

99 FERC ¶ 61, 247
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

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

v.

Docket No. EL02-71-000

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,
Respondents

ORDER ON COMPLAINT

(Issued May 31, 2002)

On March 20, 2002, the State of California, ex rel. Bill Lockyer, Attorney General of the State of California (Attorney General), filed a complaint alleging that generators and marketers selling power into markets operated by the California Independent System Operator (ISO) and California Power Exchange (PX), as well as those making spot market sales of energy to the California Energy Resources Scheduling Division of the

California Department of Water Resources (CERS), have failed to file their rates as required by section 205(c) of the Federal Power Act (FPA), 16 U.S.C. § 824d(c) (1994). Specifically, the Attorney General alleges that: (1) the section 205(c) filing requirement is not met by the Commission requirement that power marketers file (a) rate schedules that simply acknowledge that sales will be made at rates established by agreement between buyer and seller and (b) quarterly transaction reports; and (2) the quarterly reports actually filed by power marketers do not contain transaction-specific information about their sales and purchases at market-based rates as required by section 205(c) and Commission directives.

As discussed below, the Commission dismisses the complaint insofar as it constitutes a collateral attack on prior Commission orders, and denies the complaint with respect to the allegations that the Commission's market-based rate filing requirements violate the FPA as a matter of law. With respect to the allegations that marketers' quarterly reports are not in compliance with the Commission's reporting requirements, the Commission directs public utility marketers that made short-term sales at market-based rates to CERS or into the PX or ISO markets since October 2, 2000, and that have not complied with the Commission's reporting requirements, *i.e.*, have not filed quarterly reports containing transaction-specific information with respect to their sales and purchases at market-based rates, to file new quarterly transaction reports for the period beginning October 2, 2000 and up to the date of this order. The Commission denies the Attorney General's request for other remedies.

This order is in the public interest because it elucidates the statutory requirements of the FPA and provides regulatory certainty regarding the filing and reporting requirements on which market-based rates are conditioned.

I. Complaint

The Attorney General argues that the market-based rate schedules filed by sellers in the California markets do not satisfy the requirement of section 205(c) of the FPA that all rates must be filed with the Commission and published for public review.¹ He argues

¹Section 205(c) 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

(continued...)

that the filing of rates is essential to the Commission's 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.²

He states that sellers with market-based rate authority typically file a pro forma rate schedule stating that "all sales shall be made at rates established by agreement between [seller] and purchaser" and that "all other terms and conditions shall be established by agreement between [seller] and the purchaser."³ He then argues that this "vague description" does not provide the public with advanced notice of the rate charged by a seller, nor the Commission with an opportunity to review the rates charged before they go into effect.⁴ Further, he argues that, without filed rates, customers and competitors are unable to challenge wholesale power rates as unreasonable or discriminatory.

He also notes that, when granting market-based rate authority to a seller, the Commission makes a finding in advance of any sales that any rate negotiated pursuant to the seller's tariff is just and reasonable. According to the Attorney General, this finding cannot be reconciled with the section 205 filing requirement, which is designed to ensure that the Commission has an opportunity in every instance to judge the reasonableness of rates before they go into effect. Further, he argues that market-based rates, which fluctuate widely and rapidly, cannot be likened to a "formula" rate, which courts have found to be acceptable.

¹(...continued)

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.

²Citing 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).

³Complaint at 7.

⁴Electrical District No. 1 v. FERC, 774 F.2d 490, 492 (D.C. Cir. 1985); Public Service Company of New Mexico v. FERC, 832 F.2d 1201, 1222-25 (10th Cir. 1987); Columbia Gas Transmission Corporation v. FERC, 831 F.2d 1135, 1140-41 (D.C. Cir. 1987).

According to the Attorney General, the quarterly reporting requirement that sellers identify short-term purchases and sales during the previous quarter does not comply with the section 205(c) filing requirement. He argues that such after-the-fact reporting does not provide sufficient notice to the public and does not allow the Commission the opportunity to review the rates for reasonableness before they go into effect. Instead, consumers must file a complaint pursuant to section 206 of the FPA to challenge the legality of rates being charged in the marketplace. He contends that the complaint procedure is not fully effective because it places the burden of proof on the complainant, and the Commission can order refunds only if it acts before the rate goes into effect.

The Attorney General states that he does not object to market-based pricing, provided that negotiated rates do not exceed a price cap established by the Commission to ensure that rates are just and reasonable.

The Attorney General further argues that the Commission does not have the authority to waive (or modify out of existence) the statutory requirement that all rates be filed. He notes that, in MCI, the Supreme Court stated that "rate filings are . . . the essential characteristic of a regulated industry" and that the tariff requirement "was Congress's chosen means of preventing unreasonableness and discrimination in charges."⁵ He argues that, in both MCI and Maislin, the Supreme Court refused to allow an agency to do away with a filing requirement. In MCI, the Supreme Court explained that, where Congress has chosen a scheme of rate regulation that depends on the filing and publication of rates, a desire to increase competition does not justify the promulgation of rules that "alter the well-established statutory filed rate requirements."⁶ The Attorney General argues that the Commission has exceeded its statutory authority, and that the quarterly reporting requirement is an unacceptable substitute for filed rates that allow an agency to review in advance the reasonableness of the rates charged for electricity.

Alternatively, the Attorney General argues that, if the filing of quarterly after-the-fact transactions reports satisfies the section 205(c) filing requirement, the actual reports filed by sellers are so deficient that they violate section 205(c) as well as the filing requirements established by the Commission. He states that the Commission has consistently required sellers with market-based rate authority to report their short-term sales and purchases on a transaction-specific basis to ensure that their rates will be on file, to evaluate the reasonableness of those charges, and to monitor the seller's ability to

⁵MCI, 512 U.S. at 229-231.

⁶Id., at 234.

exercise market power.⁷ The Attorney General contends that this condition is mandated by the section 205(c) requirement that rates for any sale of wholesale power must be filed and posted for public inspection. Further, he contends that the filing of transaction-specific information is an express condition of the grant of market-based rate authority.⁸

According to the Attorney General, sellers must report for each transaction: the buyer's or seller's name; a brief description of the service; the delivery point(s) for each service; the price of each service; quantities to be served or purchased; the duration of the transaction; and any other attribute of the product being bought or sold which contribute to its market value.⁹ He argues that, despite requests by market participants to ease the requirement, the Commission has refused to deviate from it. He contends that, for example, in EPMI I, the Commission denied a request to report transactions on an aggregate basis, without identifying the terms of specific transactions or counter-parties.¹⁰

However, according to the Attorney General, sellers routinely report aggregated data, typically listing the total number of megawatts sold, along with the minimum and maximum prices charged, for the entire quarter. In particular, he complains that sellers have failed to file transaction-specific data relating to their sales of energy into the ISO and PX, as well as their spot market sales to CERS.¹¹ He contends that the Commission

⁷Citing Enron Power Marketing, Inc., 65 FERC ¶ 61,305 at 62,406 (1993) (EPMI I), on reh'g, 66 FERC ¶ 61,244 (1994) (EPMI II).

⁸Citing, e.g., Ormond Beach Power Generation, L.L.C., 83 FERC ¶ 61,306 at 62,259 (1998); Citizens Power & Light Corporation, 48 FERC ¶ 61,210 (1989) (Citizens).

⁹Citing Intercoast Power Marketing Company, 68 FERC ¶ 61,248, at 62,134 (1994).

¹⁰EPMI I, 65 FERC at 62,406. Also citing, EPMI II, 66 FERC at 61,599; and National Electric Associates LP, 50 FERC ¶ 61,378 (1990).

¹¹Appendix A to the Complaint provides a spreadsheet that identifies entities that sold electric power on a short-term basis to CERS from January 18 to October 31, 2001 and the number of transactions that CERS entered into with each seller. According to the Attorney General, none of the quarterly transaction reports for the first three quarters of 2001 filed by the relevant sellers provided transaction-specific information regarding sales to CERS.

itself has acknowledged the failure of market-based sellers to report their rates, making it "very difficult for the Commission to carry out its duties under the FPA."¹²

To remedy the alleged violations, the Attorney General asks that the Commission (1) require defendants to comply prospectively with the section 205(c) requirement; (2) require defendants 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 defendants to refund the difference between the rate charged and a just and reasonable, rate, plus interest; (4) issue a declaration that defendants have 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 defendants' market-based rate authority.

