UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

PacifiCorp	Docket Nos. EL02-80-001
	EL02-80-002
v.	EL02-81-001
	EL02-81-002
Reliant Energy Services, Inc.,	EL02-82-001
Morgan Stanley Capital Group Inc.,	EL02-82-002
Williams Energy Marketing & Trading	EL02-83-001
Company, and	EL02-83-002
El Paso Merchant Energy, L.P.	
	(Consolidated)

ORDER ON REHEARING AND CLARIFICATION

(Issued November 10, 2003)

1. This case is one of a series in which the Commission considered whether to modify contracts entered into for the purchase of electricity during the Western energy crisis of 2000-2001. The proceeding addresses complaints filed by PacifiCorp seeking to modify twelve forward bilateral contracts entered into between July 1, 2002 and September 30, 2002. The complaints allege that dysfunctions in the California electricity spot market caused these forward contracts to be unjust and unreasonable. In this order, we deny the requests for rehearing and we reaffirm our conclusion that the record in this proceeding does not support modification of the contracts at issue for the reasons stated below, and we address the request for clarification. This order is in the public interest because it balances effective rate regulation with respect for the sanctity of contracts, as dictated by the U.S. Supreme Court under the Mobile-Sierra doctrine.

I. Background

2. On June 26, 2003, the Commission issued an Order on Initial Decision, Requests for Rehearing, and Motion to Reopen Record in this proceeding (June 26 Order).[1] That order affirmed the findings of the Administrative Law Judge (ALJ) that the applicable standard of review under the Mobile-Sierra doctrine is the public interest standard and that Complainant failed to meet its burden under this standard of review.

3. Based on "wholesale price volatility" and "rapidly changing markets and market price volatility," during the summer of 2000, the Commission issued a July 26, 2000 Order designed to "gather information on whether bulk power markets are working efficiently and, if not, the underlying causes."[2]

4. On August 2, 2000, San Diego Gas & Electric Company (San Diego) filed a complaint seeking an emergency order imposing a $250 per MWh cap on sales into the California Independent System Operator (ISO) and the California Power Exchange (PX). San Diego sought an amendment to each seller's market based rate schedule to restrict the seller's bids into the ISO and PX markets. In an order issued August 23, 2000, the Commission denied San Diego's request, but instituted hearing proceeding pursuant to Section 206 of the Federal Power Act (FPA) to investigate: (1) the justness and reasonableness of the rates and charges of public utilities that sell in the California ISO and PX markets and; (2) whether the tariffs and institutional structures were adversely affecting the efficient operation of competitive wholesale electric power markets.[3] The San Diego hearing was held in abeyance pending completion of the Staff investigation of bulk power markets, which was completed in October 2000.

5. An order was issued in the San Diego proceeding on November 1, 2000, that proposed measures to address dysfunctions in the California market and remedy the problems identified by the Staff investigation.[4] The Commission found that the electric market structure and market rules for wholesale sales of electric energy in California were seriously flawed and that these structures and rules, in conjunction with an

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[1] PacifiCorp v. Reliant Energy Services, Inc., 103 FERC ¶ 61,355 (2003) (June 26 Order).

[2] Investigation of Electric Bulk Power Markets, Order Directing Staff Investigation, 92 FERC ¶ 61,160 (July 26, 2000).

[3] San Diego Gas & Elec. Co., 92 FERC ¶ 61,172 (2000).

[4] San Diego Gas & Elec. Co., 93 FERC ¶ 61,121 (2000).

imbalance of supply and demand in California, have caused, and continued to have the potential to cause, unjust and unreasonable rates for short-term energy (Day-Ahead, Day-of, Ancillary Services and real-time energy sales) under certain conditions. The Commission identified a number of rules and regulatory policies as flawed, and proposed a number of corrective measures, including, elimination of the requirement that California Investor Owner Utilities sell all their generation into and buy all their requirements from the PX.[5]

6. On December 15, 2000, the Commission adopted, among other things, a benchmark price to provide guidance for assessing the prices of long term electric supply contracts, and market monitoring and price mitigation for the ISO and PX spot markets, including a $150 per MWh price breakpoint.[6] The benchmark for five year contracts for supply around-the-clock was set at $74/Mwh and would be used as a reference point to address any complaints regarding the pricing of long term contracts negotiated over the next year.[7] The Commission noted that it would monitor vigilantly the possible exercise of market power. The Commission rejected arguments that the prices in the forward markets would be affected by the Summer 2000 spiraling spot prices and should therefore be deemed unreasonable. The Commission, therefore, did not mandate forward contracts at specified prices and recognized that "suppliers also benefit from the stable revenue stream of forward markets and have every bit as much incentive to avoid the volatility of the spot market as do purchasers."

7. Additional orders were issued on April 26, 2001[8] and June 19, 2001[9] that adopted further market monitoring and mitigation measures for the California markets, and extended those measures to all Western states. The June 19 Order imposed measures in

[5] Id.

[6] San Diego Gas & Elec. Co. v. Sellers of Energy, 93 FERC ¶ 61,294 (2000) (December 15 Order).

[7] Id. at 61,994-95.

[8] San Diego Gas & Elec. Co. v. Sellers of Energy, 95 FERC ¶ 61,115 (2001) (April 26 Order).

[9] San Diego Gas & Elec. Co. v. Sellers of Energy, 95 FERC ¶ 61,418 (2001) (June 19 Order).

the spot market[10] referred to as the "West-wide price cap" or "West-wide mitigation," for the period June 20, 2001 through September 30, 2002.

8. At issue in this case are twelve short-term, 90-day contracts executed by Complainant PacifiCorp during April, May, and June 2001 that provided for delivery of electrical energy during July 1, 2002 to September 30, 2002. The contracts' delivery period fell during the effective date of the West-wide price cap for spot market sales. PacifiCorp's contract prices ranged from \$126 to \$226 per MWh. These amounts reflected generally prevailing market prices at the time the contracts were executed.[11] During this same time frame, Complainant entered into a large number of other contracts for both the purchase and sale of energy. Of all the contracts, Complainant seeks to modify only the relatively small number of contracts included in the instant complaint.

9. The contracts at issue are known in the industry as "six-by-sixteen" contracts. They provide for delivery of electricity during the sixteen "heavy load" or daytime hours, six days per week, Sundays and holidays excluded. This product is a standard purchase for load-serving entities with a need to secure additional supplies of energy to serve peak load.

10. PacifiCorp had been purchasing these contracts as part of its "dollar averaging" strategy. Out of concern that it would be "short" sufficient energy to serve its peak summer load, PacifiCorp purchased more energy than it actually needed to serve its loads; the electricity supplied during the "shoulder hours" was surplus. PacifiCorp typically sold the surplus on the futures market in an effort to recoup some of its expenditures.[12]

11. In total, 12 contracts were entered into with Respondents: four with El Paso, three with Morgan Stanley, two with Reliant, and three with Williams. The contracts are one page confirmations that incorporate by reference the terms of one of two master agreements that were developed by Edison Electric Institute (a trade association of investor-owned electric utilities) (EEI) and the Western Systems Power Pool (WSPP).[13]

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[10] Spot markets involve sales that are 24 hours or less and that are entered into on the day of, or day prior to, delivery. See June 19 Order at 62,545 n. 3 (2001).

