

135 FERC ¶ 61,178
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

People of the State of California, *ex rel.*
Edmund G. Brown, Jr. Attorney General
of the State of California
Complainant

v.

Docket No. EL09-56-000

Powerex Corp. (f/k/a British Columbia
Power Exchange Corp.)
Sempra Energy Trading, LLC (f/k/a Sempra
Energy Trading Corp.)
Allegheny Energy Supply Company, LLC
TransAlta Energy Marketing (US), Inc.
Public Service Company of New Mexico
MIECO, Inc.
Shell Energy North America (U.S.), L.P.
(successor by merger to Coral Power LLC)
Merrill Lynch Capital Services
TransCanada Energy Ltd. (f/k/a TransCanada
Power Corp.)
Commerce Energy Corp. (f/k/a Commonwealth
Energy Corp.)
Nevada Power Company
Tucson Electric Power Company
American Electric Power Service Corp.
Commission Federal de Electricidad
Sierra Pacific Power Company
Sierra Pacific Industries
Avista Corp. (f/k/a Washington Water Power Company)
Avista Energy, Inc.
Sempra Energy Solutions LLC
Respondents

ORDER DISMISSING COMPLAINT

(Issued May 24, 2011)

1. On May 22, 2009, the People of the State of California *ex rel.* Edmund G. Brown Jr., Attorney General (California AG) filed a complaint (CERS Complaint or Complaint) against the named respondents¹ alleging that they made short-term bilateral sales² at unjust and unreasonable prices to the California Energy Resources Scheduling Division (CERS) of the California Department of Water Resources (DWR) during the period

¹ The respondents are Powerex Corp. (f/k/a British Columbia Power Exchange Corp.) (Powerex); Sempra Energy Trading, LLC (f/k/a Sempra Energy Trading Corp.) and Sempra Energy Solutions (Sempra); Allegheny Energy Supply Company, LLC (Allegheny); TransAlta Energy Marketing (US), Inc. (TransAlta); Public Service Company of New Mexico (PNM); MIECO, Inc. (MIECO); Shell Energy North America (US), L.P. (successor by merger to Coral Power LLC) (Shell); Merrill Lynch Capital Services, Inc. (Merrill Lynch); TransCanada Energy Ltd. (f/k/a TransCanada Power Corp.) (TransCanada); Commerce Energy Inc. (f/k/a Commonwealth Energy Corp.) (Commerce Energy); Nevada Power Company and Sierra Pacific Power Company d/b/a NV Energy, Inc. (NV Energy); Tucson Electric Power Company (Tucson Electric); American Electric Power Service Corp. (AEP); Commission Federal de Electricidad (CFE); Sierra Pacific Industries; and Avista Corp. (f/k/a Washington Water Power Company) d/b/a Avista Utilities and Avista Energy, Inc. (Avista).

The Commission has accepted separate settlements resolving claims against CFE, PNM, Tucson Electric and Sempra arising from events and transactions during the Western energy crisis in 2000 and 2001, including claims related to the short-term bilateral sales made to CERS during the CERS Period. *See San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 129 FERC ¶ 61,256 (2009), *order on reh'g*, 130 FERC ¶ 61,199 (2010); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 131 FERC ¶ 61,082 (2010); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.* 131 FERC ¶ 61,259 (2010); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.* 133 FERC ¶ 61,249 (2010).

² As used in the CERS Complaint, the California AG uses the terms “short-term bilateral sales” and “spot market sales” interchangeably. Complaint at 3 n.8. As will be discussed *infra*, we do not agree with the California AG’s lexicon. We have always treated, and will continue to treat, the short-term bilateral sales and spot market sales as separate and distinct categories of sales meriting separate and distinct analysis and treatment.

January 18, 2001 to June 20, 2001 (the CERS Period).³ The California AG seeks refunds on behalf of the California ratepayers for these sales to CERS. In this order, we dismiss the Complaint for the reasons discussed below.

2. First, we are compelled to dismiss the Complaint as it seeks an unavailable remedy, advances inadequate legal theories and, to the extent it raises an appropriate legal theory, to wit, Federal Power Act (FPA) section 309,⁴ the claims are not sufficiently supported. We find that FPA section 309 cannot serve as the basis for relief sought by the California AG. As stated by the Ninth Circuit Court of Appeals (Ninth Circuit), under FPA section 309, the Commission “has remedial authority to require that entities violating the FPA pay restitution for profits gained as a result of a statutory or tariff violation.”⁵ Consequently, the California AG must first prove that individual sellers violated the FPA or their filed tariffs and that such violation resulted in an unjust and unreasonable contract, and second, the remedy, if the Commission determines one is appropriate, would be for any seller found to have committed such a violation to disgorge its unjust profits.

