

100 FERC ¶ 61, 295  
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. EL02-71-001

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

ORDER DENYING REHEARING

(Issued September 23, 2002)

1. In this order, the Commission denies rehearing of a May 31, 2002 order (May 31 order)<sup>1</sup> addressing a Complaint filed by the State of California, ex rel. Bill Lockyer, Attorney General of the State of California (Attorney General). 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.

### **Background**

2. On March 20, 2002, the 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), failed to file their rates as required by section 205(c) of the Federal Power Act (FPA), 16 U.S.C. § 824d(c) (1994). The complaint alleged that the section 205(c) filing requirement is not met by the Commission requirements that power marketers file (a) after a finding that they lack market power, rate schedules that give them authority to make sales at rates established by agreement between buyer and seller (i.e., market based rates) and (b) quarterly transaction reports. The Attorney General further alleged that 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 the Commission's filing requirements.

3. With respect to the allegation that the Commission's market-based rate filing requirements violate the FPA as a matter of law, the May 31 order both dismissed the complaint insofar as it constituted a collateral attack on prior Commission orders, and denied the complaint on substantive grounds. With respect to the allegation that marketers' quarterly transaction reports were not in compliance with the Commission's reporting requirements, the Commission directed 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 had not complied with the Commission's reporting requirements, i.e., had 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 showing non-aggregated data for the period October 2, 2000 forward. The Commission

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<sup>1</sup>State of California, ex rel. Bill Lockyer v. British Columbia Power Exchange Corp., et al., 99 FERC ¶ 61,247 (2002).

denied the Attorney General's request to institute a refund proceeding as a remedy to those sellers who previously filed aggregated data.

4. The Attorney General filed a timely request for rehearing. Californians for Renewable Energy, Inc. (CARE) filed a motion to intervene out-of-time and a timely request for rehearing of the May 31 order.

## **Discussion**

### **Procedural Matters**

5. With regard to CARE's motion for late intervention, we note that when late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for the granting of such late intervention.<sup>2</sup> CARE argues that, as a member of the general public, it does not have adequate understanding of Commission procedures or resources to obtain legal assistance. We find that CARE has not met its burden of justifying late intervention. CARE has participated in various Commission proceedings for close to two years,<sup>3</sup> and has the obligation to familiarize itself with the Commission's rules and procedures. Accordingly, CARE's motion for late intervention is denied and the request for rehearing will not be considered.

### **Rehearing Request**

6. The Attorney General argues that the FPA prohibits the use of market-based rates for sales of electric energy. He claims that, because a market-based rate tariff does not specify an exact numerical rate for each potential sale, the Commission cannot satisfy its obligation to assure that the proposed market-based rates are just and reasonable. On a related point, he argues that the Commission's reliance on market power studies to determine that rates are just and reasonable is inadequate because, he alleges, existing guideposts have not been reliable in making market power determinations. In addition, the Attorney General contends that the use of market-based rates violates the filed rate

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<sup>2</sup>See, e.g., *Midwest Independent Transmission System Operator*, 99 FERC ¶ 61,258 (2002).

<sup>3</sup>On October 6, 2000, CARE filed a Complaint in Docket No. EL01-2-000, and has also participated in Docket No. EL00-95-000 et al.

doctrine because the exact numerical rate of each sale is not on file with the Commission before the sale occurs. He also argues that the Commission's position is contrary to the FPA and contradicts Commission precedent. He claims that Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990) (Maislin) and MCI Telecommunications Corp. v. AT&T Co., 512 U.S. 218 (1994) (MCI), are directly on point and the Commission's attempts to distinguish these cases are inadequate.

7. Further, the Attorney General seeks clarification that the May 31 order denied on the merits the allegations (set forth in sections III and IV of the complaint) that the Commission's market-based rate filing requirements violate the FPA as a matter of law. To the extent that the allegations were dismissed as an improper collateral attack without reaching the merits, the Attorney General contends that the Commission erred. He argues that the issues raised in the complaint were not raised previously by any party in a Commission proceeding, and the Attorney General did not have an opportunity to litigate the issues in the proceedings cited in the May 31 order.