II. Answers, Protests and Motions to Dismiss

A. Motions to Dismiss

Several respondents argue that the complaint is procedurally defective. TransCanada, Exelon, IDACORP, Puget and Avista complain that they were not properly served. A number of entities contend that the complaint is too vague and fails to satisfy the pleading requirements of 18 C.F.R. § 385.206.¹³ For instance, they contend that the complaint fails to identify what transactions are at issue, what time period the transactions took place, what purchasers are paying for those transactions, and which sellers the complaint is targeting.

Certain parties identified in the complaint's appendices intervened to argue that they should be dismissed because they do not fall within the scope of the complaint.

¹²Revised Public Utility Filing Requirements, IV FERC Stats. & Regs., Regulations Preambles ¶ 32,554 at 34,072 (2001). Also citing San Diego Gas & Electric Company, 95 FERC ¶ 61,418 at 62,565 (2001) (noting failure of marketer to report transaction in its quarterly report); Notice to All Jurisdictional Sellers and All Non-Jurisdictional Sellers in the West, Docket No. PA02-2-000 (March 5, 2002) (stating that Commission staff has reviewed quarterly reports filed by sellers participating in western power markets and "determined that the information contained in the reports is not useful").

¹³See e.g., Answers and Protests of PS Colorado, Pinnacle, PacifiCorp, PPM, TransCanada, Exelon, and Puget.

APX contends that because it does not own, operate or control generation facilities, or sell power or ancillary services or take title to such products, it does not engage in any of the activities that are the subject of the complaint. City of Seattle argues that because it is a non-public utility under FPA § 201, it is not subject to the rate-filing requirements of FPA § 205 that form the basis of the complaint. City of Tacoma makes a similar argument, and also argues that it should be dismissed from the complaint because any energy sales it made to the ISO or to the CERS during the relevant time period were not made into the ISO spot market, were not transacted in the State of California, and were not accomplished through use of any part of the ISO's interstate transmission grid. Sunrise contends that it has not made any sales at market-based prices, and therefore, its activities do not fall within the scope of the Attorney General's complaint. Nevada Power, Sierra Pacific, PNM and Puget/Avista argue that they should be dismissed as their sales were made (and reported) pursuant to the Western Systems Power Pool (WSPP) Agreement and were not made pursuant to their market-based rate authority.

B. Legality of the Market-Based Rates Program

Nearly all of the respondents argue that the complaint should be dismissed as a collateral attack on prior Commission and court decisions relating to the Commission's market-based rate authority and procedures.¹⁴ They contend that the complaint echoes similar requests for the Commission to overturn its market-based rate system and return to cost-based regulation which the Commission has already rejected in its California investigation orders.¹⁵ In addition, they argue that in those proceedings the Commission already rejected the argument advanced in the complaint that the FPA requires advance notice of the actual numerical market-based rates.¹⁶ They point out that prior challenges like those made by the Attorney General to the legality of the Commission's system of relying on markets to ensure just and reasonable rates under the FPA have been rebuffed

¹⁴See Answers and Protests of GWF, EMMT, EPSA/WPTF, Enron, Williams, MLCS, PPM, Duke Energy, AES, PS Colorado, Pinnacle, PPL, Sierra, Powerex, Sempra, IDACORP, PNM, TransCanada, Mirant, Exelon, Strategic Energy, Avista, Reliant, Idaho Power, Allegheny, CAC/EPUC, Portland, PGET, EPME, Wellhead companies, Puget, TransAlta and Coral.

¹⁵Citing *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 95 FERC ¶ 61,148 at 62,558 (2001); *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 93 FERC ¶ 61,294 at 62,008 (2000).

¹⁶Citing *San Diego Gas & Electric Co., et al.*, 96 FERC ¶ 61,120 at 61,506 n.31 (2001).

by the courts.¹⁷ They further argue that the Commission has rejected calls similar to those made by the Attorney General for pre-approval of all individual market-based rate transactions, on the ground that such sales made pursuant to a previously accepted market-based rate tariff are, in effect, pre-authorized pursuant to the acceptance for filing of the market-based rate tariff.¹⁸ They also argue that the Commission has already considered and rejected the contention that the Commission's filing requirements associated with its market-based rate program conflict with Maislin and MCI.¹⁹

Numerous parties also contend that the complaint attempts to circumvent various rulings made by the Commission in prior decisions defining the scope of its investigation into the California wholesale electricity market.²⁰ They point out that in its order instituting the investigation into the justness and reasonableness of sales into the PX and ISO markets, the Commission established a refund effective date of October 2, 2000,²¹ and has repeatedly rejected requests to extend refund liability prior to that date as well as to bilateral transactions outside of the ISO and PX spot markets.²² The parties argue that, to the extent the Attorney General's complaint seeks to relitigate the Commission's holdings to restrict refund liability to spot-market ISO and PX sales after October 2, 2000, the complaint constitutes an improper collateral attack on the Commission's prior orders, and should be dismissed.

¹⁷Citing Louisiana Energy and Power Authority v. FERC, 141 F.3d 364 (D.C. Cir. 1998); Elizabethtown Gas Co. v. FERC, 10 F.3d 866 (D.C. Cir. 1993).

¹⁸Citing PacifiCorp Power Marketing, Inc., 98 FERC ¶ 61,108 (2002); GWF Energy, LLC, 98 FERC ¶ 61,330 (2002).

¹⁹Citing Southern Company Energy Marketing, L.P., et al., 86 FERC ¶ 61,131 at 61,460 n.41 (1999), aff'd sub nom., Power Co. of America v. FERC, 245 F.3d 839 (D.C. Cir. 2001); Koch Gateway Pipeline Co., 66 FERC ¶ 61,385 (1994).

²⁰See e.g., Answers and Protests of GWF, EMMT, EPSA/WPTF, Enron, Williams, MLCS, PPM, Duke Energy, AES, PS Colorado, Pinnacle, PPL, Sierra, Powerex, Sempra, IDACORP, PNM, TransCanada, Mirant, Exelon, Strategic Energy, Avista, Reliant and Idaho Power.

²¹Citing San Diego Gas & Electric Co., et al., 92 FERC ¶ 61,172 at 61,608 (2000).

²²Citing San Diego Gas & Electric Co., et al., 97 FERC ¶ 61,275 at 62,195 and 62,199 (2001); San Diego Gas & Electric Co., et al., 96 FERC ¶ 61,120 at 61,505 and 515 (2001); San Diego Gas & Electric Co., et al., 93 FERC ¶ 61,121 at 61,371 (2000).

In addition, several entities contend that the complaint constitutes a collateral attack on prior Commission orders granting their individual requests for market-based rate authority.²³ They argue that since the Attorney General did not contest the Commission's legal authority to grant market-based rate authority when they applied for and received that authority, any belated challenge to their market-based authority now constitutes a collateral attack on those long-final authorization orders.

C. Alleged Deficiencies in Quarterly Reports Filed by Marketers

As noted above, the Attorney General argues, in the alternative, that the actual quarterly transaction reports filed by sellers in the ISO and PX markets, and to CERS, are deficient because they do not contain transaction-specific information and therefore violate section 205(c) of the FPA and the Commission's filing requirements. Numerous entities respond that the complaint does not present any evidence of specific deficiencies in their particular quarterly reports, and argue that their reports in fact satisfy the Commission's requirements.

Some entities claim that they have complied by submitting transaction-specific information in their quarterly reports.²⁴ They believe that the Attorney General is mistaken in including them in the complaint. Some further argue that, while they provided transaction-specific information with respect to bilateral transactions, they were not required to separately report each sale to the ISO and PX because: (1) APX, as scheduler, was responsible for such reporting; (2) it is onerous to require separate reporting of each ten-minute clearing interval for the ISO and hour-interval for the PX, especially considering that the information is available through the ISO and PX; and (3) the Commission requirement that marketers report the "dates of service" for each transaction does not contemplate the reporting of sales at each ten-minute clearing interval, nor hourly for the PX.

