Nos. 13-71276, 13-71487, 14-72384 (consolidated)

In the United States Court of Appeals for the Ninth Circuit

THE PEOPLE OF THE STATE OF CALIFORNIA, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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STATEMENT OF JURISDICTION

The orders challenged in these consolidated appeals arise from this Court's remand in *Port of Seattle v. FERC*, 499 F.3d 1016 (9th Cir. 2007), granting in part petitions for review of Federal Energy Regulatory Commission (FERC or the Commission) orders denying refunds to wholesale purchasers of power in the Pacific Northwest spot market during the Western energy crisis of 2000 and 2001. By order of February 17, 2015, this Court consolidated Docket Nos. 13-71276, 13-

71487, 13-72220 and 14-72384, and denominated those appeals as the Pacific Northwest cases.[1]

Docket Nos. 13-71276 and 13-71487 seek review of *Puget Sound Energy, Inc. v. All Jurisdictional Sellers*, 137 FERC ¶ 61,001 (2011) (Remand Order), *on reh'g*, 143 FERC ¶ 61,020 (2013) (Remand Rehearing Order) (collectively the Remand Orders). Those orders are preliminary, interlocutory rulings by the Commission concerning the scope of evidentiary proceedings following the *Port of Seattle* remand. As discussed more fully below, *see* Argument Section II, the Commission's preliminary determinations in those orders do not constitute reviewable final agency action, and therefore the petitions for review of those orders should be dismissed.

Nos. 13-72220 and 14-72384 seek review of Commission orders conditionally approving proposed settlements of the potential refund liability of Idaho Power Company and IDACORP Energy Services Company (collectively Idaho Power) for power sales in the Pacific Northwest in 2000 and 2001. No. 13-72220 concerns a proposed settlement between Idaho Power and the City of Tacoma (Tacoma Settlement). No. 13-72220 is already fully briefed. No. 14-

[1] The February 17, 2015 order also consolidated Nos. 02-70329 and 03-74550 with the Pacific Northwest cases, but the Court granted petitioner's voluntary dismissal of those petitions by order of March 5, 2015.

72384, addressed herein, concerns orders on a subsequent proposed settlement between Idaho Power and Powerex Corp. (Powerex Settlement). *Puget Sound Energy, Inc. v. All Jurisdictional Sellers*, 146 FERC ¶ 61,123 (2014) (Settlement Order), *on reh'g*, 147 FERC ¶ 61,223 (2014) (Settlement Rehearing Order) (collectively the Settlement Orders).

The Commission had jurisdiction to issue the orders under review under sections 201, 205 and 206 of the Federal Power Act, 16 U.S.C. §§ 824, 824d and 824e. Petitioners timely petitioned for review of the challenged orders under section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), and this Court has jurisdiction over the Settlement Orders under the same section. The Court lacks jurisdiction over the Remand Orders because they do not constitute reviewable final agency action.

STATEMENT OF THE ISSUES

1. Whether, in Nos. 13-71276 and 13-71487, the Court lacks jurisdiction over Commission orders setting for hearing the issue of refunds in the Pacific Northwest spot market during the Western energy crisis following this Court's remand in *Port of Seattle*, because such interlocutory orders do not constitute final, reviewable agency action.

2. Assuming jurisdiction, whether, in the orders challenged in Nos. 13-71276 and 13-71487, the Commission reasonably made the preliminary determination, based on a 2008 Supreme Court decision, that a presumption of reasonableness applies to the bilateral contracts entered into in the Pacific Northwest spot market, and reasonably set the parameters of evidence admissible at hearing to avoid or rebut the presumption.

3. Whether, in the orders challenged in No. 14-72384, the Commission reasonably conditioned its approval of the Powerex Settlement on removal of language requiring the Commission to reinstate provisions extinguishing non-settling party rights that were rejected in the orders challenged in No. 13-72220.[2]

STATUTES AND REGULATIONS

The applicable statutes and regulations are contained in the Addendum to this brief.

STATEMENT OF THE CASE

Port of Seattle remanded Commission orders denying refunds for power sales made in the Pacific Northwest spot market during the Western energy crisis of 2000-2001. The Court directed the Commission to consider new evidence of

[2] Idaho Power appeal No. 13-72220 is fully briefed and has been consolidated with Nos. 13-71276, 13-71487 and 14-72384 for purposes of oral argument and decision.

possible unlawful activity that may have influenced prices during that period, and further directed the Commission to include sales to the California Energy Resources Scheduling division.

In the Remand Orders challenged in Nos. 13-71276 and 13-71487, the Commission set the remanded issues for hearing before an Administrative Law Judge. In light of *Morgan Stanley Capital Group. Inc. v. Public Utility District No. 1 of Snohomish County*, 554 U.S. 527 (2008), issued after *Port of Seattle*, the Commission made the preliminary determination that the *Mobile-Sierra* presumption of reasonableness applies to the bilateral contracts negotiated in the Pacific Northwest spot market. The Commission also prescribed the types of evidence that parties may submit at hearing to avoid or rebut the presumption.

On appeal, petitioners California Parties (People of the State of California *ex rel*. Kamala D. Harris, Attorney General, and the Public Utilities Commission of the State of California) and the City of Seattle (Seattle) challenge the Commission's determination that the *Mobile-Sierra* presumption applies to the contracts in the first instance, and the Commission's rulings regarding the evidence admissible at hearing to avoid or rebut the presumption. The Administrative Law Judge issued an Initial Decision in Phase I of the evidentiary hearing on March 28, 2014, which remains pending before the Commission on exceptions.

The orders challenged in No. 13-72220, already fully briefed, concerned the Tacoma Settlement, which purported to release not only Tacoma's refund claims against Idaho Power, but also the claims of other parties to the Pacific Northwest refund proceeding. Non-settling parties PPL Montana, LLC and PPL EnergyPlus, LLC (collectively PPL) and Powerex objected to the compromise of non-settling party rights. The Commission approved the Tacoma Settlement, conditioned on removal of the language extinguishing non-settling party rights.

The Settlement Orders challenged in Docket No. 14-72384 concern the subsequent Powerex Settlement. That settlement purports not only to mutually release refund claims as between Idaho Power and Powerex, but also to require the Commission to approve the provision extinguishing non-settling party rights rejected in the No. 13-72220 orders, with the addition of a provision preserving PPL's claims. Consistent with the No. 13-72220 orders, the Commission approved the proposed Powerex Settlement conditioned on removal of the provisions concerning the No. 13-72220 settlement.

STATEMENT OF FACTS

I. THE WESTERN ENERGY CRISIS OF 2000-2001 AND THE PACIFIC NORTHWEST REFUND PROCEEDING

This Court is very familiar with the Western energy crisis of 2000-2001 and its consequences. *City of Redding v. FERC*, 693 F.3d 828, 831 (9th Cir. 2012).

See also, e.g., *Cal. ex rel. Harris v. FERC*, ___ F.3d ___, 2015 WL 1923139 (9th Cir. Apr. 29, 2015); *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1008 (9th Cir. 2004); *Pub. Utils. Comm'n of Cal. v. FERC*, 462 F.3d 1027 (9th Cir. 2006). In response to the energy crisis, the Commission initiated a series of adjudicatory and investigative proceedings, intended both to settle and reform markets going forward and, where appropriate, to provide ratepayer relief retroactively.

Among those proceedings is the Pacific Northwest refund proceeding, which addresses whether refunds are warranted for sales made in the Pacific Northwest spot market during the Western energy crisis. Following a hearing and based on the particular circumstances presented, the Commission originally denied refunds. *Puget Sound Energy, Inc. v. All Jurisdictional Sellers*, 103 FERC ¶ 61,348, *on reh'g*, 105 FERC ¶ 61,183 (2003). On appeal, this Court granted in part petitions for review of those orders, and directed the Commission on remand to consider new evidence of market manipulation, and to include sales made to the California Energy Resources Scheduling division. *Port of Seattle*, 499 F.3d at 1034, 1035-36.

A. The Challenged Remand Orders

In the challenged Remand Orders, the Commission ordered an evidentiary hearing before an Administrative Law Judge to address the issue of refunds.

Remand Order P 16,[3] California Parties Excerpts of Record (Cal. ER) 32. In addressing the scope of that proceeding, the Commission rejected the argument that it should establish a market-wide remedy for the Pacific Northwest, like that utilized in California. Remand Order P 24, Cal. ER 37. Unlike the California spot market, which operated through a centralized power exchange with a uniform clearing price, the Pacific Northwest spot market operated through independently negotiated bilateral contracts. *Id*. PP 18, 24, Cal. ER 33, 37. In California, where all sellers are paid the price bid by the marginal seller, all spot market sales could be mitigated to the level of a just and reasonable market-clearing price. *Id*. In the Pacific Northwest, however, each seller receives only what a specific buyer agrees to pay for a given transaction, and accordingly a market-wide remedy would penalize sellers that followed the law for other sellers' bad conduct, which is an unfair and unreasonable result. *Id*. P 24 & n.56, Cal. ER 37.

Thus, the Commission found that buyers seeking refunds for purchases in the Pacific Northwest spot market must make individualized showings of circumstances particular to their contracts. Remand Order P 21, Cal. ER 35. "Under the *Mobile-Sierra* doctrine, [FERC] must presume that the rate set out in a freely negotiated wholesale-energy contract meets the 'just and reasonable'

[3] "P" refers to the internal paragraph number within a FERC order.

requirement imposed by law. The presumption may be overcome only if FERC concludes that the contract seriously harms the public interest." *Morgan Stanley*, 554 U.S. at 530. However, "if it is clear that one party to a contract engaged in such extensive unlawful market manipulation as to alter the playing field for contract negotiations, the Commission should not presume that the contract is just and reasonable." *Id*. at 554.

Following *Morgan Stanley*, the Commission found that "[i]f the challenged rates are 'contract rates,' the [*Mobile-Sierra*] presumption applies. . . ." Remand Rehearing Order P 14, Cal. ER 7. Accordingly, the Commission rejected arguments that *Mobile-Sierra* does not apply to short-term contracts, Remand Order P 20 & n.45, Cal. ER 34-35; Remand Rehearing Order PP 13, 17, Cal. ER 7, 8-9, or to contracts executed after the original Puget Sound complaint was filed, Remand Rehearing Order PP 14, 30, Cal. ER 7, 14-15, as neither the type of contract or the timing of the challenge alters the applicability of the presumption. The Commission likewise rejected arguments that sellers' subsequent failure to adhere to the Commission's reporting regulations undermined the applicability of the presumption to the contract rates. Remand Rehearing Order PP 18, 24, Cal. ER 9, 11-12.

The *Mobile-Sierra* presumption may be rebutted by showing that the contract seriously harms the public interest, or avoided by showing that unfair dealing at the contract formation stage directly influenced the contract rate. *Id*. P 14, Cal. ER 7 (citing *Morgan Stanley*, 554 U.S. at 545-48). The Commission found that evidence of reporting violations without proof of underlying manipulation would not suffice to avoid or rebut the presumption. *Id*. PP 18, 24, Cal. ER 9, 11-12. The Commission also excluded evidence of unlawful activity by non-contracting parties, because the focus of the *Mobile-Sierra* inquiry is the individual contract and the conduct of the seller in negotiating the contract. *Id*. P 26, Cal. ER 13. The Commission declined to adjudicate alleged violations of state good faith contracting obligations, *id*. P 25, Cal. ER 12, but affirmed that it would permit at hearing evidence relevant to avoiding the *Mobile-Sierra* presumption, as set out in *Morgan Stanley*, which includes unfair dealing at the contract formation stage. *Id*. PP 14, 27, Cal. ER 7, 13.

The Commission also rejected arguments that sections 38.1 and 38.2 of the umbrella Western Systems Power Pool Agreement -- which permit amendments to the umbrella Agreement itself -- authorize unilateral changes to the rates set out in individualized contracts entered into under that Agreement. Remand Rehearing Order P 16, Cal. ER 8.

The presiding Administrative Law Judge bifurcated the evidentiary hearing into two phases: Phase I addressed whether the *Mobile-Sierra* presumption of reasonableness has been avoided or rebutted; and Phase II will address, if necessary, the appropriate refund methodology. *Puget Sound Energy, Inc. v. All Jurisdictional Sellers*, 146 FERC ¶ 63,028 P 25 (2014). Phase I commenced on August 27, 2013, and the presiding Administrative Law Judge issued an Initial Decision on March 28, 2014.