8. The Attorney General also argues that the Commission abused its discretion by not ordering refunds as a remedy to the finding that sellers in the California markets did not comply with the requirement to report transaction-specific data. He argues that the May 15 order erred by treating the violations as a "compliance matter." According to the Attorney General, the reporting of aggregate data constituted a serious violation of the FPA and Commission rules because it "short circuited" the Commission's ability to monitor the market for market power abuse and other misconduct by generators and marketers with market-based rate authority.

9. The Attorney General also criticizes the conclusion that ordering refunds would be "inequitable." Rather, he claims that the equities support a refund proceeding considering the unjust and unreasonable rates in California, and in light of the fact that prohibited schemes such as "hockey stick bidding"<sup>4</sup> and "round trip trades"<sup>5</sup> escaped detection by the failure to report transaction-specific data. He contends that, while the Commission has discretion in determining the equities of the case, it failed in its

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<sup>4</sup>Hockey stick bidding occurs when the last megawatts bid from a generation unit are bid at an excessively high price relative to the bid(s) on the other capacity from the same unit.

<sup>5</sup>A round trip trade involves the sale of an electricity product to another company together with a simultaneous purchase of the same product at the same price and at the same location.

responsibility to provide a well-reasoned explanation for its decision. According to the Attorney General, the Commission was required, but failed, to exercise its discretion in a manner consistent with (i) its fundamental statutory purpose, *i.e.*, the protection of the public interest and (ii) Commission precedent holding that quarterly transaction reports are essential to protect the public from excessive rates in a market-based regime.

10. The Attorney General further argues that the Commission, having found that sellers violated the terms and conditions of their grants of market-based rate authority, is no longer barred from ordering retroactive refunds.<sup>6</sup> He argues that, just as in Washington Water Power Company,<sup>7</sup> where the Commission found that refunds were appropriate because of the severity of the violations and permissible because the marketer violated the terms of its market-based rate authorization, so here the failure to comply with the quarterly reporting requirement is serious and violates the terms of marketers' market-based rate authorizations. The Attorney General contends that his position is also supported by 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), in which a utility collected spent nuclear fuel disposal costs through its fuel adjustment clause without prior Commission approval. The Attorney General argues that, just as Delmarva's improper use of its fuel adjustment clause allowed it to overcharge consumers with impunity, the failure of sellers in the California markets to file their rates in quarterly reports made it impossible for the Commission to monitor the California market to detect unreasonable prices and improper practices such as "hockey stick bidding."

### **Commission Ruling**

#### **A. Legality of the Market-Based Rate Program**

11. The Attorney General reiterates his prior claims that the use of market-based rates violates the filed rate doctrine and prevents the Commission from satisfying its obligation to assure that the proposed market-based rates are just and reasonable because a market-based rate tariff does not specify the exact numerical rate (or, presumably, formula rate) for each potential sale. As we found in the May 31 order, the Attorney General's claims

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<sup>6</sup>Citing San Diego Gas & Electric Co., et al., 96 FERC ¶ 61,120 at 61,507 (2001); San Diego Gas & Electric Co., et al., 93 FERC ¶ 61,121 (2000) (Appendix E).

<sup>7</sup>83 FERC ¶ 61,097 (Show Cause Order); 83 FERC ¶ 61,282 (1998) (Order on Responses to Show Cause Order) (Washington Water Power),

that the FPA prohibits the use of market-based rates for sales of electric energy are an impermissible collateral attack on prior Commission orders rejecting those contentions.<sup>8</sup> Thus these claims are dismissed. In addition, we again find that these claims have no merit. These arguments of the Attorney General were addressed in the May 31 order, 99 FERC at 62,062-64.