[11] PacifiCorp v. Reliant Energy Services, Inc., 102 FERC ¶ 63,030 at P. 2 (2003) (Initial Decision).

[12] Initial Decision at 4.

[13] See Ex. PAC-13 at 13 and Initial Decision at 3.

All 12 contracts were entered into prior to June 20, 2001, the date on which the Commission's West-wide mitigation went into effect pursuant to the Commission's June 19 Order.

12. On May 2, 2002, PacifiCorp filed, pursuant to FPA Section 206, a complaint against each of the four sellers.[14] PacifiCorp alleged that the rates in its short-term, forward contracts were unjust and unreasonable and/or contrary to the public interest as a result of the market dysfunction identified by the Commission and the imposition of the West-wide price cap. The essence of PacifiCorp's complaint is that the price cap, imposed after the date of the contracts, inhibited PacifiCorp's ability to resell its excess supply at compensatory prices in the spot market. The complaint sought to reduce the contract prices to the maximum level authorized in the spot market by the June 19, 2001 Order, or, alternatively, to set the issue of the appropriate reformed rate for hearing.

13. On June 28, 2002, the Commission consolidated the complaints and set the matter for an evidentiary hearing.[15] The Commission set a July 1, 2002 refund effective date pursuant to FPA Section 206(b). The Commission limited the hearing to the question of "whether the dysfunctional California spot markets adversely affected the forward bilateral markets, and, if so, whether modification of any individual contract at issue is warranted."[16] Further, the Commission instructed that the hearing would not address "the Commission's policies on granting market-based rate authority or on regulation of sellers with such authority."[17]

14. After a full evidentiary hearing, the ALJ issued an initial decision on February 26, 2003, finding that the public interest standard of review applied to PacifiCorp's complaint, and that PacifiCorp has failed to demonstrate that its request to reform the contract rates met this standard.[18] Alternatively, the ALJ found that even if the just and reasonable standard of review applied in this case, PacifiCorp had failed to meet its

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[14] A complaint was also filed against a fifth seller, Enron Power Marketing, Inc., but PacifiCorp withdrew the complaint against it.

[15] PacifiCorp v. Reliant Energy Services, Inc., 99 FERC ¶ 61,381 (2002) (Hearing Order).

[16] Hearing Order at 28 (footnote omitted).

[17] Id.

[18] Initial Decision at 14-30.

burden under FPA section 206 to show that the contract rates were not just and reasonable.[19] A detailed summary of the ALJ's decision is set out in the June 26 Order.

15. On November 20, 2002, the Commission allowed the parties in Docket No. EL00-95, *et al.* to adduce evidence that was either indicative or counter-indicative of market manipulation that may have occurred during the California Energy Crisis of 2000-2001 ("100-Day Discovery Proceeding").

16. On March 26, 2003, in Docket No. PA02-2-000, the Commission released the "Staff Report" on Price Manipulation in Western Markets in Docket No. PA02-2-00, which found that trading strategies employed by certain companies "were undertaken in violation of antigaming provisions of the Commission-approved tariffs for the Cal ISO and Cal PX."[20] In addition, Staff concluded that the dysfunctional spot market for electricity had an impact on forward prices in long-term power supply arrangements.[21] Staff found this impact or influence was the greatest for contracts with 1-2 year terms.[22]

17. On June 26, 2003, the Commission denied PacifiCorp's complaint seeking to modify its twelve bilateral forward contracts.[23] Finding that Mobile-Sierra's public interest standard of review applied to the contracts entered into pursuant to both the WSPP Agreement and the EEI Master Agreement, the June 26 Order determined that PacifiCorp had failed to make such a showing.[24]

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[19] Id. at 31-36.

[20] Final Report on Price Manipulation in Western Energy Markets: Fact Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, Docket No. PA-02-2-000 at ES-2 (March 2003) (Staff Report). The Staff Report is available on the Commission's web site.

[21] See Staff Report at ES-2 ("The Staff's analysis finds that spot prices influenced forward prices negotiated during the January 1, 2000 through June 21, 2001 crisis period").

[22] See Staff Report at ES-2 ("The Staff's analysis finds that spot prices influenced forward prices negotiated during the January 1, 2000 through June 21, 2001 crisis period").

[23] See June 26 Order.

[24] Id.

18. In reaching its decision, the June 26 Order took into consideration both the Staff Report and the Evidence submitted in the 100-Day discovery proceeding. These proceedings suggested that the ISO and PX markets were subject to market manipulation and gaming. Both of these proceedings were being contested, however, and even if the findings were accepted as true, they were not deemed dispositive.

19. The June 26 Order recognized that a finding that unjust and unreasonable spot market prices caused forward markets to produce unjust and unreasonable rates would be significant to contract modification only where a just and reasonable standard of review applied. Because the public interest standard applied to these contracts, the Commission concluded that it was not enough to show that forward prices became unjust and unreasonable, it must be shown that the rates, terms, and conditions are contrary to the public interest.[25]

20. To determine whether a change was required by the public interest, the Commission looked to the three factors set forth in the Sierra case: 1) whether the company was in financial distress; 2) whether other customers will bear an excessive burden in upholding the contracts and; 3)whether the contracts were unduly discriminatory. The Commission concluded that PacifiCorp failed to meet these factors or provide any other showing sufficient to meet the public interest standard.

21. The Commission also considered the totality of the circumstances, looking to the choices available to PacifiCorp at the time of contracting. This included the observation that between December 2001 and April 2002, PacifiCorp sold one-and-one-half times the total amount it purchased under the contracts at issue, and that PacifiCorp sold to at least one Respondent at prices ranging from $150 to $330 per MWh, while the challenged contract prices ranged from $126 per MWh to $262 per MWh.

22. Finally, the Commission concluded that there was no evidence to support a finding that there was market manipulation, unfairness, bad faith, or duress specific to the challenged long-term contracts.

II. Requests for Rehearing

23. PacifiCorp and the Public Utility District No. 1 of Snohomish County, Washington ("Snohomish") sought rehearing. El Paso Merchant Energy, L.P. and Morgan Stanley Capital Group, Inc. ("Respondents") filed a limited request for clarification or, in the alternative, for rehearing.

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[25] June 26 Order ¶ 61.

III. Discussion

A. Standard of Review

The Public Interest Standard and Market-Based Rates

24. We reaffirm our holding that the public interest standard applies to any unilateral changes to the challenged contracts. As discussed in our June 26 Order, Mobile-Sierra holds that in cases "where parties have negotiated a . . . contract that sets firm prices . . . and that denies either party the right to change such prices [] unilaterally, the Commission may abrogate or modify the contract only if the public interest so requires."[26] The Commission has previously determined that the Mobile-Sierra doctrine applies to these market-based rate contacts, even though such contracts were not specifically reviewed by the Commission.[27] At the time the Commission grants a seller market-based rate authorization, it pre-determines that rates under future contracts entered into pursuant to market-based rate authority will be just and reasonable.

