶ 61,348 (2003).

² San Diego Gas & Electric Company, et al., 93 FERC ¶ 61,294 (2000).

may have been unjust and unreasonable charges for spot market sales” in the region and the calculation of any refunds associated with such charges.³ The Commission, however, did not establish a refund effective date.

4. On September 24, 2001, the Presiding ALJ in the preliminary evidentiary proceeding issued her recommendations and proposed findings of fact.⁴ The ALJ recommended to the Commission that no refunds are warranted for wholesale power sales made in the Pacific Northwest between December 25, 2000 and June 20, 2001. In essence, she concluded that the evidence demonstrated that the Pacific Northwest market for spot sales of electricity was competitive and functional during the relevant period of time, and prices were just and reasonable.⁵

5. On June 2, 2003, the Commission heard oral argument regarding refunds.⁶

B. The June 25 Order

6. In the June 25 Order, the Commission first denied a pending motion by Puget to withdraw its pleadings. The order further granted Puget’s request for rehearing of the Commission’s December 2000 decision to dismiss the complaint. The order then noted that the relief requested by Puget was provided by a June 19, 2001 Order (June 2001 Order) in which the Commission implemented price mitigation measures on wholesale sales throughout the West.⁷

7. Next, the Commission concluded that, while it technically may have authority to require refunds for a short prior period, “based on the record before us . . . even if prices were unjust and unreasonable, it is not possible to fashion a remedy that would be

³ San Diego Gas & Electric Company, et al., 96 FERC ¶ 61,120 at 61,499-500 (2001) (July 2001 Order).

⁴ Puget Sound Energy, Inc., et al., 96 FERC ¶ 63,044 (2001) (ALJ Recommendations).

⁵ Additional details regarding the procedural history of the case are provided in the June 25 Order at P 4-20.

⁶ See Notice Scheduling Oral Argument, 68 Fed. Reg. 32,031 (2003).

⁷ San Diego Gas & Electric Company, et al., 95 FERC ¶61,418 (2001), order on reh’g, 97 FERC ¶ 61,275 (2001), order on reh’g, 99 FERC ¶ 61,160 (2002), appeal sub nom. Public Utilities Comm. of the State of California, et al. v. FERC, Nos. 01-71051 et al. (9th Cir. June 29, 2001 and later).

equitable to all the participants in the Pacific Northwest market.”⁸ The order then elaborated on circumstances unique to the proceeding that prevent an even and fair allocation of refunds (if determined to be warranted). First, the burden of paying refunds would fall on a limited class of jurisdictional sellers in the region since a large portion of transactions at issue are were conducted by governmental entities and, therefore, not subject to the Commission’s refund authority pursuant to Section 206 of the Federal Power Act (FPA), 16 U.S.C. § 824e (2000).

8. Further, the June 25 Order explained that refunds would unfairly reward entities that relied on the spot market, while other market participants that paid for hedge instruments or engaged in procurement strategies that included a higher balance of long-term instruments would not receive refunds. The order adopted the ALJ’s findings that the fair and accurate calculation of refunds may not be possible due to the sheer volume of transactions that would be implicated in a refund proceeding (estimated at approximately 500,000 transactions during the relevant time frame) and other complications such as the inability to trace upstream sellers in all transactions. The Commission also expressed concern that refunds would have adverse consequences to the Pacific Northwest spot market, a concern also expressed by the Washington Utilities and Transportation, Oregon Office of Energy and the Oregon Public Utility Commission (State Commissions) in their pleadings in the case. Thus, based on the totality of circumstances, the Commission terminated the matter without further proceedings because, even if prices were unjust and unreasonable, the directing of refunds would not result in an equitable resolution of the proceeding.

C. Requests for Rehearing

9. Timely requests for rehearing were filed by the City of Seattle, Washington (City of Seattle), the City of Tacoma, Washington (Tacoma), California State Parties,⁹ Port of

⁸ June 25 Order at P 35.

⁹ California State Parties consists of the People of the State of California ex rel. Bill Lockyer, Attorney General, the California Electricity Oversight Board and the California Public Utilities Commission.

Seattle (Port), Public Utility District No. 1 of Grays Harbor, Washington (Grays Harbor) and the Transaction Finality Group.¹⁰

Discussion

A. Requests Denied on Procedural Grounds

10. Parties raise on rehearing several issues that were not addressed in the June 25 Order. Grays Harbor argues that its six-month contract at issue falls within the definition of “spot market transactions in the Pacific Northwest.” Likewise, City of Seattle claims that the Commission erred by not addressing the appropriate definition of “spot market.” Port of Seattle argues that the ALJ erred in placing the burden of proof on refund claimants to show that rates were unjust and unreasonable.

11. The ALJ recommended that the definition of “spot market” for the region be limited to transactions of less than one month duration. However, the June 25 Order did not adopt or reject this specific ALJ recommendation as it was not relevant to the Commission’s decision to terminate the proceeding, and need not be addressed. Likewise, the Commission did not either adopt or reject the ALJ’s conclusion that spot market rates in the region were just and reasonable, as the decision to terminate the proceeding was based on other considerations. Accordingly, Port’s argument that it wrongly had to bear the burden of proof to show that rates were unjust and unreasonable is not relevant to our decision and need not be addressed.

¹⁰ The Transaction Finality Group or “TFG” consists of Puget, TransCanada Energy Ltd., Duke Energy Trading & Marketing LLC, Avista Corp., Avista Energy, Inc., Portland General Electric Company, IDACORP Energy L.P., Coral Power, L.L.C., PPL Montana, LLC, PPL EnergyPlus, LLC, Pinnacle West Capital Corporation, Arizona Public Service Corp., Sempra Energy Trading Corp., Tractebel Energy Marketing Inc., TransAlta Energy Marketing (CA) Inc., TransAlta Energy Marketing (US) Inc., Public Service Company of Colorado, Alcoa Inc., Columbia Falls Aluminum Company, LLC, BP Energy Company, PG&E Trading-Power, L.P., El Paso Merchant Energy, L.P., Public Utility District No. 2 of Grant County, Washington, City of Los Angeles Department of Water and Power, Morgan Stanley Capital Group Inc., Public Service Company of New Mexico, Powerex Corp., Public Utility District No. 1 of Benton County, Washington, and Constellation Power Source, Inc.

B. Denial of Puget's Motion to Withdraw its Pleadings

12. The June 25 Order denied Puget's motion to withdraw its complaint and other pleadings. The Commission rejected Puget's argument that its petition to withdraw was granted by operation of law since no "party" objected and the Commission failed to act within 15 days.¹¹ The Commission explained that several non-parties filed timely objections, and Rule 216 of the Commission's rules of Practice and Procedure, 18 C.F.R. § 385.216 (2003), does not state that the motion opposing a notice of withdrawal must be filed by a party.¹² Further, the non-parties were granted late intervention, making them parties to the proceeding.