Numerous parties note that a significant number of parties execute sales under the WSPP Agreement.²⁵ They state that the WSPP Agreement has been approved by the Commission, and is a completely separate tariff from the standard market-based rate tariffs, which is the focus of the Attorney General's complaint. Further, WSPP sales are

²³See e.g., Answers and Protests of Reliant, Williams, Dynegy, Idaho Power, Duke Energy, AES, PS Colorado, Pinnacle and Wellhead companies.

²⁴E.g., Fresno Cogen, TransAlta, Exelon, Avista, Puget, Strategic Energy, and BP.

²⁵E.g., Avista, Puget and PNM.

reported in quarterly reports that are available for public inspection. Therefore, the parties conclude that sales made pursuant to the WSPP Agreement are not subject to the complaint.

Other entities argue that the Commission's requirements allow for the reporting of aggregate transactions by purchaser and type of transaction.²⁶ They state that the Commission orders approving their applications for market-based rates do not require them to report on a "transaction-specific basis." Rather, they point to language in the orders accepting their market-based rate tariffs that required them to report transactions in "quarterly transaction summaries of specific sales" or to file "quarterly reports detailing [its] purchase and sales transactions." They note that they have reported transactions in the same manner for years, and the Commission has not rejected their filings or otherwise objected to their format. They also claim to have relied on industry practice, "which generally does not include the details of each transaction in quarterly reports."²⁷

They argue that if any reporting violations have occurred, they have already been rectified, noting that the Commission required in Docket No. PA02-2-000 that all sellers file non-aggregated information on short-term energy sales for calendar years 2000-2001. Further, they contend that, if the Attorney General believes the reporting requirements are insufficient, it should have raised the issues in the Commission's Notice of Proposed Rulemaking, Revised Public Utility Requirements.²⁸ Williams argues that the NOPR did not conclude that the quarterly reports were legally deficient (as implied by the Attorney General), but rather indicates that variations in the reporting format have made it very difficult for the Commission to carry out its responsibilities.

El Paso (amongst others) argues that, because the Commission has not codified the reporting requirements, marketers cannot be held to standards set in orders directed at individual entities, such as EPMLI, unless such orders were docketed for all marketers. Rather, according to El Paso, the Commission cannot assess a seller's compliance without identifying the particular reporting requirements established for that seller and reviewing that seller's submissions in light of those reporting requirements. El Paso and others²⁹ argue that, nonetheless, the Attorney General misplaces his reliance on the Commission's

²⁶E.g., IDACORP, Williams, MLCS, PGET, PacifiCorp, EMMT, AES, Duke, Pinnacle, Portland, Coral, TransCanada, Sempra, Allegheny, Reliant and Dynegy.

²⁷E.g., Pinnacle at 17.

²⁸FERC Stats. & Regs. ¶ 32,554 (2001).

²⁹E.g., IDACORP, Portland, Sempra and Dynegy.

decision in EPMI I. They argue that in EPMI I the market-based rate applicant, Enron, did not request to aggregate selected portions of its transaction data, e.g., to aggregate all sales of a given type to a given counter-party. Rather, according to the respondents, Enron made - and the Commission denied - a request to aggregate all of the data, e.g., without identifying the counter-parties or terms of individual transactions.³⁰ They claim that, subsequent to the decision, Enron did aggregate transactions by counter-party and type of transaction in its quarterly reports, and that the reports were accepted for filing by the Commission. They also argue that, since EPMI I, the Commission has not directed marketers to report transaction specific data, even where it has noted that a seller was aggregating sales prices in quarterly reports. Duke Energy Moss Landing, LLC, 86 FERC ¶ 61,187 at 61,656-57 (1999) (Moss Landing).

Williams and GWF argue that the Attorney General erroneously relies on a statement in a Staff notice in the Western Markets Investigation, Docket No. PA02-2-000, that information in the quarterly reports is not useful. They contend that whether the information is useful in the investigation is irrelevant to the issue of whether marketers have complied with the reporting requirements.

Respondents argue that, even if the quarterly reports do not comply with the Commission's requirements, refunds are not the proper remedy.³¹ They argue that refunds are inappropriate because the reports are merely "informational filings" and do not affect whether rates are on file.³² They contend that, while the Commission has the right to request additional information if it is dissatisfied with a report, failure to follow the Commission's filing instructions do not have any relevance to a claim for refunds.

Certain respondents and intervenors also challenge the basis for the relief requested in the complaint. Many parties contend that the Attorney General's request that the Commission retroactively extend refund responsibility to transactions prior to the March 16, 2002 complaint is precluded under the FPA because section 206 only permits

³⁰Citing, EPMI I, 65 FERC at 62,404.

³¹Williams, GWF, PS Colorado, IDACORP, PGET, El Paso, PacifiCorp, AES, Duke, Pinnacle, Exelon, Portland, Coral, Strategic Energy, TransCanada, and Sempra.

³²Citing GWF Energy LLC, 97 FERC ¶ 61,297 (2001), on rehearing, 98 FERC ¶ 61,330 (2002) (GWF); Southern Company Energy Marketing L.P., 86 FERC ¶ 61,131 at 61,459.

refunds to occur on a prospective basis.³³ Allegheny adds that the Commission had 60 days from the date of filing to act on quarterly reports and, having failed to do so, can not now impose refunds. Others argue that the proceedings in Docket No. EL00-95-000 et al. will determine refunds for spot sales to the ISO and PX for the period October 2, 2000 through June 20, 2001, and that the Commission has already determined that the CERS bilateral contracts are not subject to refund. Rather, they contend that the Attorney General is attempting to "bootstrap" an alleged violation of filing requirements into a finding of exercise of market power. They argue that, even if it were to present evidence of reporting violations, such violations do not establish that the underlying rates are unjust and unreasonable.

III. Notice of Filings and Interventions

Notice of the March 20 filing was published in the Federal Register, 67 Fed. Reg. 14707, with answers and motions to intervene and protests due on or before April 9, 2002. Interventions, answers, motions to dismiss and motions for summary disposition were filed by the entities listed in the Appendix. The CPUC, City of Tacoma and Aquila filed motions to intervene out-of-time. The Wellhead Companies filed a motion to accept one day out-of-time their answer and motion for summary disposition, explaining that they had technical difficulties in filing electronically.

Imperial Valley Resource Recovery Company, LLC (IVRRC) filed a motion for extension of time to answer in which it indicated that it was neither a named respondent in the complaint nor a public utility seller of energy or ancillary services, and therefore would not fall into the general class of unnamed respondents. In response, the Attorney General filed a pleading stating that IVRRC is not a respondent to the complaint.

On March 24, 2002, Californians for Renewable Energy, Inc. (CARE) filed a motion to consolidate this proceeding with the ongoing proceedings in Docket Nos. PA02-2-000, EL02-2-000, EL01-65-000 and EL00-95-000.³⁴ The Attorney General, Duke Energy, Dynegy and Competitive Supplier Group filed motions in opposition to CARE's request. On April 19, 2002, CARE filed an answer to the motions in opposition to its request.

³³See e.g., Answers and Protests of GWF, Dynegy, Idaho Power, PacifiCorp, PPM, Duke Energy, PNM, TransCanada, Exelon, Avista, Mirant, IDACORP, Williams, Coral, PNM, Allegheny and Dynegy.

³⁴We note that, while CARE has moved to consolidate, it has not moved to intervene in this proceeding.

On April 24, 2002, the Attorney General filed an answer in opposition to the motions to dismiss and motions for summary disposition. On May 9, 2002, PNM filed an answer to the Attorney General's answer.

On May 2 and 6, 2002, the Attorney General filed notices to withdraw, with prejudice, the filing of its complaint as to Calpine and Constellation, respectively. Notices of the filings were issued, with comments due by May 10, 2002. Calpine filed an answer asking the Commission to confirm its withdrawal. CARE filed an answer and protest to the notices of withdrawal.

IV. Discussion

A. Procedural Matters

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2001), the timely unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, given their interest, the early stage of the proceeding, and the absence of any undue prejudice or delay, we find good cause to grant the untimely, unopposed motions to intervene of CPUC, City of Tacoma and Aquila.