12. The Commission authorizes the use of market-based rates only after it determines that the public utility proposing to use market-based rates does not have, or has sufficiently mitigated, market power. This is consistent with court precedent that "when there is a competitive market the FERC may rely upon market-based prices in lieu of cost-of-service regulation to assure a 'just and reasonable' result."<sup>9</sup> Our recent announcement that, in response to significant structural changes and corporate realignments in the electric industry, we will apply, on an interim basis, a new generation market power screen to market-based rate applications pending review of new methods to analyze market power,<sup>10</sup> does not indicate, as the Attorney General argues (rehearing request at 17), that the existing guideposts have not been reliable in making market power determinations. Rather, our recent action makes clear that market power screening analyses will be modified when necessary to address industry changes that otherwise might allow market power to be exercised in new ways.<sup>11</sup> Such modifications recognize that meeting our statutory duty to assure only just and reasonable rates is a dynamic process.

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<sup>8</sup>See, e.g., *San Diego Gas & Electric Co.*, 96 FERC ¶ 61,120 (2001).

<sup>9</sup>*Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993) (citing *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990) ("In a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that the price is close to marginal cost, such that the seller makes only a normal return on its investment"); *Louisiana Energy and Power Authority v. FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998); see also *Cajun Electric Power Co-op, Inc. v. FERC*, 28 F.3d 173, 176, 179, 180 (D.C. Cir. 1994).

<sup>10</sup>*AEP Power Marketing, Inc.*, 97 FERC ¶ 61,219 (2001).

<sup>11</sup>See *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968) (agencies must be permitted to adapt their rules and policies to the demands of changing circumstances).

13. Further, the Attorney General's contention that FPA § 205(c) requires an exact numerical sale price to be on file with the Commission before a market-price sale is executed is baseless. As the Attorney General concedes, FPA § 205(c) explicitly leaves the timing and form of rate filings to the Commission's discretion: schedules showing all rates and charges must be filed with the Commission "within such time and in such form as the Commission may designate." In exercising that discretion, we have determined that, if a utility establishes that it does not have, or has adequately mitigated, market power and, therefore, that it will be able to charge only just and reasonable market-based rates, the filing of an umbrella market-rate tariff before sales are executed in conjunction with later-filed quarterly reports detailing the numerical rates actually charged satisfies the requirements of FPA § 205(c).<sup>12</sup> The Attorney General has not supported his claim that FPA § 205(c) mandates a different process.

14. Our statement in the May 31 order that inclusion of a specific numerical rate or a clearly defined formula in a market-based rate tariff would not indicate whether the seller could exercise market power<sup>13</sup> does not, as the Attorney General contends (rehearing at 16), miss the mark. Inclusion of a specific numerical rate or formula in a market-based rate tariff would not provide information against which that rate could be compared, and therefore, would not assist us in determining whether the seller could exercise market power. In contrast, quarterly filings addressing the actual rates of sales made provide information regarding all sales made in the relevant market, and allow both the Commission and the public to compare actual rates charged for reasonableness and indications of market power.

15. Moreover, contrary to the Attorney General's claims (rehearing request at 14), it is not our position that "sellers with market-based rate authority comply with [FPA § 205(c)] by filing economic analyses purporting to show that they lack market power." The market power analysis provides information that the Commission evaluates, along with other pertinent information filed in a market-based rate proceeding, to determine whether the utility lacks market power. Thus, utilities file market power analyses as part of the rate filing necessary to substantively support their requests for market-based rate authority, not to satisfy filed rate doctrine requirements. As explained above, the filing

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<sup>12</sup>We also reject the Attorney General's contention (rehearing request at 19 n.17) that quarterly reports must be treated by the Commission as new FPA § 205 filings. Quarterly reports simply report the actual transactions that were previously authorized by the Commission, and thus do not constitute new § 205 rate filings.

<sup>13</sup>May 31 order at 62,062-63.

of a utility's umbrella tariff plus quarterly reports are necessary to comply with FPA § 205(c) requirements.

16. Nor do we suggest, as the Attorney General asserts (rehearing at 20) "that rate filings were intended by Congress as a means of preventing discrimination only, and are unnecessary to determine whether rates are just and reasonable." Before we approve an application for market-based rates, we review the applicant's supporting evidence plus any contrary evidence to assure that the applicant cannot exercise market power. From that, it follows that a utility approved for market-based pricing will charge competitive rates that are just and reasonable. Quarterly reports provide a means for examining whether the utility continues to lack market power and, thus, that its rates remain just and reasonable, as well as for determining whether the utility's rates are unduly discriminatory.

