

122 FERC ¶ 61,260  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

State of California, *ex rel.* Bill Lockyer,  
Attorney General of the State of California

v.

Docket No. EL02-71-004

British Columbia Power Exchange Corporation,  
Coral Power, LLC, Dynegy Power  
Marketing, Inc., Enron Power Marketing,  
Inc., Mirant Americas Energy Marketing, LP,  
Reliant Energy Services, Inc., Williams  
Energy Marketing & Trading Company,

All Other Public Utility Sellers of Energy and  
Ancillary Services to the California Energy  
Resources Scheduling Division of the  
California Department of Water Resources, and

All Other Public Utility Sellers of Energy and  
Ancillary Services into Markets Operated by the  
California Power Exchange and California  
Independent System Operator

ORDER ON REMAND

(Issued March 21, 2008)

1. In this order, the Commission addresses the remand by the United States Court of Appeals for the Ninth Circuit, *State of California ex rel. Lockyer v. FERC*.<sup>1</sup> In the Ninth

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<sup>1</sup> 383 F.3d 1006 (9th Cir. 2004), *cert. denied*, *Coral Power, L.L.C. v. Cal. ex rel. Brown*, 127 S. Ct. 2972, 168 L. Ed. 2d 719 (2007) (Ninth Circuit Decision).

Circuit Decision, the court held that the Commission's authorization of market-based rate tariffs in these proceedings complied with the Federal Power Act (FPA), but that the Commission erred in ruling that it lacked authority to order refunds for violations of its reporting requirement and remanded the case for further refund proceedings. The court did not itself order any refunds, leaving it to the Commission to consider appropriate remedial options.

2. This order establishes a trial-type hearing before an Administrative Law Judge (ALJ) to address whether any individual public utility seller's violation of the Commission's market-based rate quarterly reporting requirement led to an unjust and unreasonable rate for that particular seller in California during the 2000-2001 period. In order to make such a determination, the Commission will need to supplement the record and permit wholesale purchasers that made short-term market-based rate purchases through the California Independent System Operator (CAISO) and California Power Exchange (PX), as well as those making spot market purchases of energy through the California Energy Resources Scheduling Division of the California Department of Water Resources (CERS), from January 1, 2000 to October 1, 2000, to present evidence that any seller that violated the quarterly reporting requirement failed to disclose an increased market share sufficient to give it the ability to exercise market power and thus cause its market-based rates to be unjust and unreasonable, as discussed below. Sellers similarly will be permitted to present evidence to the contrary. The hearing will focus on the individual facts and circumstances relevant to each seller. When the Commission receives the factual determinations of the ALJ with respect to each seller, it will exercise its remedial discretion to determine whether a disgorgement of profits<sup>2</sup> or other remedy is appropriate for a particular seller.

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<sup>2</sup> It should be noted that the term "refunds" has often been used loosely in these proceedings. For purposes of clarity, we note that "refunds" refers to monies returned to customers as a result of a Commission order to reset the rate to make it just and reasonable under section 205 or 206 of the FPA. A disgorgement of unjust profits, although it also may result in a return of monies to customers, relates to a violation of a rule, statute, regulation, or order which has a causal connection to unjust profits obtained by the violator as a result of its violation. As discussed below, in this proceeding the Commission is focused on potential remedies in terms of disgorgement of unjust profits of individual sellers that violated the quarterly reporting requirement where an individual seller's violation had a nexus to the reasonableness of its rates.

## I. UBackground

### A. Prior Commission Orders

3. On March 20, 2002, a year after the Commission initiated an FPA section 206<sup>3</sup> refund proceeding to investigate whether the rates charged in California were just and reasonable during 2000-2001 and established a refund effective period,<sup>4</sup> the State of California, *ex rel.* Bill Lockyer, Attorney General of the State of California (California) filed a complaint against all generators and marketers selling power into markets operated by the CAISO and PX, as well as those making spot market sales of energy to CERS during 2000-2001.<sup>5</sup> In that complaint, California alleged that the FPA section 205(c)<sup>6</sup> filing requirement was not met by the Commission's requirements for obtaining the authority to make sales at market-based rates.<sup>7</sup> Those rules require power marketers to

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<sup>3</sup> 16 U.S.C. § 824e (2000).

<sup>4</sup> The Commission established the refund effective period as October 2, 2000 through June 20, 2001. *See San Diego Gas & Electric Co.*, 93 FERC ¶ 61,121 (2000).

<sup>5</sup> *See State of California, ex rel. Bill Lockyer v. British Columbia Power Exchange Corp.*, 99 FERC ¶ 61,247 (*Lockyer I*), *order on reh'g*, 100 FERC ¶ 61,295 (2002) (*Lockyer II*).

<sup>6</sup> 16 U.S.C. § 824d(c) (2000). Section 205(c) of the FPA provides that:

[u]nder 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 classification, 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.

<sup>7</sup> *See Lockyer I*, 99 FERC at 62,055 (citing *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 229-231 (1994) (*MCI*); *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 132-33 (1990) (*Maislin*)).

Specifically, California argued that the filing of rates is essential to the Commission's

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establish that they lack market power in order to obtain market-based rate authority and to thereafter file quarterly transaction reports.<sup>8</sup> It further alleged that the quarterly reports filed by power marketers did not contain transaction-specific information about their sales and purchases at market-based rates as required by section 205(c) and the Commission's filing requirements.<sup>9</sup>

4. To remedy the alleged violations, California asked that the Commission: (1) require California wholesale sellers to comply, on a prospective basis, with section 205(c) requirements; (2) require California wholesale sellers to provide transaction-specific data to the Commission on all short-term sales to the ISO, PX and CERS for the calendar years 2000-2001; (3) to the extent that rates for short-term power sold to the ISO, PX or CERS are found to exceed just and reasonable levels, require the California wholesale sellers to refund the difference between the rate charged and a just and reasonable rate, plus interest; (4) issue a declaration that the California wholesale sellers failed to file their rates in accordance with the filed-rate doctrine; and (5) institute proceedings to determine whether any other relief is necessary, including revocation of the California wholesale sellers' market-based rate authority.<sup>10</sup>

5. In *Lockyer I*, the Commission denied California's complaint with respect to the allegations that the Commission's market-based rate filing requirements violate the FPA as a matter of law, finding that the complaint constituted an impermissible collateral attack on prior Commission orders relating to the Commission's market-based rate authority.<sup>11</sup> However, the Commission granted the complaint in part holding that where California wholesalers reported aggregated rather than transaction-specific data, the quarterly reports failed to comply with section 205(c) of the FPA. Thus, the Commission directed all marketers and other public utility sellers that made short-term sales at market-

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functions and, without filed rates, the Commission cannot carry out its statutory duty to ensure that all rates charged for jurisdictional services are just and reasonable. California March 20, 2002 complaint at 14-15.