25. Both Snohomish and PacifiCorp (the parties) argue that the Commission erred by applying the public interest standard of review to the contracts at issue. The cornerstone of Snohomish's argument is its claim that "the just and reasonable standard must apply on the initial review of a contract regardless of any Mobile-Sierra language that might apply when the regulated utility later seeks a change in the rate."[28] According to Snohomish, "application of the Mobile-Sierra doctrine is inappropriate and contrary to law in the context of market-based rates. . . ."[29] Snohomish argues that the Commission's decision overlooks that while the FPA allows utilities to set rates by contract, the Commission is required to review those rates, terms, and conditions, and to modify rates that are found unlawful. Snohomish argues that the Commission is shirking its obligation to correct unjust, unreasonable, and unduly discriminatory contract terms. It argues that its complaint in this case is similar to the "initial review" of a rate made by the Commission in the cost-based rate context, and is therefore subject to the just and reasonable review. On this point, PacifiCorp adds that, in the market based rate context, where there is no initial review of rates for justness and reasonableness, contractual

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[26] Texaco Inc. v. FERC, 148 F.3d 1091, 1095 (D.C. Cir. 1998).

[27] June 26 Order at 32.

[28] Snohomish Rehearing Request at 12 (footnote omitted) (Snohomish Rehearing).

[29] Id. (footnote omitted).

silence requires that rates be reviewed under the just and reasonable standard. Further, Snohomish points out that the Commission has never applied the Mobile-Sierra doctrine in the context of market-based rates.

26. Further, the parties claim that the contracts were never reviewed and deemed just and reasonable, and that the seller's market-based rate certificates do not constitute review and approval of the contracts sufficient to satisfy the FPA.[30] In addition, PacifiCorp argues that the June 26 Order is inconsistent with the Commission's responsibility to protect buyers from unjust and unreasonable rates.[31] PacifiCorp explains that the Commission's review of seller's market power cannot ensure that all rates subsequently charged are just and reasonable. PacifiCorp adds that the Commission's reliance on State of California ex re Lockyer v. British Columbia Power Exchange Corp, et al.,[32] was erroneous, as that decision supports application of the just and reasonable standard.

27. Contrary to the parties' claims, the Commission is not required to specifically review each market-based rate contract to assure that it is just and reasonable. Instead, upon a showing that the seller lacks or has mitigated market power in the relevant market, the Commission pre-determines that sales at market-based rates will be just and reasonable.[33] In effect, the Commission makes a "blanket" just and reasonable determination which applies to subsequent market-based sales made by the seller. As we explained in our June 26 Order, if we were required to examine every long-term service agreement as if the seller was seeking new market-based rate authority, it would make the original grant of authority a pointless exercise of no value to anyone.[34]

28. The Commission has held that this grant of market-based rate authority is comparable to the "initial review" of rates in the cost-based rate context. Subsequently parties who have reserved rights to make unilateral filings proposing rate changes may come to the Commission pursuant to FPA Section 206 and demonstrate that the rate is no longer just and reasonable. Alternatively, a party who does not have such a right may

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[30] Snohomish's Request for Rehearing at 19-20.

[31] PacifiCorp's Request for Rehearing at 28-43.

[32] 99 FERC ¶ 61,247 at 62,064 (2002) (Lockyer).

[33] Louisiana Energy and Power Authority v. FERC, 141 F.3d 364, 365 (D.C. Cir. 1998); Elizabethtown Gas Co. v. FERC, 10 F.3d 866, 870 (D.C. Cir. 1993).

[34] June 26 Order ¶ 32.

seek changes by demonstrating that the contract rate is contrary to the public interest. In essence, Snohomish seeks to add another layer to this two-step process, claiming that "even if such contracts contain Mobile-Sierra clauses,"[35] parties with market-based rates have another opportunity to demonstrate that the rate was not just and reasonable at the outset. This argument, however, has no support in either the statute or the relevant Commission or Court precedent. Indeed, Snohomish's suggested approach would create uncertainty in the market, as a party who suddenly finds that its deal has become uneconomic can undo at any time the terms to which it was contractually bound.[36] This is precisely what Mobile-Sierra was designed to avoid, and we see no support for an exception to this established doctrine simply because a party has contracted in a market-based rate regime.

29. Our decision in Lockyer supports this result. The "view that only cost-based or formula rate models satisfy the statutory framework fundamentally misapprehends the Commission's ratemaking authority." Contrary to PacifiCorp's argument that "market-based rate contracts" involve "rates and terms that were never prefiled with the Commission and reviewed for justness and reasonableness,"[37] Lockyer held that market-based rate authorizations satisfy the FPA Section 205(c) requirement that rates be on file with the Commission and recognized that the Commission reviews the reasonableness of the use of market-based rates prior to their effectiveness.

> Prior review consists, however, not of the particular prices agreed to by willing buyers and sellers. Rather, it consists of analysis to assure that the seller lacks or has mitigated market power so that its prices will fall within a zone of reasonableness.[38]

Thus, at the time sellers are granted market-based rate certificates, their filed rates (i.e., the authority to sell at market-based rates) are subject to the initial review required by the FPA. This review is different than that conducted for cost-based rates because "[t]he availability of genuine alternatives provides a sufficient basis . . . to conclude that 'market discipline' will be sufficient to keep the prices that sellers charge within the

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[35] Snohomish's Request for Rehearing at 17-18.

[36] Competitive power markets simply cannot attract the capital needed to build adequate generating infrastructure without regulatory certainty.

[37] PacifiCorp's Request for Rehearing at 4.

[38] Lockyer at 62,063.

statutorily-prescribed just and reasonable zone."[39] We reject the parties' argument that this approach is insufficient to satisfy the statute. Our decision in Lockyer is on all fours with our finding here.[40]

30. PacifiCorp argues that the Commission's initial review of a seller's market power for purposes of granting market-based rate authority "cannot assure that all the rates the seller subsequently charges will be just and reasonable under all circumstances."[41] We agree with PacifiCorp's position. Indeed, we have recognized that "FPA Section 206 complaint procedures apply when it appears that [market-based] rates are no longer just and reasonable."[42] Should a seller acquire market power subsequent to the Commission's acceptance of market-based rates, there is a safeguard that "places sellers on notice that their transactions will be subject to review and to prospective remedial action, including the possible loss of their market-pricing authority."[43] Contrary to PacifiCorp's position, however, this remedial authority does not require contract abrogation where the contract limits changes to those required by the public interest under Mobile-Sierra. As discussed below, there has been no showing that Respondents exercised market power while selling under their market-based pricing authorization. Thus, there is no reason to move beyond the self-imposed limits on contract changes set by the parties in the challenged contracts. This result is consistent with both our responsibility to assure that market-based rates are just and reasonable and our long-standing respect for the sanctity of private contracts.