3. To meet these requirements, the CERS Complaint at first attempts to prove that individual sellers violated the FPA and/or their filed tariffs by failing to comply with their reporting requirements. However, these issues were confined to the *Lockyer* proceeding, which has already explored whether any individual seller’s improper or untimely filing of its quarterly transaction reports masked an accumulation of market power such that the

³ The California AG states that he does not seek relief from any seller of short-term bilateral energy to CERS with whom he has already settled claims. These entities include: BP Energy Company; Calpine Energy Services, LP; Constellation Energy Group; Duke Energy Corporation (including all Duke entities named in the settlement), Dynegy, Inc. (including all Dynegy entities named in the settlement and NRG Energy, Inc.), Enron Corporation (including all Enron entities named in the settlement), Fresno Cogen, Inc., Mirant Corporation (including all Mirant entities named in the settlement), NEGTEnergy Trading- Power, LP and NEGTEnergy Trading Holdings Corp., PacifiCorp, the Pinnacle West Companies (including Arizona Public Service Company, Pinnacle West Capital Corp. and APS Energy Services, Inc.), Portland General Electric Company, Reliant Energy, Inc. (including all Reliant entities named in the settlement), Strategic Energy LLC, and the Williams Companies (including all entities named in the settlement).

⁴ 16 U.S.C. § 825h (2006).

⁵ See *Pub. Util. Comm’n of the State of Cal. v. FERC*, 462 F.3d 1027, 1047-48 (9th Cir. 2006) (*CPUC*).

market rates were unjust and unreasonable in the California Independent System Operator, Inc. (CAISO) or California Power Exchange (CalPX) markets from June 1, 2000 to October 1, 2000, or to CERS during the CERS Period and whether remedies, if any,⁶ against any particular sellers respecting these reporting issues was warranted.⁷ We will not open a new proceeding to address these previously-litigated issues.⁸

4. To the extent the Complaint is based on a theory of other tariff violations and market manipulation by various sellers, the California AG has failed to provide sufficient evidence demonstrating that specific sellers engaged in specific tariff or statutory violations, and that those violations resulted in unjust and unreasonable rates for the short-term bilateral sales to CERS that need to be remedied.

5. Second, to the extent the California AG is claiming that the short-term bilateral sales contracts were unjust and unreasonable, he has not adequately pleaded or otherwise advanced evidence sufficient to address the *Mobile-Sierra* presumption regarding contract modification.⁹ The CERS purchases were made bilaterally under the framework of the Western Systems Power Pool (WSPP) agreement, which contains a *Mobile-Sierra* clause. Indeed, the short-term bilateral sales contracts at issue here are a type of

⁶ See *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) (“Finally, we observe that the breadth of agency discretion is, if anything, at its zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies and sanctions, including enforcement and voluntary compliance programs in order to arrive at maximum effectuation of Congressional objectives.”).

⁷ See *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004), *cert. denied*, 127 S. Ct. 2972 (2007) (*Lockyer*), *order on remand*, 122 FERC ¶ 61,260 (*Lockyer Order on Remand*), *clarified*, 123 FERC ¶ 61,042, *reh’g granted*, 125 FERC ¶ 61,016, at P 3, 18-19 (2008) (*Lockyer Order on Rehearing and Clarification*).

⁸ We note that the *Lockyer* hearing procedures have been completed and the Initial Decision has already been issued by the Presiding Judge (granting summary disposition in favor of respondent sellers) and affirmed by the Commission. See *Cal., ex rel. Bill Lockyer v. B.C. Power Exch. Corp.*, 130 FERC ¶ 63,017 (2010) (*Lockyer Initial Decision*); Opinion No. 512, 135 FERC ¶ 61,113 (2011) (*Lockyer Order Affirming Initial Decision*).

⁹ *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Mobile-Sierra*).

agreement to which the Supreme Court has found that the *Mobile-Sierra* presumption generally applies, absent language therein to the contrary.¹⁰ Thus, the rates set in those contracts are to be presumed just and reasonable, and that presumption may be overcome only if the Commission concludes that the contract seriously harms the public interest.¹¹ As the Supreme Court has made clear, general allegations of market dysfunction, like those made in the Complaint, are an insufficient basis to overcome the *Mobile-Sierra* presumption or find that it is inapplicable.¹²

6. Finally, we find the Complaint time-barred by the federal “catchall” statute of limitations that requires actions seeking penalties or forfeitures to be brought within five years.¹³ In finding that the relief, especially the market-wide refunds the California AG seeks, would lead to punitive results, we find the federal statute of limitations applies and the Complaint comes too late. Even assuming that the five-year statute of limitations was subject to equitable tolling during the pendency of the *CPUC* appeal, as argued by the California AG, we nevertheless find that under applicable law, any tolling would have expired one year from the 2006 issuance of the *CPUC* opinion. Therefore, even under a time calculation most generous to the California AG, he was at least one and one-half years too late in bringing this action.