13. TFG, which is opposed to refunds, argues that the Commission erred by failing to recognize that Puget's motion to withdraw its complaint was granted as a matter of law on July 9, 2001, 15 days after it filed the motion. TFG claims that, while Rule 216 does not explicitly state that a motion in opposition to a notice of withdrawal must be filed by a party, Rule 212(a)(2) makes clear that motions can only be made by a "person" or a "participant" who has filed a timely motion to intervene which has not been denied. (Rule 102 defines "parties" to include any person "whose intervention is effective.") TFG contends that the Commission erred in relying on the opposition of non-parties in denying Puget's request to withdraw its pleadings. According to TFG, the subsequent grants of intervention of the opposing parties did not cure their non-party status since the grant of late intervention does not work retroactively. Rather, late interveners must accept the record of the proceeding as the record was developed prior to the late intervention. Rule 214(d).

Commission Determination

14. Puget's motion to withdraw its pleadings was timely opposed by several entities that, in the same filing, moved for late intervention in the proceeding.¹³ According to TFG's position, the Commission could have properly considered the opposition motions

¹¹ June 25 Order at P 25 n 19.

¹² Rule 216, which sets forth the rules for the withdrawal of pleadings, provides that a withdrawal is effective 15 days after a notice of withdrawal is filed, provided that no motion in opposition to the notice of withdrawal is filed within the period and provided that the decisional authority does not issue an order disallowing the withdrawal within that period.

¹³ On July 9, 2001, both the City of Seattle and The Attorney General of the State of Washington filed late motions to intervene and oppositions to Puget's motion to withdraw. The City of Tacoma and Port of Seattle also filed a timely "answer" to Puget's motion, but did not seek intervention until later.

had the Commission granted the motions for late intervention on the day they were filed because, in that case, a party to the proceeding would have timely opposed the motion to withdraw. However, the Commission must provide others the opportunity to protest or comment on the motions for late intervention. The Commission subsequently granted the motions for late intervention, giving the interveners party status in the proceeding. In these circumstances, it does not make sense that the oppositions cannot be considered simply because the Commission followed its procedures and did not grant late intervention immediately. Accordingly, the Commission denies TFG's request for rehearing on this issue.

C. Due Process Issues

1. Nature and Scope of the Proceeding

15. Port of Seattle and City of Tacoma contend that they were denied due process because the July 2001 Order was unreasonably vague as to the nature and scope of the preliminary evidentiary hearing, which was referred to as "preliminary" (implying a second proceeding) and "evidentiary," but in certain places indicated that the proceeding was simply a "discussion." This led to confusion regarding the issues to be litigated and the conclusive effect of the proceedings. Further, they claim that the accelerated procedural schedule prevented participants from effectively presenting their case. According to Tacoma and the Port, participants were given an inadequate opportunity to conduct discovery, could not take depositions of fact witnesses, had only three days after the filing of initial testimony to file rebuttal testimony with direct testimony arriving in some cases the same day that rebuttal was due, and were forced to waive cross-examination of many witnesses in order to have sufficient time to devote to other witnesses.

16. They claim that the re-opening of the record in the "100-day discovery" proceeding did not cure the defects because the Commission failed to provide a second opportunity for a trial-type hearing, and was anyway ignored in the Commission's June 25 Order. They argue that, as a result, the Commission erred in relying on the ALJ's proposed findings as a result of these defects.

Commission Determination

17. The Commission provided sufficient due process in this proceeding. The reason for this conclusion is best understood from the context in which the preliminary evidentiary hearing arose. When Puget filed its complaint, notice was published in the Federal Register. Respondents and other interested parties had a full opportunity to file answers and comments. Based on the record established by this process, the Commission dismissed the Complaint.

18. Subsequently, while rehearing was pending but the complaint was still dismissed, the Commission decided, in consideration of certain parties that were seeking settlement of claims related to sales in the Pacific Northwest, to set the matter for a preliminary evidentiary hearing before an ALJ to “explore whether there may have been unjust and unreasonable charges for spot market sales” in the region. The July 2001 Order made clear that the complaint remained dismissed, but the Commission was providing additional as well as unusual process to determine whether the proceeding should continue or be terminated. (Given the posture of the case, the Commission declined to set a refund effective date when setting the matter for preliminary evidentiary hearing.) The July 2001 Order was sufficiently clear as demonstrated by the fact that the Presiding ALJ commenced an inquiry that comported with our instructions, and participants in the proceeding litigated the issues that would provide the Commission with relevant information to make a decision whether to continue or terminate the proceeding.

19. Despite the accelerated schedule, the participants engaged in discovery, prepared testimony of over 40 witnesses, followed by rebuttal testimony and cross-examination and filed post-hearing briefs. After the ALJ issued her proposed findings of fact and recommendations, parties had the opportunity to file comments with the Commission. The Commission allowed participants in the proceeding to further supplement the record in March 2003.¹⁴

20. The Commission provided adequate due process when it provided an opportunity for respondents and other interested entities to respond to Puget’s complaint. Based on the record, the Commission determined that the complaint should be dismissed. This decision was challenged on rehearing by no-one but Puget. This opportunity to submit fact and argument satisfies due process as well as the Administrative Procedure Act.¹⁵ The Commission, however, in the interest of fairness, provided two additional opportunities for participants in the proceeding to make a case for refunds.

¹⁴ See Puget Sound Energy, Inc., et al., 101 FERC ¶ 61,304 (2002).

¹⁵ See 5 U.S.C. § 554(c) (2000) (the agency shall give all interested parties opportunity for the submission and consideration of facts); Vermont Yankee Nuclear Power Corp. v NRDC, 435 U.S. 519, 543-44 (1978); Exxon Co., U.S.A. v. FERC, 182 F.3d 30, 45-47 (D.C. Cir. 1999) (Commission may resolve factual issues on a written record unless motive, intent, or credibility are at issue or there is a dispute over past events).

21. Having already satisfied the due process requirements, the accelerated nature of the ALJ proceeding did not violate participants' due process rights.¹⁶ Moreover, standing alone, the ALJ proceeding provided adequate due process. As mentioned above, participants engaged in discovery, prepared testimony of over 40 witnesses, followed by rebuttal testimony and cross-examination, filed post-hearing briefs with the ALJ, and after the ALJ issuance, parties had the opportunity to file comments with the Commission. The constraints of the rigorous schedule identified by the Port and Tacoma do not amount to a denial of due process.