In the Initial Decision, the Administrative Law Judge concluded that petitioner Seattle had not established a *prima facie* case for receiving refunds from any seller, nor had California Parties established a *prima facie* case for refunds from seller TransCanada Energy Ltd. *Id*. P 3. However, California Parties had established a *prima facie* case that certain of their contracts with Coral Power LLC were tainted by unlawful acts. *Id*. The Phase I Initial Decision is pending before the Commission on exceptions; Phase II of the proceeding has not yet commenced.

B. The Challenged Settlement Orders

To facilitate settlement efforts, the Remand Orders also directed the appointment of a settlement judge. Remand Order PP 30-31, Cal. ER 38-39. Under the settlement procedures established, parties with a direct refund claim against another party were directed to file a Notice of Settlement Claim. *Puget*

Sound Energy, Inc. v. All Jurisdictional Sellers, Order of the Chief Judge Confirming Settlement Procedures, Docket No. EL01-10-026 (Nov. 23, 2011). The Chief Judge specified, however, that the order requiring the filing of direct claims "shall not be construed to either diminish or enlarge the right of any Party to assert its position with respect to Ripple Claims." *Id*. P 10.[4]

Tacoma and Seattle made refund claims against Idaho Power. On March 12, 2012, Idaho Power and Tacoma submitted the proposed Tacoma Settlement, which purported not only to settle Tacoma's claims against Idaho Power, but also purported to release Idaho Power from all claims in the Pacific Northwest refund proceeding, except those brought by Seattle. *Puget Sound Energy, Inc. v. All Jurisdictional Sellers*, 141 FERC ¶ 61,148 P 3 (2012). No parties opposed the settlement of claims between Tacoma and Idaho Power, but non-settling parties Powerex and PPL expressed concern that the settlement would extinguish non-parties' rights to bring "ripple claims" against Idaho Power in the future. *Id*. P 4.

[4] During the relevant period, electricity in the Pacific Northwest wholesale spot market was traded an average of six times between the point of generation to the last wholesale purchaser in the chain. *Puget Sound*, 103 FERC ¶ 61,348 P 47. As a result, an award of refunds to the last wholesale purchaser in the chain could potentially give rise to so-called "ripple" claims, which are the "sequential claims against a succession of sellers in a chain of purchasers that are triggered if the last wholesale purchaser in the chain is entitled to a refund." *Puget Sound*, 146 FERC ¶ 63,028 P 25 n.49.

The Commission found the uncontested Tacoma Settlement fair and reasonable and in the public interest as between Idaho Power and Tacoma, and approved the settlement, "subject to the removal of the language purporting to foreclose claims" by others. *Id*. P 6. While the potential for ripple claims is speculative, the Commission held that the Tacoma Settlement could not be used to extinguish potential claims of others. *Id*. PP 9-10. The Commission also rejected Idaho Power's request to preserve only the potential claims of the objecting parties Powerex and PPL. *Id*. P 14.

Idaho Power petitioned for review of the Commission's conditional approval of the Tacoma Settlement in No. 13-72220. That appeal has been fully briefed, and has been consolidated with the appeals addressed in this brief.

Subsequently, Idaho Power and Powerex filed the proposed Powerex Settlement, which provided that the Commission would seek this Court's leave to modify its previous orders to approve the Tacoma Settlement as originally filed, subject to the addition of a new article preserving PPL ripple claims. Settlement and Release of Claims Agreement, Art. III § 8, Idaho Power Supplemental Excerpts of Record (Idaho SER) 543. *See also* Settlement Order P 7, Idaho SER 451. This modification would reinstate the provisions in the Tacoma Settlement that the Commission had previously rejected. Reiterating its conclusion that the

parties could not extinguish potential claims of non-parties through settlement, the Commission approved the Powerex Settlement conditioned on removal of the provisions concerning the Tacoma Settlement. *Id*. P 9, Idaho SER 451-52; Settlement Rehearing Order P 7, Idaho SER 442-43.

SUMMARY OF ARGUMENT

Following this Court's *Port of Seattle* decision remanding the Pacific Northwest refund proceeding to the Commission, the Supreme Court in *Morgan Stanley* held that the Commission was required to apply the *Mobile-Sierra* presumption of reasonableness to market-based rate contracts entered into under the Western Systems Power Pool Agreement in the Pacific Northwest during the Western energy crisis. In the challenged Remand Orders, the Commission set the issue of refunds for evidentiary hearing, and made the preliminary determination that the market-based rate contracts at issue here, which similarly were entered into under the Western Systems Power Pool Agreement during the Western energy crisis, were also subject to the *Mobile-Sierra* presumption of reasonableness.

Under *Morgan Stanley*, the presumption of reasonableness can be avoided through proof of unlawful acts affecting contract negotiations -- in which case the presumption of reasonableness does not apply -- or the presumption may be rebutted through proof that the contract seriously harms the public interest. The

challenged Remand Orders permitted parties to introduce evidence relevant to these issues at hearing. Accordingly, the Commission has made no final determination regarding either the ultimate applicability of the *Mobile-Sierra* presumption to the contracts at issue or the justness and reasonableness of the contract rates. The challenged Remand Orders do not constitute final agency action, and the appeals challenging those orders -- Nos. 13-71276 and 13-71487 -- should be dismissed.

Assuming jurisdiction, the Remand Orders faithfully implemented this Court's *Port of Seattle* remand instructions, as informed by the subsequent *Morgan Stanley* decision, in setting the scope of issues to be addressed at hearing. Following *Morgan Stanley*, the Commission reasonably concluded that the *Mobile-Sierra* presumption applies to the contracts at issue. The Commission correctly rejected arguments that *Mobile-Sierra* did not apply because the contracts were not filed rates under this Court's 2004 *Lockyer* decision. This Court has held that, under *Lockyer*, Pacific Northwest spot market contracts entered into during the Western energy crisis are filed rates under the filed rate doctrine. Further, as *Morgan Stanley* found, the presumption of reasonableness arises from the negotiation of the contract, not the subsequent filing with or review by the Commission.

The Commission reasonably rejected arguments that *Mobile-Sierra* does not apply to short-term contracts, or to contracts executed after the original Puget Sound complaint was filed, as neither the type of contract nor the timing of the challenge alters the applicability of the presumption to contract rates. Nor does the "ordinary" just and reasonable standard apply, as *Morgan Stanley* made clear that *Mobile-Sierra* is the just and reasonable standard applicable to contracts.

In addition, the Commission reasonably rejected arguments that sections 38.1 and 38.2 of the umbrella Western Systems Power Pool Agreement -- which authorize amendments to the umbrella Agreement itself -- constitute a so-called "Memphis" clause permitting unilateral changes to the rates set out in individualized transaction contracts. Rather, section 6.1 of the Western Systems Power Pool Agreement precludes unilateral changes to the rates established in individual transactions under the Agreement.

The Commission also reasonably set the parameters for evidence that would be admissible at hearing to avoid or rebut the *Mobile-Sierra* presumption. The Commission found a market-wide remedy inappropriate in the Pacific Northwest spot market, based upon both the individualized, contract-specific nature of the *Mobile-Sierra* inquiry, as well as the nature of the Pacific Northwest spot market itself. Under *Morgan Stanley*, generalized evidence of market dysfunction, or

proof of reporting violations, does not itself suffice to avoid the presumption. Rather, there must be specific evidence of a causal connection, demonstrating that the negotiated contract rate cannot be presumed to be the product of good faith, arms-length negotiation deserving of *Mobile-Sierra* protection.

The Commission also reasonably excluded evidence of unlawful activity by non-contracting parties, because the focus of the *Mobile-Sierra* inquiry is the individual contract and the conduct of the seller as it relates to the formation of the contract. The Commission declined to adjudicate alleged violations of state good faith contracting obligations, but affirmed that it would permit at hearing evidence relevant to avoiding the *Mobile-Sierra* presumption, as set out in *Morgan Stanley*, which includes unfair dealing at the contract formation stage.

As explained in the Commission's earlier-filed brief in Case No. 13-72220 and herein, the challenged Settlement Orders reasonably conditioned approval of both the Tacoma and Powerex Settlements on the removal of provisions that would extinguish the right of non-settling parties to bring ripple claims in the future. Although the possibility of ripple claims at this stage in the proceedings is speculative, such claims may arise in the future if the Commission orders refunds. Accordingly, the Commission exercised its independent judgment -- as it is obligated to do in evaluating both contested and (here) uncontested settlements --

and reaffirmed its stated policy of preserving ripple claims in this proceeding. The Commission's determination is consistent with its prior orders in this and other proceedings and strikes a reasonable balance between the settling parties' interest in finality and the possible foreclosure of non-settling parties' claims.

ARGUMENT

I. STANDARD OF REVIEW

Court review "of a FERC decision is limited to whether the decision was arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, or not in accordance with the law." *Cal. Dep't of Water Res. v. FERC*, 341 F.3d 906, 910 (9th Cir. 2003). "As a general rule, [the Court] show[s] great deference to an administrative agency's interpretation of the law which it is charged with administering." *Steamboaters v. FERC*, 759 F.2d 1382, 1388 (9th Cir. 1985). The Commission's factual findings are conclusive if supported by substantial evidence. Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b); *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1076 (9th Cir. 2003).

Petitioners' challenges to the Remand Orders concern whether the *Mobile-Sierra* "application" of the just and reasonable standard applies to the bilateral contracts entered into in the Pacific Northwest spot market. *See Morgan Stanley*, 554 U.S. at 535 ("the term 'public interest standard' refers to the differing

application of that just-and-reasonable standard to contract rates"). "The statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and [the Court] afford[s] great deference to the Commission in its rate decisions." *Id*. at 532. FERC's reasonable interpretation must therefore be upheld so long as it represents "a permissible construction of the statute." *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843 (1984). Further, the Commission also should be afforded deference in the interpretation of jurisdictional contracts, "particularly with regard to the *Mobile-Sierra* issue." *ASARCO, Inc. v. FERC*, 777 F.2d 764, 772 (D.C. Cir. 1985). *See also, e.g., Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 271 (D.C. Cir. 2007) ("as FERC's *Mobile-Sierra* analysis hinges on interpretation of utility contracts, our review of that analysis is deferential").

The appeal of the Settlement Orders challenges FERC's application of its own settlement regulations and precedents. FERC's interpretation of its own regulations is entitled to deference, unless the interpretation is plainly erroneous. *Pankratz Lumber Co. v. FERC*, 824 F.2d 774, 777 (9th Cir. 1987); *City of Centralia v. FERC*, 799 F.2d 475, 481 (9th Cir. 1986); *Pac. Gas & Elec. Co. v. FERC*, 746 F.2d 1383, 1386 (9th Cir. 1984). "Likewise, [the court] must give deference to the Commission's interpretation of its own orders." *Cal. Trout v.*

FERC, 572 F.3d 1003, 1013 (9th Cir. 2009) (citing *Cal. Dep't of Water Res. v. FERC*, 489 F.3d 1029, 1036 (9th Cir. 2007)).

II. THE REMAND ORDERS ARE NOT REVIEWABLE FINAL AGENCY ACTION

The challenged Remand Orders set for hearing the issues remanded by this Court in *Port of Seattle*. Remand Rehearing Order P 4, Cal. ER 2. The Commission also made preliminary determinations governing the scope of the hearing, including, as challenged here, the preliminary determination that the *Mobile-Sierra* presumption of reasonableness applies to the bilateral contracts at issue, unless the presumption is avoided or rebutted through evidence adduced at hearing. Remand Order P 20, Cal. ER 34-35; Remand Rehearing Order PP 13-14, Cal. ER 7.

The Commission's preliminary determinations in the challenged Remand Orders do not constitute final agency action, and therefore the appeals in Nos. 13-71276 and 13-71487 should be dismissed for lack of finality. In *Steamboaters*, 759 F.2d at 1387-88, this Court adopted the three-part analysis set forth in *Papago Tribal Utility Authority v. FERC*, 628 F.2d 235, 238 (D.C. Cir. 1980), for determining whether an order is reviewable under section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*: "first, we ask whether the order is final; second, whether, if unreviewed, it would inflict irreparable harm on the party seeking

review; and third, whether judicial review at this stage would invade the province reserved to the discretion of the agency."