<sup>8</sup> *Lockyer I*, 99 FERC at 62,062 (citing *Louisiana Energy and Power Authority v. FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998). The Commission established the quarterly reporting requirement in *Citizens Power & Light Corp.*, 48 FERC ¶ 61,210 (1989).

<sup>9</sup> *Lockyer I*, 99 FERC at 62,055.

<sup>10</sup> *Id.* at 62,057.

<sup>11</sup> *Id.* at 62,062.

based rates to CERS or into the PX or ISO markets since October 2, 2000 to the date of the order, May 31, 2002, to file in compliance with our reporting requirement new quarterly reports showing transaction-specific information.<sup>12</sup>

6. The Commission denied California's request to require refunds as a remedy from those sellers who previously filed aggregated data. The Commission stated that the reporting deficiencies, while serious and in need of correction, did not invalidate market-based rate tariffs as lawful filed rates.<sup>13</sup> Further, because FPA section 206 bars retroactive refunds, the Commission would not extend refund responsibility to transactions prior to 60 days from the date of California's March 16, 2002 complaint.<sup>14</sup> Finally, the Commission stated that "the failure to report transactions in the format required by the Commission for quarterly reports is essentially a compliance issue" and that re-filing them "to include transaction-specific data is an appropriate and sufficient remedy."<sup>15</sup>

7. On rehearing, California reiterated the argument that the FPA prohibits the use of market-based rates for sales of electric energy. It also argued that the Commission abused its discretion by not ordering refunds as a remedy for the finding that sellers in the California markets did not comply with the requirement to report transaction-specific data. In *Lockyer II*, the Commission denied California's request for rehearing of *Lockyer I*.<sup>16</sup>

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<sup>12</sup> *Id.* at 62,067. Specifically, the Commission stated that these new quarterly transaction reports must contain the following description of each transaction: identification of the buyer/seller; description of the service (e.g., purchase/sale, firm/non-firm); delivery point(s); price(s) (power marketer must provide price per transaction, not price ranges); quantities (e.g., MWh/MW); and dates/duration of service (e.g., daily, monthly, hourly).

<sup>13</sup> *Id.*

<sup>14</sup> The Commission explained that, under section 206 of the FPA, it can institute a refund proceeding only for the refund effective period, which can begin no sooner than 60 days after the filing of a complaint. *Id.*

<sup>15</sup> *Id.* at 62,068.

<sup>16</sup> *Lockyer II*, 100 FERC at 62,329.

8. California filed a timely petition for review from the United States Court of Appeals for the Ninth Circuit.<sup>17</sup>

**B. The Ninth Circuit Decision**

9. In the Ninth Circuit Decision, the court considered two main issues: (1) whether the Commission's market-based rate tariffs complied with the FPA; and (2) if so, whether the Commission failed to administer the tariffs in accordance with their terms and abused its discretion in limiting available remedies (such as refunds) for regulatory violations.

10. With regard to the first issue, the court found that California's facial challenge to market-based rate tariffs failed. Specifically, the court held that the Commission's regulatory scheme consisting of "the dual requirement of an *ex ante* finding of the absence of market power *and* sufficient post-approval reporting requirements" is consistent with the FPA.<sup>18</sup> The court explained that Commission approval of market-based rate tariffs is conditioned on a finding that the applicant lacks market power (or has sufficiently mitigated market power) coupled with a strict reporting requirement to ensure that the rate is "just and reasonable" and that markets are not subject to manipulation.<sup>19</sup> It stated that "so long as [the Commission] has approved a tariff within the scope of its FPA authority, it has broad discretion to establish effective reporting requirements for administration of the tariff."<sup>20</sup> In this case, the court noted, the Commission required the wholesale seller to file certain reports summarizing its transactions during the preceding three months (including summaries of both long and short-term contracts). Thus, the court concluded that the Commission's reporting oversight mechanism distinguished the Commission's market-based rate regulatory scheme from those previously prohibited by the Supreme Court in *MCI* and *Maislin* with respect to other regulated industries.<sup>21</sup>

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<sup>17</sup> Ninth Circuit Decision, 383 F.3d at 1008.

<sup>18</sup> *Id.* at 1013 (*emphasis in the original*).

<sup>19</sup> *Id.* at 1012 (citing *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993) and *Louisiana Energy and Power Authority v. FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998)).

<sup>20</sup> Ninth Circuit Decision, 383 F.3d at 1012.