22. Further, the Commission's reliance on the written pleadings in the reopening of the record in this proceeding provides sufficient due process, as the Commission is not required to hold a trial-type evidentiary hearing in every case.¹⁷ In reaching its decision to terminate the proceeding, the Commission considered the complete record, including the material submitted in the March 2003 filings. Accordingly, Tacoma's and Port's due process rights were not violated but, to the contrary, the Commission provided additional opportunities to revive the complaint proceeding beyond that required by minimum due process requirements.

2. No Parties' Rights Were Compromised by Establishment of the Preliminary Evidentiary Proceeding

23. Port of Seattle argues that the July 2001 Order established a new and separate proceeding involving parties from both the Puget (EL01-10) and San Diego (EL00-95) complaint proceedings and encompassing substantive rights from both dockets. According to the Port, the proceeding, as implemented, has been treated as a continuation of the Puget complaint alone, thereby wrongfully extinguishing any rights or claims that emanated from the San Diego proceeding (also known as the "California refund proceeding"). However, the Port misreads the July 2001 Order. In that Order, the Commission clearly established the preliminary evidentiary hearing to address issues in Docket No. EL01-10-000, the Puget Sound complaint, the only relevant complaint proceeding that relates to the Pacific Northwest.¹⁸ Further, Port's argument makes no sense since the San Diego docket was limited to mitigation of the centralized California Independent System Operator (ISO) and California Power Exchange (PX) markets in

¹⁶ Louisiana Association of Independent Producers & Royalty Owners v. FERC, 958 FERC 1101, 1113-1114 (D.C. Cir. 1992) (finding limited hearing procedures to be acceptable because "once due process is satisfied the amount and form of any additional process an agency wishes to provide is left almost entirely to its discretion").

¹⁷ E.g., Southern California Edison Co., 70 FERC ¶ 61,087 at 61,251 & n.43 (1995).

¹⁸ July 2001 Order, 96 FERC ¶ 61,120 at 61,500, 61,502-03 and 61,520-21.

California, and did not include bilateral purchases made outside of California.¹⁹ Thus, no rights or claims emanating from the California refund proceeding could have been compromised by creation of a separate proceeding in Docket No. EL01-10 to explore possible refunds in the Pacific Northwest.

D. The Commission Engaged in an Appropriate Exercise of its Discretion in Terminating the Proceeding Without Deciding Whether Rates in the Pacific Northwest Were Unjust and Unreasonable

24. While the June 25 Order found that electricity prices “rose dramatically,” it did not make a finding whether prices were unjust and unreasonable. Nor did the Commission make a finding regarding the cause(s) of the high prices. Rather, it determined that the West-wide price mitigation plan adopted by the Commission in the June 2001 Order “provided the relief requested by Puget, and on a forward basis the relief sought by other participants in the complaint proceeding.”²⁰ Further, the Commission concluded that, based on the record established in the preliminary evidentiary hearing, “even if prices were unjust and unreasonable, it is not possible to fashion a remedy that would be equitable to all the participants in the Pacific Northwest market.”²¹ The Commission noted that its broad discretion in fashioning remedies includes the authority to determine that it would be inappropriate, in a particular case, to provide a remedy.²²

25. City of Tacoma, City of Seattle, California State Parties and Port of Seattle argue that the Commission erred by failing to find that prices in the Pacific Northwest were unjust and unreasonable. They contend that the Commission is compelled to make this finding based on record evidence, and that the Commission is bound by prior decisions in which it already made such a finding. Grays Harbor claims that the June 25 Order in fact acknowledged that prices were unjust and unreasonable during the spring of 2001.

26. Building on the premise that rates were unjust and unreasonable, parties argue that the Commission has no discretion when rates are found to be unjust and unreasonable and must provide refunds. City of Seattle states that the Commission may not refuse to order

¹⁹ Id., at 61,515 (clarifying that DWR bilateral contracts were not subject to refund because “imposing after-the-fact refund liability on California transactions outside of the centralized ISO and PX markets is unjustified”).

²⁰ June 25 Order at P 33.

²¹ Id., at P 35. See also id. at P 53.

²² Id., at P 52 & n.64.

refunds where the denial of relief would violate the core purpose of the FPA.²³ It argues that the denial of refunds in this proceeding violates the FPA's core purpose of protecting purchasers in the Pacific Northwest from unjust and unreasonable rates as mandated by Sections 205 and 206 of the FPA. It also argues that refunds are non-discretionary in this case because the Commission cannot authorize sellers to charge market-based rates unless it finds that the market is functionally competitive, yet the Commission has repeatedly found that the Western markets including the Pacific Northwest were dysfunctional and pervaded by market abuse. Further, it contends that the Commission's decision to allow sellers to retain the unjust profits they realized renders nugatory the provisions of Section 206 that prevent sellers from retaining the revenues in excess of just and reasonable prices collected during a pending Section 206 investigation. Related, City of Seattle also argues that the Commission departed, without explanation, from precedent establishing a Commission policy of granting full refund of all amounts charged in excess of the just and reasonable price.

27. The Port argues that, under FPA Section 206, if the Commission finds that existing charges are unjust and unreasonable, it is required (without discretion) to determine the just and reasonable rate. It also contends that the filing of a complaint imposes a statutory obligation on the Commission to determine whether prices are unjust and unreasonable. Yet, while the Commission has made such a determination in the California refund proceeding, it has failed to do so in the Pacific Northwest proceeding. It argues that, “[g]iven the Commission’s determination that prices in excess of the [market clearing price] are unlawful per se there is no rational basis upon which to refund revenues collected in excess of the [market clearing price] in California while refusing to do so in the Pacific Northwest.”²⁴

28. In a similar vein, Tacoma and City of Seattle argue that that the denial of refunds is unlawfully discriminatory. They contend that the Commission cannot treat a market participant's purchases in the Pacific Northwest any different from its purchases in the California ISO and PX spot markets unless there is a rational basis for such treatment. According to City of Seattle, the dysfunctional California spot markets caused the unjust and unreasonable prices in the interconnected spot market in the Pacific Northwest. Therefore, purchasers in the in the Pacific Northwest spot market paid the exact same exorbitant prices as purchaser in the ISO and PX spot markets. Yet, the Commission has ordered sellers in the California spot markets to pay refunds while denying the same relief to purchasers in the Pacific Northwest, a selective refund remedy that treats

²³ Citing *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990).

²⁴ Port request for rehearing at 27.

similarly-situated persons differently is unlawful.²⁵ City of Seattle also contends that the June 25 Order unduly discriminates against purchasers in the Pacific Northwest by allowing a disgorgement remedy in the California markets but failing to even discuss City of Seattle's request for disgorgement of excess profits realized by sellers in the Pacific Northwest.