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[39] Id.

[40] This responds, as well, to the argument that our approach is inconsistent with language clarifying that market-based rate authority does not constitute approval of "any service, rate, charge, classification, or any rule, regulation, contract, or practice affecting such rate or service provided for in the filed documents." See PacifiCorp Rehearing at 25. This language makes the obvious point that we do not specifically approve the service or rate, etc. As discussed, however, at the time market-based rate certificates are issued, there is a presumption that the market rates will be just and reasonable. There is no inconsistency.

[41] PacifiCorp's Request for Rehearing at 22-26, 24 (citing AEP Power Marketing, Inc., 97 FERC ¶ 61,219 (2001); Enron Power Marketing, Inc., 103 FERC ¶ 61,343 (2003); Enron Power Marketing, Inc., slip opin., 104 FERC ¶ 63,010, at 128 (2003)).

[42] Lockyer at 62,064.

[43] Id. at 62,065.

31. Respondents seek clarification that the public interest standard of review does not authorize unjust and unreasonable rates. We clarify as follows. Respondents are correct that rates initially must be just and reasonable. For market-based rates, this determination is made when the authorization for market-based rates is granted. However, if rates subsequently become unjust and unreasonable and the contract at issue is subject to a Mobile-Sierra standard of review, the Commission under court precedent may not change a contract simply because it is no longer just and reasonable. If parties' market-based rate contracts provide for a Mobile-Sierra standard of review, the Commission is bound to a higher burden to support modification of such contracts. Mobile-Sierra's public interest standard applies to changes to contract rates and "represents the Supreme Court's attempt to strike a balance between private contractual rights and the regulatory power to modify contracts when necessary to protect the public interest."[44] Our finding that changes to the challenged contracts should be evaluated under the public interest standard does not equate to a finding that the underlying rates are not just and reasonable. As discussed below, there has been no showing that the challenged contracts allow unjust and unreasonable rates. To the extent Respondents request for clarification asks the Commission to opine on matters not before us in this case, we decline to do so.

32. Snohomish challenges the Commission's determination, based on Borough of Lansdale v. FPC, 494 F.2d 1004, 1113 (D.C. Cir. 1974) and Richmond Power & Light v. FPC, 481 F.2d 490, 497 (D.C. Cir. 1973), that Mobile-Sierra applies to contracts not on file with the Commission. Contrary to Snohomish's argument, the Commission did not find Lansdale and Richmond to hold that "entities holding market-based rate certificates [are entitled] to charge unjust and unreasonable rates."[45] Instead, as Snohomish itself concedes, the Commission relied on the Lansdale and Richmond cases to demonstrate that a party may not circumvent Mobile-Sierra's limitations by failing to file a contract with the Commission.[46] The Commission reasoning here was sound.

33. In addition, Snohomish argues that the Mobile-Sierra doctrine applies only in situations where a regulated utility is challenging a contract with a rate it argues is too

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[44] Northeast Util. Serv. Co., v FERC, 55 F.3d 686, 689 (1st Cir. 1995).

[45] Snohomish's Request for Rehearing at 16-17.

[46] Id. at 16 (claiming that the cases hold that "utilities do not gain the right, denied them by the *Mobile-Sierra* doctrine, to challenge contract rates as too low simply by failing to comply with the FPA's requirement that all jurisdictional contracts be on file with the Commission."

low.[47] As we stated in the June 26 Order at page, paragraph 7, "[i]n later cases, the Mobile-Sierra doctrine was applied to contracts containing rates that allegedly were too high."[48] Snohomish, however, believes that the PSC of New York case the Commission relied on is inapposite. We disagree. The Court in PSC of New York held that the Mobile-Sierra doctrine protects contracts not rates, it obligates both buyers and sellers and that the Commission is no more at liberty to alter a contract "to the prejudice of the producers than to do so in their favor."[49]

34. Snohomish argues that the contracts should be reformed to a $74/MWh "benchmark." [50] We disagree. For comparison purposes, the advisory benchmark cannot be taken at face value. The $74/MWh advisory benchmark represents a suggested price for five-year contracts for supply around-the-clock, whereas all PacifiCorp's contracts are for three months or shorter for standard on-peak 6x16 blocks of power in 25 MW. Snohomish failed to provide any calculations adjusting the $74/MWh benchmark to reflect the terms of their specific contracts. As a result, neither the Presiding Judge nor the Commission had any evidence to base their conclusions regarding the relationship of the contract prices at issue to the advisory benchmark.

The Public Interest Standard and the Challenged Contracts

35. Taking a slightly different tack, PacifiCorp argues that the just and reasonable standard applies because the contracts "were silent with respect to the standard of review and the parties' rights under [FPA] Section 206." PacifiCorp explains that there was no mutual intent as to what standard would apply to contract changes, and therefore, the just and reasonable standard governs review of the contracts.[51] PacifiCorp argues that the Commission erroneously found that it was the mutual intent of the parties that the public interest standard would apply.[52] PacifiCorp claims that parties and the ALJ acknowledged that the contracts were silent on the issue. PacifiCorp adds that it did not intend to waive its right to challenge the contracts under the just and reasonable standard.

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[47] Snohomish's Request for Rehearing at 15.

[48] See, e.g., Public Service Commission of the State of New York v. FPC, 543 F.2d 757 (D.C. Cir. 1974) (PSC of New York).

[49] Id. at 798.

[50] Snohomish's Request for Rehearing at 15.

[51] PacifiCorp's Request for Rehearing at 8-21.

[52] Id. at 8-10.

36. PacifiCorp argues that the June 26 Order is contrary to the result that would be reached under the Commission's proposed policy statement.[53] Under the Proposed Policy Statement,[54] unless a contract contains the proposed language, the just and reasonable standard of review would apply to the contract. If adopted, the Policy Statement will apply on the prospective basis only, specifically, to contracts entered into 30 days after the date of issuance of the Final Policy Statement. Numerous parties filed comments to the Proposed Policy Statement raising various issues. The Commission is currently reviewing all of the comments.

37. As we explained in our June 26 Order, the challenged contracts were entered into under two standardized agreements, the EEI Master Agreement and the WSPP Agreement and incorporate their form terms and conditions.[55]

38. The Commission agrees that the EEI Master Agreement and WSPP Agreement are silent on the specific issue of a party's right to make changes pursuant to FPA Section 206. As discussed more fully below, however, the Commission's finding that the contracts were intended to restrict a party's FPA Section 206 rights is based not on contractual silence, but on the related contract language, as well as the evidence in the record regarding the parties' intentions.