<sup>21</sup> *Id.* at 1013 (citing *MCI*, 512 U.S. at 234 (holding that the FCC could not eliminate rate-filing requirements for any class of carrier, even when necessary to promote competitive markets)); *Maislin*, 497 U.S. at 132-33 (holding that the ICC could

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11. Regarding the second issue, the court agreed with California that the Commission failed to administer the tariffs in accordance with their terms and abused its discretion in limiting available remedies for regulatory violations. The court found that the Commission's transactional reporting requirement was not followed in the period at issue.<sup>22</sup> It explained that the crucial oversight mechanism that distinguished the Commission's tariff from those prohibited by the Supreme Court in *MCI* and *Maislin* "was, for all practical purposes, non-existent while energy prices skyrocketed and rolling brownouts threatened California's businesses and citizens."<sup>23</sup> Further, the court stated that *MCI* and *Maislin* affirm that the filed rate doctrine is undermined when market-based rate tariffs are "structured so as to virtually deregulate an industry and remove it from statutorily required oversight."<sup>24</sup> Thus, the court determined that, without the required filings, which were "an integral part of a market-based [rate] tariff that could pass legal muster," the ability to effectively monitor the market or gauge the just and reasonable nature of the rates was eliminated and, "under such circumstances, there is no filed tariff in place at all."<sup>25</sup>

12. The court also found that the power to order retroactive refunds under the FPA when a company's non-compliance has been so egregious that it eviscerates the tariff is inherent in the Commission's authority to approve a market-based rate tariff.<sup>26</sup> The court clarified that the Commission's "construed limitations on its own authority are not supported by a careful examination of the FPA" and that the Commission indeed possesses "broad remedial authority to address anti-competitive behavior" and impose retroactive refunds for section 205 violations.<sup>27</sup> Specifically, the court noted that the

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not allow common carriers to charge unfiled, privately negotiated rates lower than the filed rates, even when the carriers were in highly competitive markets).

<sup>22</sup> Ninth Circuit Decision, 383 F.3d at 1014. Specifically, the court stated that non-compliance with the Commission's reporting requirement "was rampant throughout California's energy crisis." *Id.*

<sup>23</sup> *Id.* at 1014-15 (citing *Enron Power Marketing, Inc.*, 65 FERC ¶ 61,305 (1993), *order on reh'g*, 66 FERC ¶ 61,244 (1994) (*Enron*)).

<sup>24</sup> Ninth Circuit Decision, 383 F.3d at 1014.

<sup>25</sup> *Id.* at 1016-17.

<sup>26</sup> *Id.* at 1016.

<sup>27</sup> *Id.* at 1017.

Commission has ordered refunds in the past where utilities violated FPA section 205, either by violating the terms of an accepted rate, or by charging rates without first seeking approval under FPA section 205.<sup>28</sup> Thus, the court determined that the refund remedy is legally available and that the Commission “abused its administrative discretion by declining to order refunds for violations of its reporting requirements.”<sup>29</sup> The court, however, declined to order refunds itself stating that, on remand, the Commission should “reconsider its remedial options in the first instance.”<sup>30</sup> The court also noted that the Commission “may elect not to exercise its remedial discretion by requiring refunds, but it unquestionably has the power to do so.”<sup>31</sup>

13. Subsequently, parties petitioned the Supreme Court for a *writ of certiorari*, which was denied in June 2007.<sup>32</sup>

### C. Responsive Pleadings

14. On December 10, 2007, the California Parties<sup>33</sup> filed a motion requesting that the Commission hold in abeyance its consideration of the proceeding in Docket No. EL02-71, following the Ninth Circuit Decision, pending the issuance of the mandates by the Ninth Circuit in *Pub. Util. Comm’n of the State of Cal. v. FERC*, 462 F.3d 1027 (9th Cir. 2006), *reh’g pending (CPUC)*, and *Port of Seattle, Washington v. FERC*, 499 F.3d 1016 (9th Cir. 2007) (*Port of Seattle*). The California Parties explain that all three proceedings involve common issues of law and fact, including many of the same parties, same sellers, same customers, same transactions, same overlapping time periods, as well as the same

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<sup>28</sup> *Id.* at 1015, 1017 (citing *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 686 (D.C. Cir. 2000)).

<sup>29</sup> *Id.* at 1008.

<sup>30</sup> *Id.* at 1018.

<sup>31</sup> *Id.* at 1015.

<sup>32</sup> *Coral Power, L.L.C. v. Cal. ex rel. Brown*, 127 S. Ct. 2972, 168 L. Ed. 2d 719 (2007).

<sup>33</sup> The California Parties include the People of the State of California, *ex rel.* Edmund G. Brown Jr., Attorney General, the California Electricity Oversight Board (EOB), the Public Utilities Commission of the State of California (CPUC), Pacific Gas and Electric Company (PG&E), and Southern California Edison Company.



evidence.<sup>34</sup> They asserted that if the *Lockyer* remand proceeding is not held in abeyance, it could be necessary for parties to submit the same evidence in all of the cases, and thus the same facts relating to the same transactions could end up being tried multiple times in separate dockets. Further, the California Parties assert that when the mandates issue in *CPUC* and *Port of Seattle*, they anticipate seeking partial consolidation of all three proceedings. Thus, the California Parties argue that holding the *Lockyer* remand proceeding in abeyance would be administratively efficient and would avoid conducting multiple separate proceedings with overlapping issues and parties resulting in potentially inconsistent determinations.

15. On December 17, 2007, Competitive Supplier Group (Competitive Supplier)<sup>35</sup> filed comments suggesting procedures the Commission should use in addressing the Ninth Circuit Decision. Specifically, Competitive Supplier argues that the Commission's action on remand should remain circumscribed by the scope of California's original complaint, which was limited to market-based rate sales during 2000-2001 to CAISO and the PX, and to the CERS on a bilateral spot basis. It asserts that the complaint did not encompass other bilateral transactions in California or the West, including those made under the Western Systems Power Pool (WSPP) Agreement. Competitive Supplier also asserts that, on remand, California must demonstrate that individual seller misconduct occurred with respect to market-based rate quarterly reports, and that such misconduct alone resulted in an "overcharge" that should now be disgorged.<sup>36</sup> They assert that, if California is unable to establish a causal link between an individual seller's reporting deficiency and unjust enrichment, the Commission should reaffirm its prior conclusion that no remedies are in order against that seller.

16. Further, Competitive Supplier argues that, if the Commission decides to impose remedies on remand, then it must do so via an evidentiary hearing process that permits each accused seller to present fully its individual facts, circumstances and defenses.<sup>37</sup>

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<sup>34</sup> California Parties Motion at 10.