Pursuant to Rule 2008 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2008 (2001), the Commission accepts the Wellhead Companies' late answer and motion for summary judgement. According to their motion, because the electronic filing system failed to recognize a user account, filing of the pleading occurred at 5:02 p.m. on April 9, 2002 (the deadline for answers). As a result, the pleading was not accepted for filing until the morning of April 10. Given these circumstances, and the absence of undue prejudice or delay, we find good cause to grant the Wellhead Companies' motion.

We deny CARE's motion to consolidate this proceeding with other dockets listed in CARE's motion. The dockets raise distinct issues from those in the Attorney General's complaint and therefore no benefit is gained from consolidation.

Notwithstanding CARE's protest, we grant the withdrawal, with prejudice, of complaint with respect to Calpine and Constellation. In its filing, CARE challenges the fairness of the terms of the settlement, which is outside the scope of this complaint proceeding.

Finally, we reject PNM's May 9, 2002 filing as an impermissible answer to an answer.

B. Motions to Dismiss

Rule 206(c) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.206(c) (2001) requires that a copy of a complaint must be served on the respondents, and provides that service can be accomplished by electronic mail in accordance with Rule 2010(f)(3), which permits electronic service to participants who have agreed to receive service via the specified electronic means. The Attorney General states that he has served the complaint on all parties to Docket Nos. EL00-95-000 et al. by e-mail, and by posting the complaint on the website of the California Department of Justice. He asks for a waiver of the requirements of Rule 206(c) to the extent that the above method of service is not in compliance with the Rule.

Exelon, IDACORP, Puget and Avista argue that service was defective because they did not agree to electronic service. They also argue that some parties that are not active in the EL00-95-000 docket may not have received simultaneous service. TransCanada contends that it never received service.

The Attorney General has not shown that respondents have agreed to accept service by e-mail, as required by Rules 206(c) and 2010(f)(3). However, we will grant the Attorney General's request for a waiver of the Rules. This is appropriate in light of the likelihood of overlap among parties to the current proceeding and those in Docket No. EL00-95-000. Further, no prejudice has been shown to result from the manner of service. However, in the future, we expect the Attorney General to only serve pleadings by electronic service to parties that have consented to such form of service. The motions to dismiss based on inadequacy of service are denied.

Further, we deny the motions to dismiss based on claims that the complaint fails to clearly state what transactions are at issue and does not specify allegations as to the conduct of specific parties. The complaint makes clear that it is challenging whether the Commission's market-based rate program legally satisfies the filing requirements of section 205(c) of the FPA. The complaint is also sufficiently clear that it challenges sellers' quarterly compliance with the Commission's reporting requirements when filing quarterly transaction reports. The Attorney General then identifies specific examples of what he alleges to be such violations of the reporting requirements. This level of detail suffices to put respondents on notice of the allegations against them.

We grant the motions to dismiss of APX and Sunrise because they did not make sales to the ISO, PX or CERS at market-based rates during the relevant time. Further, we grant the motions to dismiss of the Cities of Seattle and Tacoma because, while their sales

are subject to the west-wide mitigation program established by the Commission,³⁵ they are governmental entities under section 201 of the FPA and the Commission has not required them to file the quarterly reports required of public utility sellers with market-based rates.³⁶ Therefore, they are not proper respondents to the complaint.

The Commission denies the motions to dismiss of Nevada Power, Sierra Pacific, PNM, Avista and Puget, claiming that they made sales under the WSPP Agreement. As discussed below, we find that sellers need not report transaction information that was previously and properly submitted by WSPP. However, it is not clear from their pleadings that their sales were made exclusively under the WSPP Agreement. For example, while PNM contends that all of its sales to CERS were made pursuant to the WSPP Agreement, it does not extend this claim to its sales in the ISO and PX markets.

C. Legality of the Market-Based Rates Program

The Attorney General challenges the legality of the current filing and reporting requirements for market-based rate tariffs under the FPA. Complaint at 5-16. The Attorney General argues that the filing requirements do not provide sufficient notice of the rate to be charged or permit advance Commission approval of actual prices, while the reporting requirements impermissibly shift the burden of proof. *Id.* These contentions rest largely on the view that the cost-of-service ratemaking model must control the reporting and review of market-based rates. *See* Complaint at 7 (faulting the current plan on grounds that it "do[es] not meet [the] fundamental requirements of the FPA" for cost-of-service or formula rates). These arguments were advanced and addressed in prior Commission orders, and thus the Complaint constitutes an impermissible collateral attack on those earlier Commission rulings. Compare Complaint at 5 (summarizing contentions with San Diego Gas & Electric Co., et al., 96 FERC ¶ 61,120 at 61,505-06 (2001) (July 25 Order) (summarizing similar contentions raised).³⁷ In addition, the Commission agrees with those parties who have pointed to other similarities between the complaint and arguments addressed in prior Commission orders. *See supra* nn. 14-18 and accompanying text. Accordingly, we dismiss this portion of the Complaint as an impermissible collateral attack on those orders.

³⁵*See* San Diego Gas & Electric Co., et al., 95 FERC ¶ 61,418 (2001)

³⁶The Attorney General, in his answer, at 4, acknowledges that APX, City of Seattle and City of Tacoma are not respondents.

³⁷The July 25 Order is currently the subject of several pending appeals.

Even if these arguments were not dismissed, they lack merit. The Complaint's view that only cost-based or formula rate models satisfy the statutory framework fundamentally misapprehends the Commission's ratemaking authority. The Complaint states that the tariffs on which "the market-based rates charged by California wholesalers" are based include neither the specific, numeric rates that characterize cost-of-service tariffs nor the clearly identified components that characterize a formula rate tariffs. *Id.* at 8-9. The Complaint then alleges that the notice requirements of the NGA and the FPA "dictate that [a] utility file either the actual rate to be charged or a [clearly-stated] formula." *Id.* at 9.

According to the Complaint, the absence of such elements renders market-based tariffs unlawful. But that allegation rests on a fallacious assumption: that because certain elements are necessary for a cost-based or formula rate tariff, they must also be found in a market-based rate tariff. However, nothing in the FPA supports that assumption, as the Act does not dictate the ratemaking methodology to be followed or the elements that must be included in a lawful tariff. Market-based rate tariffs are allowed under the FPA, and the current filing and reporting plan complies with the statutory conditions for assuring the lawfulness of such tariffs.

Market-based rates are permitted by the FPA. Use of market-based rates has been approved as satisfying the just and reasonable standard in certain circumstances. Louisiana Energy and Power Authority v. FERC, 141 F.3d 364, 365 (D.C.Cir. 1998) (LEPA); Elizabethtown Gas Co. v. FERC, 10 F.3d 866, 870 (D.C.Cir. 1993). The prerequisite for approval of market-based rates is a finding that the seller lacks or has mitigated its market power in the relevant market. LEPA, 141 F.3d at 365; see Grand Council of the Crees v. FERC, 198 F.3d 950, 953 (D.C.Cir. 2000) (same). So long as a seller lacks market power and thus buyers have alternatives, market-based rates will meet the just and reasonable standard. See Elizabethtown, 10 F.3d at 871 ("Such market discipline provides strong reason to believe that [the pipeline] will be able to charge only a price that is 'just and reasonable' within the meaning of § 4 of the NGA."). This satisfies the FPA § 205(e) standard that use of market-based rates by a seller is just and reasonable.

As the "purpose of the filed rate doctrine is to assure effective Commission oversight of the rates at which power is sold," City of Girard v. FERC, 790 F.2d 919, 922 (D.C.Cir. 1986), filing requirements are tailored to allow the Commission to perform its oversight function. Filing requirements thus vary depending on the type of rates involved. For cost-of-service rate tariffs, there is "a bright-line insistence that a numerical rate be 'specified.'" Transwestern Pipeline Co. v. FERC, 897 F.2d 570, 577 (D.C.Cir. 1990) (citations omitted). The need for a numerical rate does not apply, however, for rate formula tariffs, *id.* at 578, "because once we determine that the formula

is just and reasonable, the protection against unreasonable rates is the fixed nature of the formula, which, so long as it is not changed, generally requires no further Commission monitoring." Ocean State Power II, 69 FERC ¶ 61,146 at 61,552 (1994)(footnote omitted).