Under this analysis, Commission orders setting matters for hearing are non-final, non-reviewable decisions. *Papago*, 628 F.2d at 240 ("Acceptance of a filing, coupled with scheduling of a hearing, is the initiation of an administrative proceeding; judicial review properly follows the conclusion of the proceeding."). *See also Cities of Anaheim v. FERC*, 723 F.2d 656, 660 (9th Cir. 1984) (recognizing the Supreme Court has excluded procedural orders from review, citing *FPC v. Metropolitan Edison Co*., 304 U.S. 375, 383-85 (1938)); *Ala. Power Co. v. FERC*, 993 F.2d 1557, 1566 (D.C. Cir. 1993) (same). *See generally Pub. Util. Comm'r of Or. v. Bonneville Power Admin*., 767 F.2d 622, 629 (9th Cir. 1985) (referencing "the general presumption in favor of postponing review until the conclusion of agency proceedings").

While the Remand Orders did preliminarily determine that the *Mobile-Sierra* presumption of reasonableness applied, the Commission has made no final determination regarding either the ultimate applicability of the presumption, or whether the rates at issue are just and reasonable, as those determinations depend upon the proof adduced at hearing. Remand Order P 20, Cal. ER 34-35; Remand Rehearing Order PP 13-14, Cal. ER 7. Therefore, even the issue of whether the

Mobile-Sierra presumption applies to these contracts is not final, as the presumption can be avoided by proof adduced at hearing of unlawful acts affecting the contract negotiations. *Id*. *See Morgan Stanley*, 554 U.S. at 547, 554 (the *Mobile-Sierra* presumption of reasonableness does not apply to contracts where there is evidence of fraud, duress, bad faith, or market manipulation that affect contract negotiations). Absent a final decision on that issue, it is not ripe for review. *See Cal. Dep't of Water Res. v. FERC*, 361 F.3d 517, 520-21 (9th Cir. 2004) (applying *Steamboaters*) (court has jurisdiction to review discrete issues when they have been "definitively resolved by the agency").

If the presumption is avoided or rebutted at hearing, petitioners will suffer no injury from the Commission's preliminary determination in the Remand Orders that the presumption applies. *See Papago*, 628 F.2d at 240 ("Perhaps the Commission will resolve the claims of the parties and obviate any injury to them if we allow it to complete its proceedings."). Petitioners will in any event suffer no irreparable injury from the Commission's preliminary *Mobile-Sierra* determination because their objections to that ruling can be heard by the Court upon review of any final order on the justness and reasonableness of the contract rates. "[T]he imminence of a future hearing, and the alternative remedy it provides, undercut

both the finality of the Commission's decision and the irreparability of its harm." *Delmarva Power & Light Co. v. FERC*, 671 F.2d 587, 594 (D.C. Cir. 1982).

Additionally, as this Court has found, reviewing preliminary determinations prior to the Commission's final decision on the reasonableness of rates interrupts the administrative process unnecessarily, "especially where the final rate decision is reviewable." *Cities of Anaheim*, 723 F.2d at 661.[5] *See also Papago*, 628 F.2d at 243 (finding it would "'undermine the Commission's primary jurisdiction'" to intervene in the Commission's rate proceeding in advance of the Commission's final determination on rates) (quoting *S. Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 460 (1979)).

III. THE COMMISSION'S PRELIMINARY DETERMINATIONS IN THE CHALLENGED REMAND ORDERS WERE REASONABLE.

In its original orders denying refunds in the Pacific Northwest, the Commission made no finding whether the rates in the Pacific Northwest were just and reasonable, because the Commission determined for equitable reasons to deny refunds. *See Puget Sound*, 105 FERC ¶ 61,183 P 25, Cal. ER 50. While the

[5] In contrast, courts review Commission orders *rejecting* arguments that *Mobile-Sierra* applies and accepting rate filings; such orders deny a contractual right to purchase power at the agreed-upon rate during the administrative process, which cannot be restored upon review of the final order. *See Papago*, 628 F.2d at 245 (*rejection* of the *Mobile-Sierra* argument is "effectively a final disposition of the purchaser's contractual claim of right").

Commission did not specify the standard that would apply, the Commission found it "quite possible" that *Mobile-Sierra* would be the appropriate standard. Remand Rehearing Order P 20, ER 34 (citing *Puget Sound*, 105 FERC ¶ 61,183 P 29 & n.27, Cal. ER 52).

In its 2007 *Port of Seattle* decision, this Court remanded the Pacific Northwest refund proceeding, directing the Commission to consider new evidence of market manipulation and the transactions of the California Energy Resources Scheduling division. 499 F.3d at 1034-36. The Court made no determination regarding the applicable standard, declining to reach the merits of the Commission's decision to deny refunds. *Id*. at 1036. *See* Remand Rehearing Order P 23, Cal. ER 11.

Subsequently, in 2008, in *Morgan Stanley*, the Supreme Court held that the Commission was required to apply the *Mobile-Sierra* presumption of reasonableness to market-based rate contracts for power purchased under the Western Systems Power Pool Agreement in the Pacific Northwest during the Western energy crisis. *See* 554 U.S. at 540-41, 544-48. The Supreme Court found the *Mobile-Sierra* presumption applicable, notwithstanding arguments that the market was dysfunctional, *id*. at 547-48, and that the Commission had no prior opportunity to review the terms of the contracts at issue. *Id*. at 545-46.

In 2009, this Court denied petitions for rehearing of *Port of Seattle*, and issued the mandate remanding the case to the Commission. *See* Mandate, *Port of Seattle v. FERC*, No. 03-74139, *et al*. (9th Cir. Apr. 16, 2009).

In the Remand Orders, the Commission set for evidentiary hearing the issues remanded by this Court in *Port of Seattle*. Petitioners here challenge the Commission's preliminary determination that, following *Morgan Stanley*, the bilateral contracts at issue are subject to the *Mobile-Sierra* presumption of reasonableness, absent petitioners avoiding or rebutting the presumption at hearing. Petitioners also challenge certain evidentiary rulings concerning what proof could be adduced at hearing. These challenges are without merit.

A. The Commission Reasonably Made The Preliminary Determination That, Under *Morgan Stanley*, The *Mobile-Sierra* Presumption Of Reasonableness Applies To The Bilateral Pacific Northwest Contracts, Absent Being Rebutted Or Avoided At Hearing.

As this Court recognized in *Port of Seattle*, "[u]nlike the California spot market, which operated through a centralized power exchange using a central clearing price, the Pacific Northwest spot market operated through bilateral contracts negotiated independently between buyers and sellers, without a central clearing price." 499 F.3d at 1023. *See also Cal. Pub. Utils. Comm'n*, 462 F.3d at 1063 (noting the "fundamental differences" between the California markets and the

bilateral contracts negotiated by the California Energy Resources Scheduling division); *Harris*, ___ F.3d ___, 2015 WL 1923139 at *5 (distinguishing between "a traditional bilateral transaction" and "clearinghouse sales"). Following *Morgan Stanley*, the Commission reasonably made the preliminary determination that the *Mobile-Sierra* presumption of reasonableness applies to the bilateral Pacific Northwest contracts at issue, unless it is avoided or rebutted by petitioners at hearing. Remand Order P 20, Cal. ER 34-35 (citing *Morgan Stanley*, 554 U.S. at 543-48); Remand Rehearing Order PP 13-14, Cal. ER 7.

Petitioners assert that various circumstances preclude applying the *Mobile-Sierra* presumption of reasonableness to the contracts at issue at all. As demonstrated in the Remand Orders and below, under *Morgan Stanley*, these arguments are without merit.

1. This Court Has Determined That Market-Based Rates In The Pacific Northwest Spot Market During The Western Energy Crisis Are Filed Rates, And *Morgan Stanley* In Any Event Based The Presumption Of Reasonableness On The Formation Of The Contract, Not The Filing With The Commission.

Petitioners argue that *Mobile-Sierra* cannot apply to the contract rates at issue here because, under this Court's decision in *Lockyer*, the rates were not filed rates. *See* Cal. Br. 14-15 (quoting *Lockyer*, 383 F.3d at 1015-16 ("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**")) (emphasis added by California Parties); Seattle Br. 17-19. The Commission reasonably rejected this argument. Remand Rehearing Order PP 10, 18, 24, Cal. ER 6, 9, 12. This Court in *Wah Chang v. Duke Energy Trading & Marketing, LLC*, 507 F.3d 1222, 1227 (9th Cir. 2007), following *Lockyer*, in fact held that market-based rates in the Pacific Northwest spot market during the Western energy crisis are filed rates. Further, under *Morgan Stanley*, the *Mobile-Sierra* presumption of reasonableness arises from the negotiation of the contract, not any subsequent filing with or review by the Commission.

First, the Commission reasonably rejected petitioners' argument that *Mobile-Sierra* did not apply because, under this Court's decision in *Lockyer*, the contract rates at issue were not filed rates. Remand Rehearing Order PP 10, 18, 24, Cal. ER 6, 9, 12. As this Court explained in its April 29 decision in *Harris*, *Lockyer* held that "FERC may authorize market-based energy tariffs, so long as that regulatory framework incorporates both an ex ante market power analysis and enforceable post-approval transaction reporting." *Harris*, ___ F.3d ___, 2015 WL 1923139 at *1. Because of the "integral nature" of the reporting requirement to the tariff, *Lockyer* found that the Commission possessed authority under section 205 of the Federal Power Act to order refunds for violations of the tariff reporting

requirement. *Id*. at *4 (quoting *Lockyer*, 383 F.3d at 1014-16). The Court did not hold that, due to reporting violations, there was no filed tariff.

To the contrary, this Court expressly relied on *Lockyer* in holding that the filed rate doctrine precluded a court challenge to sellers' market-based rates in the wholesale Pacific Northwest spot market during the Western energy crisis. *Wah Chang*, 507 F.3d at 1224, 1225, 1227 (discussing *Lockyer*). This Court found that the market-based rate tariffs' "legal effect is the same as the effect of any other tariff set by FERC." *Id*. at 1224. Thus, the filed rate doctrine applies to the market-based rate contracts. *Id*. at 1225 (citing *Lockyer*, 383 F.3d at 1012-13; *Pub. Util. Dist. No. 1 of Snohomish Cnty. v. Dynegy Power Mktg*., 384 F.3d 756, 761 (9th Cir. 2004); *Pub. Util. Dist. No. 1 of Grays Harbor Cnty. v. IDACORP Inc.*, 379 F.3d 641, 650-51 (9th Cir. 2004); *Cal. ex rel. Lockyer v. Dynegy, Inc*. 375 F.3d 831, 852-53 (9th Cir. 2004)). *See also, e.g*., *Oneok, Inc. v. Learjet, Inc*., ___ S. Ct. ___, 2015 WL 1780926 at *11 (Apr. 21, 2015) (recognizing that state inquiry is preempted where is it "directed at [FERC] jurisdictional sales" as opposed to state antitrust lawsuits challenging "background marketplace conditions").

The petitioner in *Wah Chang* made the same argument that petitioners make here; that *Lockyer* found, given the "rampant non-compliance" with reporting obligations, that "'there is no filed tariff in place at all.'" *See* Appellant's Opening

Brief, *Wah Chang v. Duke Energy Trading & Mktg., LLC*, 9th Cir. No. 05-55367, 2005 WL 4155665 at *17 (Oct. 31, 2005) (quoting *Lockyer*, 383 F.3d at 1016). This Court rejected that argument. "Finally, Wah Chang ululates about FERC's lax oversight, but laxness does not indicate, much less establish, that Wah Chang can turn directly to the courts for rate relief." *Wah Chang*, 507 F.3d at 1227 (citing *Lockyer*, 383 F.3d at 1016). "There may well have been a shadow of wrongdoing brooding over the Pacific Northwest wholesale power market, but Wah Chang cannot succeed in this forum. The filed-rate doctrine bars its rate-based action, just as it has barred the similar actions brought by other victims of the 2000-2001 energy crisis." *Id*. *See also Mont. Consumer Counsel v. FERC*, 659 F.3d 910, 919-22 (9th Cir. 2011) (rejecting arguments that market-based rate tariffs failed to meet Federal Power Act notice and filing requirements, finding that the "rate" filing occurs when a seller files a market-based rate tariff, even though the price charged subsequently rises and falls, and the seller continues to be subject to reporting requirements).