Commission Determination

1. The Commission Is Not Required To Make a Determination Whether Rates Were Unjust and Unreasonable

29. The Commission is not required to make a determination whether prices were unjust and unreasonable in the Pacific Northwest spot markets for the potential refund period in this proceeding.²⁶ Indeed, the Commission never determined whether the just and reasonable standard would have been the correct standard to apply.²⁷ A substantial majority of the bilateral contracts at issue were transacted pursuant to the WSPP Agreement. In recent decisions, the Commission has determined that, pursuant to the Mobile-Sierra doctrine, the public interest standard is the applicable standard of review for transactions that took place pursuant to the WSPP Agreement.²⁸ Thus, it is quite possible that the public interest standard would have applied in the current proceeding as well, if we had found it necessary to reach the issue.

30. As noted above, the Commission initially dismissed Puget's complaint in a December 2000 Order. Certainly, the Commission had no reason to make a rate-related finding in the proceeding prior to issuance of the July 2001 Order in which the

²⁵ Citing July 2001 Order at 61,514.

The refund period is only "potential" because the Commission never established a refund effective date in the proceeding. The June 25 Order determined that the Commission technically had the authority to set a refund effective date, but found it unnecessary to do so because of the decision to terminate the proceeding.

²⁷ While the July 2001 Order directed the ALJ to explore whether there may have been unjust and unreasonable charges for spot market sales, this cannot be understood as a Commission determination regarding the applicable standard, as the issue had not yet been raised. The issue of which standard applies to the contracts involved in this proceeding was raised for the first time in pleadings before the ALJ. The ALJ, in her recommendations, identified the applicability of the Mobile-Sierra doctrine as an issue that the Commission would have to decide if further proceedings were ordered in this case. See ALJ Recommendations, 96 FERC ¶ 63,044 at 65,384.

²⁸ E.g., Nevada Power Co., et al., 103 FERC ¶ 61,353 (2003), pending rehearing.

Commission reconsidered its earlier decision and set the matter for a preliminary evidentiary hearing before an ALJ. In the July 2001 Order, the Commission tasked an ALJ to develop “a factual record on whether there may have been unjust and unreasonable charges for spot market bilateral sales” in the region.²⁹ This directive cannot be construed as a determination on the matter but, rather, confirms that the Commission desired additional information before making a decision.

31. The Commission orders relied upon by the parties seeking rehearing relate either to the California “real time” markets³⁰ or to the entire West-wide market for a time other than the potential refund period at issue in this proceeding.³¹

2. The Commission Engaged in an Appropriate Exercise of its Discretion in Terminating the Proceeding

32. Parties seeking refunds argue that the Commission lacks discretion in this matter and must direct refunds based on the language of FPA Section 206 and because the denial of refunds would violate the core purpose of the FPA. We reject these arguments. First, these arguments are premised on the notion that rates were unjust and unreasonable, a finding that the Commission has not made. Further, under FPA Section 206(b), refunds in fact are discretionary, as the statute provides that “at the conclusion of any proceeding under this section, the Commission may order the public utility to make refunds”³²

33. Moreover, Puget, in its complaint, requested a regional price cap as a remedy, not refunds.³³ The June 25 Order determined that the appropriate remedy was provided by the implementation of the West-wide price mitigation plan in June 2001, and Puget has indicated that this remedy is satisfactory. The parties seeking refunds are interveners in this matter, and have not filed a separate complaint. As interveners, these parties are not in the position to argue that the Commission must determine a just and reasonable rate under FPA Section 206(a) or that the Commission’s remedy offends a core purpose of the

²⁹ July 2001 Order, 96 FERC ¶ 61,120 at 61,520.

³⁰ E.g., July 2001 Order.

³¹ E.g., June 2001 Order.

³² 16 U.S.C. § 824e(b) (2000) (emphasis added).

³³ See Puget Complaint at Introduction and Paragraphs 14-16. In a section of the Complaint titled “other matters,” Puget makes clear that it seeks prospective relief only, and then asks that a refund effective date be set pursuant to FPA Section 206(b). It is clear from the context that Puget sought a price cap, and requested a refund effective date to fulfill the statutory requirement.

statute. Rather, the Commission, in a reasonable exercise of its discretion, provided a remedy of a prospective price cap – the precise remedy requested by the complainant.

34. Further, the Commission determined that, due to the unique circumstances present in the Pacific Northwest, it is not possible to fashion a refund remedy that would be fair and equitable to all market participants in the region. Having made such a determination, it was unnecessary to proceed further. Based on these circumstances, the Commission engaged in a proper exercise of its discretion in terminating the proceeding without directing refunds.

35. The termination of the proceeding was not unduly discriminatory since the interveners seeking rehearing in this proceeding are not similarly situated to market participants in the California spot markets. Major differences include the fact that the California ISO and PX markets are centralized with a single clearing price for the spot markets,³⁴ while the Pacific Northwest spot markets are based on bilateral contracts between individual market participants. The major utilities in California were prevented by law from entering into forward contracts during the relevant period of time, while the Pacific Northwest market participants were free to enter into forward contracts. Further, as discussed in the next section, while the Commission has jurisdiction over the transactions of governmental entities that participated in the California spot markets, the Commission does not have jurisdiction over the transactions of governmental entities that participated in the Pacific Northwest spot markets. The Commission has in various contexts recognized the integrated nature of the Western markets. However, that fact alone does not dictate refunds. The significant differences between the California and Pacific Northwest spot markets, as well as the differing procedural postures of the California refund and Pacific Northwest proceedings, refute the notion that the different outcomes in the two proceedings results in unlawful discrimination to market participants in the Pacific Northwest.

36. City of Seattle argues that, by denying refunds in the Pacific Northwest, the Commission has departed without explanation from a policy of granting refunds of all amounts in excess of the just and reasonable price. Aside from the fact that the Commission has not determined that prices were unjust and unreasonable, City of Seattle's argument is best refuted by the same statement on which it relies to make its argument, "the Commission's practice has been to order full refunds of any amounts collected above the just and reasonable level, absent contrary equitable considerations."³⁵

³⁴ See July 2001 Order, 96 FERC ¶ 61,120 at 61,511-513.

³⁵ City of Seattle, request for rehearing at 28, quoting San Diego Gas & Electric Co., et al., 97 FERC ¶ 61,275 at 62,185 (2001) (emphasis added).