<sup>35</sup> Competitive Supplier includes Aquila Merchant Services, Inc.; Avista Energy, Inc; Coral Power, L.L.C.; Exelon Corporation, on behalf of Exelon Generation Company, PECO Energy Company, and Commonwealth Edison Company; PPL EnergyPlus, LLC; PPL Montana, LLC; Powerex Corp.; Puget Sound Energy, Inc.; Sempra Energy Trading LLC; TransCanada Energy Ltd.; and Tucson Electric Power Company.

<sup>36</sup> Competitive Supplier Comments at 4-5, 18-19.

<sup>37</sup> *Id.* at 6.

Within this context, it asserts, the Commission must resolve a number of issues before it may order retroactive remedies for any sales that were not reported by individual sellers on a disaggregated basis, including: (A) the precise extent of the individual seller's reporting obligations under the seller's then-applicable market-based rate authorization; (B) the extent to which the seller complied with its quarterly reporting obligations; (C) if a seller did not comply with applicable reporting obligations, whether the seller furnished the requisite information through alternative means; (D) whether there were other sources of information available to the Commission, market participants, and the public to monitor price spikes and market behavior, such as the CAISO and PX postings of hourly and ten-minute interval pricing information upon closing of the relevant market; and (E) equitable and policy considerations that mitigate against imposition of retroactive remedies in these circumstances, as well as other defenses and mitigation factors that sellers may wish to assert.<sup>38</sup> Ultimately, Competitive Supplier argues, the Commission must determine whether any deviation by a seller from quarterly reporting obligations was so "egregious" as to "eviscerate" its market-based rate schedule.<sup>39</sup>

17. On December 21, 2007, Puget Sound Energy, Inc. (Puget) filed a motion to extend the period to file answers to the California Parties' motion to hold the Ninth Circuit Decision in abeyance until January 4, 2008. On December 26, 2007, in a *Notice Granting Extension of Time*, the Commission granted Puget's request.

18. On January 4, 2008, Nevada Power Company and Sierra Pacific Power Company (Nevada Companies) and Puget Sound Energy, Inc.; PPL EnergyPlus, LLC and PPL Montana, LLC; Tucson Electric Power Company; Public Service Company of New Mexico; Idacorp Energy, LP and Idaho Power Company; Avista Corporation; TransCanada Energy Ltd.; Coral Power, L.L.C.; Exelon Corporation, on behalf of Exelon Generation Company, LLC, PECO Energy Company and Commonwealth Edison Company, Powerex Corporation, and Constellation Energy Commodities Group, Inc. (collectively, the Indicated Parties) filed answers opposing the California Parties' motion.

19. Specifically, Nevada Companies argue that the Commission should deny the California Parties' motion because the nature and scope of any proceedings on remand of *Lockyer* remain quite narrow and distinct from the *CPUC* refund proceedings. They assert that the remand requires the Commission to exercise remedial discretion informed by the record already established, not to take new evidence. Nevada Companies note that now that the Ninth Circuit has confirmed that the Commission has the authority to

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<sup>38</sup> *Id.* at 20-28.

<sup>39</sup> *Id.* at 8, 28-39 (citing Ninth Circuit Decision, 383 F.3d at 1016).

retroactively require refunds in connection with past reporting violations, the Commission must weigh the equities and explain the basis for its decision.<sup>40</sup> Nevada Companies argue that if, upon reconsideration of its remedial options on the record already established in these proceedings, the Commission determines that it will require refunds in connection with failure to file quarterly reports in sufficient particularity as to satisfy the Commission's requirement, it should continue its deliberations. They assert that the Commission must then focus on seller-specific culpability, seller-specific remedies, and allocation or distribution of such remedies (if any). However, Nevada Companies assert that, if the Commission decides that retroactive monetary remedies will not be required under the circumstances, then no proceedings on remand (other than an order on remand) will be required.

20. The City of Tacoma, Washington; Port of Seattle, Washington; and City of Seattle, Washington (collectively, the Pacific Northwest Parties) and Californians for Renewable Energy, Inc. (CARE) filed timely answers supporting the California Parties' motion to hold in abeyance the remand proceedings resulting from the Ninth Circuit Decision. Portland General Electric Company and PacifiCorp filed timely answers taking no position on the motion, but support the idea of concurrent Commission action on the Ninth Circuit Decision and *CPUC* remand. AES Companies filed an answer stating that the California Parties' motion presents factual inaccuracies concerning which AES affiliates are parties to which of the three proceedings.

21. On January 16, 2008, the California Parties filed an answer to the answers and the Competitive Supplier's comments. On January 23, 2008, the Nevada Companies filed an answer to the California Parties' request for waiver to file an answer to the answers.

## II. Discussion

### A. Procedural Matters

22. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure<sup>41</sup> prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept the California Parties' and the Nevada Companies' answers because they have provided information that assisted us in our decision-making process.

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<sup>40</sup> Nevada Companies Answer at 6.

<sup>41</sup> 18 C.F.R. § 385.213(a)(2) (2007).

23. We will deny the California Parties' motion to hold in abeyance our consideration of the Ninth Circuit Decision pending the issuance of the mandates by the Ninth Circuit in *CPUC* and *Port of Seattle*. First, we find that, while all three proceedings involve many of the same parties and overlapping time periods, the nature and scope of the proceedings remain distinct. The focus of this proceeding is centered on the market-based rate program and the related quarterly reporting requirement and potential remedies for violations of this filing requirement. The *CPUC* proceeding, however, is focused on tariff violations (such as gaming and anomalous bidding behavior) as a basis for ordering refunds.<sup>42</sup> Further, the *Port of Seattle* proceeding addresses potential refunds to wholesale buyers of electricity that purchased energy in the short-term supply market at unusually high prices in the Pacific Northwest. Thus, the issues in *CPUC* and *Port of Seattle* are more appropriately addressed in those other proceedings.