I. Background

7. In the mid-1990s the California legislature deregulated the electricity market in an effort to reduce energy prices for consumers.¹⁴ In the summer of 2000, for a variety of reasons related to deregulation and other market factors, wholesale electricity prices skyrocketed in California’s short-term supply market, or “spot market.”¹⁵ Rolling blackouts also occurred.

¹⁰ See *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 544-48 (2008) (*Morgan Stanley*).

¹¹ See, e.g., *NRG Power Mktg., LLC v. Me. PUC*, 130 S. Ct. 693 (2010).

¹² *Morgan Stanley*, 544 U.S. at 547 (“The mere fact that the market is imperfect, or even chaotic, is no reason to undermine the stabilizing force of contracts that the FPA embraced as an alternative to purely tariff-based regulation.”)

¹³ 28 U.S.C. § 1658 (2006).

¹⁴ See generally, *Morgan Stanley*, 554 U.S. at 538-40, *order on remand*, 125 FERC ¶ 61,312 (2008) (*Morgan Stanley Order on Remand*).

¹⁵ *Morgan Stanley*, 554 U.S. at 538-40.

8. The high prices saddled utilities with mounting debt that pushed them to insolvency. In January 2001, the Governor of the State of California declared a state of emergency and directed CERS to purchase wholesale power on the spot market on behalf of California consumers to halt rolling blackouts.¹⁶ Most sales after January 18, 2001 were made directly to CERS, and CalPX ceased operations on January 30, 2001.¹⁷

9. In November 2000, the Commission ordered structural and rule changes, such as abolishing the requirement that investor-owned utilities (IOU) purchase and sell all power through the CalPX and encouraging them to enter into long-term contracts and putting price caps on wholesale electricity.¹⁸

10. In response to this Western energy crisis in 2000 and 2001 (Western Energy Crisis but also referenced as the California Energy Crisis in the California proceedings), numerous proceedings were initiated at the Commission. In relevant part these include the Refund/CPUC proceeding, the *Lockyer* proceeding, the *Port of Seattle*¹⁹ proceeding and the *Morgan Stanley* proceeding. In sum, the CPUC proceeding is focused on the appropriate FPA section 206²⁰ refund effective date and the scope of transactions in the CAISO and CalPX markets covered.²¹ The CPUC proceeding does not include CERS transactions.²² The *Lockyer* proceeding centered on the failure by any seller to satisfy its quarterly reporting requirement, whether there is a link between any such failure by a seller and unjust and unreasonable rates for such seller and potential remedies.²³ The *Port of Seattle* proceeding addresses potential refunds to wholesale buyers of electricity that purchased energy in the short-term supply market in the Pacific Northwest.²⁴ The

¹⁶ See generally, *Lockyer*, 383 F.3d at 1006.

¹⁷ See generally, *CPUC* 462 F.3d at 1042, *order on remand*, 129 FERC ¶ 61,147 (2009) (*CPUC Order on Remand*).

¹⁸ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 93 FERC ¶ 61,121, *modified*, 93 FERC ¶ 61,294 (2000).

¹⁹ *Port of Seattle, Washington v. FERC*, 499 F.3d 1016, 1022 (9th Cir. 2007) (*Port of Seattle*), *cert. denied*, 130 S. Ct. 1050 (2010).

²⁰ 16 U.S.C. § 824e(a) (2006).

²¹ *CPUC*, 462 F.3d at 1035.

²² *Id.*

²³ *Lockyer Order on Remand*, 122 FERC ¶ 61,260 at P 23.

Morgan Stanley proceeding involved buyers seeking to abrogate or reform contracts they signed during the Western Energy Crisis.²⁵

11. The Refund/*CPUC* proceeding began in August 2000, when San Diego Gas & Electric Company (SDG&E) filed a complaint under section 206 of the FPA, requesting that the Commission impose a price cap on sales into the CAISO and CalPX markets.²⁶ In response, the Commission initiated proceedings to investigate the justness and reasonableness of the rates for all sales in the CalPX and CAISO markets.²⁷ Ultimately the Commission issued an order establishing a refund methodology whereby all sales of 24-hours or shorter (spot market transactions) in the CAISO or CalPX markets for the period from October 2, 2000 through June 20, 2001 (the Refund Period) were to be mitigated to the level of a mitigated market clearing price (MMCP).²⁸ The Commission also established hearing procedures to determine the appropriate refund amounts during the Refund Period.²⁹

²⁴ *Port of Seattle*, 499 F.3d at 1022.