The WSPP Agreement

39. PacifiCorp challenges the Commission's reliance on Section 6.1 of the WSPP Master Agreement. PacifiCorp argues that Section 6.1 applies to all entities who have executed the master agreement, not specific parties to the Confirmation Agreements (the contracts) under the master agreements. PacifiCorp explains that this provision does not apply to buyers and sellers who seek changes to the rates specified in the Confirmation Agreements because Section 4.1 of the WSPP Agreement does not include "confirmation agreements" in its definition of "Agreement." Further, PacifiCorp claims that, even if Section 6.1 applies, its terms do not support the Commission's decision because it says nothing about the parties' right to file pursuant to FPA Section 206. PacifiCorp claims that the maxim cited by the Commission expressio unius est exclusio alterius (the expression of one thing is the exclusion of the other) provides no meaningful guidance in

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[53] Id. at 26-27.

[54] Standard of Review for Proposed Changes of Market-Based Rate Contracts for Wholesale Sales of Electric Energy by Public Utilities, 100 FERC ¶ 61,145 (2002).

[55] June 26 Order at 28 (citing PacifiCorp's Complaints at 2 and 7; Ex. RES-1 at 5).

this case. PacifiCorp states that the Commission's finding directly conflicts with its decision in Sithe/Independence Power Partners L.P. v. Niagara Mohawk Power Corp.[56] Finally, PacifiCorp argues that Commission reliance on Texaco, Inc. v. FERC,[57] is not supported by a majority of the Commission.

40. Respondents seek clarification that absent contractual language to the contrary, the public interest standard applies.

41. Section 6.1 of the WSPP Agreement allows parties to jointly seek to change rates, terms and conditions of a contract under FPA Section 205. It is reasonable to read this provision's permissive reference to "joint" filings as evidencing an intent to prohibit other types of filings (i.e., unilateral filings either by sellers pursuant to FPA Section 205 or by non-sellers including buyers pursuant to FPA Section 206) as the statute does not prohibit joint filings, an alternative reading would make Section 6.1 unnecessary and/or redundant. As we recognized in our June 26 Order, the same result could have been achieved by including language that prohibits both unilateral filings by the seller pursuant to FPA Section 205 and the filing of a complaint by a buyer under FPA Section 206. Nevertheless, the most reasonable reading of Section 6.1 is that it is intended to exclude all unilateral filings.

42. This interpretation is consistent with the maxim "expressio unius est exclusio alterius" (the expression of one thing is the exclusion of the other). We reject PacifiCorp's argument that the maxim does not apply because the contracts' Section 205 language is not part of an "associated group or series."[58] In the context of both the Mobile-Sierra doctrine and the FPA, Section 205 and Section 206 comprise the category or "group" of filing rights relevant to contracting parties.[59]

43. In addition, we recognized in our June 26 Order addressing the WSPP contracts that a contrary result would be inconsistent with the court's holding in Texaco, Inc. v.

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[56] 76 FERC ¶ 61,285 (1996).

[57] 148 F.3d 1091 (D.C. Cir. 1998).

[58] PacifiCorp's Request for Rehearing at 18-19 (citing Barnhart v. Peabody Coal Co., 537 U.S. 149, 123 S. Ct. 748 (2003)).

[59] See Barnhart, 123 S. Ct at 760 ("The canon depends on identifying a series of two or more terms or things that should be understood to go hand in hand") (citations omitted).

FERC.[60] Nevertheless, we need not rely on Texaco's holding regarding contract silence (i.e., that the public interest standard applies unless there express language preserving Section 206 rights), because PacifiCorp's WSPP contracts are not silent and contain language prohibiting Section 206 changes. Thus, it is not necessary to decide what standard might apply in the absence of such language, and we need not rely on Texaco.[61] For this reason, we deny Respondent's request for clarification regarding the standard to be applied when a contract is silent.

44. PacifiCorp is correct that we have, in the past, stated that a waiver of a known claim or right must be clearly established. Even under this principle, however, PacifiCorp would not prevail. We recognize that the contract language at issue here may not represent the most direct or most obvious manner in which a party may waive its FPA Section 206 rights, nevertheless, it is sufficient to demonstrate waiver. In contrast to this case, our findings of no FPA Section 206 waiver in Sithe[62] and Southern California Edison Co.,[63] were based on a lack of any language susceptible to the interpretation that the parties intended to waive their rights.

45. We reject PacifiCorp's claim that Section 6.1 does not apply to buyers and sellers who seek changes to the rates specified in the Confirmation Agreements. The relevant language in Section 6.1 of the WSPP Agreement explicitly refers to possible changes in the rates, charges, classification, service, terms, or conditions for transactions entered into pursuant to the WSPP Agreement, and not just Service Schedules appearing in the last part of the WSPP Agreement. In particular, Section 6.1 of the WSPP Agreement states in pertinent part as follows:

> 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 WSPP transactions under Section 205 of the Federal Power Act and pursuant to FERC rules and regulations promulgated thereunder... (Emphasis added).

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[60] 148 F.3d 1091 (D.C. Cir. 1998).

[61] See June 26 Order n.42.

[62] See 76 FERC at 62,458

[63] Opinion No. 289, 41 FERC ¶ 61,188 at 61,491 (1987), reh'g denied, 52 FERC ¶ 61,299 (1990), vacated in part, 55 FERC ¶ 61,258 (1991).

46. Our decision interpreting Section 6.1 is consistent with Sithe/Independence Power Partners v. Niagara Mohawk Power Corp.[64] The provision at issue in Sithe did not address the parties' rights to make Section 205 filings, but instead involved a provision "mention[ing the buyer's] right under Section 205 of the FPA [] to challenge any rate modifications sought by the seller."[65] This difference is significant because PacifiCorp's contract language permitting joint applications indicates that the parties' filing rights were considered. The same cannot be said for the contract language in Sithe, which addresses the buyers' right to protest a filing. More importantly, Sithe did not turn on whether the contract language alone demonstrated waiver, but whether it did so when contrasted with the seller's contracts "with other parties that explicitly reserve[d] this right."[66] In Sithe, we rejected the "course of conduct argument" on the basis that it "overlook[ed] the obvious fact that [the buyer] was not a party to those other contracts."[67] As PacifiCorp has not argued "course of conduct," our holding in Sithe is inapposite.

The EEI Agreement

47. PacifiCorp argues that the Commission's use of extrinsic evidence to infer mutual intent from the EEI Agreements was in error.[68] According to PacifiCorp, the Commission's contract interpretation must be conducted under controlling New York state law, which prohibits resort to extrinsic evidence when contracts are silent with respect to the standard of review. [69] Alternatively, PacifiCorp claims that the evidence does not support a finding that the public interest standard would apply to contract change. Finally, PacifiCorp argues that the Commission ignored PacifiCorp's evidence regarding the intent of the parties.

48. In our June 26 Order we found as follows. Unlike the WSPP Agreement, the EEI Master Agreement is completely silent on the subject of the applicable standard of review. The burden was on the complainant to present evidence on the parties' intent regarding the applicable standard of review. PacifiCorp, however, failed to offer

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[64] 76 FERC ¶ 61,285 (1996).

[65] Id. at 62,458 (emphasis added)

[66] Id.