### **B. Commission Determination**

24. In response to the Ninth Circuit Decision, the Commission will address its remedial options and discretion to order disgorgement for violations of the Commission's reporting requirement prior to the October 2, 2000 refund effective date established in these proceedings.<sup>43</sup> In order to make such a determination, the Commission must consider the issue of whether, and to what extent, based on the facts associated with each seller who failed to comply with the Commission's market-based rate quarterly reporting requirement, the Commission should now require disgorgement or take other remedial action for that individual seller.<sup>44</sup>

25. The Commission's market-based rate program presumes that, so long as a seller lacks, or has adequately mitigated, market power, it is unable to significantly influence prices in the market and, thus, that seller's resulting rates are presumed to be just and reasonable.<sup>45</sup> As the court in the Ninth Circuit Decision explained, the crucial factor

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<sup>42</sup> We also note that the *CPUC* proceeding does not include CERS transactions, while the proceeding here does.

<sup>43</sup> The period after the refund period (i.e., after June 20, 2001), is covered and discussed in detail in the California refund orders. See *San Diego Gas & Elec. Co.*, 95 FERC ¶ 61,418, at 62,545 (2001); *San Diego Gas & Elec. Co.*, 93 FERC ¶ 61,294 (2000).

<sup>44</sup> See *supra* note 2 (clarifying the term "refunds").

<sup>45</sup> See, e.g., *Consumers Energy Co. v. FERC*, 367 F.3d 915, 923 (D.C. Cir. 2004) ("The Commission approves applications to sell electric energy at market-based rates

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distinguishing the Commission's market-based rate approach as just and reasonable "is the dual requirement of an ex ante finding of the absence of market power *and* sufficient post-approval reporting requirements."<sup>46</sup> We note that these quarterly transaction reports, which are available for public review, and a triennial review of the seller's continued ability to satisfy the Commission's market power screens, enable the Commission, as well as the public, to monitor signs of potential gains in a seller's market share or ability to exercise market power in order to ensure that market-based rates remain just and reasonable over time. If it appears that the market share has increased sufficiently to convey market power, the Commission may step in to revoke the seller's market-based rate authority or take other appropriate action. The court emphasized the crucial nature of the transactional reports stating that they "are an integral part" to "an effective market-based tariff."<sup>47</sup> We agree and note that, since the 1990s, the Commission has clarified to sellers that quarterly reports may not be filed in aggregate and that transaction-specific reporting is "necessary so that the marketer's rates will be on file as required by section 205(c) of the FPA, to evaluate the reasonableness of the charges, and to provide for ongoing monitoring of the marketer's ability to exercise market power."<sup>48</sup>

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only if the seller and its affiliates do not have, or adequately have mitigated, market power in the generation and transmission of such energy, and cannot erect other barriers to entry by potential competitors") (citing *Louisiana Energy and Power Authority v. FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998)). See also *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990). We note that, recently, in *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity, and Ancillary Services by Public Utilities*, Order No. 697, 72 Fed. Reg. 39,904 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252, at P 955, 963 (2007), *clarified*, 121 FERC ¶ 61,260 (2007), the Commission modified the analysis for market-based rates that was in effect at the time of these transactions. However, here, we are applying the analysis that was in effect at the time of the transactions in this proceeding. The Commission's market-based rate program that was in place at that time generally relied on a 20 percent market share threshold and looked at additional market power factors if the 20 percent threshold was reached by a particular seller. This is discussed *infra*.

<sup>46</sup> Ninth Circuit Decision, 383 F.3d at 1013 (emphasis in the original).

<sup>47</sup> *Id.* at 1015.

<sup>48</sup> *Enron*, 65 FERC ¶ 61,305 at 62,406. In *Enron*, the Commission specifically denied Enron's request to "waive the requirement that a power marketer file informational reports detailing the purchase and sale transactions undertaken in the prior quarter," and instead that Enron "be permitted to report data on an aggregate basis (i.e.,

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26. Our focus on remand is the exercise of the Commission's broad remedial discretion to address violations of the filed rate requirements of FPA section 205.<sup>49</sup> Courts have long held that the breadth of the Commission's "discretion is, if anything, at its zenith" when it is "fashioning [] remedies and sanctions, including enforcement and voluntary compliance programs in order to arrive at maximum effectuation of Congressional objectives."<sup>50</sup> In considering our "broad remedial authority" to determine appropriate remedies, if any, for sellers that violated our quarterly reporting requirement, we will weigh the equities for each individual seller.<sup>51</sup>

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without identifying the other parties or the terms of the individual transactions)." *Id.* In California's March 20, 2002 complaint at 16-17, it points to the *Enron* case (as well as other cases), stating that the Commission "has repeatedly held that sellers with market-based rate authority must report their short-term sales and purchases ... on a transaction-specific" and that the Commission has refused to deviate from this requirement. *Id.* at 17-18 (citing *National Elec. Assoc's. Ltd. P'ship*, 50 FERC ¶ 61,378 (1990) (rejecting request to report transactions on a confidential basis); *Enron Power Marketing, Inc.*, 66 FERC ¶ 61,244 (1994) (rejecting request to report only the maximum price charged to each customer)).

<sup>49</sup> Ninth Circuit Decision, 383 F.3d at 1015 (citing *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 686 (D.C. Cir. 2000); *The Washington Water Power Co.*, 83 FERC ¶ 61,097, *order on responses to show cause*, 83 FERC ¶ 61,282 (1998) (*Washington Water*); *Delmarva Power & Light Company*, 24 FERC ¶ 61,199 at 61,461, *on reh'g*, 24 FERC ¶ 61,380, *reh'g denied*, 25 FERC ¶ 61,308 (1983) (*Delmarva*)).