Second, as the Commission found, under *Morgan Stanley*, "if the challenged rates are contract rates, the presumption applies. . . ." Remand Rehearing Order P 14, Cal. ER 7. *See Morgan Stanley*, 554 U.S. at 548 ("FERC may abrogate a valid contract only if it harms the public interest."). The contracts at issue in

Morgan Stanley were themselves market-based rate contracts entered into in the Pacific Northwest during the Western energy crisis. This Court relied upon the reporting violations to find that the *Mobile-Sierra* presumption did not apply, because the Commission had no prior opportunity to review the rates. *Pub. Util. Dist. No. 1 of Snohomish Cnty. v. FERC*, 471 F.3d 1053, 1082-83 (9th Cir. 2006), *vacated*, 547 F.3d 1081 (9th Cir. 2008).

Morgan Stanley rejected that finding, concluding that the *Mobile-Sierra* standard applied notwithstanding that the Commission had not previously reviewed the contracts. 554 U.S. at 545-46. *Morgan Stanley* expressly recognized that, under the Commission's market-based rate program, individual contracts entered into under authority of a seller's market-based rate tariff "no longer need to be filed with FERC (and subjected to its investigatory power) before going into effect." 554 U.S. at 538. Nevertheless, the Court found such market-based rate contracts subject to the *Mobile-Sierra* presumption. The presumption of reasonableness rests on the fact that the contract is negotiated between "'often sophisticated businesses enjoying presumptively equal bargaining power,'" not on any prior review of the rate by the Commission. *Id*. at 545-46 (quoting *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 479 (2002)).

Consequently, the *Mobile-Sierra* presumption of reasonableness is premised upon the negotiation of the contract, not upon any subsequent filing with or review by the Commission. Courts have long recognized that *Mobile-Sierra* applies to unfiled contracts. *See, e.g., Borough of Lansdale v. FPC*, 494 F.2d 1104, 1114 (D.C. Cir. 1974) ("the present case does not fall outside the confines of the *Sierra-Mobile* doctrine merely because the 1971 contract has never been filed with, or accepted by, the Commission"); *Sam Rayburn Dam Elec. Coop. v. FPC*, 515 F.2d 998, 1008-09 (D.C. Cir. 1975) (*Mobile-Sierra* applies to modified contract, whether or not seller filed the modified contract with the Commission); *Natural Gas Pipeline Co. v. Harrington*, 246 F.2d 915, 919 (5th Cir. 1957) (under the rationale of *Mobile*, "the contract rate, even though unfiled, became and remained the only lawful rate until changed by order of" the Commission).

2. The Short-Term Nature Of The Pacific Northwest Contracts Does Not Preclude Application Of *Mobile-Sierra.*

Petitioners argue that the *Mobile-Sierra* presumption does not apply because the short-term Pacific Northwest spot market contracts at issue here are distinguishable from the long-term Pacific Northwest contracts at issue in *Morgan Stanley*. Cal. Br. 27; Seattle Br. 17-18. In petitioners' view, *Morgan Stanley* "justified the presumption that long-term sales are just and reasonable specifically because long-term sales can guard against the volatility of spot market sales." Cal.

Br. 27. *See also* Seattle Br. 19 (*Morgan Stanley* found long-term contracts "deserved special protection" because of their role in stabilizing energy markets).

As the Commission found, nothing in *Morgan Stanley* limits *Mobile-Sierra* to long-term contracts. Remand Order P 20 & n.45, Cal. ER 34-35; Remand Rehearing Order PP 13, 17, Cal. ER 7, 8-9. Again, "if the challenged rates are 'contract rates,' the presumption applies." Remand Rehearing Order P 14, Cal. ER 7. "In unmistakably plain language, *Morgan Stanley* restated *Mobile-Sierra*'s instruction to the Commission: FERC 'must presume that the rate set out in a freely negotiated wholesale-energy contract meets the 'just and reasonable' requirement imposed by law.'" *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 174 (2010) (quoting *Morgan Stanley*, 554 U.S. at 530). *See also Morgan Stanley*, 554 U.S. at 534 ("'The regulatory system created by the [Federal Power Act] is premised on contractual agreements voluntarily devised by the regulated companies; it contemplates abrogation of these agreements only in circumstances of unequivocal public necessity.'") (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968)).

The language from *Morgan Stanley* cited by petitioners simply explained how the Ninth Circuit's holding that *Mobile-Sierra* can be overcome by market dysfunction would "undermine[] the role of contracts in [the Federal Power Act's]

statutory scheme." *See Morgan Stanley*, 554 U.S. at 547. *Morgan Stanley* in no way held that *Mobile-Sierra* only applied to long-term contracts. As noted above, it is the negotiation between parties -- not the terms of the contract -- that creates the basis for presuming the rate to be just and reasonable. *Morgan Stanley*, 554 U.S. at 545. *See id.* at 530 (*Mobile-Sierra* applies to a "freely negotiated wholesale-energy contract"); *id*. at 545-46 (*Mobile-Sierra* applies to a "mutually agreed-upon contract rate").

Further, the purpose of the *Mobile-Sierra* doctrine is protecting the integrity of contracts, which also does not depend on the contract's particular terms. The Federal Power Act, as interpreted in *Sierra*, "recognizes that contract stability ultimately benefits consumers" by encouraging investment, "which is why [the Act] permits rates to be set by contract and not just by tariff." *Morgan Stanley*, 554 U.S. at 551. *See also United Gas Pipeline Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 344 (1956) ("By preserving the integrity of contracts, [the similarly-worded Natural Gas Act] permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry.").

3. Prior References To The "Just And Reasonable Standard" Do Not Preclude Application Of *Mobile-Sierra*.

Petitioners assert that the "ordinary" just and reasonable standard must apply because the 2000 Puget Complaint put sellers on notice that their sales may be subject to refund if they were not "just and reasonable," Cal. Br. 21; Seattle Br. 26-27, and the Commission set for hearing whether the contracts were in fact "just and reasonable," without specifying that the *Mobile-Sierra* presumption applied. Cal. Br. 19-20; Seattle Br. 21-23. This claim is likewise precluded by *Morgan Stanley*, which held that the presumption of reasonableness is the just and reasonable standard as applied to contracts. Remand Rehearing Order PP 14, 30, Cal. ER 7, 14-15; *Cal. ex rel. Brown v. Powerex Corp.*, 135 FERC ¶ 61,178 P 90 (2011), *reh'g denied*, 139 FERC ¶ 61,210 (2012) (cited in Remand Rehearing Order P 17 n.32, Cal. ER 9; Remand Order PP 20, 21, 24, 26, Cal. ER 34-38).

"As the Supreme Court stated in *Morgan Stanley*, '[t]here is only one statutory standard for assessing wholesale electricity rates set by contract or tariff – the just-and-reasonable standard.'" *Brown*, 135 FERC ¶ 61,178 P 90 (quoting *Morgan Stanley*, 554 U.S. at 545). *Mobile-Sierra* provides "a definition of what it means for a rate to satisfy the just-and-reasonable standard in the contract context – a definition that applies regardless of when the contract is reviewed." *Morgan Stanley*, 554 U.S. at 546. *See also NRG Power Mktg.*, 558 U.S. at 168 ("*Morgan*

Stanley . . . made clear that the *Mobile-Sierra* public interest standard is not an exception to the statutory just-and-reasonable standard; it is the application of that standard in the context of rates set by contract."). Thus, "in a proper regulatory scheme, the ordinary mode for evaluating contractually set rates is to look to whether the rates seriously harm the public interest, not to whether they are unfair to one of the parties that voluntarily assented to the contract." *Morgan Stanley*, 554 U.S. at 546-47.

The Commission was obliged to follow *Morgan Stanley* and find that the *Mobile-Sierra* presumption of reasonableness applied to the contracts at issue here. *See Morgan Stanley*, 554 U.S. at 544-45 ("the Commission was *required*, under our decision in *Sierra*, to apply the *Mobile-Sierra* presumption in its evaluation of the contracts here"). But there is no merit, in any event, in petitioners' claims of surprise that the Commission applied the *Mobile-Sierra* presumption on remand, or their contentions that it was an "abrupt change in position." *See* Seattle Br. 21-23; Cal. Br. 19-20. To the contrary, in the challenged orders, Remand Order P 20 & n.44, Cal. ER 34; Remand Rehearing Order P 23 & n.44, Cal. ER 11, the Commission pointed to its pre-remand (2003) findings in *Puget Sound Energy*, 105 FERC ¶ 61,183 P 29 & n.27, Cal. ER 52, where the Commission expressly stated

that it had not determined the applicable standard, but found it "quite possible" that the *Mobile-Sierra* public interest standard would apply. *Id*. P 29, Cal. ER 52.

Earlier Commission orders directing the Administrative Law Judge to explore whether there were unjust and unreasonable charges could not "be understood as a Commission determination regarding the applicable standard, as the issue had not yet been raised." *Id*. P 29 n.27, Cal. ER 52. Parties raised the issue for the first time before the Administrative Law Judge, who identified *Mobile-Sierra* as an issue that the Commission would have to decide if further proceedings were ordered in this case. *Id*. (citing *Puget Sound Energy, Inc. v. All Jurisdictional Sellers*, 96 FERC ¶ 63,044 at 65,384 (2003)). *See* Remand Order P 20, Cal. ER 34-36.

Port of Seattle remanded the case to the Commission without specifying the applicable standard, directing only that the Commission "account for [the evidence] in any future orders regarding the award or denial of refunds" in this proceeding. Remand Rehearing Order P 23, Cal. ER 11 (quoting *Port of Seattle*, 499 F.3d at 1036). Thus, the Commission clarified in the Remand Orders what refund claimants would have to show to avoid or rebut application of the *Mobile-Sierra* public interest standard. *Id*. "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." *Id*.

4. The Presence Of Market Dysfunction Does Not Preclude Application Of *Mobile-Sierra.*

Morgan Stanley likewise rejected the conclusion that the *Mobile-Sierra* presumption should not apply, as petitioners argue, Cal. Br. 23-28, because a contract was executed during times of market dysfunction. Remand Order P 21 & n.51, Cal. ER 35-36 (quoting *Morgan Stanley*, 554 U.S. at 547-48 ("[T]he mere fact that the market is imperfect, or even chaotic, is no reason to undermine the stabilizing force of contracts that the [Federal Power Act] embraced as an alternative to 'purely tariff-based regulation.'")).

While California Parties strenuously contend that the California Energy Resources Scheduling division was under duress in executing the contracts at issue, Cal. Br. 23-26, the issue of whether the sales at issue were transacted lawfully -- including whether any seller "engaged in unlawful activity that resulted in unequal bargaining power" -- is a matter being addressed at hearing. Remand Rehearing Order P 18, Cal. ER 9. *Morgan Stanley* held that "FERC has ample authority to set aside a contract where there is unfair dealing at the contract formation stage -- for instance, if it finds traditional grounds for the abrogation of

the contract such as fraud or duress." 554 U.S. at 547. Additionally, *Mobile-Sierra* would not apply if the "dysfunctional" market conditions under which the contract was formed were caused by illegal action of one of the parties. *Id*. In other words, "if it is clear that one party to a contract engaged in such extensive unlawful market manipulation as to alter the playing field for contract negotiations, the Commission should not presume that the contract is just and reasonable." *Id*. at 554.

Nevertheless, the presence of unlawful activity is insufficient to overcome the presumption absent "a causal connection between unlawful activity and the contract rate." *Id*. at 554-55. Accordingly, the Commission set the issue for hearing, and specified that buyers would have the opportunity at hearing to demonstrate that sellers' market manipulation or other unlawful conduct directly affected contract negotiations and the resulting contract rate. Remand Rehearing Order P 18, Cal. ER 9; Remand Order P 21, Cal. ER 35.

At hearing, the Administrative Law Judge concluded that petitioner Seattle had not established a *prima facie* case for receiving refunds from any seller, and California Parties similarly failed to establish a *prima facie* case for refunds from seller TransCanada. *Puget Sound Energy*, 146 FERC ¶ 63,028 P 3. However, California Parties had established a *prima facie* case that certain of their contracts

with seller Coral Power were tainted by unlawful acts or bad faith. *Id*. These findings in Phase I of the proceeding remain pending before the Commission on exceptions.

5. The Western Systems Power Pool Agreement Does Not Contain A "Memphis" Clause Permitting Unilateral Changes To Individual Transaction Rates.