17. Our holdings in this proceeding are fully consistent with those in San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Service, 96 FERC ¶ 61,120 at 61,506 (July 25, 2001) ("July 25 order"). Contrary to the Attorney General's claim (rehearing request at 15 n.15), the Commission did not hold in the July 25 order that the "filing of quarterly reports was necessary to trigger the application of the filed rate doctrine." Rather, we held there, as we do here, that, where market-based rate authority has been granted, the later filing of quarterly reports detailing actual sales made, in conjunction with the earlier-filed umbrella tariff, satisfies all purposes of the filed rate doctrine.

18. The Attorney General claims (rehearing at 18) that market-based rates cannot stand under the FPA because spot market rates will expire before an FPA § 206 complaint can be filed at the Commission, purportedly rendering the § 206 refund provision useless. As the Attorney General must be aware, due to the refund proceedings currently taking place regarding past period market-based rate markets in California, the FPA § 206 refund provision is as vital a part of market-based ratemaking as it is under cost-based ratemaking. Short-term sales made under a cost-based ratemaking regime would face the same refund limitations as those made under market-based rates. Thus, any complaints the Attorney General has concerning refund availability under FPA § 206 for spot market sales challenge the statutory scheme, not the validity of market-based rates.

19. We again find that the filing requirements associated with our market-based rate program do not conflict with Maislin or MCI.<sup>14</sup> In Maislin, the Court rejected an Interstate Commerce Commission ("ICC") policy which, despite the ICA's filed rate requirement, allowed a carrier to receive, in lieu of its filed tariff rate, a lower, privately negotiated contract rate. Noting that the policy allowed carriers to receive privately negotiated contract rates that were never disclosed to the ICC, were never reviewed for reasonableness, and were not subject to challenge as discriminatory, the Court held that the ICC's policy violated the filed rate doctrine. In contrast, FERC market-based rate authority is granted only after we find the public utility lacks market power and a market-based rate umbrella tariff is filed with and accepted by the Commission after public notice and opportunity for comment. Moreover, our system requires the quarterly filing of the actual rates charged for individual transactions, allowing both the Commission and the public to review rates for reasonableness and lack of undue discrimination.

20. In MCI, the Court rejected a Federal Communications Commission ("FCC") policy that, despite the Communications Act's filed rate requirement, relieved all nondominant carriers of any requirement to file any of their rates with the FCC. The Court found that this amounted to wholesale detariffing for nondominant carriers, which violated the filed rate doctrine.<sup>15</sup> Our market-based rate system, by contrast, requires all those the Commission has authorized to offer market-based rates to have on file an umbrella market-rate tariff and to file quarterly reports. No detariffing has occurred in these circumstances.

21. The Attorney General seeks clarification that the May 31 order denied solely on the merits the allegations that the Commission's market-based rate filing requirements violate the FPA as a matter of law. The May 31 order, 99 FERC ¶ 61,247 at 62,061-62,

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<sup>14</sup>Our finding is no longer based on the proposition in the May 31 order that the statutes involved in Maislin and MCI were based on a common carrier model that did not allow for private contracting. Nor do we continue to base our finding on the proposition that the statutes at issue in Maislin and MCI contain absolute pre-transaction filing requirements. Further consideration has caused us to question the accuracy of those statements. We again conclude, however, that our market-based rate filing requirements do not conflict with Maislin and MCI for the reasons stated below as well as for those addressed in the May 31 order and not explicitly abandoned here.

<sup>15</sup>The Court found however, that the FCC "certainly [could] modify the form, contents, and location of required filings, and [could] defer filing or perhaps even waive it altogether in limited circumstances." MCI, 512 U.S. at 234.

was abundantly clear that the Attorney General's challenge regarding the legality of the current filing and reporting requirements for market-based rate tariffs under the FPA was dismissed as a collateral attack because the same arguments had been advanced and addressed in prior Commission orders. In addition, the May 31 order considered the substance of the issues and, after a thorough analysis, denied the complaint on the merits as well. *Id.*, at 62,062 ("even if these arguments were not dismissed, they lack merit").