<sup>50</sup> *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967). *See also* *Towns of Concord v. FERC*, 955 F.2d 67, 75 (D.C. Cir. 1992) (citing *Moss v. Civil Aeronautics Board*, 521 F.2d 298, 308-09 (D.C. Cir. 1975) ("Because the 'equitable aspects of refunding past rates are . . . inextricably entwined with the [agency's] normal regulatory responsibility,' . . . absent some conflict with the explicit requirements or core purposes of a statute, we have refused to constrain agency discretion by imposing a presumption in favor of refunds")); *Con. Edison Co. of N.Y., Inc. v. FERC*, No. 06-10-25, slip op. at 13-14, 2007 U.S. App. 29,213 (D.C. Cir. 2007); *Connecticut Valley Elec. Co. v. FERC*, 208 F.3d 1037, 1043 (D.C. Cir. 2000); *La. Pub. Serv. Comm'n v. FERC*, 174 F.3d 218, 225 (D.C. Cir. 1999); *Public Utilities Com'n of Cal. v. FERC* 462 F.3d 1027, 1053 (9<sup>th</sup> Cir. 2006).

<sup>51</sup> Ninth Circuit Decision, 383 F.3d at 1015.

27. We note that the Commission has, in the past, used its discretionary authority to fashion various remedies in response to FPA section 205 violations. In the relatively early stages of the market-based rate program in 1991, the Commission announced a policy on public utilities' failure to comply with FPA section 205 filing requirements in *Central Maine Power Co.*<sup>52</sup> Noting that the Commission does not look favorably at utilities undertaking sales in violation of the FPA section 205 requirement that a rate schedule be on file for any wholesale sale in interstate commerce,<sup>53</sup> *Central Maine* addressed utilities' failure to properly comply with the Commission's 60-day prior notice filing requirement for cost-based as well as market-based rates. In that order, the Commission established an amnesty window and directed all sellers providing jurisdictional service without agreements on file with the Commission to submit rates for such pre-existing service within a certain period of time. *Central Maine* also set a refund obligation and found that the remedy for non-traditional (market-based) rates that had not been filed previously but were filed within 60 days after the order would be to permit the seller to recover no more than 100 percent contribution to fixed costs from the date of service until the date the Commission accepted the rates; with respect to non-traditional rates that were not timely filed at all, the Commission would permit the seller to recover no more than the variable operation and maintenance costs plus interest.<sup>54</sup>

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<sup>52</sup> 56 FERC ¶ 61,200 at 61,818, *order on reh'g*, 57 FERC ¶ 61,083 (1991) (*Central Maine*).

<sup>53</sup> *Id.* at 61,817 (finding that this is particularly true "in a case such as this, where nontraditional rates are being sought for a long-term power sale and our ability to effectively remedy the defect in rates is restricted as a result of the sales taking place without Commission approval.").

<sup>54</sup> *Id.* The Commission explained the importance of the section FPA section 205 requirement that a rate schedule be on file for any wholesale sale in interstate commerce, stating that:

in several recent cases public utilities have delayed tendering rate filings to the Commission until after service has begun, and in some cases, as here, completed. Such delay has occurred in instances where utilities have sought to justify their rates on a cost basis, as well as in instances where nontraditional (market-based) rates have been requested. Delay in tendering rate filings can place the Commission in a difficult position, regardless of whether the rates are cost- or market-based. However, this problem is most acute when

(continued...)

28. The situation present in this case, however, is different than the situation in *Central Maine*. Here, the California sellers were pre-authorized to sell at market-based rates and had market-based rate tariffs on file with the Commission at the time they made the sales at issue. As discussed above, prior to granting such market-based rate authorization, the Commission had undertaken an inquiry into the market power of each seller and had made specific findings that the seller lacked market power in transmission and generation, and could not erect other barriers to entry and therefore could sell at market rates subject only to the filing of quarterly reports and triennial reviews. Thus, unlike the *Central Maine* case where no rates were ever filed and the public had no notice under the FPA of the rates being charged, the California sellers in this case made an initial showing that they lacked market power and received up-front market-based rate approval from the Commission. The proceedings to grant market-based rates for each seller were publicly noticed and interested persons had the opportunity to intervene and protest. Once the market-based rate authorizations were granted by the Commission under section 205, the public was on notice that future rates to be charged by the seller would be market-based.<sup>55</sup>

29. We note that the type of remedy announced in *Central Maine* is not appropriate in all cases; for instance, for marketers that do not have physical assets and “fixed” costs. In more recent cases, the Commission has adopted other remedies. For example, in *Washington Water*, the Commission ordered profits disgorged because the public utility had violated posting requirements and “the conditions upon which the Commission authorized [it] to make sales at market-based rates” when it conferred undue preferences on its marketing affiliate.<sup>56</sup> The Commission emphasized that, due to the serious nature

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market-based rates are requested. Timing is critical in such cases. The Commission cannot cure a defective market or market process retroactively. *See id.* at 61,818.

<sup>55</sup> We also note that the *Central Maine* case differs from the California situation, because in that case, the Commission based its decision on a prior, similar case where it took the same remedial action. *Id.* at 61,817-18 (citing *Central Vt. Public Service Com’n*, 54 FERC ¶ 61,153, at 61,484-85 (1991)). Whereas, at the time of the California situation, the Commission had never taken any monetary remedial action with respect to filings containing aggregate, as opposed to transaction-specific, information.

<sup>56</sup> 83 FERC at 61,464. *See also Delmarva*, 24 FERC at 61,461 (the Commission ordered refunds for all periods prior to the filed rates at issue because a utility illegally collected spent nuclear fuel disposal costs through its fuel adjustment clause without prior Commission approval. The Commission explained that “[t]o do otherwise would allow companies to flout our regulations, and overcharge consumers with impunity.”).



of the violations, any further violations could lead to the Commission limiting the utilities' market-based rate authority. In *El Paso Electric Company*,<sup>57</sup> the Commission required that a public utility refund the time value of the revenues collected during the time period the rates were collected without Commission authorization because it violated the Commission's prior notice requirement. In that case, the Commission stated that "[o]ur imposition of time value refunds here redresses injury to the Commission's ability to carry out its statutory duties."<sup>58</sup>

30. With respect to the Commission's quarterly reporting requirement specifically, we note that, since *Lockyer I* was issued, the Commission has also revoked the market-based rate authority of sellers that have failed to comply with the Order No. 2001<sup>59</sup> electronic quarterly reporting (EQR) filing requirement.<sup>60</sup> More recently, in Order No. 890,<sup>61</sup> the Commission concluded that it would revoke an entity's market-based rate authority in

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<sup>57</sup> *El Paso Elec. Co.*, 101 FERC ¶ 61,276 (2002), *order denying reh'g*, 105 FERC ¶ 61,131 (2003).