²⁵ *Morgan Stanley*, 554 U.S. at 540-41. The *Morgan Stanley* proceeding has since been resolved by settlement. A related case, the “CDWR” proceeding, remains pending before the Commission on remand from the 9th Circuit. See *Pub. Util. Comm’n of the State of Cal. v. Sellers of Long Term Contracts to the Cal. Dep’t of Water Res.; Cal. Oversight Bd. v. Sellers of Energy and Capacity Under Long-Term Contracts with the Cal. Dep’t of Water Res.*, 103 FERC ¶ 61,354 (order on initial decision), *reh’g denied*, 105 FERC ¶ 61,182 (2003), *remanded sub nom. Pub. Util. Comm’n of the State of Cal. v. FERC*, 474 F.3d 587 (9th Cir. 2006), *vacated and remanded*, 554 U.S. 527 (2008), *remanded*, 530 F.3d 767 (9th Cir. 2009).

²⁶ SDG&E, Complaint, Docket No. EL00-95-000, at 14 (Aug. 2, 2000).

²⁷ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 92 FERC ¶ 61,172, at 61,603 (2000).

²⁸ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 96 FERC ¶ 61,120 (2001) (July 25, 2001 Order) (sellers were also given the opportunity to demonstrate that they had costs in excess of the MMCP).

²⁹ *Id.* at 61,499 (establishing hearing); *San Diego Gas & Elec. Co.*, 93 FERC ¶ 61,121 at 61,370 (establishing October 2, 2000 as beginning of refund period); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 95 FERC ¶ 61,418, at 62,545 (2001) (setting June 20, 2001 as the end of the refund period); see July 25, 2001 Order, 96 FERC ¶ 61,120 at 61,499, 61,516-17 (confirming the Refund Period dates).

12. The Ninth Circuit reviewed the scope of the Commission's refund proceedings and expanded the time frame considered and the transactions considered.³⁰ Specifically, the Ninth Circuit remanded the case to the Commission to consider whether relief is warranted for: (1) tariff violations prior to October 2, 2000; (2) for block forward market transactions; and (3) for energy exchange transactions during the Refund Period which were previously excluded from the scope of the refund proceeding.³¹ On remand the Commission set these issues for hearing.³²

13. The *Lockyer* proceeding stemmed from a complaint filed by the State of California in late 2001 against all sellers of power and ancillary services in the CAISO and CalPX markets and sellers of power to CERS, alleging, in pertinent part, that the sales transaction reports filed by electricity sellers did not contain the transaction specific information the FPA requires.³³ The Commission granted the complaint in part, holding that the failure to report transactions in the proper format was essentially a compliance issue for which re-filing of quarterly reports to include transaction specific data was an appropriate remedy.³⁴ On appeal, the Ninth Circuit found that the Commission erred in ruling that it lacked authority to order refunds for violations of its reporting requirement and remanded the case for further refund proceedings.³⁵ On remand the Commission established a trial-type hearing to address whether any individual public utility seller's violation of the Commission's market-based rate quarterly reporting requirement masked an accumulation of market power that led to an unjust and unreasonable rate for that seller during the 2000-2001 period.³⁶

14. The *Morgan Stanley* proceedings stemmed from complaints filed at the Commission between December 2001 and February 2002 by buyers seeking to abrogate

³⁰ *CPUC*, 462 F.3d at 1035.

³¹ *Id.*

³² *CPUC Order on Remand*, 129 FERC ¶ 61,147 at P 2.

³³ *See Cal., ex rel. Bill Lockyer v. B.C. Power Exch. Corp.*, 99 FERC ¶ 61,247, *order on reh'g*, 100 FERC ¶ 61,295 (2002).

³⁴ *Cal., ex rel. Bill Lockyer*, 99 FERC ¶ 61,247 at 62,055.

³⁵ *Lockyer*, 383 F.3d at 1018.

³⁶ *Lockyer Order on Remand*, 122 FERC ¶ 61,260 at P 2; *Lockyer Initial Decision*, 130 FERC ¶ 63,017 at P 6; *Lockyer Order Affirming Initial Decision*, 135 FERC ¶ 61,113 at P 4.