22. The Attorney General argues that the dismissal was in error because the issues raised in the complaint had not been raised in previous Commission proceedings. In the July 25 order, 96 FERC ¶ 61,120 at 61,505-06, cited in the May 31 order, the Commission, addressing arguments that the filed rate doctrine did not preclude retroactive refunds (prior to the October 2, 2000 effective refund date set forth in Docket No. EL00-95 *et al.*), concluded that "the Commission's current procedures for quarterly filing of market-based transactions satisfy the section 205(c) filing requirements for market-based rates." Thus, contrary to the Attorney General's claims, the substantive arguments brought in the complaint were raised and addressed in the earlier Commission order. Further, the Attorney General's claim that he did not have an opportunity to litigate the issues in the earlier proceedings is not relevant. By seeking to relitigate an issue decided in an earlier Commission order, the Attorney General is essentially requesting a rehearing after expiration of the statutory thirty-day deadline set forth in Section 313(a) of the FPA, 16 U.S.C. § 825l(a) (1994). If the Commission were to consider such collateral attacks, there would never be finality on issues addressed in Commission orders. Nonetheless, we note that the Attorney General, as an intervenor in Docket No. EL00-95 *et al.*, in fact had an opportunity to litigate the filed rate doctrine-related issues in the earlier proceeding.<sup>16</sup>

### **B. Denial of Refund Remedy for Deficiencies in Quarterly Reports**

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<sup>16</sup>See July 17, 2001, Motion for Confirmation of Intervenor Status or, in the Alternative, Motion for Leave to Intervene Out-of-Time By the People of the State of California Ex Rel. Bill Lockyer. In the filing, the Attorney General moved to intervene in Docket No. EL00-95-031, noting his previous participation in the docket without formal intervention and stating that "[the Attorney General's] formal designation as a party to simply cure a possible procedural deficiency is appropriate." The July 25 order granted the request as a late intervention. July 25 order, 96 FERC ¶ 61,120 at 61,503-04.

23. The breadth of the Commission's discretion is at its zenith when called upon to fashion remedies.<sup>17</sup> Courts will not second-guess the Commission's judgment on remedies as long as the remedies have a rational basis.<sup>18</sup> As an expert agency, the Commission is vested with wide discretion to balance competing equities against the back drop of the public interest.<sup>19</sup> In the May 31 order, the Commission concluded that the failure to report non-aggregated data was essentially a compliance issue and determined that the appropriate remedy was to require non-compliant sellers to submit the required information in the proper format. The Commission remains unpersuaded that the refund remedy requested by the Attorney General, even if legally available, would be appropriate under the circumstances.

24. The May 31 order denied the Attorney General's request to institute a refund proceeding as a remedy for the filing of aggregated data in quarterly transaction reports.<sup>20</sup> The order explained that, under section 206 of the FPA, the Commission 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. The order rejected the Attorney General's claim that section 206 does not bar the requested relief because, due to the deficiencies in the sellers' quarterly reports, no rates were lawfully on file. Instead, the Commission explained that the reporting deficiencies, while serious and in need of correction, did not invalidate market-based pricing tariffs as lawful filed rates. Further, the May 31 order stated that:

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

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<sup>17</sup>Niagara Mohawk Power Co. v. FERC, 379 F.2d 153, 159 (D.C. Cir. 1967). See also Consolidated Gas Transmission Corp. v. FERC, 771 F.2d 1536, 1549 (D.C. Cir. 1985); Mesa Petroleum Company v. FERC, 441 F.2d 182, 187 (D.C. Cir. 1971).

<sup>18</sup>Office of Consumers Counsel v. FERC, 783 F.2d 206, 233 (D.C. Cir. 1986).

<sup>19</sup>E.g., Columbia Gas Transmission Corp. v. FERC, 750 F.2d 105, 112 (D.C. Cir. 1984).