<sup>58</sup> The Commission also stated that "[i]mposition of time value refunds is the Commission's method of encouraging compliance by public utilities with the requirements of Section 205, and compensating customers that have been deprived of the use of their monies for the period that the rates had not been filed." *Id.* P 40.

<sup>59</sup> *Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127, *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reh'g denied*, Order No. 2001-B, 100 FERC ¶ 61,342, *order directing filing*, Order No. 2001-C, 101 FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001-D, 102 FERC ¶ 61,334 (2003). Under Order No. 2001, which was adopted after the transactions at issue in this docket, failure to file an EQR (without an appropriate request for extension), or failure to report an agreement in an EQR, may result in forfeiture of market-based rate authority, requiring filing of a new application for market-based rate authority if the seller wishes to resume making sales at market-based rates.

<sup>60</sup> *See Electric Quarterly Reports*, 115 FERC ¶ 61,073 (2006); *Electric Quarterly Reports*, 114 FERC ¶ 61,171 (2006); *Electric Quarterly Reports*, 69 Fed. Reg. 57,679 (Sept. 27, 2004); *Electric Quarterly Reports*, 105 FERC ¶ 61,219 (2003).

<sup>61</sup> *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12,266, at P 1743 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241 (2007), *order on reh'g*, Order No. 890-A, 73 Fed. Reg. 2984, at P 1036-42 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007).

response to an open access transmission tariff (OATT) violation upon a finding of a specific factual “nexus” between the violation and the entity’s market-based rate authority. The Commission reasoned that the “nexus condition” is required in order to ensure that the Commission’s actions are not arbitrary or capricious or based on an inadequate factual record. The Commission stated that “our view is that the nexus condition requires us to find both that a substantial OATT violation has occurred and that the violation either related to the exercise of the violator’s market-based rate authority or violated a specific condition of that authority.”<sup>62</sup> The Commission also emphasized that it has discretion to fashion remedies for tariff violations that relate to the violator’s market-based rate authority in instances in which we do not find a factual nexus justifying revocation of that authority.<sup>63</sup> The Commission stated that, in appropriate circumstances, it might modify or add additional conditions to the violator’s market-based rate authority or impose other requirements to help ensure that the violator does not commit future, similar misconduct.

31. In this case, California complainants alleged that all sellers that violated the Commission’s filing requirement were charging an unjust and unreasonable rate and implied that there is a link between the failure of these particular sellers to properly file quarterly reports and the reasonableness of their individual rates. However, it is not clear on the record developed thus far that there has been any demonstration of a nexus between a particular seller’s reporting failures and any gain in market share that would have given that particular seller the potential to exercise market power, thus making the rates charged by the seller unjust and unreasonable. As the court indicated, the reporting requirement is a means by which the Commission can “monitor the market or gauge the ‘just and reasonable’ nature of the rates. . .”.<sup>64</sup> The court did not say that failure to comply with the Commission’s quarterly reporting requirement automatically makes the rate charged by a particular customer unjust and unreasonable.

32. Thus, a central question before us is whether, based on the facts and circumstances associated with each individual seller, that seller’s improper or untimely filing of its quarterly transaction reports masked an accumulation of market power such that the market rates were unjust and unreasonable.

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<sup>62</sup> *Id.* P 1744.

<sup>63</sup> *Id.* P 1745.

<sup>64</sup> Ninth Circuit Decision, 383 F.3d at 1015.

33. To make this determination, the Commission will allow both buyers and sellers that made short-term purchases or sales to the ISO, PX and CERS for the calendar years 2000-2001 to supplement the record by presenting evidence of individual facts and circumstances that any seller that violated the quarterly reporting requirement did or did not gain an increased generation market share sufficient to give it the ability to exercise market power and cause market-based rates to be unjust and unreasonable as a result. Therefore, our initial action on remand will be to establish a trial-type hearing before an ALJ to make findings of fact regarding whether, based on the facts and circumstances associated with each individual seller, that seller's improper or untimely filing of its quarterly transaction reports masked an accumulation of market power such that the market rates were unjust and unreasonable, during the relevant period, as discussed below.<sup>65</sup> After such hearing is completed, the Commission will determine what remedy, if any, will be ordered for particular sellers.

34. Regarding the relevant time periods at issue in this case, we note that California's March 2002 complaint concerned the calendar years 2000 and 2001. We clarify that the 2000/2001 time period may be divided into three segments for purposes of this case: (1) from January 1, 2000 until the day before the date that the refund period began, or October 1, 2000; (2) from October 2, 2000 until June 20, 2001, the date that the price cap was imposed in California (i.e., the refund period established in the refund proceedings);<sup>66</sup> and (3) from June 21, 2001 until December 31, 2001, which includes the final period covered in California's complaint during which a price cap was in place. Here, on remand, we address only the first of these three periods. During the second period, the Commission ordered refunds by establishing a mitigated market clearing price (MMCP) in an attempt to replicate what it believed to be the just and reasonable rates that a competitive energy market would have produced. The MMCP methodology disregarded prices actually bid by sellers and instead calculated a price using the heat rate of the marginal unit, certain gas prices and miscellaneous costs.<sup>67</sup> During this period, any retroactive finding that a seller had gained market power would not alter the MMCP,

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<sup>65</sup> In directing this hearing, we remind parties that this is not a proceeding to address any tariff violations (such as gaming and anomalous bidding behavior) raised in the CPUC remand case. This proceeding focuses solely on whether, based on the facts and circumstances associated with each individual seller, that seller's improper or untimely filing of its quarterly transaction reports masked an accumulation of market power such that the market rates were unjust and unreasonable.