In the case of market-based rates, which rest on a finding that a seller (and its affiliates) cannot exercise market power, the Commission requires quarterly filings to assure that the seller is not exercising market power in the relevant market. See Transwestern, 897 F.2d at 578-79 (Commission's role is to "mak[e] sure that the utility's monopoly power does not bring about rates that are materially worse for the customers than what they could get for themselves under competition"); see also, e.g., EPMI I, 65 FERC ¶ 61,305 at 62,406 (1993) ("informational filings are necessary so that the marketer's rates will be on file as required by Section 205(c) of the FPA, 16 U.S.C. § 824d(c), to evaluate the reasonableness of the charges, and to provide for ongoing monitoring of the marketer's ability to exercise market power").

Inclusion of a specific numerical rate or a clearly defined formula in a market-based rate tariff would not address nor further the Commission's oversight role as to those tariffs. Neither of those elements would indicate whether the seller was able to exercise market power, and thus could not answer whether continued use of market-based rates was reasonable. As these filing procedures satisfy the filed rate doctrine for market-based rates, we reject the Attorney General's implication that the filing of a specified numerical rate or a clearly-stated rate formula are the only means to satisfy the statutory requirement for market-based rate tariffs.

We also reject the claim that "all rates must be filed with FERC and published for public review prior to the time service commences." Complaint at 5 (emphasis added). As stated in the July 25 Order, FPA § 205(c) does not "require that the Commission receive prior notice of market-based rates." 96 FERC at 61,506 (quoting language of subsection: "every public utility shall file with the Commission, within such time and in such form as the Commission may designate").

This is not to say the Commission fails to consider 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. In the case of market-based rates, the just and reasonable standard of FPA § 205(e) is satisfied by the Commission's determination, prior to the effectiveness of those rates, that the utility (and its affiliates) lacks market power or has taken sufficient steps to mitigate market power. E.g., Grand Council of the Crees, 198 F.3d at 953 ("In reviewing such applications, the Commission demands that the power

marketer establish that it, and its affiliates, either do not have, or have adequately mitigated, market power in both generation and transmission. The applicant must also establish that it cannot erect barriers to entry, and that there is no evidence of other behavior perceived as anti-competitive, such as affiliate abuse or reciprocal dealing.").

Lack of market power justifies use of market-based ratemaking because it indicates that "customers have genuine alternatives to buying the seller's product." Louisville Gas & Electric Co., 62 FERC ¶ 61,016 at 61,144 (1993). The availability of genuine alternatives provides a sufficient basis for the Commission to conclude that "market discipline" will be sufficient to keep the prices that sellers charge within the statutorily-prescribed just and reasonable zone. Elizabethtown, 10 F.3d at 871. The prior market power review thus meets the FPA § 205(e) standard.

The current reporting requirements provide an efficient and adequate means for the Commission and the public to examine on a continuing basis whether a seller and its affiliates lack market power. After-the-fact quarterly reports provide a means for spotting pricing trends, discriminatory patterns, or other indicia of the exercise of market power.

Contrary to the Attorney General's contention, reliance on MCI and Maislin is misplaced in this case because of the difference in the underlying statutory schemes. Both the Interstate Commerce Act in Maislin and the Communications Act in MCI are based on a common carrier regulatory model that requires "that rates to all shippers be uniform and comply with the single tariff filed with the Commission," while, in contrast, the FPA "recognizes the need for private contracts of varying terms and expressly provides for the filing of such contracts as part of the rate schedules." United Gas Co. v. Mobile Gas Corp., 350 U.S. 332, 345 (1956). Further, filings under section 205(c) are to be made "within such time and in such form as the Commission may designate" Thus, parties are free to contract even before actual prices under a market-based tariff are filed with the Commission. In short, the absolute prior filing requirement found in the statutes addressed by Maislin and MCI are not found in the FPA.³⁸

Further, the Attorney General's reliance on MCI and Maislin rest on a view that the after-the-fact quarterly reports constitute the only rate filings for market-based rates. That is erroneous; unless and until a utility can demonstrate that it (and its affiliates)

³⁸Nevertheless, in Order No. 2001, the Commission required that marketers report transaction-specific information in their after-the-fact quarterly transaction reports, citing to the need for full disclosure, as expressed in Maislin and MCI, to assure that rates fall within the zone of reasonableness. See Revised Public Utility Filing Requirements, 99 FERC ¶ 61,107, mimeo at pp. 51-52 and fn 101 and 89-91 and fn 160 (April 25, 2002).

lacks market power in the relevant market, it will not be granted market-based rate authority. A prior finding of lack of market power justifies Commission approval of market-based rates as just and reasonable, and thus the on-file market-based umbrella tariff (which was the subject of Commission approval) preauthorizes the seller to engage in market-based sales and puts the public on notice that the seller may do so. The later-filed quarterly reports allow monitoring by the public and Commission to determine whether the lack of market power finding remains valid. The umbrella tariff, in conjunction with the quarterly report filings, thus allow us to fulfill our statutory obligations to assure that market-based rates are properly in effect as just and reasonable. See, e.g., Southern Company Energy Marketing, L.P., 86 FERC ¶ 61,131 at 61,460 n.41; Koch Gateway Pipeline Co., 66 FERC ¶ 61,385 at 62,306 (1994).

The Complaint charges that quarterly filing "effectively shifts the burden of proof as to the reasonableness of rate to purchasers . . . [and] violates the cardinal purpose of the filing requirement, which is to *prevent* public utilities from charging excessive rates by providing an opportunity for FERC to act before rates go into effect." Complaint at 3 (emphasis in original); see also id. at 13 ("after-the-fact reporting of rates virtually eliminates any meaningful review of rates under Section 205"). These charges ignore that before a utility can charge market-based rates, the Commission must find the utility (and its affiliates) lacks or has mitigated market power. That determination supports a conclusion that resulting market-based rates, through market discipline, will be just and reasonable. E.g., PacifiCorp Power Marketing Inc., 98 FERC ¶ 61,108 at 61,326 (2002). The filings give notice of the actual prices that were charged and allow monitoring to assure that conditions have not changed so as to permit the exercise of market power, and therefore that market rates will no longer be in the zone of reasonableness. E.g., Enron Power Marketing Inc., 65 FERC ¶ 61,305 at 62,406 (1993) (noting the necessity for "informational filings" as offering the means "to evaluate the reasonableness of the charges, and to provide for ongoing monitoring of the marketer's ability to exercise market power").

The current filing and reporting plan for market-based rates is consistent with the underlying statutory plan. Under FPA § 205, utilities propose rates for Commission approval as being just and reasonable. FPA § 206 complaint procedures apply when it appears that those rates are no longer just and reasonable.³⁹ When the Commission

³⁹In this regard, FPA § 206 complaint procedures apply in the same manner to market-based rates as they do to cost-of-service or formula rates. In all cases, rates become effective after an initial determination that proposed rates are just and reasonable. If those same rates later appear to be excessive, they can be changed only (assuming the

(continued...)

moves to a market-based rate system, it "must retain some general oversight over the system, to see if competition in fact drives rates into the zone of reasonableness 'or to check rates if it does not.'" Interstate Natural Gas Ass'n of America v. FERC, No 98-1332 et al., (April 5, 2002), slip op. at 10; see id. at 15 ("set[ting] great store" on the availability of "monitoring and assurance of remedies in the event of insufficient competition" as adequate safeguards). The reporting and filing requirements for market-based rates allow us to do just that.

Case law indicates that monitoring and FPA § 206 complaint procedures offer sufficient protection against consumer exploitation in a market-based rate context. See Elizabethtown, 10 F.3d at 870 (approving market-based rates, in part, because Commission "will exercise its [NGA] § 5 authority . . . to assure that a market (*i.e.*, negotiated) rate is just and reasonable"); see Transmission Access Policy Study Group v. FERC, 225 F.3d 667, 689 (D.C.Cir. 2000), aff'd sub nom., New York v. FERC, 122 S.Ct. 1012 (2002)(if a party "has evidence that the tariff results in undue discrimination in its individual circumstances, [that party] remains free to file a petition under FPA § 206 for redress"). In sum, the current plan follows from and furthers the statutory objectives.