Petitioners contend that the Western Systems Power Pool Agreement contains a so-called "Memphis" clause that authorizes them to unilaterally amend their contract rates. Cal. Br. 28-32; Seattle Br. 28-30. The Commission reasonably interpreted the Western Systems Power Pool Agreement to preclude unilateral changes to individual transaction contract rates. Remand Rehearing Order P 16, Cal. ER 8 (citing *PacifiCorp v. Reliant Energy Servs., Inc*., 105 FERC ¶ 61,184 (2003), *petition for review dismissed*, *PacifiCorp v. FERC*, 143 Fed. Appx. 785 (9th Cir. 2005)).

The *Mobile-Sierra* doctrine "addresse[s] the authority of the Commission to modify rates set bilaterally by contract rather than unilaterally by tariff." *Morgan Stanley*, 554 U.S. at 532. A *Mobile-Sierra* contract denies either party the right to change prices unilaterally. *Texaco, Inc. v. FERC*, 148 F.3d 1091, 1095 (D.C. Cir. 1998). In *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Div*., 358 U.S. 103, 110-13 (1958), the Court held that parties could contract out of the

Mobile-Sierra presumption. *Morgan Stanley*, 554 U.S. at 534. A "Memphis" clause therefore is "a specific contract provision that gives parties the unilateral right to seek revisions to the contract." Remand Rehearing Order P 16 n.30, Cal. ER 8. In the absence of express agreement, "the *Mobile-Sierra* presumption remains the default rule." *Morgan Stanley*, 554 U.S. at 534.

The contracts at issue here were entered into under the Western Systems Power Pool Agreement, Remand Order PP 18, 20, Cal. ER 33, 34, which is an umbrella agreement establishing standardized terms for power transactions. *See Puget Sound*, 96 FERC ¶ 63,044 at 65,325. The terms of individual contracts entered into under that umbrella agreement are reflected in Confirmation Agreements establishing, *inter alia*, the price, volume, and duration of the contract -- contract terms that are particular to each contract, not standard terms under an umbrella agreement. *Id*. *See* Exhibit C to the Western Systems Power Pool Agreement "Sample Form for Confirmation," Cal. ER 170; Section 32 of the Western Systems Power Pool Agreement "Transaction Specific Terms and Oral Agreements," Cal. ER 154-55.

Petitioners contend that section 38 of the Western Systems Power Pool Agreement contains a "Memphis" clause, because section 38.1 authorizes unilateral amendments to that Agreement, and section 38.2 provides that such

amendments apply only to new transactions. Cal. Br. 28-31; Seattle Br. 28-30. As petitioners acknowledge, section 38.1 only authorizes amendments to the Western Systems Power Pool Agreement itself. Seattle Br. 28 ("under Section 38.1, the parties agreed that the [Western Systems Power Pool] Agreement can be amended"); Cal. Br. 29 ("Section 38.1 provides that parties may seek to amend the Agreement"). *See* Section 38.1, Cal. ER 163 ("This Agreement may be amended upon the submission to FERC and acceptance by FERC of that amendment.").

Section 4.1 of the Western Systems Power Pool Agreement defines the term "Agreement" to include only the umbrella Western Systems Power Pool Agreement itself; it expressly excludes the Confirmation Agreements that specify the contract rate. *PacifiCorp*, 105 FERC ¶ 61,184 P 39 (cited in Remand Rehearing Order P 16 n.31, Cal. ER 8). *See* Section 4.1, Cal. ER 110 (defining "Agreement: This Western Systems Power Pool Agreement . . . ; provided, however, that Confirmation Agreements are not included within this definition."). Accordingly, section 38.1 does not authorize amendments to Confirmation Agreements.

The Commission reasonably rejected petitioners' argument that 38.1 applies here, where petitioners are not seeking to amend the Western Systems Power Pool Agreement itself, but rather are unilaterally seeking to modify contract rates, which

are set out in the individualized Confirmation Agreements for each transaction. Remand Rehearing Order P 16, Cal. ER 8; *PacifiCorp*, 105 FERC ¶ 61,184 P 45. The Commission found that section 6.1 of the Western Systems Power Pool Agreement applies to buyers or sellers seeking changes to the rates specified in the Confirmation Agreements. Remand Rehearing Order P 16, Cal. ER 8; *PacifiCorp*, 105 FERC ¶ 61,184 P 45. Section 6.1 (Cal. ER 117-18) explicitly refers to possible changes in "rates . . . affecting [Western Systems Power Pool] transactions." Remand Rehearing Order P 16, Cal. ER 8; *PacifiCorp*, 105 FERC ¶ 61,184 P 45. Section 6.1 provides that:

> Nothing contained herein shall be construed as affecting in any way the rights of the Parties to jointly make application to FERC for a change in the rates and charges, classification, service, terms, or conditions affecting [Western Systems Power Pool] transactions under Section 205 of the Federal Power Act and pursuant to FERC rules and regulations promulgated thereunder. . . .

The Commission found that the permissive reference to "joint" filings evidenced that the parties "intended to exclude all unilateral filings" seeking to modify rates, and thus the *Mobile-Sierra* standard did apply to petitioners' contractual rate obligations. Remand Rehearing Order P 16, Cal. ER 8 (quoting *PacifiCorp*, 105 FERC ¶ 61,184 P 41). This Court upheld FERC's interpretation of section 6.1 as reasonable in *Pub. Util. Dist.*, 471 F.3d at 1079 ("Preserving *joint*

modification does not negate the default application of the *Mobile-Sierra* presumption when that presumption is otherwise appropriate, as the *Mobile-Sierra* presumption applies to unilateral, not joint, rate changes."). This issue was not raised before the Supreme Court. *Morgan Stanley*, 554 U.S. at 543 n.2. The Commission further reasonably rejected the contention that sections 6.1 and 38.1 refer to the same subject matter, i.e, contract rates, because if section 38.1 means that "parties can unilaterally seek changes to the rates specified in contracts negotiated under the [Western Systems Power Pool] Agreement, such an interpretation would render the joint filing clause in section 6.1 meaningless." Remand Rehearing Order P 16, Cal. ER 8.

Section 38.2 of the Western Systems Power Pool Agreement provides that amendments apply only to new transactions. *See* Cal. ER 163; Cal. Br. 29; Seattle Br. 28. Because there is no joint filing to amend rates as required by section 6.1, the effective date clause of section 38.2 simply "does not come into play." Remand Rehearing Order P 16, Cal. ER 8.

Westar Energy, Inc. v. FERC, 568 F.3d 985, 987 (D.C. Cir. 2009), Cal. Br. 21-22, is inapposite as it addressed a tariff, rather than contract rates. Remand Rehearing Order P 15, Cal. ER 7-8. In *Westar* the Commission rejected a proposed market-based rate tariff, and ordered refunds for market-based rate sales

made under the rejected tariff in areas where the seller possessed market power. *See Westar*, 568 F.3d at 987-88. As California Parties acknowledge, the Commission is not required to apply *Mobile-Sierra* to a uniform, generally applicable tariff. *See* Cal. Br. 26-27 (citing *W. Sys. Power Pool, Inc*., 129 FERC ¶ 61,055 (2009) (amending Schedule Q of the Western Systems Power Pool Agreement)). *See also NRG Power Mktg.*, 558 U.S. at 171 (the Federal Power Act differentiates between rates set "unilaterally by tariff" and rates set "by contract"); *Verizon*, 535 U.S. at 478-79 (generally-applicable tariff schedules are reviewed under the ordinary just and reasonable standard, whereas negotiated contracts are subject to the *Mobile-Sierra* public interest standard); Cal. Br. 26 (the *Mobile-Sierra* presumption "applies to contract rates, not to tariffs").

Thus, "[*Westar*] merely stands for the proposition that from the time a seller files a tariff at the Commission and the Commission formally accepts the same, the Commission may impose refund liability retroactively to the refund effective date without impermissibly upsetting settled expectations." *Brown*, 139 FERC ¶ 61,210 P 48.

B. The Commission Reasonably Rejected A Market-Wide Remedy Given The Applicability Of The *Mobile-Sierra* Presumption And The Nature Of The Pacific Northwest Market.

Seattle contends that the Commission erred in rejecting a market-wide remedy because the Commission erred in finding the *Mobile-Sierra* presumption applicable to the contracts at issue. Seattle Br. 33-34. As demonstrated in Section A, the Commission reasonably determined that *Mobile-Sierra* applies. Under *Mobile-Sierra*, the Commission must presume that the Pacific Northwest bilateral contracts are just and reasonable unless the buyers can avoid or overcome the presumption at hearing. Remand Rehearing Order P 30, Cal. ER 14-15. "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." *Id*. Therefore, the Commission rejected a market-wide remedy.

Further, the Commission also reasonably concluded that a market-wide remedy would be inappropriate "given the nature of the Pacific Northwest spot market." Remand Order P 24, Cal. ER 37. As this Court recognized in *Port of Seattle*, "[u]nlike the California spot market, which operated through a centralized power exchange using a central clearing price, the Pacific Northwest spot market operated through bilateral contracts negotiated independently between buyers and sellers without a central clearing price." 499 F.3d at 1023. *See also Cal. Pub.*

Utils. Comm'n, 462 F.3d at 1063 (noting the "fundamental differences" between the California markets and the bilateral contracts negotiated by the California Energy Resources Scheduling division); *Harris*, 2015 WL 1923139 at *5 (distinguishing between "a traditional bilateral transaction" and "clearinghouse sales").

In a centralized market, like California, unlawful market activity by any spot market seller had the potential to influence the price paid by all buyers purchasing electricity through the central exchange. Remand Order P 24 n.55, Cal. ER 37. Accordingly, in California, spot market sales could be mitigated to the level of a just and reasonable market-clearing price. *Id*. PP 18, 24, Cal. ER 33, 37.

In contrast, in the Pacific Northwest, where the spot market operated through bilateral contracts negotiated independently between buyers and sellers, each seller receives only what a specific buyer agrees to pay for a given transaction, and each buyer has the opportunity to negotiate a lower price. *Id.* P 24, Cal. ER 37. If the Commission imposed a market-wide remedy, sellers that followed the law would be penalized for other sellers' bad conduct, which is an unfair and unreasonable result. *Id*. P 24 n.56, Cal. ER 37 (citing *Brown*, 135 FERC ¶ 61,178 P 77).

Seattle also asserts that this Court's remand in *Port of Seattle* compelled consideration of a market-wide remedy. Seattle Br. 33. The Commission found

that *Port of Seattle* made no such requirement; the Court did not address the merits of the issues remanded to the Commission or the appropriate remedies, if any. Remand Order P 3, Cal. ER 27 (citing *Port of Seattle*, 499 F.3d at 1035). Rather, the Court held: "[w]e remand to permit FERC to examine this new evidence of market manipulation in detail and account for it in any future orders regarding the award or denial of refunds in the Pacific Northwest proceeding." *Port of Seattle*, 499 F.3d at 1035-36.

C. Petitioners' Evidentiary Arguments Are Without Merit.

Under *Morgan Stanley*, the bilateral contracts at issue are presumed to be just and reasonable. Remand Rehearing Order P 14, Cal. ER 7. *Morgan Stanley* identified two circumstances that can rebut or avoid the presumption: (1) the presumption can be rebutted if the contract seriously harms the public interest, or (2) the presumption can be avoided if unfair dealing at the contract formation stage directly influenced the contract rate. *Id*. (citing *Morgan Stanley*, 554 U.S. at 545-48).

With regard to demonstrating harm to the public interest, the Commission clarified that its Remand Orders were "not intended to alter the general state of law, as summarized in *Morgan Stanley*." *Id*. P 27, Cal. ER 13 (quoting *Puget Sound*, 141 FERC ¶ 61,248 P 13, Cal. ER 22). Therefore, "[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." *Id*. (quoting *Puget Sound*, 141 FERC ¶ 61,248 P 15, Cal. ER 23). However, under *Mobile-Sierra*, setting aside a contract rate requires a finding of "unequivocal public necessity" or "extraordinary circumstances," and not "the mere exceeding of marginal cost." *Id*. (quoting *Morgan Stanley*, 527 U.S. at 550-52).