<sup>20</sup>May 31, order, 99 FERC ¶ 61,247 at 62,067.

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.<sup>[21]</sup>

25. The Attorney General argues that the Commission failed to properly balance the equities in the proceeding. He claims that sellers' non-compliance with the reporting requirements prevented the Commission from effectively monitoring the market and, thus, gave sellers the opportunity to collect unjust and unreasonable rates in California and conceal illegal practices. In these circumstances, he contends, the Commission's discretion in fashioning a remedy is "bounded by a statutory framework that requires the Commission to take measures necessary to ensure just and reasonable rates."<sup>22</sup>

26. Fundamentally, the problem with the Attorney General's argument is that, while he has alleged and the Commission has found that some sellers were in non-compliance with one requirement, *i.e.*, the Commission's requirements for reporting market-based transactions, he seeks relief for different, unproven claims, namely that sellers charged unjust and unreasonable rates and engaged in "prohibited schemes." The Attorney General cannot bootstrap one complaint onto the other. Moreover, he has made no effort to establish the necessary record to demonstrate specific instances of alleged unjust and unreasonable rates or prohibited schemes - or that they resulted from sellers' non-compliance with the filing requirements.<sup>23</sup> The Attorney General's attempt to seek recovery for these high prices based on sellers' non-compliance with the reporting requirements is simply a non-sequitur.

27. Moreover, contrary to the Attorney General's claims, the Commission has and continues to engage in vigilant market oversight. The Commission as well as all market participants were aware that energy prices in California were rising beginning in early

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<sup>21</sup>Id., at 62,068.

<sup>22</sup>Rehearing Request at 9.

<sup>23</sup>The Attorney General attaches as Appendix A to the rehearing request the General Accounting Office's (GAO's) June 2002 Energy Markets report to Congress. However, this report does not provide the necessary information that would permit us to find particular exercises of market power by individual sellers, nor does it require that we grant the Attorney General's preferred remedy of granting refunds.

2000.<sup>24</sup> The filing of aggregated data did not conceal the fact that prices were going up. However, the mere fact that sellers charged high prices did not necessarily show any violation of the terms of their market-based rate tariffs. As the July 25 order explained, while the Commission may take retroactive action where a seller violates rules in applicable rate tariffs, intervenors had not demonstrated any such violations.<sup>25</sup> The Attorney General's demonstration of a reporting violation does not cure that defect, in that he has not related the violation to specific unlawful pricing. As a result, his efforts to obtain retroactive relief for alleged unjust and unreasonable rates must be denied for the same reason that similar requests were denied in the EL00-95 et al. proceeding.

28. The Commission has instituted formal enforcement investigations into specific instances of possible violations of the FPA and Commission orders and regulations by power marketers, including standards of conduct violations and trading strategies involving deceit.<sup>26</sup> If these allegations are found to be true, then the Commission could elect a full array of remedies, including the loss or suspension of market based rate authority and the disgorgement of profits that resulted from the violations of the FPA and Commission orders and regulations. In the instant proceeding, the Attorney General demonstrated non-compliance of some sellers with the quarterly reporting requirements, but has not shown how those reporting violations alone resulted in overcharges that should now be disgorged.

29. Our conclusion is supported by Commission precedent. For example, in Aquila Energy Marketing Corporation v. Niagara Mohawk Power Corporation, we directed a public utility to comply with OASIS posting requirements that it had violated but

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<sup>24</sup>In July 2000, the Commission initiated a fact-finding investigation of the conditions in electric bulk power markets (including volatile price fluctuations in various regions of the country). Investigation of Electric Bulk Power Markets, 92 FERC ¶ 61,160 (2000). Later, Staff was asked to expedite the investigation as it related to California and markets in the Western Interconnection. See, also, San Diego Gas & Electric Co., 93 FERC ¶ 61,121 at 61,353 (2000) (describing conditions in the California wholesale electricity market during the Summer 2000).

<sup>25</sup>July 25 order, 96 FERC ¶ 61,120 at 61,507-08.