or reform contracts they signed during the Western Energy Crisis.³⁷ The complainants argued that the Commission had already determined that the dysfunctional CAISO and CalPX spot markets had produced unjust and unreasonable spot prices, the dysfunctional spot prices had tainted the long-term markets and, therefore, the long-term contracts signed during the period of market dysfunction should be found unjust and unreasonable.³⁸ The Commission affirmed the administrative law judge's decision denying the complaints, finding that under the factors identified in *Mobile-Sierra*, as well as under a totality-of-the-circumstances test, the complainants had not demonstrated that the contracts threatened the public interest.³⁹ On appeal the Ninth Circuit remanded the case to the Commission, stating that it found flaws in the Commission's analysis.⁴⁰ However, on review of that decision the Supreme Court rejected several aspects of the Ninth Circuit's interpretation and remanded the matters to the Commission with direction to amplify or clarify findings on two points.⁴¹ First, the Court stated that the Commission's analysis should determine whether the contracts at issue imposed an excessive burden "down the line" relative to the rates consumers could have obtained (but for the contracts) after elimination of the dysfunctional spot markets.⁴² Second, the Court found that it was unclear from the Commission's orders whether the Commission found the evidence inadequate to support the claim that individual sellers' alleged unlawful activities affected the contracts at issue.⁴³ On December 19, 2008, the Commission issued its order on remand, which established a paper hearing but held the

³⁷ *Nevada Power Co. v. Duke Energy Trading and Mktg., L.L.C.*, 99 FERC ¶ 61,047 (2002).

³⁸ *Id.* at 61,191.

³⁹ *Nevada Power Co. v. Enron Power Mktg., Inc.*, 103 FERC ¶ 61,353 (2003), *order on reh'g*, 105 FERC ¶ 61,185 (2003).

⁴⁰ *Pub. Util. Dist. No. 1 of Snohomish County v. FERC*, 471 F.3d 1053, 1085-97 (9th Cir. 2006), *vacated*, 547 F.3d 1081 (9th Cir. 2008) (remanding to the Commission for further proceedings consistent with the Court's *Morgan Stanley* opinion).

⁴¹ *Morgan Stanley*, 554 U.S. at 544-52.

⁴² *Id.* at 2749-50.

⁴³ *Id.* at 2750-51.

hearing in abeyance to allow parties to engage in settlement discussions, which proved successful, all parties having resolved the matter through settlement.⁴⁴

15. The *Port of Seattle* proceeding stems from a complaint filed in October 2000 requesting price caps for sales of capacity or energy into Pacific Northwest wholesale power markets.⁴⁵ The proceeding was expanded to include the issue of whether there were unjust and unreasonable charges for bilateral sales in the Pacific Northwest.⁴⁶ Ultimately the Commission affirmed the administrative law judge's recommendations and denied refunds for energy purchases in the Pacific Northwest spot market.⁴⁷ On appeal, the Ninth Circuit determined that the Commission abused its discretion in denying potential relief for transactions involving energy that was ultimately consumed in California and that the Commission should have considered evidence of market manipulation.⁴⁸

16. Contemporaneous with the filing of the CERS Complaint, the California Parties⁴⁹ moved to consolidate this Complaint with various other cases related to the Western Energy Crisis into one proceeding,⁵⁰ in particular the *Lockyer* proceeding; the *CPUC* proceeding; and the *Port of Seattle* proceeding. Once consolidated into one all-

⁴⁴ *Morgan Stanley Order on Remand*, 125 FERC ¶ 61,312 at P 29-33; *see also* note 25 *supra*.

⁴⁵ Puget Sound Energy, Inc., Complaint, Docket No. EL01-10-000 (filed October 26, 2000).

⁴⁶ July 25, 2001 Order, 96 FERC ¶ 61,120 at 61,520.

⁴⁷ *Puget Sound Energy, Inc.*, 103 FERC ¶ 61,348, *reh'g denied*, 105 FERC ¶ 61,183 (2003), *reh'g denied*, 106 FERC ¶ 61,109 (2004).

⁴⁸ *Port of Seattle*, 499 F.3d at 1022.

⁴⁹ The California Parties include the California AG, the California Public Utilities Commission (CPUC), Pacific Gas and Electric Company (PG&E) and Southern California Edison (SoCal Edison).

⁵⁰ *See* California Parties May 22, 2009 Motion Requesting: (1) Consolidation and Severance of Specified Proceedings; (2) Summary Disposition; and in the Alternative, (3) Settlement Procedures and an Evidentiary Hearing in the Consolidated Proceedings, Docket Nos. EL00-95, *et al.*, EL00-98 *et al.*, EL02-71 *et al.*, EL01-10 *et al.*, EL09-56-000 (Not Consolidated) (California Parties' Motion to Consolidate).

encompassing proceeding, the California Parties request that the Commission establish a MMCP and order market-wide refunds.^{51 52}

II. CERS Complaint

17. The California AG filed this Complaint, on behalf of the California ratepayers, pursuant to sections 205, 206, 306, and 309 of the FPA,⁵³ seeking refunds calculated based on the MMCP methodology (previously employed by the Commission in the California Refund Proceeding)⁵⁴ on all short-term bilateral sales to CERS. The Complaint alleges that those sales were made at unjust and unreasonable rates because those rates resulted from: (1) the Commission's regulatory failure to protect ratepayers; and (2) sellers' violation of applicable tariffs, exercise of undue market power in California's electricity markets, manipulation of those markets through withholding and other abusive market schemes, and failure to comply with market-based rate oversight requirements.