The June 25 Order found that refunds were not appropriate due to the presence of overriding equitable considerations.³⁶

E. The Equitable Considerations Relied Upon by the Commission Justify Termination of This Proceeding

1. The Inability to Impose Refund Liability on the Transactions of Governmental Entities

37. The June 25 Order concluded that the Commission does not have authority to impose refund liability on the transactions of governmental entities that participated in the bilateral spot market for electricity in the Pacific Northwest.³⁷ The Commission explained that governmental entities account for a large portion of the power bought and sold in the region. Since electricity in the region is traded an average of six times between the point of generation to the last wholesale purchaser in the chain, and governmental entities will likely often be included in the chain, the burden of paying refunds would “fall on a limited class of jurisdictional sellers in the region; and the benefit of receiving refunds will be available only to buyers who bought from those same sellers.”³⁸ The Commission found that allowing refunds in such circumstances would be “inequitable and unbalanced.”

38. On rehearing, California State Parties argue that the Commission erred in finding that it lacks authority to require governmental entities in the Pacific Northwest to pay refunds in this proceeding. They claim that the same rationale that applies to the Commission’s assertion of jurisdiction over transactions of governmental entities in the California refund proceeding applies in the Pacific Northwest as well. They argue that the same conditioning authority relied upon by the Commission in the June 19, 2001 Order to establish a mitigated price applicable prospectively to wholesale power transactions in the Pacific Northwest involving governmental entities could be invoked to establish a mitigated benchmark price prospectively from a refund effective date.

³⁶ City of Seattle, rehearing at 34, argues that the Commission failed to consider relevant equitable factors such as the impact of the denial of refunds on load serving entities. Again, the thrust of the June 25 Order was that no equitable remedy is available and that granting the requested refund remedy would simply serve to redistribute the inequities, but would not make the market whole. In balance, the Commission believes that this fundamental, overriding equitable consideration should prevail.

³⁷ June 25 Order at P 36-38. See also FPA Section 201(f), 16 U.S.C. § 824(f) (2000).

³⁸ Id., at P 39, quoting ALJ Recommendations, 96 FERC ¶ 63,044 at 65,370.

39. City of Seattle, Tacoma, Port of Seattle, and California State Parties argue that, even if the Commission lacks refund authority over the transactions of governmental entities, this is no reason to avoid directing jurisdictional sellers in the region to make refunds for sales at unjust and unreasonable prices. They contend that, even if complete justice cannot be done, the Commission should do what is in its power to remedy unjust and unreasonable rates. California State Parties argue that the Commission's lack of refund authority over governmental entities is, in any case, irrelevant to their particular circumstances since 85% of the refund amount that they seek is from Commission-jurisdictional entities. Likewise, Grays Harbor states that it seeks refunds for a single transaction with a Commission-jurisdictional entity.

Commission Determination

40. The Commission correctly determined that it does not have FPA Section 206 refund authority over the transactions of governmental entity sellers in the Pacific Northwest. For the reasons stated in the June 25 Order,³⁹ we are not convinced by California State Parties' attempt to liken bilateral transactions made pursuant to the Commission-approved WSPP Agreement to the transactions in the California centralized markets. In addition, we note that, in the California markets, governmental entity sellers entered into arrangements that acknowledged the Commission's authority over the centralized transaction.⁴⁰ In contrast, the WSPP Agreement specifically states that nothing in the Agreement provides the Commission with jurisdiction over parties that are not otherwise subject to Commission jurisdiction, including state or federal agencies.⁴¹

41. California State Parties also rely on the Commission's application of the West-wide mitigation plan to governmental entities throughout the West. However, that aspect of the plan was subsequently reversed.⁴² Further, we reject their argument that the Commission could invoke its conditioning authority to prospectively mitigate, from a refund effective date, the sales transactions of governmental entities in the Pacific Northwest. The problem with this argument is that, rather than establishing a refund

³⁹ June 25 Order at P 36-38. See also ALJ's Recommendations, 96 FERC ¶63,044 at 65,370; cf., July 2001 Order, 96 FERC ¶ 61,120 at 61,511-513.

⁴⁰ July 2001 Order, 96 FERC ¶ 61,120 at 61,513.

⁴¹ See WSPP Agreement Section 13.1. (Submitted as Exhibit No. NPG-24.) In Western Systems Power Pool, 55 FERC ¶ 61,495 at 62,713 (1991), the Commission explained that it "cannot assert jurisdiction over nonpublic utility members of the WSPP" and that the decision of nonpublic utility members of the WSPP to be bound by contract to the Agreement is not a matter for the Commission under the FPA.

⁴² San Diego Gas & Electric Co., et al., 97 FERC ¶ 61,275 at 62,252 (2001).

effective date, the Commission dismissed Puget's complaint in December 2000. Throughout the potential refund period, market participants had every reason to believe that the complaint was terminated. The Commission did not indicate until July 2001, after the end-date of the potential refund period, that it would reconsider the possibility of refunds. Thus, California State Parties are wrong to suggest that this proceeding is ripe for "prospective" conditioning of governmental entities' (or, for that matter, any other market participants') sales transactions.

42. As mentioned above, certain refund claimants argue on rehearing that, even if the Commission cannot direct refunds for the transactions of governmental entities, the Commission should do "partial justice" by directing jurisdictional sellers in the Pacific Northwest to make refunds for unjust and unreasonable rates. Assuming that the Commission found that rates were unjust and unreasonable (or, perhaps, not in the public interest), the ordering of refunds would not result in "partial justice" but, rather, an arbitrary redistribution of inequities. Whether or not a purchaser would receive a refund for a particular transaction would arbitrarily depend on whether the counter-party happened to be a jurisdictional entity. The fact that Grays Harbor and California State Parties on behalf of CERS can identify jurisdictional sellers as their counter-parties would not change the arbitrary nature of any attempt to remedy the Pacific Northwest spot market.⁴³

43. Thus, the Commission found compelling the reasoning of the State Commissions:

the burden of paying refunds will fall on a limited class of jurisdictional sellers in the region; and the benefit of receiving refunds will be available only to buyers who bought from those same sellers. Some entities, the

⁴³ The ALJ, in determining the proper definition of "Pacific Northwest" for purposes of the proceeding, recommended that the California State Parties claims for refunds of CERS bilateral transactions should not be considered in the proceeding. ALJ Recommendations, 96 FERC ¶ 63,044 at 65,331-332 and Proposed Findings of Fact 1-2, 25-36. She explained that Puget's complaint referred specifically to a price cap on sales of capacity and energy "into" the Pacific Northwest. However, she concluded, the bilateral transactions involving CERS were sales into California, not into the Pacific Northwest. She found that southbound wholesale sales of power at the California-Oregon Border and Nevada-Oregon Border interconnections are not within the Pacific Northwest because the delivery point is not to a Pacific Northwest load server and because deliveries actually take place in California. *Id.* Therefore, she concluded that the CERS transactions were outside the scope of the proceeding. We find that the ALJ's definition of "Pacific Northwest" and her conclusion that CERS transactions are outside the scope of this proceeding are reasonable and supported by the record and we, therefore, adopt her proposed findings and recommendations on these matters.

public utilities, will be subject to pay refunds, but not entitled to receive refunds from non-public utilities that sold power at the very same elevated and volatile prices. This asymmetry would be an inequitable outcome serving not to remedy the market dysfunction, but rather, to send the bill for market dysfunction to sellers who comprise only a portion of the market-sales volume.^[44]

44. Accordingly, requests for rehearing on this issue are denied.

2. Refunds Are Not an Appropriate Remedy

45. The June 25 Order concluded that refunds would unfairly reward entities that relied on the spot market.⁴⁵ The Order explained that a full array of short, medium and long-term contracts, as well as hedging instruments were available to market participants in the Pacific Northwest. Since the proceeding only concerns spot transactions, entities that procured a higher balance of long-term instruments would not be eligible to receive refunds for such long-term contracts, yet they might be obligated to pay refunds for power purchased in long-term markets that was later sold in short-term markets.