<sup>26</sup>See El Paso Electric Company, 100 FERC ¶ 61,188 (2002); Portland General Electric Company, 100 FERC ¶ 61,186 (2002); Avista Corporation, 100 FERC ¶ 61,187 (2002) (all issued August 13, 2002). Each order establishes a refund effective date.

declined to direct the disgorgement of profits as requested by the complainant.<sup>27</sup> The Commission distinguished Washington Water Power, in which we ordered disgorgement of profits. We explained that, while Aquila involved a reporting violation, in Washington Water Power, the public utility not only violated the OASIS posting requirements but, in doing so, conferred undue preferences to its marketing affiliate. Although the Attorney General likens the current case to Washington Water Power, his complaint only alleged and we have only found non-compliance with Commission reporting requirements. The violations here are more akin to those in Aquila and imposing a similar remedy is an appropriate exercise of our discretion.<sup>28</sup>

30. The Attorney General also contends that the Commission, by failing to order refunds or other sanctions, has not taken sufficient action to deter similar violations in the future.<sup>29</sup> We disagree. The Commission has made clear - and reiterates here - that non-compliance of filing requirements will not be tolerated. Order No. 2001, in which the Commission codified revised reporting requirements for quarterly reporting of market-based rate transactions, states that public utilities that fail to comply with the new reporting requirements may face revocation of their authority to make wholesale power sales at market-based rates.<sup>30</sup> Our recently-initiated investigations into Enron and other sellers' marketing practices should make clear the Commission's intent to follow through with detailed investigation and appropriate sanctions when warranted.

31. This proceeding is limited, however, to reporting violations by some sellers. The Commission fashioned a reasonable remedy, designed to fix the deficiency, when it directed non-compliant sellers to file new transaction reports that contain non-aggregated data as required. As discussed above, the remedy is consistent with precedent regarding non-compliance with filing rules. See Aquila and contrast Washington Water Power. Further, the Commission's chosen remedy is appropriate because, despite the consistent

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<sup>27</sup>87 FERC ¶ 61,328 at 62,280 (1999) (Aquila).

<sup>28</sup>Likewise, Delmarva, also relied upon by the Attorney General, is readily distinguished as it involved the refund of unauthorized charges collected by a public utility and not compliance with Commission reporting requirements.

<sup>29</sup>Rehearing Request at 7.

<sup>30</sup>Order No. 2001, Revised Public Utility Filing Requirements, III FERC Stats. & Regs., Regulations Preambles ¶ 31,127 at 30,145 para. 223 (April 25, 2002), reh'g pending.

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position of the Commission (see May 31 order at 62,065-67) that transaction-specific data must be filed, their appears to have been some legitimate confusion as to the Commission's expectations. This is due at least in part to the fact that many sellers filed aggregated data in their quarterly reports for years without having been challenged by any market-participant.<sup>31</sup> For example, the Attorney General waited until March 2002 (when the complaint was filed) to challenge quarterly reports beginning with the first quarter of 2000, which would have been filed in April 2000.

32. In summary, the Commission properly exercised its discretion when it denied the request for retroactive refunds to remedy some sellers' non-compliance with the Commission's transaction reporting requirements. The Attorney General essentially attempts to bootstrap these limited reporting violations into an overarching showing that sellers employed unjust and unreasonable rates and prohibited schemes. However, he fails to demonstrate these latter claims or their causal connection to the reporting violations. Consequently, the Commission fashioned an appropriate remedy when it required non-compliant sellers to submit transaction information in the required format. This remedy is consistent with Commission precedent and also takes into account that there appears to have been legitimate uncertainty whether aggregated data was acceptable. Accordingly, we deny the Attorney General's request for rehearing.

The Commission orders:

(A) The Attorney General's request for rehearing is hereby denied, as discussed in the body of this order.

(B) CARE's motion to intervene out-of-time is denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Linwood A. Watson, Jr.,  
Deputy Secretary.

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<sup>31</sup>See, e.g., April 9, 2002 Answer of El Paso Merchant Energy, L.P. to Complaint at 18-19; IDACORP Answer at 25; Sempra Answer at 19.

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