With regard to avoiding the presumption, *Morgan Stanley* requires demonstration of a "causal connection between unlawful activity and the contract rate, such that the Commission should not presume that the contract is just and reasonable." *Puget Sound*, 141 FERC ¶ 61,248 P 12 (citing *Morgan Stanley*, 554 U.S. at 554-55), Cal. ER 22; Remand Rehearing Order P 14, Cal. ER 7. In the Remand Orders, the Commission made certain evidentiary rulings regarding the evidence admissible to show such a causal connection. Remand Order PP 16-24, Cal. ER 32-37; Remand Rehearing Order PP 23-26, Cal. ER 11-13. Petitioners argue that the Commission erred in excluding evidence of reporting violations, Cal. Br. 36-39, Seattle Br. 30-32, third-party conduct, Cal. Br. 43-50, and contractual good faith violations. *Id*. 39-43. These arguments are without merit.

1. The Commission Reasonably Excluded Evidence Of Reporting Violations.

Petitioners contend that the Commission should consider evidence that sellers violated reporting obligations in this proceeding because it is relevant to whether sellers engaged in unlawful market manipulation. *See* Cal. Br. 35-36; Seattle Br. 31-32. On reply, petitioners doubtless will rely on this Court's April 29 decision in *Harris*, in which the Court remanded the *Lockyer* complaint proceeding addressing reporting violations to the Commission. *See Harris*, ___ F.3d ___, 2015 WL 1923139. *Harris* found that the Commission improperly limited its consideration of a remedy for reporting violations by considering only the accumulation of market power without considering California Parties' evidence of market manipulation. *See id*. at *7 ("The California Parties' manipulation claims are integral to their allegation that reporting deficiencies fostered the subtle accumulation of market power and resulted in an excessive rate."); *8 ("To remedy reporting violations, FERC must review the transaction reports to determine whether a just and reasonable price was charged by each seller, with specific attention to whether reporting deficiencies masked manipulation or accumulation of market power.").

Harris is not instructive on the relevance of reporting violations here, in the *Mobile-Sierra* context, for several reasons. Here, in contrast to *Harris*, in

compliance with this Court's remand in *Port of Seattle*, the Commission ordered an evidentiary hearing and reopened the record to permit parties to present evidence of unlawful market activity. Remand Order P 16, Cal. ER 32. Parties were permitted to present evidence of tariff violations, as well as "gaming and anomalous behavior." *Id*. PP 18-19, Cal. ER 33-34. *Compare Harris*, ___ F.3d ___, 2015 WL 1923139 at *2 (noting that, in the Commission's *Lockyer* remand proceeding, "[o]ther claims of tariff violations, such as gaming and anomalous bidding behavior, were off the table."); *id*. at *6 (same).

Also, *Harris* did not address the significance of reporting violations in the *Mobile-Sierra* context. The rates at issue there were not subject to the *Mobile-Sierra* presumption of reasonableness, *see id*. at *5 (recognizing the distinction between rates arising from a traditional bilateral transaction between a willing buyer and seller, and rates arising from clearinghouse sales), and the Court declined to address the question of relief for reporting deficiencies under contracts subject to the *Mobile-Sierra* standard. *Id*. at *7 n.4.

Accordingly, here, the question is whether -- having permitted parties to adduce evidence of tariff violations, market manipulation and market power at hearing -- the Commission was required to permit additional evidence of reporting violations. The Commission reasonably concluded that evidence of reporting

violations, without more, would not demonstrate the causal connection between an unlawful act and an unjust and unreasonable contract rate necessary to avoid the *Mobile-Sierra* presumption. Remand Rehearing Order PP 18, 24, Cal. ER 9, 12. As *Morgan Stanley* held, "if it is clear that one party to a contract engaged in such extensive unlawful market manipulation as to alter the playing field for contract negotiations, the Commission should not presume that the contract is just and reasonable." 554 U.S. at 554. However, "[t]here is no reason why FERC should be able to abrogate a contract on these grounds without finding a causal connection between unlawful activity and the contract rate." *Id*. at 554-55. As California Parties concede, this showing "is limited to an examination of 'individual contracts and the conduct of the seller as it relates to the formation of each contract.'" Cal. Br. 45 (quoting Remand Rehearing Order P 26, Cal. ER 13).

Accordingly, petitioners would have to demonstrate market manipulation causally affecting a particular contract rate to avoid the *Mobile-Sierra* presumption. Remand Rehearing Order PP 18, 24, Cal. ER 9, 12. If petitioners can demonstrate such market manipulation, "evidence of a reporting violation would be superfluous." *Id*. P 24, Cal. ER 12.

Excluding such evidence does not foreclose a remedy for reporting violations themselves; the *Lockyer* proceeding remanded in *Harris* specifically

addresses California Parties' claims that a remedy is warranted as a result of reporting violations.[6] *See Harris*, ___ F.3d ___, 2015 WL 1923139 at *1.

Barring such evidence also does not preclude petitioners from proving their case in this proceeding. *See* Seattle Br. 32. The question of whether the contracts were lawfully transacted is a question being addressed at hearing; buyers are permitted at hearing to demonstrate that sellers' market manipulation or other unlawful acts are causally connected to contract negotiations and the resulting contract rate. Remand Rehearing Order P 18, Cal. ER 9.

2. The Commission Reasonably Excluded Evidence Of Unfair Dealing, Fraud Or Duress By Non-Parties.

California Parties assert that the Commission must consider evidence of unfair dealing, fraud or duress by entities other than the contract seller in determining whether there was unfair dealing at the contract formation stage. Cal. Br. 43-50. While California Parties concede that *Morgan Stanley* requires a showing that the seller engaged in manipulation affecting contract negotiations, California Parties maintain that *Morgan Stanley* permits other showings of unfair dealing such as fraud or duress to be based on the conduct of non-parties to the

[6] Petitioner Seattle was originally a party to the *Lockyer* complaint proceeding as a respondent. Seattle successfully moved to dismiss itself as a respondent, *see Cal. ex rel. Lockyer v. British Columbia Power Exch. Corp.*, 99 FERC ¶ 61,247 at 62,061 (2002), but did not participate in the proceeding as a refund claimant.

contract. Cal. Br. 45. California Parties point to the California refund proceeding, in which the Commission mitigated rates to a just and reasonable level without regard to individual seller conduct. Cal. Br. 48.

Of course, the presence of bilateral contracts subject to the *Mobile-Sierra* presumption of reasonableness distinguishes this situation from that in California. "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." Remand Rehearing Order P 26, Cal. ER 13. In other words, the relevant conduct is that of the seller in negotiating the contract.

As *Morgan Stanley* recognized, the issue is whether there is "'evidence of unfairness, bad faith or duress in the original negotiations.'" 554 U.S. at 547 (quoting *Nev. Power Co. v. Enron Power Mktg., Inc.*, 103 FERC ¶ 61,353 at 62,399-400 (2003)). *Morgan Stanley* further expressly linked market manipulation -- which California Parties concede must be seller-specific (Cal. Br. 45) -- to fraud and duress. "Like fraud and duress, unlawful market activity that directly affects contract negotiations eliminates the premise on which the *Mobile-Sierra* presumption rests: that the contract rates are the product of fair, arms-length

negotiations." *Id*. at 554. *See also, e.g.*, *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 14 (D.C. Cir. 2002) ("the purpose of the *Mobile-Sierra* doctrine is to preserve the benefit of the parties' bargain as reflected in the contract, assuming that there was no reason to question what transpired at the contract formation stage") (citing *Town of Norwood v. FERC*, 587 F.2d 1306, 1312 (D.C. Cir. 1978)); *Potomac Elec. Power Co. v. FERC*, 210 F.3d 403, 410 (D.C. Cir. 2000) (absent evidence of unfairness or bad faith in the original negotiations, FERC did not abuse its discretion in declining to modify *Mobile-Sierra* contract).

Accordingly, the relevant issue is whether the seller exercised bad faith, fraud or duress in the original contract negotiations. *See* Remand Rehearing Order P 30, Cal. ER 15 ("the Commission must evaluate each seller's conduct in relation to specific contract negotiations"). Under those circumstances, the Commission reasonably excluded evidence of the unlawful acts of third parties in determining whether the *Mobile-Sierra* presumption is avoided by unfair dealing at the contract formation stage. Remand Rehearing Order P 26, Cal. ER 13.

3. The Commission Reasonably Declined To Adjudicate Alleged State Law Violations But Permitted Consideration Of Any Evidence Permissible Under *Morgan Stanley* To Rebut Or Avoid The *Mobile-Sierra* Presumption.

California Parties argue that the Commission erred in excluding evidence that sellers violated their state law obligations of good faith and fair dealing in

determining whether there was unfair dealing at the contract formation stage. Cal. Br. 42-43.

The Commission held that evidence of violations of state good faith obligations should be excluded, because "permitting such evidence would require us to interpret and apply state contract law." Remand Rehearing Order P 25, Cal. ER 12. The Commission cited to two prior Commission decisions, *San Diego Gas & Elec. Co. v. Sellers of Energy*, 135 FERC ¶ 61,183 P 30 (2011), and *Prohibition of Energy Market Manipulation*, 114 FERC ¶ 61,047 P 37 (2006), in which the Commission discussed its expectation that parties would resolve most state law contract disputes in court without Commission involvement. Remand Rehearing Order P 25 n.49, Cal. ER 12.

The Commission further stated, however, that nothing in its orders setting this matter for hearing was "intended to alter the general state of law, as summarized in *Morgan Stanley*," which would include the ability of parties to demonstrate unfair dealing at the contract formation stage. Remand Rehearing Order PP 14, 27, Cal. ER 7, 13; *Puget Sound Energy, Inc.*, 141 FERC ¶ 61,248 P 13 (2012), Cal. ER 22 (order on California Parties' interlocutory appeal). *See Morgan Stanley*, 554 U.S. at 547 (recognizing that the Commission "has ample authority to set aside a contract where there is unfair dealing at the contract

formation stage -- for instance, if it finds traditional grounds for the abrogation of the contract such as fraud or duress.").

Accordingly, at hearing the Administrative Law Judge permitted California Parties to introduce evidence addressing sellers' bad faith in contract negotiations. The Administrative Law Judge found that, as the sales to the California Energy Resources Scheduling division were made under the Western Systems Power Pool Agreement, which is governed by Utah law, Utah would provide the governing law in determining whether there was duress, fraud or bad faith in the formation of the relevant contracts. *Puget Sound Energy*, 146 FERC ¶ 63,028 P 1419. The Administrative Law Judge further determined that, as to respondent Coral Power, "the California Parties have successfully established a *prima facie* case that certain transactions were tainted by 'bad faith.'" *Id*. P 1422. *See id*. at P 3 (finding that the California Parties have established a *prima facie* case that "as many as 119 of the subject contracts with Coral [Power] may have been tainted by 'bad faith'"). Thus, California Parties were not precluded at hearing from introducing evidence regarding violations of state good faith law in overcoming the *Mobile-Sierra* presumption.

As noted, the Administrative Law Judge's Initial Decision on Phase I of the hearing remains pending before the Commission on exceptions. This further

illustrates, see Argument Section II *supra*, that consideration of the *Mobile-Sierra* issue at this time is premature. Proceedings at hearing, as reviewed by the Commission, may obviate or resolve many or all of the arguments raised here.

IV. THE COMMISSION REASONABLY CONDITIONED APPROVAL OF THE POWEREX SETTLEMENT ON REMOVAL OF PROVISIONS LIMITING THIRD-PARTY CLAIMS.

In Case No. 14-72384, petitioner Idaho Power challenges the Commission's approval of the proposed Powerex Settlement, conditioned upon removal of certain provisions that would require the Commission to reverse its prior determination on the proposed Tacoma Settlement (at issue in No. 13-72220), and approve settlement provisions that would eliminate non-settling parties' potential "ripple claims."[7] Consistent with its earlier determination with respect to the Tacoma Settlement, the Commission reasonably found that the Powerex Settlement could not be used to extinguish the rights of non-settling parties. Settlement Order PP 5-9, Idaho SER 450-52; Settlement Rehearing Order PP 12-17, Idaho SER 444-46.

[7] "Ripple claims" are "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." Settlement Order P 5, n.4, Idaho SER 450; Settlement Rehearing Order P 3 n.3, Idaho SER 441.