46. Tacoma and City of Seattle argue that this conclusion is not relevant because purchasers in the Pacific Northwest, regardless of whether they made their purchases in the spot or forward market or hedged, should not have to accept the risk of unjust and unreasonable prices. Similarly, California State Parties contend that any sale that is not just and reasonable is unlawful and the Commission has a duty to act regardless of a market participants' reliance on the spot market. Port of Seattle contends that the conclusion is premised on the notion that "those who operated on the assumption that the Commission's determination that the region's markets were not subject to the exercise of market power . . . should not have done so."⁴⁶ The Port further contends that the decision rewards entities that exercised market power. City of Seattle argues that the Commission's reasoning is inconsistent with its decision to grant refunds to buyers that relied on the California spot markets and its issuance of show cause orders directing the numerous entities to show cause why certain alleged gaming behavior does not violate the ISO and PX tariffs. City of Seattle, California State Parties and Tacoma claim that

⁴⁴ State Commissions Joint Post-Hearing Brief at 7. The Commission did not err in giving "due respect" to the position of the State Commissions, as argued by California State Parties, City of Seattle and the Port. These State agencies are responsible for protecting many of the retail ratepayers in the Pacific Northwest, and their position is therefore particularly germane to this proceeding.

⁴⁵ June 25 Order at PP 42.

⁴⁶ Port at 30-31.

the Commission's conclusion is "disingenuous" and not based on reasoned decision-making given that the Commission has denied every complaint filed by a purchaser seeking to reform forward contracts in the western markets.⁴⁷

47. Tacoma argues that the Commission should not have relied on the ALJ's proposed findings that the Pacific Northwest was generally forewarned of power supply shortages and hedging opportunities were available in the region because these proposed findings were outside of the scope of the preliminary evidentiary hearing. It also contends that the Commission failed to consider conflicting evidence, and refers to witness testimony indicating that Tacoma had purchased power to cover the sale of the Centralia generating plant. Grays Harbor contends that it had not willingly relied on the spot market but rather was forced into the market after the majority owners sold the Centralia plant over Grays Harbor's objection. City of Seattle claims that there is no evidence that its purchasing practices were imprudent, noting that the ALJ found that it made 99 percent of its purchases in the forward market. California State Parties argue that the Commission's rationale does not apply to purchases made by CERS since it began its purchasing responsibilities at the height of the energy crisis in January 2001 without any portfolio, and did not have the opportunity at that time to purchase long-term power at reasonable rates.

Commission Determination

48. The Commission's consideration of the fact that refunds would unfairly reward entities that relied on the spot market was one of the factors the Commission considered in determining whether refunds are an appropriate remedy in the particular circumstances of this proceeding.

49. The arguments raised on rehearing are not persuasive. The thrust of the Commission's findings in the June 25 Order was that refunds are not appropriate because such relief would arbitrarily remedy only a portion of the regional market.

50. Contrary to the position of Tacoma and City of Seattle, the availability of long-term contracts as well as hedge instruments is relevant. When potential supply shortages are looming,⁴⁸ it is incumbent upon market participants to avail themselves of the instruments available in the marketplace to protect their interests. Market participants

⁴⁷ Citing Nevada Power Co., 103 FERC ¶ 61,353; Public Utilities Commission of California, 103 FERC ¶ 61,354 (2003), rehearing pending; and PacifiCorp, 103 FERC ¶ 61,353 (2003), rehearing pending.

⁴⁸ ALJ Recommendations, 96 FERC ¶ 63,044 at 65,366-67. See also, e.g., Exh. BPA-1 at 19.

have to pay for hedge instruments and long-term contracts in order to protect their interests. Those who chose to avoid the cost must bear the risk.

51. The factual distinctions raised by certain parties, suggesting that they did not overly-rely on the spot market or that they had no choice but to participate in the spot market, are not relevant to the Commission's reasoning that refunds would arbitrarily remedy only a portion of the regional market.⁴⁹

3. Allowing Refunds Would Have Adverse Consequences on the Market

52. The June 25 Order adopted the ALJ's proposed finding and determined that allowing refunds would have adverse consequences on the market by creating instability and driving away potential sellers.⁵⁰

53. California State Parties and Tacoma contend that this finding is speculative and the Commission failed to identify any record evidence to support the finding. City of Seattle and the Port argue that denying refunds will have an adverse impact on the market, since it sends a signal that the market is "lawless" and prudent purchasers will not participate. City of Seattle also argues that the denial of refunds in a market in which

⁴⁹ Moreover, the factual distinctions raised do not comport with the record in the proceeding. City of Seattle claims that the ALJ found that it made 99 percent of its purchases in the forward market. The Exhibit cited by the ALJ, PWX-3, refers specifically to City of Seattle's spot sales of 24 hours or less. However, the ALJ defined the spot market in the region as including transactions up to one month in duration. Based on the ALJ's definition, City of Seattle's participation in the spot market would be much greater; and if we were to apply the definition advocated by City of Seattle, which would include transactions up to 18 months duration, its participation in the spot market would increase greater still. On the other hand, TFG's proposed definition of 24 hours or less would, in fact, result in City of Seattle having spot market sales of less than 1 percent, and its refund claim significantly reduced. See Exhibits PWX-12 at pp 5-6 and PWX-13 (94% of refund claims are eliminated if limited to transactions of 24 hours of less). Further, the record indicates that Tacoma sold its 80 MW share of Centralia production. According to Tacoma, it covered this loss with a series of multi-month contracts. See Exh. NPG-57 at 3. However, it appears that these contracts – involving purchases from Powerex and BPA, from whom it now seeks refunds – in fact left Tacoma vulnerable to the fluctuations of the short term market. See ALJ Recommendations, 96 FERC ¶ 63,044 at 65,343 and exhibits cited therein (discussing City of Seattle's and Tacoma's choosing to take the risk of high spot market prices). It can hardly be said that Tacoma covered its sale of the Centralia plant with equally available, long-term resources.