18. The Complaint alleges that CERS was forced to purchase more than \$5.7 billion in short-term bilateral energy to supply the IOUs' customers and keep California's grid operational.⁵⁵ The California AG claims that during the CERS Period, as measured by the MMCP refund methodology, CERS was overcharged approximately \$1.9 billion by the sellers who have not yet settled with the California AG.⁵⁶ The California AG argues that use of the MMCP methodology will ensure that refunds will be awarded only on prices charged to CERS that are in excess of just and reasonable levels.

⁵¹ The California Parties' Motion to Consolidate is being addressed in a concurrent order.

⁵² On March 11, 2011, Commissioner Cheryl A. LaFleur issued a memorandum to the file in sixty dockets, including Docket No. EL09-56, documenting her decision, based on a memorandum from the Office of General Counsel's General and Administrative law section, dated February 18, 2011, not to recuse herself from considering matters in those dockets.

⁵³ 16 U.S.C. §§ 824d, 824e, 825e, and 825h (2006).

⁵⁴ See July 25, 2001 Order, 96 FERC ¶ 61,120, 61,506-11, *order on clarification and reh'g*, 97 FERC ¶ 61,275 (2001).

⁵⁵ Complaint at 12.

⁵⁶ *Id.*

19. The California AG contends that his filing of this separate Complaint, to remedy the unjust and unreasonable prices that sellers charged California ratepayers for short-term bilateral sales made to CERS, is consistent with the Ninth Circuit's statements in *CPUC*. He notes that the court observed that the California Parties had argued "with considerable force, that unjust and unreasonable rates were charged in the CERS transactions and that the transactions in substance were indistinguishable from transactions within the CalPX and Cal-ISO markets."⁵⁷ Moreover, the California AG points to the court's observation that "while the bilateral CERS transactions are beyond the scope of the Remedy Proceedings at issue here, those transactions may be the subject of other challenges, the posture and merits of which are beyond the scope of the instant case."⁵⁸

20. The California AG posits that the misbehavior of sellers coupled with the Commission's lack of oversight dramatically increased the prices of virtually all short-term bilateral sales made to CERS. Citing *Lockyer*,⁵⁹ the California AG alludes to multiple manipulation schemes such as round-trip trades, hockey-stick bidding, Fat Boy, Get Shorty, and Death Star. Market abuses such as these, argues the California AG, led to the Ninth Circuit's finding that the Commission's market monitoring system failed to ensure just and reasonable rates⁶⁰ and could not even have "theoretically . . . monitored the California energy market"⁶¹ in which CERS was forced to purchase electricity.

21. The California AG argues that the Commission should order refunds based on a just and reasonable rate as a matter of law. The California AG claims that the testimony and exhibits submitted with his Complaint provides evidence that sellers violated applicable tariffs in their sales to CERS, and therefore did not charge filed rates. The California AG contends that sellers violated these tariffs repeatedly and in many different ways. The California AG argues that in *CPUC*, the Ninth Circuit held that, in such cases, FPA section 309 gives the Commission the ability to order refunds for sales to CERS

⁵⁷ *Id.* at 2 (citing *CPUC*, 462 F.3d at 1064).

⁵⁸ *Id.* at 2-3 (impliedly citing *CPUC*, 462 F.3d at 1064).

⁵⁹ *Id.* at 4 (citing *Lockyer*, 383 F.3d at 1006, 1012).

⁶⁰ *Id.* (citing *Lockyer*, 383 F.3d at 1014, 1015 nn.6-8, 1017).

⁶¹ *Id.* (citing *Lockyer*, 383 F.3d at 1014).

made at unjust and unreasonable rates, and that no temporal (or “retrospective”) limitation on such relief exists.⁶²

22. The California AG states that during the Western Energy Crisis, virtually all sellers selling into the CAISO and CalPX spot markets, and later to CERS, regardless of whether they were the tariff violators or “situational beneficiaries,” reaped unjust and unreasonable windfalls from such violations. Moreover, asserts the California AG, the Commission’s failure to exercise appropriate regulatory oversight allowed multiple sellers to reap unjust and unreasonable rates. Argues the California AG, a refund remedy based on an MMCP is not punitive, and does not depend on the level of culpability of an individual seller. For these reasons, the California AG seeks the establishment of an MMCP to be used to calculate market-wide refunds for all short-term bilateral sales made to CERS at allegedly unjust and unreasonable rates.