<sup>66</sup> *San Diego Gas & Elec. Co.*, 95 FERC ¶ 61,418, at 62,545 (2001).

<sup>67</sup> *San Diego Gas & Elec. Co.*, 96 FERC ¶ 61,120 (2001).

since even a seller with cost-based rates could have bid the marginal unit. During the third period at issue here, the Commission set a hard price cap, which limited prices to a just and reasonable level. Thus, any finding now that a seller had market power (and should potentially be required to disgorge profits) during the period covered in California's complaint would apply only to the first of the three periods in these years.

35. We find that issues of material fact exist with respect to the question of whether, based on the facts and circumstances associated with each individual seller, that seller's improper or untimely filing of its quarterly transaction reports masked an accumulation of market power (as defined by the Commission's test for approving market-based rates in effect at the time of the transaction) such that the market rates were unjust and unreasonable. In other words, since the time of the Commission's approval of the seller's market-based rates, did the seller gain the ability to exercise market power? In examining this issue, the parties and presiding judge should first address whether the seller at any point reached a 20 percent generation market share threshold and, if the seller did reach a 20 percent market share, whether other factors were present to indicate that the seller did not have the ability to exercise market power.<sup>68</sup> These issues of material fact cannot be resolved on the record before us. Therefore, we will set the issues for hearing and settlement judge procedures.<sup>69</sup> If the parties do not settle, the presiding judge is directed to make findings of fact with respect to these issues, for each seller, and to submit those findings of fact to the Commission. The Commission will then exercise its remedial discretion to determine whether a disgorgement of profits or other remedial

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<sup>68</sup> Such factors could include: (1) what was the magnitude and duration of the failure to stay below a 20 percent generation market share (*e.g.*, was the seller at or above 20 percent for just one season and below it at all other times?); (2) if the seller tripped the 20 percent threshold based on installed capacity, was the seller under 20 percent using uncommitted capacity?; or (3) what was the ability of traditional franchised utility sellers and non-utility (*e.g.*, independent and affiliated power producer) sellers to enter the market (*e.g.*, was there evidence of ample and recent ease of entry)? We note that this is a non-exclusive list of factors that may be relevant.

<sup>69</sup> We note that the settlement "time-out" that had been in effect at the Ninth Circuit since August 2, 2006 for issuance of the remand mandate in the *Lockyer* appeal, as well as for the filing of petitions for rehearing in related Ninth Circuit appeals, recently has expired. While the time-out was lifted, the court noted that parties should continue to try to settle. *See Pub. Utils. Comm'n of Cal., et al. v. FERC*, Order of August 6, 2007 (Ninth Circuit Nos. 01-71051, *et al.*). By appointing a settlement judge in this order, the Commission does not intend to interfere with -- and indeed encourages -- any ongoing court-mediated settlement efforts.

action is appropriate for a particular seller. In the hearing, for purposes of determining whether a particular wholesale seller had accumulated market power, we will direct the parties to supplement the record by presenting evidence of individual facts and circumstances that any seller that violated the quarterly reporting requirement did or did not gain an increased generation market share sufficient to give it the ability to exercise market power and cause market-based rates to be unjust and unreasonable as a result.<sup>70</sup> We note that the Commission, in *Lockyer I*, directed all marketers and other public utility sellers that made short-term sales at market-based rates to CERS or into the PX or ISO markets since October 2, 2000 to the date of the order, May 31, 2002, to file new, proper quarterly reports. For the convenience of the parties to the hearing ordered herein, we will direct such sellers to submit for the hearing record copies of the previously filed proper quarterly reports for the period January 1, 2000 – October 1, 2000.<sup>71</sup> We will also direct such sellers to submit for the hearing record copies of any improper quarterly reports that were filed for that period.

36. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.<sup>72</sup> If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding;

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<sup>70</sup> We note that the Commission has long used a 20 percent generation market share as an indicator of potential generation market power. In the early years of its market-based rate program, which began in the 1980s, the Commission employed the "hub-and-spoke" analysis to determine whether an individual entity and its affiliates had the ability to exercise generation market power (the first part of the four-part test). In a hub-and-spoke analysis, the applicant computed its market share of both installed and uncommitted generation capacity in its control area market and separately for each of the control area markets to which it is directly interconnected (first-tier markets). While the Commission did not employ a bright-line test, it looked to a benchmark for generation market power of whether a seller had a market share of 20 percent or less in each of the relevant markets. *See, e.g., Western Resources*, 83 FERC ¶ 61,110, at 61,532 (1998) and *Louisville Gas & Electric Co.*, 62 FERC ¶ 61,016, at 61,146 (1993).

<sup>71</sup> *See Lockyer I*, 99 FERC at 62,067.

<sup>72</sup> 18 C.F.R. § 385.603 (2007).

otherwise, the Chief Judge will select a judge for this purpose.<sup>73</sup> The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

37. As discussed above, the Commission has considerable discretion in shaping an appropriate remedy and has exercised such discretion in past situations where filing requirements were violated. Once the Commission is presented with the ALJ's findings of facts at issue in these proceedings, the Commission will issue a further order regarding what remedies, if any, we will impose on individual sellers.

The Commission orders:

(A) All marketers and other public utility sellers that made short-term sales at market-based rates to CERS or into the PX or ISO markets are directed to submit for the hearing record copies of all previously filed quarterly reports for the period January 1, 2000, to October 1, 2000. This includes both the properly filed, and improperly filed quarterly reports for that period.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205, 206 and 309 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held concerning whether, based on the facts and circumstances associated with each individual seller, that seller's improper or untimely filing of its quarterly transaction reports masked an accumulation of market power such that the market rates were unjust and unreasonable. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

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<sup>73</sup> If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience ([www.ferc.gov](http://www.ferc.gov) – click on Office of Administrative Law Judges).

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2007), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(D) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, N.E., Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.