Adequate notice of rates thus does not necessarily require the filing of a specific numerical rate. Rather, it requires that the notice "enable[s] purchasers to 'know in advance the consequences of the purchasing decisions they make.'" Western Resources, Inc. v. FERC, 72 F.3d 147, 149 (D.C.Cir. 1995)(citations omitted). When tariffs with market-based rates are approved by the Commission, purchasers know in advance that, to borrow the Complaint's language (at 9), the rates could "fluctuate widely and rapidly (every hour or less in the ISO and PX) according to supply and demand and any other consideration taken into account by buyers and sellers in the course of business." Based on such possible fluctuations, purchasers can predict in advance the consequences of relying, for example, on last minute spot purchases in a sellers' market. See In re California Power Exchange Corp., 245 F.3d 1110, 1116 (9th Cir. 2001)(contrasting consequences of reliance on spot purchases with those based on managing risks through long-term contracts); July 25 Order at 61,506 n. 31 (noting when market-based rates are used, buyers "can predict that rates will fluctuate").⁴⁰

³⁹(...continued)

utility does not file new rates) through FPA § 206 procedures, which place the burden on the moving party, not the utility. Thus, the Complaint really challenges the statutory scheme, not market-based rates.

⁴⁰In a buyers' market, as existed in California in the first years after restructuring,
(continued...)

The Commission disagrees with the Complaint's contention (at 15) that the current filing and reporting requirements "exceed[] the bounds set by [the] controlling statute in an effort to promote competition in the electricity industry." As demonstrated above, the filing and reporting requirements have been tailored in a way that fully satisfy our duty to assure that rates are just and reasonable, while at the same time promoting the non-cost benefits that flow from market-based pricing, such as the building of new generation.

Given the very large number of transactions along with, in many cases, their short duration, after-the-fact reporting allows the market to operate initially without regulatory intrusion, while, at the same time, offering 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 authorization. Louisville Gas & Electric Co., 62 FERC ¶ at 61,143 n. 15 (1993) (noting that "periodic, update market analyses and complaints" are appropriate mechanisms for assuring "that a seller's right to sell at market-based rates is revoked if the seller, subsequent to the Commission's acceptance of market-based rates, acquires market power in a relevant market"). This filing and reporting plan represents the type of "pragmatic adjustments which may be called for by particular circumstances," that courts have long interpreted the FPA to allow. E.g., FPC v. Louisiana Power & Light Co., 406 U.S. 621, 642 (1972).

The Complaint "does not contend that market-based pricing per se violates the FPA." Complaint at 13. The Attorney General suggests that market-based pricing could be used "so long as rates do not exceed a cap lawfully established by FERC." Id. As the Complaint acknowledges, such a "system [is] currently in place throughout the Western Systems Coordinating Coun[cil]." Id. at 14 n. 13.⁴¹ Rate caps offer a useful remedy in

⁴⁰(...continued)

the consequences of heavy reliance on spot markets were favorable to purchasers. Presumably, this is why the Attorney General did not challenge market-based tariffs and our notice and filing requirements during that period, even though, for all practical purposes, the tariffs and requirements operated then as they did in 2000-01.

⁴¹As the Complaint addresses only matters related to the California market, which are subsumed within the WSCC, it is difficult to surmise how the Attorney General is injured given this recognition of the refund system currently in place. While the Complaint indicates differences over "the appropriate level of the cap," id., those differences are being litigated in the pending refund hearings. Similarly, to the extent the Complaint challenges the validity of the October 2, 2000 refund effective date, it constitutes an impermissible collateral attack on the Commission's prior orders.

(continued...)

certain circumstances, but they are not, as the Complaint seems to suggest, necessary or appropriate in all circumstances. At one time, the Commission required an avoided cost showing as a regulatory backstop for assuring the reasonableness of market-based rates. E.g., Louis Dreyfus Electric Power Inc., 61 FERC ¶ 61,303 at 62,142 (1992). With experience, the Commission determined that "reliance on an 'avoided cost' requirement would be validating rather than detecting the exercise of market power," and, as a result, dropped use of that cap. Louisville Gas & Electric, 62 FERC at 61,143 n. 15.

As our action in the WSCC indicates, a ceiling rate can be a useful ratemaking measure in certain circumstances. Other circumstances, however, could call for the use of different measures. For example, the Commission currently requires a different form of price mitigation in the ISO's spot market, until September 30, 2002. We reject the Attorney General's argument that we are required to employ a cap as the primary means of assuring that market-based pricing meets the just and reasonable standard. The better approach, in our view, is to have in place adequate infrastructure, market rules that are not subject to gaming, and other foundations of a well-functioning market.

D. Deficiencies in Quarterly Reports Filed by Marketers

As discussed below, the Commission agrees with the Attorney General's position to the extent that he argues that some sellers have failed to comply with the Commission's existing reporting requirements. Pursuant to section 205(c) of the FPA and the Commission's reporting requirements as contained in orders authorizing sellers' market-based rates and as interpreted in Commission precedent, sellers must report transaction-specific information in their quarterly transaction reports. As a corollary, the reporting of aggregated data does not comply with existing Commission requirements.

The Commission has previously concluded that the reporting of transaction-specific information is a necessary component of our section 205(c) requirements. That is not to say that the after-the-fact reports establish the market rate but, rather, they are an important tool in assuring that a seller's use of market-based rates remains reasonable. In EPMI I, the Commission explained that it was denying Enron's request to aggregate data in its quarterly reports because "informational filings are necessary so that the marketer's rates will be on file as required by Section 205(c) of the FPA, 16 U.S.C. § 824d(c), to evaluate the reasonableness of the charges, and to provide for ongoing monitoring of the

⁴¹(...continued)

Moreover, that matter is currently the subject of court appeals.

marketer's ability to exercise market power."⁴² Most recently, in Order No. 2001, the Commission explained that aggregated data do not provide sufficient disclosure of rates to the public and would prevent customers from detecting improper conduct.⁴³

Further, contrary to the assertions of some respondents, the Commission has consistently required that marketers report transaction-specific information in their quarterly reports. In Citizens, the Commission established the reporting requirement and identified specific categories of information to be disclosed in the quarterly reports:

For each purchase contract and sale contract, Citizens Power should provide the following information: the buyers or sellers name; a brief description of the service, including degree of firmness; the delivery point for each service; the price of each service; the quantities to be served or purchased; the contract's duration; . . . and any other attributes of the product being purchased or sold which contribute to its market value.^[44]

As noted above, in EPMI I, the Commission denied Enron's request to report sales and purchase data on an aggregate basis. Some respondents argue that EPMI I is inapposite because the Commission denied Enron's request to aggregate data in one way, while the respondents aggregate data differently. We find this argument unpersuasive. The Commission clearly stated "[w]e will deny Enron's request to modify the reporting requirement in any way."⁴⁵ If marketers believed that the order did not preclude other methods of aggregating information, it was incumbent upon them to request such guidance from the Commission.

⁴²EPMI I, 65 FERC ¶ 61,305 at 62,406. See also Heartland Energy Service, Inc., 68 FERC ¶ 61,223 at 62,065 (1994) (Heartland); InterCoast Power Marketing, 68 FERC ¶ 61,248 at 62,134 (1994).

⁴³Revised Public Utility Filing Requirements, 99 FERC ¶ 61,107, mimeo at 51-52 and fn 101 (April 25, 2002), citing Maislin and Southwestern Bell Corp. v. FCC, 43 F.3d 1515 (D.C. Cir. 1995).

⁴⁴48 FERC ¶ 61,210 at 61,778. From the context, it is clear that the "contract" refers to individual purchase and sales transactions, and not to "umbrella" contracts. This distinction is also made clear from the Commission's subsequent discussion of the reporting requirement in Southern Company Services, Inc., 75 FERC ¶ 61,130 at 61,444 (1996), on reh'g, 87 FERC ¶ 61,214 (1999); reh'g dismissed, 99 FERC ¶ 61,103 (2002).

⁴⁵EPMI I, 65 FERC ¶ 61305 at 62,406.