23. The California AG claims that his Complaint responds directly to the Ninth Circuit’s decisions in *Lockyer*, *CPUC*, and *Port of Seattle*. The California AG maintains that holdings of these cases permit the California AG to seek refund relief for short-term bilateral sales made to CERS during the CERS Period. States the California AG, in *CPUC*, the court recognized that FPA section 309 provides a basis for relief from statutory or tariff violations.⁶³ More recently, notes the California AG, in *Port of Seattle*, the court ordered the Commission to treat sales to CERS that occurred in the Pacific Northwest as eligible for refunds.⁶⁴ The CERS Complaint therefore requests MMCP-based refund relief, with interest, for all short-term bilateral sales made to CERS that occurred at unjust and unreasonable levels.⁶⁵

⁶² *Id.* (citing *CPUC*, 462 F.3d at 1045).

⁶³ *Id.* at 9 n.30 (citing *CPUC*, 462 F.3d at 1048).

⁶⁴ *Id.* (citing *Port of Seattle*, 499 F.3d at 1034). The California AG here also notes that approximately 70 percent of the short-term bilateral energy market sales to CERS that are the subject of this Complaint were transacted in the Pacific Northwest.

⁶⁵ In the case of sellers that allegedly made market-based rate sales without Commission authorization to do so, the California AG seeks a cost-based rate methodology if use of such methodology produces a refund greater than the MMCP methodology.

III. Notice of Filing and Responsive Pleadings

24. Notice of the California AG's May 22, 2009 Complaint was published in the *Federal Register*, 74 Fed. Reg. 27,527 (2009), with interventions and protests due on or before August 20, 2009. In response to an unopposed motion, on July 29, 2009, the Commission extended the time for filing answers to the Complaint until September 3, 2009.

25. Motions to intervene were filed by the Electric Power Supply Association; Californians for Renewable Energy, Inc.; the cities of Burbank and Glendale and Turlock Irrigation District; the city of Tacoma, Washington; Port of Seattle, Washington; Salt River Project Agricultural Improvement and Power District; and the Sacramento Municipal Utility District.

26. On June 26, 2009, NV Energy⁶⁶ filed a motion to stay and a motion to dismiss the Complaint. On July 1, 2009, the Competitive Supplier Group (CSG)⁶⁷ filed a motion to dismiss, or in the alternative for a more definite statement. On July 2, 2009, the CPUC filed its notice of intervention and comments.⁶⁸ On July 13, 2009, AEP filed an answer supporting the CSG and NV Energy motions to dismiss the Complaint. On the same day, the California AG filed answers to NV Energy's motion to stay and motion to dismiss. On July 16, 2009, the California AG filed an answer to CSG's motion to dismiss. NV Energy filed an answer in support of CSG's motion to dismiss. On July 31, 2009, the California AG filed an answer to NV Energy's answer in support of CSG's motion to dismiss. On August 4, 2009, Portland General Electric Company filed a motion to intervene and comments.

27. On September 3, 2009, answers were filed by PNM, Shell, Tucson Electric, TransCanada, AEP, NV Energy, and TransAlta. Answers and motions to dismiss were

⁶⁶ Nevada Power Company and Sierra Pacific Power Company conduct business under the name NV Energy.

⁶⁷ For purposes of the motion, CSG includes Avista, Commerce Energy, Merrill Lynch, Shell, TransAlta, and TransCanada.

⁶⁸ In its comments, the CPUC generally supports the California AG's allegations. Further, the CPUC urges the Commission to grant the California Parties' Motion to Consolidate.

filed by Avista, MIECO, Commerce Energy, Sempra, Merrill Lynch, and Allegheny. Powerex filed an answer and motion to strike.⁶⁹

28. On September 18, 2009, the California Parties filed a combined motion for leave to respond and a response to the sellers' answers opposing the California Parties' Motion to Consolidate and a response to the sellers' motions to dismiss and answers to the CERS Complaint. On October 5, 2009, MIECO filed an answer to the California Parties' September 18, 2009 response. Similarly, NV Energy filed a motion for leave to file and answer and an answer in opposition to the California Parties' September 18, 2009 response. On July 6, 2010, CSG filed a request for a Commission order pending dispositive motions or setting the matter for hearing. On July 21, 2010 the California Parties and SEA-TAC filed answers to CSG's request.

29. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

30. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept the California AG's July 31 answer, the California Parties' September 18, 2009 answer, as well as MIECO's and NV Energy's October 5, 2009 answers because they have provided information that assisted us in our decision-making process. The July 6, 2010 CSG request for a Commission order and the answers in response are mooted by this issuance of this order.