[67] Id.

[68] PacifiCorp's Request for Rehearing 10-15.

[69] Id. at 11-12.

extrinsic evidence on this point. PacifiCorp provided only conclusory allegations on the issue of the applicable standard of review. No witness testified that the parties communicated to each other their intent to adopt either of the standards of review, or that PacifiCorp unilaterally expressed its intent to its broker or counterparty.[70] We thus relied on other evidence in the record and the ALJ's analysis to make a determination on the issue.

49. We reject PacifiCorp's argument that our analysis is inconsistent with New York state contract law under Schmidt v. Magnetic Head Corp.[71] The Schmidt court refused to look to extrinsic evidence to infer a right not provided in the agreement itself. Schmidt held that ambiguity must be ascertained from the face of the agreement. Schmidt concluded that the agreement's failure to include a procedure for electing successive directors meant that plaintiffs could not appoint successive directors. Refusing to "make a new contract for the parties under the guise of interpreting the writing," the court concluded that it would not read a right into the contract based solely on extrinsic evidence. While New York law may state that silence does not create ambiguity, PacifiCorp cites no New York caselaw on whether contractual silence requires a public interest or just and reasonable standard. (Assuming arguendo that New York law would control on this point). In these circumstances and in light of the varied precedent from federal courts and this Commission, we found the extrinsic evidence helpful in evaluating the intent of the parties.

50. The record demonstrated that the contracts at issue were brokered transactions, i.e., a broker matched bids and offers between parties who did not negotiate with each other on a face-to-face basis.[72] These contracts were short-term arrangements calling for deliveries of electricity and payment of the prices during a period of only 90 days. The ALJ also found that the parties did not expect the rates to change[73] and that "in a competitive marketplace, the obligations of the parties to commodity futures contracts are 'firm,' at least in the absence of some catastrophic occurrence in the nature of a world war."[74] The ALJ thus concluded that "in that context, it could hardly have occurred to

[70] See June 26 Order ¶ 30.

[71] See PacifiCorp Rehearing at 12 (citing 97 A.D.2d 151 (N.Y. App. Div. 1983).

[72] Initial Decision Slip Op. at 2.

[73] Id. at 35.

[74] Id. at 8-9.

either PacifiCorp or any of the Respondents that it, or its counterparty, might apply to the Commission for a change in the contract prices."[75] We agree with the ALJ that in the circumstances presented in this record, the parties could not have contemplated that their contracts would be modified in the absence of some unforeseen extraordinary circumstances. We thus found that the challenged contracts entered into pursuant to the EEI Master Agreement must also be reviewed under the "public interest" standard.

B. PacifiCorp Failed to Meet The Public Interest Standard

51. The parties claim that even if the public interest standard applied, PacifiCorp has met this standard.[76] Snohomish argues that the Commission was inconsistent in considering both the three-prong Sierra test and whether the respondents exercised market power.[77] PacifiCorp argues that the June 26 Order is inconsistent with decisions in French Broad Elec. Membership Corp. v. Carolina Power & Light Co.[78] and Texaco v FERC, 148 F.3d at 1097. In addition, Snohomish claims that the public interest is met because 1) there is evidence that the bargaining process leading to the execution of the contracts was not the product of a functionally competitive market; 2) after a period of market dysfunction, the contracts were no longer economical.[79] Further, PacifiCorp argues that the Commission has ignored the public interest. PacifiCorp argues that Sierra's "excessive burden" inquiry does not allow the Commission to ignore what is considers "*de minimis*" harm to consumers.[80]

52. PacifiCorp argues that the Commission ignored the excessive rates that were produced by the Western electricity crisis.[81] PacifiCorp explains that the Commission should have considered the $1 billion in overall losses it experienced. In addition, PacifiCorp argues that the Commission erroneously relied on its purchasing practices,

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[75] Id. at 9.

[76] Snohomish's Request for Rehearing 32-40; PacifiCorp's Request for Rehearing at 43-52.

[77] Snohomish's Request for Rehearing 32-33.

[78] 92 FERC ¶ 61,283 (2000).

[79] Snohomish's Request for Rehearing 33-34.

[80] Id. at 37.

[81] PacifiCorp's Request for Rehearing at 43-47.

and that the Commission's conclusions regarding such practices are not supported by the record. Finally, PacifiCorp paints itself as a "victim" and claims that the Commission's decision protects the wrongdoers.[82]

53. Our June 26 Order determined that PacifiCorp failed to demonstrate that contract abrogation was required by the public interest.[83] We considered whether PacifiCorp had demonstrated that "any of the three prongs announced in the Sierra case [was] met or [whether] any other factor introduced into evidence warrant[ed] a finding that any of the contracts is contrary to the public interest and should be modified."[84] We found none of the Sierra factors to be present here--whether the rate might impair the ability of the public utility to continue service, cast upon other consumers an excessive burden, or be unduly discriminatory. Moreover, we considered the totality of the circumstances preceding and following the execution of the contracts, and found that none justified contract modification.

54. Contrary to PacifiCorp's claim, the Commission did not err by considering both the Sierra test and whether the Respondents exercised market power. Even accepting as true PacifiCorp's argument that the Commission considered too many factors, PacifiCorp does not prevail. PacifiCorp failed to demonstrate either that it has satisfied the Sierra factors or that Respondents exercised market power. Thus, even considering each factor independently, PacifiCorp has still failed to demonstrate that contract modification is required by the public interest.

55. Further, we find PacifiCorp's reliance on Atlantic City Elec. Co. v. FERC,[85] Northeast Utils. Service Co. v. FERC,[86] and Town of Norwood v. FERC,[87] to be misplaced. PacifiCorp claims that all three demonstrate that the public interest standard is met where "there is evidence that the bargaining process leading to the execution of the contracts was not the product of a functionally competitive market." However,

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[82] PacifiCorp's Request for Rehearing 51-52.

[83] June 26 Order ¶ 61-74.

[84] Id. at P. 62.

[85] 295 F.3d 1, 14 (D.C. Cir. 2002)

[86] 993 F.2d 937, 961 (1st Cir. 1993) remanded, 66 FERC ¶ 61,332, reh'g denied, 68 FERC ¶ 61,041, aff'd, 55 F.3d 686 (1995).

[87] 587 F.2d 1306, 1313-14 (D.C. Cir. 1978).

PacifiCorp's reading of the cases is not entirely accurate. All three cases recognize that Mobile-Sierra preserves the parties' bargain as reflected in the contract, when there is no need to question what transpired at the contract formation stage.[88] Our decision here is consistent with those cases, as there has been no showing of fraud, duress, or the exercise of market power at the contract formation stage.[89]

56. In addition, we reject Snohomish's contention that there are broad policy concerns sufficient to justify Mobile-Sierra's public interest standard.[90] There is no policy initiative that would be served by modifying the challenged contracts. The cases on which Snohomish relies involve "extreme circumstances, such as the fundamental industry-wide restructuring under Order No. 888 and the reorganization of a bankrupt utility."[91] Moreover, any connection between these contracts and Commission policy is tenuous as the contract terms have expired and none went to physical delivery.[92] Contract modification is, if anything, contrary to the Commission's policy of respecting

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[88] 295 F. 3d at 14 (finding the public interest standard to apply when no concern about details of contract formation); 993 F.2d at 961 (rejecting FERC's position that the public interest standard allows contract modification where lack of arm's length bargaining results in unjust and unreasonable contract); 587 F.2d at1313-14 (allegations of lack of good faith at the contract formation stage resulting in discrimination may justify contract modification under Mobile-Sierra).