In Heartland, 68 FERC ¶ 61,223 at 62,065, the Commission held Heartland, an affiliate of Wisconsin Power and Light Company, to the reporting standards in EPMI I. Heartland's filing was the first application by an affiliated power marketer for open-ended authorization to transact at market-based rates.⁴⁶ In subsequent orders, the Commission has consistently made clear that marketers must report transaction-specific data.⁴⁷ Thus, we reject the respondents' arguments that marketers were either not subject to the case-specific holding of EPMI I, or that nuances in the Commission orders accepting their market-based rate tariffs and requiring the submission of quarterly transaction reports somehow held certain marketers to a lesser reporting standard.⁴⁸

The quarterly reports submitted recently by a number of the respondents do not comply with these requirements. For example, Williams Energy Marketing and Trading Company, Dynegy Power Marketing, Inc., Mirant Americas Energy Marketing, LP, and Reliant Energy Services, Inc. filed aggregated data in their transaction reports for the fourth quarter 2000 and all four quarters of 2001. These filings did not comply with the Commission's reporting requirements. Similarly, any other filings that report aggregate data did not comply with the reporting requirements.

⁴⁶See also Detroit Edison Company, et al., 80 FERC ¶ 61,348 (1997); LG&E Power Marketing, Inc., 68 FERC ¶ 61,247 (1994) (denying affiliated marketer request to depart from the reporting requirements applicable to other marketers).

⁴⁷See, e.g., San Manuel Power Company LLC, 96 FERC ¶ 61,089 at 61,370 fn 9 (2001) (listing reporting requirements, and explaining that marketers must provide price per transaction, no price ranges); Huntington Beach Development, L.L.C., 96 FERC ¶ 61,212 at 61,895 (2001); and Duke Energy Mohave, LLC, 95 FERC ¶ 61,256 at 61,890 and fn 9 (2001); Commonwealth Electric Company, 78 FERC ¶ 61,191 (1997).

⁴⁸Some respondents imply that, because they were directed to file "quarterly transaction summaries of specific sales," they were authorized to report transactions on a summary, i.e., aggregated, basis. They are mistaken. Rather, the Commission's reporting requirement remained constant, and the quoted language simply directed marketers to comply with the requirement. In Huntington Beach Development, LLC, 96 FERC ¶ 61,212 at 61,895-96, the Commission required Huntington Beach to report "quarterly transaction summaries of specific sales." Elsewhere in the same order, the Commission specified the information to be submitted for each transaction, and specifically stated that "transaction reports should not aggregate transactions by seller or purchaser." Id. at n. 11. See also Southern Company Services, Inc., 75 FERC ¶ 61,130 at 61,444 (Southern to report "transaction summaries of each individual short-term transaction entered into under the filed umbrella service agreements").

As a remedy to cure this non-compliance, the Commission directs 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 file in compliance with our reporting requirements, within 30 days, new quarterly transaction reports showing non-aggregated data for sales made during the period October 2, 2000 to the date of this order. Specifically, 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 points(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).⁴⁹ Further, all future quarterly reports must contain the same transaction-specific information, and conform to the new filing requirements required by Order No. 2001, once effective.

Those respondents that have filed transaction information in Docket No. PA02-2-000⁵⁰ will not be relieved of their obligation to file new quarterly reports pursuant to the above criteria. The information requested in the investigation differs from that described above for compliance with the quarterly reporting requirement. For example, the investigation template for short-term sales requires the reporting of weighted average prices.

Further, the sellers in the ISO and PX markets must submit complete price data, including information for each clearing-price interval in the market. As we indicated in Order No. 2001, this information is necessary pursuant to section 205(c) of the FPA.⁵¹ To the extent that this information has been filed in a docket before the Commission and is publicly available, i.e., not subject to confidentiality protections, or is publicly available through another forum, such as the ISO website, sellers are not required to re-submit this information. However, we require sellers to identify with specificity the docket or forum where the information is publicly available. We will not require sellers to report information regarding transactions pursuant to the WSPP Agreement, provided that the WSPP has reported those transactions consistent with the reporting requirements for WSPP transactions.⁵²

⁴⁹See e.g., *Huntington Beach Development, LLC*, 96 FERC ¶ 61,212 at 61,895.

⁵⁰See *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 98 FERC ¶ 61,165 (2002).

⁵¹Order No. 2001, mimeo at pp. 89-91.

⁵²For many years, the WSPP was obligated to report, on a quarterly basis,
(continued...)

The Commission denies the Attorney General's request to institute a refund proceeding as a remedy as to those sellers who previously filed aggregated data. Under section 206 of the FPA, the Commission currently 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. Thus, we are currently precluded under section 206 from extending refund responsibility to transactions prior to 60 days from the date of the Attorney General's March 16, 2002 complaint. Further, to the extent the Attorney General is arguing that we could order refunds prior to the October 2, 2000 refund effective date in the Docket EL00-95 complaint proceeding, this too is prohibited by the statute except in limited circumstances that are not present here.

The Attorney General argues that, while section 206 bars retroactive refund liability in cases challenging existing rates, the provision does not bar the relief requested in the complaint because, due to the deficiencies in the sellers' quarterly transaction reports, no rates were lawfully on file in the first instance. This position ignores the fact that the sellers at issue, all authorized to make power sales at market-based rates, have a tariff on file that provides for power sales at market-based rates. Those tariffs, not the quarterly reports, constitute the authorization to sell at market-based rates. Power sales made pursuant to a previously accepted market-based rate tariff are, in effect, pre-authorized pursuant to the acceptance for filing of the market-based rate tariff.⁵³ The quarterly reports allow for monitoring and oversight of that tariff. The reporting deficiencies identified by the Attorney General in the quarterly reports, while serious and in need of correction, do not invalidate market-based pricing tariffs as lawful filed rates. Thus, contrary to the Attorney General's position, section 206 bars retroactive refunds in this proceeding, or in the EL00-95 proceeding.

In our view, the failure to report transactions in the format required by the Commission for quarterly reports is essentially a compliance issue. By itself, non-

⁵²(...continued)

transaction-specific information for each transaction made pursuant to the WSPP Agreement. See Western Systems Power Pool, 59 FERC ¶ 61,249 (1992) (specifying reporting requirements); Western Systems Power Pool, 55 FERC ¶ 61,495 (1991) (directing WSPP to submit transaction reports quarterly). However, the WSPP's reporting requirement was eliminated in an April 25, 2002 order, Western Systems Power Pool, 99 FERC ¶ 61,104 (2002). Marketers are now required to report WSPP transactions directly to the Commission by their inclusion in marketers' quarterly transaction reports.

⁵³See GWF, 98 FERC ¶ 61,330 at 62,390-91; PacifiCorp Power Marketing, Inc., 97 FERC ¶ 61,105 (2001), reh'g denied, 98 FERC ¶ 61,108 (2002).

compliance with reporting requirements by some sellers does not render unlawful all market-based rate sales in the California markets since January 1, 2000. In essence, the complaint seeks to use non-compliance of some sellers to void for all sellers the section 206 refund effective date of October 2, 2000 in Docket No. EL00-95. That proposal, in our view, exceeds what the FPA requires as well as what is equitable.⁵⁴ We have previously rejected attempts to extend the refund period earlier than the statutorily-based October 2, 2000 refund date, and we will do so here as well.⁵⁵ Rather, the sellers' re-filing of quarterly reports to include transaction-specific data is an appropriate and sufficient remedy in this proceeding.

The Commission orders:

(A) The Complaint is hereby dismissed in part, as discussed in the body of this order.

(B) The complaint is hereby granted in part and denied in part, as discussed in the body of this order.

(C) All marketers and other public utility sellers that made short-term sales of electric energy and electric capacity at market-based rates in the ISO markets, PX markets and to CERS during the period during the period October 2, 2000 to the date of this order must, within thirty (30) days from the date of this order, file new quarterly transaction reports showing non-aggregated data for sales made during the period October 2, 2000 to the date of this order.

(D) All marketers and other public utility sellers that made short-term sales of electric energy and electric capacity at market-based rates in the ISO markets, PX markets and to CERS must, prospective from the date of this order, report all sales at market-based rates in quarterly transaction reports on a transaction-specific basis, as discussed in the body of this order, until such time that the revised filing requirements in Order No. 2001 are implemented.

⁵⁴When the Commission is considering what remedy may be appropriate, as it is doing here, its discretion is at its "zenith." Connecticut Valley Electric Co., Inc. v. FERC, 208 F.3d 1037, 1044 (D.C. Cir. 2000); Towns of Concord *et al.* v. FERC, 955 F.2d 67, 72-73, 76 & n. 8 (D.C. Cir. 1992); Niagara Mohawk Power Co. v. FPC, 379 F.2d 153, 159 (D.C. Cir. 1967).