A. FERC Fully Supported Its Decision To Continue Preserving Ripple Claims.

When reviewing an uncontested settlement, the Commission is obligated to exercise "independent judgment" and determine whether the settlement is "fair and reasonable and in the public interest." Settlement Rehearing Order P 12, nn.22 & 23, Idaho SER 444-45 (citations omitted). *See* 18 C.F.R. § 385.602(g)(3) ("An uncontested offer of settlement may be approved by the Commission upon a finding that the settlement appears to be fair and reasonable and in the public interest"). *See also, e.g.*, *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 314 (1974) (settlement proposal that enjoys unanimous support may be adopted only "if approved in the general interest of the public"); *Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695, 701 (D.C. Cir. 2007) ("[T]he Commission has a duty to disapprove uncontested settlements that are unfair, unreasonable, or against the public interest."); *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1998) ("Even if . . . customers had unanimously supported the proposed settlement, the Commission would still have the responsibility to make an independent judgment" regarding the reasonableness of the settlement).

Here, the Commission reasonably determined that eliminating potential ripple claims belonging to non-settling parties was not in the public interest. The Commission has consistently held throughout the Pacific Northwest refund

proceeding that ripple claims should be preserved and that non-settling parties' potential ripple claims may not be unilaterally extinguished by settling parties. *See, e.g.*, Settlement Order P 8 n.8, Idaho SER 451 (citing *Puget Sound Energy, Inc.*, 139 FERC ¶ 61,209 at PP 6-7). As the Commission explained in the Settlement Rehearing Order, "foreclosing ripple claims would be contrary to the history of the Pacific Northwest refund proceeding, in which the rights of parties to assert ripple claims in the future should circumstances arise had been preserved." Settlement Rehearing Order P 15, Idaho SER 446. And "[e]ven prior to the remand of the Pacific Northwest refund proceeding, the Commission held that all parties reserved their rights to pursue ripple claims in the event of further proceedings to determine refunds." *Id.* *See also* Settlement Order P 9 n.10, Idaho SER 451 (citing orders rejecting provisions in the Tacoma Settlement that similarly purported to extinguish ripple claims, *Puget Sound Energy, Inc.*, 139 FERC ¶ 61,209 P 7, and *Puget Sound Energy, Inc.*, 141 FERC ¶ 61,148 P 10).

Thus, contrary to Idaho Power's arguments, the Commission does not rest its decision solely on *San Diego Gas & Elec. Co. v. Sellers of Energy*, 113 FERC ¶ 61,171 (2005). *See* Idaho Power Br. 13-17. In any event, the Commission in *San Diego Gas* approved a settlement as uncontested, despite opposition by various parties, because the settlement "d[id] not resolve anything" as to non-settling

parties, and non-settling parties "retain[ed] the ability to pursue . . . claims against Enron in the underlying proceedings." *San Diego Gas*, 113 FERC ¶ 61,171 P 40. The entire decision thus evidences the Commission's policy of protecting the rights of non-settling parties. *See*, *e.g.*, *id.* at PP 5, 24, 25, 32, 44, 50. Accordingly, *San Diego Gas* supports the Commission's conclusion here that it could not, consistent with its independent public interest responsibility, permit parties to a settlement agreement to unilaterally extinguish the rights of non-settling parties to bring claims in the first instance.

Idaho Power emphasizes that no non-settling parties objected to the Powerex Settlement, and points out that FERC has previously imposed settlement terms on non-signatories. Idaho Power Br. 23-26. To be sure, the Commission may approve a proposed settlement over the objections -- or silence -- of parties, but only if, in its independent judgment, such a settlement satisfies the "fair and reasonable and in the public interest" standard. *See*, *e.g.*, *Mobil Oil*, 417 U.S. at 314; *Petal Gas Storage*, 496 F.3d at 701; *NorAm Gas*, 148 F.3d at 1165.[8]

[8] Idaho Power's citations to various cases in which the Commission has approved challenged and unchallenged settlements are inapposite. Idaho Power Br. 23-24 & n.40. None of the cases cited by Idaho Power involves a settlement in which the settling parties attempted to extinguish the ability of other parties to bring claims in the first instance.

The mere fact that Idaho Power and Powerex have agreed, and no one has objected, to the proposed settlement does not alter the Commission's obligation to exercise independent judgment and determine if the settlement is appropriate. Indeed, as the Commission has stated in prior proceedings, it exercises this authority "particularly when the settlement . . . may have an impact on future parties or others not present during the negotiations." *Saltville Gas Storage Co., L.L.C.*, 128 FERC ¶ 61,257 P 9 (2009). *See also Tuscarora Gas Transmission Co.*, 127 FERC ¶ 61,217 P 28 (2009) (uncontested settlement approval conditioned on revision of section that may adversely affect similarly-situated shippers across the grid). In its orders addressing the Tacoma Settlement and the Powerex Settlement, the Commission reasonably determined that the settling parties could not, consistent with this standard, extinguish the potential ripple claims of non-settling parties.

Contrary to Idaho Power's suggestion, the Commission's decision does not "swerve" away from 18 C.F.R. § 385.602(f)(3), which provides that a party's failure to file comments regarding a proposed settlement in a proceeding waives "all objections to the offer of settlement." Idaho Power Br. 26. As explained above, the Commission has repeatedly and consistently stated its intention to preserve ripple claims. Since no refunds have yet been ordered, there is no basis at

this time for any party to assert a ripple claim. It is certainly possible that parties who may have a ripple claim in the future are relying on the Commission's express reservation of ripple claims instead of filing objections.

Finally, it is certainly true that the Commission encourages settlements generally, and in Western energy crisis proceedings in particular. Idaho Power Br. 22, 27. Nevertheless, the Commission "weighed the interest in finality with the possible foreclosure of a non-party's claim, and determined it could not approve the [Powerex Settlement] with language that would foreclose even remotely possible third party claims." Settlement Rehearing Order P 16, Idaho SER 446. The Commission's decision, a product of its reasoned, independent judgment as to whether the proposed Powerex Settlement is "fair and reasonable and in the public interest," should be upheld.

B. The Absence Of A Market-Wide Remedy Does Not Foreclose Ripple Claims.

Idaho Power asserts that there can be no ripple claims because, in the Remand Orders, FERC declined to order a market-wide remedy for refunds in the Pacific Northwest spot market. Idaho Power Br. 18-20. *See* Argument Section III.B, *supra* (discussing Seattle's challenge to that determination in Case No. 14-72384).

Ripple claims do not depend on the existence of a market-wide remedy. "Ripple claims" are defined in this proceeding 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." Settlement Order P 5, n.4, Idaho SER 450; Settlement Rehearing Order P 3 n.3, Idaho SER 441. Thus, ripple claims may arise if the Commission orders refunds in these proceedings. At this time, no refunds have been ordered, so no ripple claims have been filed.[9] It is entirely possible, however, that refunds will be ordered at a later stage in the proceedings.

Idaho Power argues that, in the absence of a market-wide remedy, parties found individually liable for refunds would be barred from pursuing ripple claims because of their "unclean hands." Idaho Power Br. 19. However, the credibility of a particular party's claim and the applicability of any defense go to the *merit* of a potential ripple claim. The existence of such issues does not foreclose parties from bringing ripple claims in the first instance. As the Commission explained, Idaho Power "retains its right to argue that there is no basis for a ripple claim should

[9] As previously noted, in Phase I of the Pacific Northwest refund proceeding evidentiary hearing, the Administrative Law Judge concluded that the California Parties had established a *prima facie* case that certain contracts with Coral Power may have been tainted by unlawful conduct. *Puget Sound*, 146 FERC ¶ 63,028 P 3. The Administrative Law Judge's Initial Decision remains pending before the Commission on exceptions.

some party attempt to make such a claim; it simply cannot preclude non-settling parties from even making such a claim." Settlement Rehearing Order P 17, Idaho SER 446.

The Commission has acknowledged that, at this stage in the proceedings (*i.e.*, prior to the ordering of refunds), the possibility of ripple claims is "speculative." Settlement Rehearing Order P 16, Idaho SER 446. Nevertheless, the Commission reasonably concluded that ripple claims should be preserved upon "weigh[ing] the interest in finality with the possible foreclosure of a non-party's claim, and determin[ing] it could not approve the uncontested Settlement with language that would foreclose even remotely possible third party claims." *Id.*

V. STATEMENT OF RELATED CASES

As stated in petitioners' briefs, there are a large number of cases pending before the Court arising from the Western energy crisis. The Phase II appeals are consolidated under Case No. 01-71934, *et al*.

CONCLUSION

For the reasons stated, the Commission respectfully requests that the petitions for review, to the extent that they are not dismissed for lack of finality, be denied and the Commission's orders affirmed.

Respectfully submitted,

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May 1, 2015

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,884 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 with 14-point, Times New Roman font.

/s/ Lona T. Perry
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May 1, 2015

ADDENDUM

STATUTES
AND
REGULATIONS

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for such purpose in such order, or otherwise in contravention of such order.

(d) Authorization of capitalization not to exceed amount paid

The Commission shall not authorize the capitalization of the right to be a corporation or of any franchise, permit, or contract for consolidation, merger, or lease in excess of the amount (exclusive of any tax or annual charge) actually paid as the consideration for such right, franchise, permit, or contract.

(e) Notes or drafts maturing less than one year after issuance

Subsection (a) of this section shall not apply to the issue or renewal of, or assumption of liability on, a note or draft maturing not more than one year after the date of such issue, renewal, or assumption of liability, and aggregating (together with all other then outstanding notes and drafts of a maturity of one year or less on which such public utility is primarily or secondarily liable) not more than 5 per centum of the par value of the other securities of the public utility then outstanding. In the case of securities having no par value, the par value for the purpose of this subsection shall be the fair market value as of the date of issue. Within ten days after any such issue, renewal, or assumption of liability, the public utility shall file with the Commission a certificate of notification, in such form as may be prescribed by the Commission, setting forth such matters as the Commission shall by regulation require.

(f) Public utility securities regulated by State not affected

The provisions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission.

(g) Guarantee or obligation on part of United States

Nothing in this section shall be construed to imply any guarantee or obligation on the part of the United States in respect of any securities to which the provisions of this section relate.

(h) Filing duplicate reports with the Securities and Exchange Commission

Any public utility whose security issues are approved by the Commission under this section may file with the Securities and Exchange Commission duplicate copies of reports filed with the Federal Power Commission in lieu of the reports, information, and documents required under sections 77g, 78*l*, and 78m of title 15.

(June 10, 1920, ch. 285, pt. II, § 204, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 850.)

TRANSFER OF FUNCTIONS

Executive and administrative functions of Securities and Exchange Commission, with certain exceptions, transferred to Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 10 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out in the Appendix to Title 5, Government Organization and Employees.

§ 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and de-

livering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause" defined

(1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term ''automatic adjustment clause'' means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

(June 10, 1920, ch. 285, pt. II, § 205, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 851; amended Pub. L. 95–617, title II, §§ 207(a), 208, Nov. 9, 1978, 92 Stat. 3142.)

AMENDMENTS

1978—Subsec. (d). Pub. L. 95–617, § 207(a), substituted ''sixty'' for ''thirty'' in two places.

Subsec. (f). Pub. L. 95–617, § 208, added subsec. (f).

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

Section 207(b) of Pub. L. 95–617 directed chairman of Federal Energy Regulatory Commission, in consultation with Secretary, to conduct a study of legal requirements and administrative procedures involved in consideration and resolution of proposed wholesale electric rate increases under Federal Power Act, section 791a et seq. of this title, for purposes of providing for expeditious handling of hearings consistent with due process, preventing imposition of successive rate increases before they have been determined by Commission to be just and reasonable and otherwise lawful, and improving procedures designed to prohibit anticompetitive or unreasonable differences in wholesale and retail rates, or both, and that chairman report to Congress within nine months from Nov. 9, 1978, on results of study, on administrative actions taken as a result of this study, and on any recommendations for changes in existing law that will aid purposes of this section.

§ 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate,

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term ''automatic adjustment clause'' means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

(June 10, 1920, ch. 285, pt. II, § 205, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 851; amended Pub. L. 95–617, title II, §§ 207(a), 208, Nov. 9, 1978, 92 Stat. 3142.)

AMENDMENTS

1978—Subsec. (d). Pub. L. 95–617, § 207(a), substituted ''sixty'' for ''thirty'' in two places.

Subsec. (f). Pub. L. 95–617, § 208, added subsec. (f).