[89] Contrary to Snohomish's argument, we did not, nor did we intend to "require[] a showing of unfairness, bad faith, or duress" to modify contracts under the public interest standard. Snohomish's Request for Rehearing at 39. In our June 26 Order, we recognized these criterion as three possible grounds to support a public interest finding, but in no way limited our inquiry to these three.

[90] Snohomish's Request for Rehearing at 34 n.122 and 39 n.145.

[91] Hearing Order at 62,614 (citing Order No. 888, Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities. Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. and Regs. ¶ 31,036 (1996), order on reh'g, Order No. 888-A, 62 Fed. Reg. 12,274 (March 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), aff'd sub nom. New York v. FERC, 122 S. Ct. 1212 (2002)).

[92] See Initial Decision Slip Op. at 2 and 6.

contract sanctity and creating the regulatory certainty needed to attract sufficient capital to competitive power markets.

57. Snohomish continues to conflate the just and reasonable inquiry and the public interest inquiry when it argues that the Commission is ignoring de minimis harm to customers. In our June 26 Order, we found that PacifiCorp's estimates of "out of market" costs associated with the challenged contracts were not credible since they were based on arbitrary assumptions.[93] Alternatively, we found that even assuming the $53 million estimate to be accurate, the negative effect was not sufficient to modify the contracts. If PacifiCorp can recover all of its costs from ratepayers, we found the rate increase would amount to 1.5 percent 1.8 percent and 2.7 percent for PacifiCorp's residential, commercial and industrial customers respectively. Finally, we found that the total power involved in the 12 contracts represents only about one-half of one percent of PacifiCorp's portfolio.[94]

58. We did not intend these findings to determine whether such rate increases would result in retail rates that were not just and reasonable. Under Mobile-Sierra, we can grant a unilateral request for a rate change only if the change is required by the public interest. We found that a *de minimis* increase in retail rates did not meet Mobile-Sierra's stringent public interest requirements. PacifiCorp's complaint did not request that we make findings regarding the justness and reasonableness of retail rates. Thus, we reject Snohomish's claim that the Commission imposed a "threshold of somewhere above 5% of total costs for demonstrating harm to electric consumers."[95]

59. We find PacifiCorp claims that it suffered $1 billion dollar overall losses resulting from PacifiCorp's participation in the western markets are not credible.[96] PacifiCorp bases this figure on generalized statements made during hearing such as "I'm talking about a burden here, adding onto the billion dollars burden of our 2000 and 2001 period of something in the tens of millions, that is a burden"[97] and reference to the company's "billion dollars of excess power cost."[98] We find these statements insufficient to support

[93] June 26 Order ¶ 64 (citing Ex. S-6 at 22).

[94] Id.

[95] Snohomish's Request for Rehearing at 36.

[96] PacifiCorp's Request for Rehearing 45.

[97] Tr. 342; 21-24,

[98] Tr. 587; 14-15.

PacifiCorp's estimates. Moreover, even assuming these losses are accurate, they appear to represent total losses from PacifiCorp's portfolio, and are not limited to losses resulting from the challenged contracts. In addition, PacifiCorp was both a buyer and seller in the California market, and to the extent it suffered losses, it also made gains. For example, PacifiCorp sold to Respondent Williams at prices ranging from $150 to $330 per MWh[99] whereas the prices in the challenged contracts range from $126 per MWh to $262 per MWh, with a weighted average of $181.00 per MWh.

60. Further, as we recognized in the June 26 Order, PacifiCorp failed to hedge for the possible risk that spot market prices might fall, and it did not pursue a mix of products to reduce risk associated with market volatility through portfolio diversification. PacifiCorp could have purchased option contracts instead of the must take products it bought, it could have purchased energy under monthly contracts, and it could have purchased index contracts or longer-term contracts.[100]

61. PacifiCorp claims that the Commission's June 26 Order inappropriately focused on the company's buying practices.[101] PacifiCorp argues that, contrary to the June 26 Order, it did not have "better alternatives" to purchasing from the Respondents.[102] PacifiCorp claims that it was required to purchase power to keep the lights on.

62. PacifiCorp's buying practices are indicative of circumstances under which the transactions in question were executed. The record demonstrates that from May 2000 until June 19, 2001, PacifiCorp purchased power from 80 different sellers.[103] The availability of alternatives demonstrates that PacifiCorp was not induced to enter into the transactions at issue. It was free to reject offers that led to the execution of the contracts at issue, and turn to other suppliers. PacifiCorp participated in the market, and evidently failed to evaluate possible risks. In pursuit of its goals, PacifiCorp refused to consider other options and refused to stray from its purchasing strategy. PacifiCorp failed to evaluate the possible risks, which is not a sufficient basis to modify the challenged contracts. PacifiCorp simply found itself with contracts that had become uneconomic with the passage of time.

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[99] June 26 Order at P. 68 (citing Ex. Wil-1 at 15).

[100] June 26 Order at P. 69.

[101] PacifiCorp's Request for Rehearing 46-51.

[102] Id. 46.

[103] Ex. EPME-44 at response (k) to Data Request EPME-PAC-6.

63. We find PacifiCorp's statement that it was buying power to serve native load to be misleading. While it is true that PacifiCorp made purchases to serve its customers, PacifiCorp also purchased more energy than it needed to serve load and sold the surplus power in the forward market in order to recover its expenditures. In addition, PacifiCorp sold power at wholesale to 98 different buyers during the relevant period, and sold one-and-a-half times the total amount it purchased under the contracts at issue. Thus, PacifiCorp's purchases went well beyond what was required to serve load.

64. Finally, we reject as unsupported PacifiCorp's challenges to the June 26 Order's findings regarding PacifiCorp's purchasing practices.[104] None of PacifiCorp's arguments cite any record evidence. In contrast, the findings in our June 26 are supported by citation to the record compiled during the evidentiary hearing. For example, our finding that PacifiCorp "did not pursue a mix of products to reduce risks"[105] is supported by record evidence found at Ex. RES-9 at 5-6 demonstrating that PacifiCorp could have hedged its risk by purchasing options contracts. Thus, PacifiCorp's generalized claims regarding its purchasing strategies carry little weight, as they are not based on the record before us.