⁵⁰ June 25 Order at ¶ 44-46.

unjust and unjust rates prevailed would re-write the rules on which purchasers have relied since the enactment of the FPA. California State Parties argue that the Commission balanced the same factors in the California refund proceeding and reached the opposite conclusion. Further, they contend that during the refund period there was an enormous transfer of wealth from buyers to sellers, and that mitigated prices are more than sufficient to induce investment, while denying the windfall profits enjoyed by sellers.

Commission Determination

54. The Commission concluded in the June 25 Order that the massive revision of bilateral contracts that would be required to provide a refund remedy for market participants in the Pacific Northwest would create an unacceptable amount of risk and uncertainty for future market participants in the region, since it would set a precedent that the contract price for power may always be subject to change - without any advanced warning.⁵¹ While, in fact, the record before the ALJ supports our conclusion,⁵² this proposition does not require specific support from the record.⁵³ Thus, the Commission engaged in a proper exercise of its discretion in considering the adverse consequences of the proposed remedy as a factor in denying refunds.

55. The Commission is not persuaded by the argument that denying refunds will do equal, if not more, damage to the regional spot market. It is unlikely that purchasers would completely opt out of a market that serves an important purpose of providing a source for power “on the spot,” although it would be prudent for purchasers to be wary of overly-relying on the spot market. Further, while the Port makes allegations of lawlessness in the market-place, no evidence of such “lawlessness” has been shown with

⁵¹ As discussed above, the Puget complaint was dismissed before the potential refund period would have started and not “resurrected” until afterward. This fact also differentiates the Puget proceeding from the California refund proceeding.

⁵² See ALJ Recommendations, 96 FERC ¶ 63,044 at 65,384, and exhibits cited therein.

⁵³ See Order No. 888, FERC Stats. & Regs., Regulations Preambles January 1991-June 1996 ¶ 31,036 at 31,682 (1996), order on reh’g, Order No. 888-A, FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,048 at 30,210 (1997), order on reh’g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh’g Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff’d in relevant part sub nom. Transmission Access Policy Study Group v. FERC, 225 F.3d 667, 688 (D.C. Cir. 2000), aff’d sub nom., New York v. FERC, 122 S. Ct. 1012 (2002), quoting Associated Gas Distributors v. FERC, 824 F.2d 981, 1008 (D.C. Cir. 1987) (“Agencies do not need to conduct experiments in order to rely on the prediction that an unsupported stone will fall”).

regard to any specific transaction in the Pacific Northwest spot market that is at issue in this proceeding. Accordingly, the request for rehearing on this issue is denied.⁵⁴

4. Ripple Claims⁵⁵

56. The June 25 Order, citing to the ALJ's proposed findings, noted that it is estimated that electricity in the region is traded an average of six times between the point of generation to the last wholesale purchaser in the chain, and that approximately 500,000 transactions would have to be recalculated if refunds were directed.⁵⁶ Further, the recovery of refund claims would likely not be possible in many instances due to complications such as the large number of transactions not subject to Commission jurisdiction, difficulties in tracing upstream sellers and the difficulty of matching a sale with a particular source because most market participants rely on a portfolio of resources. Thus, while the unraveling of the massive volume of transactions necessary to determine potential refunds would require prolonged time and effort, in the end a fair result would likely not be achieved.

57. On rehearing, Tacoma, Port and others argue that the Commission erred in declining to order refunds because of the difficulty involved in making the necessary calculations. They claim that this is not a permitted consideration under the FPA. Moreover, they contend that the calculation of refunds would not be difficult. They point out that refund claimants in the preliminary evidentiary proceeding were able to submit their net claims with substantiating documentation within days of the ALJ's request, and suggest that all parties are capable of doing the same. City of Seattle contends that market participants have the necessary information readily available and that refunds could be determined in one simultaneous reconciliation. Grays Harbor claims that the calculation of ripple claims for its single contract at issue would not be complicated. California State Parties argue that the Commission's finding is based on speculation, noting that the ALJ reserved the issue of ripple claims for a future phase of the proceeding and that there is no witness testimony that the magnitude of transactions would make it impossible to unwind fairly the chain of transactions.

⁵⁴ A disgorgement remedy, as proposed by City of Seattle, is beyond the scope of Puget's complaint which is the sole basis for this proceeding.

⁵⁵ The ALJ explained "ripple claims" as "sequential claims against a succession of sellers in a chain of purchases that are triggered if the last wholesale purchaser in the chain is entitled to a refund." ALJ Recommendations, 96 FERC ¶63,044 at 65,300. Ripple claims were not entertained in the preliminary evidentiary hearing. Rather, the ALJ ruled that all parties reserved their right to pursue such claims if it was determined that such parties are liable for refunds. *Id.*

⁵⁶ June 25 Order at P 47.

58. California State Parties, Tacoma, and others posit that refunds could be calculated without difficulty if the Commission were to adopt a market clearing price or “benchmark” approach modeled after the refund methodology applied in the California refund proceeding. They claim that, once the market clearing price is fixed, it is a simple math process to apply the clearing price to each transaction. City of Seattle states that the ALJ’s concerns regarding the impossibility of tracing upstream sellers would not be relevant since, under the clearing price approach, there is no reason to match a particular sale of power with a prior transaction involving the same power. It also argues that the Commission’s concerns regarding the time and effort involved in calculating refunds is a “hollow excuse” because the calculation of refunds for the Pacific Northwest should be no more difficult than the calculation already made in the California refund proceeding. California State Parties state that the Commission decided, in denying Automated Power Exchange’s (APX’s) request (in the California refund proceeding) that the Commission impose refund liability on its upstream customers, that a seller is liable for the refunds associated with sales it made, without regard to the fact that the seller itself may have made no profit on the sales.⁵⁷ They ask that the Commission apply this same approach to the current proceeding, in which case the Commission should not even concern itself with ripple claims.

Commission Determination

59. While the ALJ reserved the right of parties to pursue specific ripple claims in a future phase of the proceeding if necessary, the impact of ripple claims was addressed by witness testimony,⁵⁸ on which the ALJ relied in making her proposed findings.⁵⁹ The time and resources that must be devoted to refund calculations is a legitimate consideration within the Commission’s discretion. The June 25 Order concluded not only that the massive undertaking would require prolonged time and effort, but in the end a fair result would not be achieved.