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

Section 207(b) of Pub. L. 95–617 directed chairman of Federal Energy Regulatory Commission, in consultation with Secretary, to conduct a study of legal requirements and administrative procedures involved in consideration and resolution of proposed wholesale electric rate increases under Federal Power Act, section 791a et seq. of this title, for purposes of providing for expeditious handling of hearings consistent with due process, preventing imposition of successive rate increases before they have been determined by Commission to be just and reasonable and otherwise lawful, and improving procedures designed to prohibit anticompetitive or unreasonable differences in wholesale and retail rates, or both, and that chairman report to Congress within nine months from Nov. 9, 1978, on results of study, on administrative actions taken as a result of this study, and on any recommendations for changes in existing law that will aid purposes of this section.

§ 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the publication date. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided*, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company" defined

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies

of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided*, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms ''electric utility companies'' and ''registered holding company'' shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended.[1]

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

(e) Short-term sales

(1) In this subsection:

(A) The term ''short-term sale'' means an agreement for the sale of electric energy at wholesale in interstate commerce that is for a period of 31 days or less (excluding monthly contracts subject to automatic renewal).

(B) The term ''applicable Commission rule'' means a Commission rule applicable to sales at wholesale by public utilities that the Commission determines after notice and comment should also be applicable to entities subject to this subsection.

(2) If an entity described in section 824(f) of this title voluntarily makes a short-term sale of electric energy through an organized market in which the rates for the sale are established by Commission-approved tariff (rather than by contract) and the sale violates the terms of the tariff or applicable Commission rules in effect at the time of the sale, the entity shall be subject to the refund authority of the Commission under this section with respect to the violation.

(3) This section shall not apply to—

(A) any entity that sells in total (including affiliates of the entity) less than 8,000,000 megawatt hours of electricity per year; or

(B) an electric cooperative.

(4)(A) The Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate.

(B) The Commission may order a refund under subparagraph (A) only for short-term sales made by the Bonneville Power Administration at rates that are higher than the highest just and reasonable rate charged by any other entity for a short-term sale of electric energy in the same geographic market for the same, or most nearly comparable, period as the sale by the Bonneville Power Administration.

(C) In the case of any Federal power marketing agency or the Tennessee Valley Authority, the Commission shall not assert or exercise any regulatory authority or power under paragraph (2) other than the ordering of refunds to achieve a just and reasonable rate.

(June 10, 1920, ch. 285, pt. II, § 206, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 852; amended Pub. L. 100–473, § 2, Oct. 6, 1988, 102 Stat. 2299; Pub. L. 109–58, title XII, §§ 1285, 1286, 1295(b), Aug. 8, 2005, 119 Stat. 980, 981, 985.)

REFERENCES IN TEXT

The Public Utility Holding Company Act of 1935, referred to in subsec. (c), is title I of act Aug. 26, 1935, ch. 687, 49 Stat. 803, as amended, which was classified generally to chapter 2C (§ 79 et seq.) of Title 15, Commerce and Trade, prior to repeal by Pub. L. 109–58, title XII, § 1263, Aug. 8, 2005, 119 Stat. 974. For complete classification of this Act to the Code, see Tables.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58, § 1295(b)(1), substituted ''hearing held'' for ''hearing had'' in first sentence.

Subsec. (b). Pub. L. 109–58, § 1295(b)(2), struck out ''the public utility to make'' before ''refunds of any amounts paid'' in seventh sentence.

Pub. L. 109–58, § 1285, in second sentence, substituted ''the date of the filing of such complaint nor later than 5 months after the filing of such complaint'' for ''the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period'', in third sentence, substituted ''the date of the publication'' for ''the date 60 days after the publication'' and ''5 months after the publication date'' for ''5 months after the expiration of such 60-day period'', and in fifth sentence, substituted ''If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision'' for ''If no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision''.

Subsec. (e). Pub. L. 109–58, § 1286, added subsec. (e).

1988—Subsec. (a). Pub. L. 100–473, § 2(1), inserted provisions for a statement of reasons for listed changes, hearings, and specification of issues.

Subsecs. (b) to (d). Pub. L. 100–473, § 2(2), added subsecs. (b) and (c) and redesignated former subsec. (b) as (d).

EFFECTIVE DATE OF 1988 AMENDMENT

Section 4 of Pub. L. 100–473 provided that: ''The amendments made by this Act [amending this section] are not applicable to complaints filed or motions initiated before the date of enactment of this Act [Oct. 6, 1988] pursuant to section 206 of the Federal Power Act [this section]: *Provided, however*, That such complaints may be withdrawn and refiled without prejudice.''

[1] See References in Text note below.

Stat. 417 [31 U.S.C. 686, 686b])'' on authority of Pub. L. 97–258, §4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

§ 825*l*. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(June 10, 1920, ch. 285, pt. III, §313, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 860; amended June 25, 1948, ch. 646, §32(a), 62 Stat. 991; May 24, 1949, ch. 139, §127, 63 Stat. 107; Pub. L. 85–791, §16, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title XII, §1284(c), Aug. 8, 2005, 119 Stat. 980.)

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58 inserted ''electric utility,'' after ''Any person,'' and ''to which such person,'' and substituted ''brought by any entity unless such entity'' for ''brought by any person unless such person''.

1958—Subsec. (a). Pub. L. 85–791, §16(a), inserted sentence to provide that Commission may modify or set aside findings or orders until record has been filed in court of appeals.

Subsec. (b). Pub. L. 85–791, §16(b), in second sentence, substituted ''transmitted by the clerk of the court to'' for ''served upon'', substituted ''file with the court'' for ''certify and file with the court a transcript of'', and inserted ''as provided in section 2112 of title 28'', and in third sentence, substituted ''jurisdiction, which upon the filing of the record with it shall be exclusive'' for ''exclusive jurisdiction''.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted ''court of appeals'' for ''circuit court of appeals''.

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this

(2) If any excluded evidence is in the form of an exhibit or is a public document, a copy of such exhibit will constitute the offer of proof or the public document will be specified for identification.

Subpart F—Conferences, Settlements, and Stipulations

§ 385.601 Conferences (Rule 601).

(a) *Convening.* The Commission or other decisional authority, upon motion or otherwise, may convene a conference of the participants in a proceeding at any time for any purpose related to the conduct or disposition of the proceeding, including submission and consideration of offers of settlement or the use of alternative dispute resolution procedures.

(b) *General requirements.* (1) The participants in a proceeding must be given due notice of the time and place of a conference under paragraph (a) of this section and of the matters to be addressed at the conference. Participants attending the conference must be prepared to discuss the matters to be addressed at the conference, unless there is good cause for a failure to be prepared.

(2) Any person appearing at the conference in a representative capacity must be authorized to act on behalf of that person's principal with respect to matters to be addressed at the conference.

(3) If any party fails to attend the conference such failure will constitute a waiver of all objections to any order or ruling arising out of, or any agreement reached at, the conference.

(c) *Powers of decisional authority at conference.* (1) The decisional authority, before which the conference is held or to which the conference reports, may dispose, during a conference, of any procedural matter on which the decisional authority is authorized to rule and which may appropriately and usefully be disposed of at that time.

(2) If, in a proceeding set for hearing under subpart E, the presiding officer determines that the proceeding would be substantially expedited by distribution of proposed exhibits, including written prepared testimony and other documents, reasonably in advance of the hearing session, the presiding officer may, with due regard for the convenience of the participants, direct advance distribution of the exhibits by a prescribed date. The presiding officer may also direct the preparation and distribution of any briefs and other documents which the presiding officer determines will substantially expedite the proceeding.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 578, 60 FR 19505, Apr. 19, 1995]

§ 385.602 Submission of settlement offers (Rule 602).

(a) *Applicability.* This section applies to written offers of settlement filed in any proceeding pending before the Commission or set for hearing under subpart E. For purposes of this section, the term ''offer of settlement'' includes any written proposal to modify an offer of settlement.

(b) *Submission of offer.* (1) Any participant in a proceeding may submit an offer of settlement at any time.

(2) An offer of settlement must be filed with the Secretary. The Secretary will transmit the offer to:

(i) The presiding officer, if the offer is filed after a hearing has been ordered under subpart E of this part and before the presiding officer certifies the record to the Commission; or

(ii) The Commission.

(3) If an offer of settlement pertains to multiple proceedings that are in part pending before the Commission and in part set for hearing, any participant may by motion request the Commission to consolidate the multiple proceedings and to provide any other appropriate procedural relief for purposes of disposition of the settlement.

(c) *Contents of offer.* (1) An offer of settlement must include:

(i) The settlement offer;

(ii) A separate explanatory statement;

(iii) Copies of, or references to, any document, testimony, or exhibit, including record citations if there is a record, and any other matters that the offerer considers relevant to the offer of settlement; and

(2) If an offer of settlement pertains to a tariff or rate filing, the offer must include any proposed change in a form

suitable for inclusion in the filed rate schedules or tariffs, and a number of copies sufficient to satisfy the filing requirements applicable to tariff or rate filings of the type at issue in the proceeding.

(d) *Service.* (1) A participant offering settlement under this section must serve a copy of the offer of settlement:

(i) On every participant in accordance with Rule 2010;

(ii) On any person required by the Commission's rules to be served with the pleading or tariff or rate schedule filing, with respect to which the proceeding was initiated.

(2) The participant serving the offer of settlement must notify any person or participant served under paragraph (d)(1) of this section of the date on which comments on the settlement are due under paragraph (f) of this section.

(e) *Use of non-approved offers of settlement as evidence.* (1) An offer of settlement that is not approved by the Commission, and any comment on that offer, is not admissible in evidence against any participant who objects to its admission.

(2) Any discussion of the parties with respect to an offer of settlement that is not approved by the Commission is not subject to discovery or admissible in evidence.

(f) *Comments.* (1) A comment on an offer of settlement must be filed with the Secretary who will transmit the comment to the Commission, if the offer of settlement was transmitted to the Commission, or to the presiding officer in any other case.

(2) A comment on an offer of settlement may be filed not later than 20 days after the filing of the offer of settlement and reply comments may be filed not later than 30 days after the filing of the offer, unless otherwise provided by the Commission or the presiding officer.

(3) Any failure to file a comment constitutes a waiver of all objections to the offer of settlement.

(4) Any comment that contests an offer of settlement by alleging a dispute as to a genuine issue of material fact must include an affidavit detailing any genuine issue of material fact by specific reference to documents, testimony, or other items included in the offer of settlement, or items not included in the settlement, that are relevant to support the claim. Reply comments may include responding affidavits.

(g) *Uncontested offers of settlement.* (1) If comments on an offer are transmitted to the presiding officer and the presiding officer finds that the offer is not contested by any participant, the presiding officer will certify to the Commission the offer of settlement, a statement that the offer of settlement is uncontested, and any hearing record or pleadings which relate to the offer of settlement.

(2) If comments on an offer of settlement are transmitted to the Commission, the Commission will determine whether the offer is uncontested.

(3) An uncontested offer of settlement may be approved by the Commission upon a finding that the settlement appears to be fair and reasonable and in the public interest.

(h) *Contested offers of settlement.* (1)(i) If the Commission determines that any offer of settlement is contested in whole or in part, by any party, the Commission may decide the merits of the contested settlement issues, if the record contains substantial evidence upon which to base a reasoned decision or the Commission determines there is no genuine issue of material fact.

(ii) If the Commission finds that the record lacks substantial evidence or that the contesting parties or contested issues can not be severed from the offer of settlement, the Commission will:

(A) Establish procedures for the purpose of receiving additional evidence before a presiding officer upon which a decision on the contested issues may reasonably be based; or

(B) Take other action which the Commission determines to be appropriate.

(iii) If contesting parties or contested issues are severable, the contesting parties or uncontested portions may be severed. The uncontested portions will be decided in accordance with paragraph (g) of this section.

(2)(i) If any comment on an offer of settlement is transmitted to the presiding officer and the presiding officer determines that the offer is contested,

The People of the State of California, et al.,
v. FERC
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14-72384 (consolidated)

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 1, 2015.

/s/ Lona Perry
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CERTIFICATE FOR BRIEF IN PAPER FORMAT

(attach this certificate to the end of each paper copy brief)

9th Circuit Case Number(s): 13-71276, 13-71487, 13-72220, 14-72384

I, Lona T. Perry , certify that this brief is identical to the version submitted electronically on [date] May 1, 2015 .

Date May 4, 2015

Signature /s/ Lona T. Perry

(either manual signature or "s/" plus typed name is acceptable)