65. PacifiCorp claims that the June 26 Order is inconsistent with the June 28, 2002 Hearing Order. PacifiCorp argues that while the Hearing Order set for consideration the issue of whether the spot markets affected the forward bilateral markets, the June 26 Order allegedly "determined the issue of adverse effect to be irrelevant to its decision."[106] We find no inconsistency between the two orders. Contrary to PacifiCorp's claim, the June 26 Order did not find any showing of adverse effect to be irrelevant. Instead, as the public interest standard applied to the challenged contracts, the Commission properly found the relevant inquiry to be whether the adverse effect, if any, demonstrated that contract abrogation was required by the public interest.[107]

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[104] See PacifiCorp's Request for Rehearing at 48-50 (points set out in bullet format).

[105] June 26 Order at 69.

[106] Id. at 33-35, 34.

[107] June 26 Order at 61 ("Under the 'public interest' standard, to justify contract modification it is not enough to show that forward prices became unjust and unreasonable due to the impact of spot market dysfunctions; it must be shown that the rates, terms, and conditions are contrary to the public interest.")

C. Remedy

66. In June 2001, mitigation measures were put into place designed to correct spot market dysfunctions. The last of the PacifiCorp contracts expired in September 2002. Thus, even if PacifiCorp established that its rates were not just and reasonable, there is no longer ongoing harm. The challenged contract rates are no longer in effect and there is no threat that PacifiCorp will be unable to continue service.

67. As discussed in the June 26 Order, the contracts had little impact on either the financial health of PacifiCorp or its ratepayers. PacifiCorp is expected to double its operating profit to £ 1 billion over the next three years. Also, while we found PacifiCorp's estimates of "out of market" costs associated with the contracts to lack credibility, even assuming them to be true, they are not sufficient to modify the contracts. If PacifiCorp is able to recover all of these costs by passing them through to its customers, the rate increase would amount to 1.5 percent, 1.8 percent, and 2.7 percent for PacifiCorp's residential, commercial and industrial customers.[108] In addition, PacifiCorp was a sophisticated player in the market and had alternatives. Moreover, none of the contracts went to physical delivery, but were settled financially. Thus, even assuming that PacifiCorp had met its burden, we find that remedial action is not warranted in this case.[109] Moreover, the same factors, combined with the desire to create certainty in the

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[108] Ex. S-6 at 22.

[109] See Heckler v. Chaney, 470 U.S. 821 (1985) ("the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities."); Baltimore Gas & Elec. Co. v. FERC, 252 F.3d 456, 460 (D.C. Cir. 2001) (affirming FERC's discretion not to prosecute a natural gas pipeline for unlawful service abandonment).

market, counsel against ordering refunds.[110] We conclude that PacifiCorp has not made a convincing argument to justify regulatory intervention. This approach is fair and reasonable, and best serves the public interest.

The Commission orders:

(A) PacifiCorp's and Snohomish's requests for rehearing are hereby denied for the reasons stated above.

(B) Respondents' request for clarification of the June 26 Order is hereby granted in part and denied in part for the reasons stated in the body of this order.

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

(S E A L) Commissioner Brownell concurring with a separate statement attached.

Linda Mitry,
Acting Secretary.

[110] Louisiana PSC v. FERC, 174 F.3d 218 (D.C. Cir. 1999) (recognizing that "when a federal court of appeals reviews an administrative agency's choice of remedies to correct a violation of a law the agency is charged with enforcing, the scope of judicial review is particularly narrow.) (citing National Treasury Employees Union v. FLRA, 910 F.2d 964, 966-67 (D.C. Cir. 1990) (en banc)) and holding "the breadth of agency discretion is, if anything, at [its] zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies and sanctions ... in order to arrive at maximum effectuation of Congressional objectives." (citing Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153, 159 (D.C. Cir. 1967)).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

PacifiCorp	Docket Nos. EL02-80-001
	EL02-80-002
	EL02-81-001
v.	EL02-81-002
Reliant Energy Services, Inc.,	EL02-82-001
Morgan Stanley Capital Group, Inc.	EL02-82-002
Williams Energy Marketing & Trading Company, and	EL02-83-001
	EL02-83-002
El Paso Merchant Energy, L.P.	
	(Consolidated)

(Issued November 10, 2003)

MASSEY, Commissioner, dissenting:

I dissented from the underlying order and nothing in today's order persuades me to change my mind. The public interest requires that the contracts at issue be reformed.

For the reasons stated in my dissent in the underlying order, I dissent from today's order.

William L. Massey
Commissioner

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

PacifiCorp v. Reliant Energy Services, Inc., Morgan Stanley Capital Group Inc., Williams Energy Marketing & Trading Company, and El Paso Merchant Energy, L.P.	Docket Nos. EL02-80-001 EL02-80-002 EL02-81-001 EL02-81-002 EL02-82-001 EL02-82-002 EL02-83-001 EL02-83-002 (Consolidated)

(Issued November 10, 2003)

Nora Mead BROWNELL, Commissioner *concurring*:

1. I am writing separately to reiterate a concern I raised about the June 26 Order: the rationale for concluding that modification of the contracts is subject to the public interest standard of review. When these cases were set for hearing, I noted that existing judicial case law seemed to indicate that the public interest standard applied to all of these contracts, based solely on the contracts' failure to explicitly reserve the buyer's right to seek unilateral changes under section 206.[1] Nevertheless, I was willing to set the issue for hearing so that the parties and the ALJ could have an opportunity to further explore whether my understanding of the case law was accurate. Three ALJs have now independently come to the same conclusion: judicial case law establishes that in the absence of clear contractual language allowing unilateral contract modification, the party seeking the change must meet the public interest standard.[2]

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[1]PacifiCorp v. Reliant Energy Services, Inc., et al., 99 FERC ¶ 61,381 (2002) (citing Texaco Inc. v. FERC, 148 F.3d 1091, 1096 (D.C. Cir. 1998) and Boston Edison Co. v. FERC, 233 F.3d 60, 67 (1st Cir. 2000)).

[2]Public Utilities Commission of the State of California v. Sellers of Long-Term Contracts to the California Department of Water Resources, et al., 102 FERC ¶ 63,013 at P 28 (2003); Nevada Power Company and Sierra Pacific Power Company v. Duke Energy Trading and Marketing, L.L.C., et al., 101 FERC ¶ 63,031 at P 27 (2002); and

2. This order could have simply affirmed the ALJ's conclusion on this point and ended there the analysis of which standard to apply. That is what I am voting to do. Unfortunately, today's order fails to do so and instead bases the finding of the applicable standard on an analysis of the extrinsic evidence that parties did or did not present at hearing. By doing so, the order ignores the law. The Mobile-Sierra doctrine is not an invention of the FERC that we are free to mold as we wish; it is a directive from the Supreme Court. Moreover, the order misses an opportunity to provide clarity and certainty to all market participants and leaves open the possibility that the Commission may order unnecessary fact-finding on the parties' intent in future contract abrogation cases.

Nora Mead Brownell

PacifiCorp v. Reliant Energy Services, Inc., et al., 102 FERC ¶ 63,030 at P 18 (2003).