⁵⁵*E.g.*, San Diego Gas & Electric Co., *et al.*, 96 FERC ¶ 61,120 at 61,505.

(E) CARE's motion to consolidate is hereby denied.

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

(S E A L)

Linwood A. Watson, Jr.,
Deputy Secretary.

APPENDIX

AES Companies (AES)*

Allegheny Energy Supply Company, LLC (Allegheny)*

Aquila Merchant Services, Inc. (Aquila)* and **

Automated Power Exchange, Inc. (APX)*

Avista Energy, Inc. (Avista)*

BP Energy Company (BP)*

California Electricity Oversight Board

California Independent System Operator Corporation

Calpine Energy Services, L.P. (Calpine)*

Cities of Santa Clara and Palo Alto, California

City of Seattle, Seattle City Light (Seattle)*

City of Tacoma, Washington (Tacoma)* and **

Cogeneration Association of California and Energy Producers and Users Coalition (CAC/EPUC)*

Competitive Supplier Group (consists of: Pinnacle West Capital Corporation; Arizona Public Service Company; PacifiCorp; PacifiCorp Power Marketing, Inc.; El Paso Merchant Energy, LP; IDACORP Energy L.P.; Portland General Electric Company; Enron Power Marketing Inc.; Puget Sound Energy, Inc.; Public Service Company of Colorado; Avista Energy, Inc.; Coral Power, L.L.C.; Powerex Corp.; Sempra Energy Trading; Sempra Solutions; Sempra Energy Resources; PPL EnergyPlus, LLC; PPL Montana, LLC; and GWF Energy LLC.

Constellation Power Source, Inc. (Constellation)*

Coral Power, LLC (Coral)* (filed answer and separate motion to dismiss)

Duke Energy Morro Bay, LLC, Duke Energy Moss Landing, LLC, Duke Energy Oakland, LLC, Duke Energy South Bay, LLC, and Duke Energy Trading and Marketing, L.L.C. (collectively "Duke Energy")*

Dynegy Power Marketing, Inc.; El Segundo Power, LLC; Long Beach Generation LLC; Cabrillo Power I LLC; Cabrillo Power II LLC; and Dynegy Power Services, Inc. (Dynegy)*

Edison Mission Marketing & Trading, Inc. (EMMT)*

El Paso Merchant Energy, L.P. (EPME)*

Electric Power Supply Association and Western Power Trading Forum (EPSA/WPTF)*

Electricity Consumers Resource Council (ELCON)*

Enron Power Marketing, Inc. (Enron)*

Exelon Corporation, on behalf of Exelon Generation Company, LLC, Commonwealth Edison Company and PECO Energy Company (Exelon)*

Fresno Cogeneration Partners, LP, Wellhead Power Gates, LLC, and Wellhead Power Panoche, LLC (Wellhead companies)* and **

GWF Energy LLC (GWF)*

IDACORP Energy L.P. (IDACORP)*

Idaho Power Company (Idaho Power)*

Independent Energy Producers Association (IEP)*

Merrill Lynch Capital Services, Inc. (MLCS)*

Mirant Americas Energy Marketing, LP, Mirant California LLC, Mirant Delta, LLC, and Mirant Potrero, LLC (collectively, "Mirant")*

Modesto Irrigation District

Morgan Stanley Capital Group Inc. (Morgan Stanley)*

NEO California Power LLC

Nevada Attorney General's Bureau of Consumer Protection

Nevada Power Company and Sierra Pacific Power Company (Sierra)*

Pacific Gas and Electric Company

PacifiCorp*

PacifiCorp Power Marketing, Inc. (PPM)*

PG&E Energy Trading-Power, L.P. (PGET)*

Pinnacle West Capital Corporation, Arizona Public Service Company, and APS Energy Services Company (Pinnacle)*

Portland General Electric Company (Portland)*

Powerex Corp. (Powerex)*

PPL EnergyPlus, LLC and PPL Montana, LLC (PPL)*

PSEG Energy Resources & Trading LLC (PSEG)

Public Service Company of Colorado (PS Colorado)*

Public Service Company of New Mexico (PNM)*

Public Utilities Commission of the State of California (CPUC)**

Puget Sound Energy, Inc. and Avista Corporation (Puget)*

Reliant Energy Services, Inc. (Reliant)*

Sacramento Municipal Utility District

Sempra Energy Trading Corp., Sempra Energy Solutions and Sempra Energy Resources (Sempra)*

Southern California Edison Company

Southern California Water Company

Strategic Energy L.L.C. (Strategic Energy)*

Sunrise Power Company, LLC (Sunrise)*

TransAlta Energy Marketing (US), Inc. and TransAlta Energy Marketing Corporation
(TransAlta)*

TransCanada Energy, Ltd. (TransCanada)*

Turlock Irrigation District

Universal Studios, Inc.

Williams Marketing & Trading Company (Williams)*

*entities filed substantive pleading (answer, protest, comments or motion to dismiss)

**Motion to intervene out-of-time

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

v.

Docket No .EL02-71-000

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

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,
Respondents

(Issued May 31, 2002)

MASSEY, Commissioner, concurring:

Today's order denies, in most respects, California's complaint that our regulatory regime governing market based rates violates the Federal Power Act requirement that rates must be on file. That regime has three major components: a finding that a seller does not have market power, a general tariff that allows the seller to charge market based rates, and quarterly transaction reports filed by the seller. The order finds that this program satisfies the requirements of the Federal Power Act, as interpreted in various court decisions.

I agree with the findings made in today's order, but am concurring to say that other aspects of our market based policies still need attention. To the extent that this is Mr. Lockyer's point in filing this complaint, I agree with him.

First, we must ensure that the markets in which we allow market based pricing are truly competitive – and that the sellers that we allow to charge market based rates do not have market power and cannot otherwise manipulate the market. This is the bedrock factor in our market based pricing regime. I understand that competitive markets require market based pricing. But if those markets are to bring benefits to customers, sellers must not be able to control prices. We have made progress in this area with the Supply Margin Assessment for evaluating market based pricing authority, but recent revelations show we have more to do.

Second, the establishment of well-structured RTOs in all regions of the country will facilitate regional trading platforms that are worthy of market-based pricing. We must redouble our efforts in establishing RTOs.

Third, we need market rules that remove the incentives for manipulation, and that prohibit abusive behavior and sham transactions. The staff must pursue and complete its ongoing investigation into what went on in the Western markets during 2000 and 2001 so that we learn exactly what behavior occurred and adopt measures to prevent any bad behavior in the future. Our Standard Market Design initiative has the promise of promoting good markets with a low probability of being abused, and I support Chairman Wood's commitment to pursue the SMD aggressively.

Fourth, we need good, aggressive market monitoring. This will require team work between our new market oversight office and the regional market monitors.

Fifth, we need effective up-front market mitigation measures - - measures that will prevent withholding and artificial price run ups. As we have seen, electricity prices can soar quickly, and we must prevent unwarranted price run ups. In another case on today's agenda, we approve revisions to the New York ISO's Automated Mitigation Procedures.¹ This is an excellent example of the kind of up front mitigation we need.

And sixth, where abuses occur, we must take corrective action. We must have refund protection in place for consumers in all markets so that they do not pay rates that are unjust and unreasonable. The Commission proposed such a refund condition last fall and we have received industry comment on it. We should make it effective and it should

¹New York Independent System Operator, Inc., et al., Docket No. ER01-3155-002, et al.

apply to all markets, including those administered by RTOs and ISOs. I also would prefer a refund condition that is triggered by both bad behavior and by a dysfunctional market. Rates are not just and reasonable in both situations.

While I agree with the basic conclusions reached in today's order, the aspects of our market based pricing program just discussed need attention to bring the benefits of competition to customers and ensure that they pay only just and reasonable rates. I agree with Attorney General Lockyer in this important respect. California was burned by a dysfunctional market, a poor market design, the exercise of market power and abusive behavior. Consumers should never suffer this kind of debacle again.

For these reasons, I concur with today's order.

William L. Massey
Commissioner