60. The June 25 Order pointed to specific difficulties in attempting to calculate refunds. On rehearing, parties did not address these specific problems but rather suggest that they could be avoided by using a benchmark approach similar to that used in the

⁵⁷ Citing San Diego Gas & Electric Co., et al., 102 FERC ¶ 61,317 at P 5, subparagraph GG (2003).

⁵⁸ E.g., Exh. BPA-1 at 19-21; PWX-1 at 15-18.

⁵⁹ ALJ Recommendations, 96 FERC ¶63,044 at 65,385, and proposed findings 44 and 45.

California refund proceeding.⁶⁰ That proceeding has proved to be extraordinarily time and resource consuming, raising myriads of issues and involving 18 months of proceedings before an ALJ. This can hardly be held out as the model to be applied to other proceedings. Also, parties have not adequately explained why it is appropriate to apply a clearing price approach in a market that is based on bilateral contracts, and has no centralized clearing price. Nor have the parties advocating such an approach adequately explained how this solves the unfairness that results from our inability to exercise jurisdiction over transactions involving governmental entities.

61. There is no basis for rejecting ripple claims as suggested by the California State Parties. First, the Commission has granted rehearing regarding APX's liability in the California refund proceeding and determined that the APX and sellers into the APX will be jointly and severally liable for refund liability in the ISO and PX markets.⁶¹ This decision was based on equitable considerations that are unique to that proceeding and provide no precedent for this proceeding. More fundamentally, Puget's complaint is directed at protecting the regional market and provides no basis for limiting refunds to a few market participants that chose to assert claims in the preliminary hearing. Such an approach would exacerbate the inequity of attempting to make the market whole.

5. Number of Refund Claimants

62. The June 25 Order noted that, of the hundreds of market participants in the region, only a handful of entities have chosen to pursue refund claims.⁶² Further, most parties to the proceeding have chosen not to pursue their claims, including some that were net purchasers during the relevant period of time.

63. Tacoma, City of Seattle, Port and California State Parties argue that the number of refund claimants and the number of market participants that chose not to pursue refunds is not relevant to the issue of whether refunds are warranted. They claim that the Commission engaged in speculation as to the reason why market participants chose not to pursue a claim. City of Seattle contends that the Commission may not deny refunds

⁶⁰ Tacoma contends that it readily produced the purchase data directed by the ALJ. However, it appears that the refund claimants' data was deficient, as it failed to provide the date and hour when each transaction was entered into, failed to reveal whether the power purchased was used to serve retail load or was resold, and failed to identify upstream vendors. ALJ Recommendations, 96 FERC ¶ 63,004 at 63,353, n.204.

⁶¹ San Diego Gas & Electric Co., 105 FERC ¶ 61,066 (2003).

⁶² June 25 Order at P 52.

simply because only a few request relief.⁶³ The Port claims that the Commission's numbers are wrong because some WSPP members were not active market participants during the relevant period of time.

Commission Determination

64. The Commission agrees that a head count of the number of parties pursuing refund claims is not in itself relevant to whether refunds are warranted. The point of the June 25 Order was that, in a bilateral market with over 200 participants, our decision that requiring refunds in these circumstances would be inequitable is consistent with the decision of the overwhelming share of market participants foregoing refunds. This point is, of course, not determinative of our decision. Even apart from this point, we believe, based on the totality of the circumstances, the proceeding should be terminated because it is not possible to fashion a remedy that would be equitable to all the market participants in the Pacific Northwest.

F. Mirant Bankruptcy

65. On September 12, 2003, the Bankruptcy Court for the Northern District of Texas issued a "Temporary Restraining Order Against the Federal Energy Regulatory Commission" ("TRO") in In re Mirant Corp. (Mirant Corp. v. FERC), Adversary Proceeding No. 03-4355, which enjoins the Commission "from taking any action, directly or indirectly, to require or coerce the [Mirant] Debtors to abide by the terms of any Wholesale Contract [to which a Mirant Debtor is a party] which Debtors are substantially performing or which Debtors are not performing pursuant to an order of the Court unless FERC shall have provided the Debtors with ten (10) days' written notice setting forth in detail the action which FERC seeks to take with respect to any Wholesale Contract which is the subject of this paragraph."

66. Should the TRO be converted into a preliminary injunction, an action that the Commission opposes, the Commission will appeal that order. Despite the Commission's disagreement with the validity of the TRO and its expectation that the TRO (or a preliminary injunction) will be vacated on appeal, the Commission must comply with it until vacated. The TRO requires ten days' written notice before the Commission takes a proscribed action with respect to a covered Mirant Wholesale Contract. Accordingly, to the extent that this Order requires Mirant to act in a manner proscribed by the TRO, the Order will provide written notice to Mirant of the action that FERC will take with respect to a covered Mirant Wholesale Contract, which action will not become effective until ten

⁶³ Citing *Exxon Co., U.S.A. v. FERC*, 182 F.3d at 50 (the agency cannot simply take a "head count" among the parties in a contested settlement to decide whether it is fair).

(10) days after issuance of this Order. In all other respects, this Order is effective immediately.

The Commission orders:

The requests for rehearing are hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Massey dissenting with a separate statement attached.
Commissioner Brownell concurring with a separate statement attached.

(S E A L)

Linda Mitry,
Acting Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Puget Sound Energy, Inc.

EL01-10-011

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

(Issued November 10, 2003)

MASSEY, Commissioner, dissenting:

I dissented from the underlying order and nothing in today's order persuades me to change my mind. I would set a refund effective date of December 25, 2000 and order refunds for spot market transactions (defined as one month or less) through June 20, 2001. I would use the MMCP methodology established in the California refund proceeding as a benchmark for just and reasonable spot market rates in the Northwest.

For the reasons set out in my dissent to the underlying order, I dissent from today's order.

William L. Massey
Commissioner

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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Systems Power Pool Agreement

(Issued November 10, 2003)

Nora Mead BROWNELL, Commissioner *concurring*:

1. This order sets forth the equity basis for denying refunds. While I agree with that analysis, my reading of the law dictates a stand-alone bar to ordering refunds, regardless of whether the equities warrant them. As the ALJ noted, the majority of the transactions at issue in this case were bilateral contracts under the standard WSPP Agreement.¹ The Commission has already concluded in other proceedings that modifications to contracts under the WSPP Agreement are subject to the Mobile-Sierra public interest standard of review.² I agree with the ALJ's finding that the refund claimants have not met that standard here.³

Nora Mead Brownell

¹ Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy, et al., 96 FERC ¶ 63,044 at 65,387 (2001).

² PacifiCorp v. Reliant Energy Services, Inc., et al., 103 FERC ¶ 61,355 (2003) Nevada Power Company and Sierra Pacific Power Company v. Duke Energy Trading and Marketing, L.L.C., 103 FERC ¶ 61,353 (2003).

³96 FERC at 65,384.