IV. Discussion

31. We are compelled to dismiss the Complaint for several reasons. First, the California AG seeks a remedy that is not available, advances legal theories that are not supportable and, to the extent that he raises a potentially supportable legal theory, i.e.,

⁶⁹ On May 16, 2011, Powerex filed a motion to supplement its original answer to the CERS Complaint and a supplemental answer. In this motion, Powerex advances no new legal theory; rather, it seeks to supplement Section IV-F of its original answer to include newly-available non-public documents and testimony that Powerex contends bolster its original contention that the California AG "is precluded from obtaining equitable relief because of the improper actions CDWR took after gaining unlawful and preferential access to confidential market information." *See* Powerex May 16, 2011 Motion for Leave to Supplement Answer and Supplemental Answer to Complaint at 11. Given our dismissal of the CERS Complaint for the reasons explained herein, we need not decide this motion.

under FPA section 309, the California AG has failed to sufficiently support his allegations. Next, as explained herein, we also find that we must dismiss the complaint because the California AG has failed to adequately plead or otherwise advance evidence sufficient to overcome the *Mobile-Sierra* presumption regarding contract modification. Finally, we find that the Complaint was filed too late under the federal statute of limitations.

A. Bilateral Sales versus Spot Market Sales

32. A preliminary issue requires clarification. As mentioned (*see note 2 supra*) the California AG has used the terms “short-term bilateral sales” and “spot market sales” interchangeably. The Commission, as affirmed by the Ninth Circuit in *CPUC*,⁷⁰ uses these terms differently in the context of the California Energy Crisis. Here we have always treated, and will continue to treat, the short-term bilateral sales and spot market sales as separate and distinct categories of sales meriting separate and distinct treatment and analysis.⁷¹

33. The Ninth Circuit used this distinction to explain why the short-term bilateral sales to CERS were not covered by the *CPUC* proceeding:

There are fundamental differences between the CalPX/Cal-ISO markets and the bilateral contracts negotiated by CERS. As we have discussed, the CalPX and Cal-ISO markets were centralized, single-price, auction markets, involving multiple participants. In contrast, the CERS transactions were two-party contracts of varying prices, terms and duration that were mutually negotiated - ostensibly at arms-length - outside the CalPX and Cal-ISO markets. Unlike ... transactions that we have concluded were properly considered in the Refund Proceedings, the CERS transactions occurred in a market that was not directly influenced by the market manipulations in

⁷⁰ *See CPUC*, 462 F.3d at 1045-46.

⁷¹ July 25, 2001 Order, 96 FERC ¶ 61,120 at 61,515, *order on reh'g*, 97 FERC ¶ 61,275 at 62,195 (Commission declined to expand scope of transactions subject to refund to include the short-term bilateral sales to CERS by distinguishing the short-term bilateral sales to CERS from transactions in the CAISO and CalPX spot markets).

the Cal-ISO and CalPX spot markets. The record reflects no direct nexus between the CERS bilateral transactions and the CalPX and Cal-ISO spot markets.⁷²

The court also observed that the short-term bilateral sales to CERS were different from the CAISO and CalPX spot market sales because they occurred at different times.⁷³

34. Thus, will continue to distinguish these separate categories of sales for purposes of addressing the CERS Complaint.

B. Subject Matter Jurisdiction

35. The next threshold issue to be addressed is our jurisdiction over this matter. In its motion to dismiss and motion to stay, NV Energy, joined by AEP, argues that the CERS Complaint should be dismissed for lack of subject matter jurisdiction.⁷⁴ The crux of this challenge is that since the California AG is seeking refunds on behalf of California ratepayers that paid unjust and unreasonable rates in violation of the FPA, the Complaint amounts to a non-jurisdictional retail refund case. Thus, NV Energy and AEP posit that the Complaint seeks a remedy the Commission cannot provide, regarding retail sales the Commission does not regulate.⁷⁵ In support, NV Energy maintains that CERS, the wholesale purchaser in the transactions at issue, not the California AG, is both an indispensable party and the only proper complainant. Finally, NV Energy asserts the Complaint requests relief that would be unenforceable at the state level and would require a *post-hoc* re-run of state ratemaking.

⁷² *CPUC*, 462 F.3d at 1063.

⁷³ *Id.* at 1046 (“Indeed, ... [i]t was not until FERC’s December 15, 2000 Order, some six months after the filing of the SDG&E complaint, that investor-owned utilities were free to conduct energy transactions outside the CalPX and Cal-ISO markets. And, it was not until January, 8, 2001 that CERS began to make its purchases.”).

⁷⁴ NV Energy June 26, 2009 Motion to Dismiss at 4-6 (citing the California AG Complaint at 2-3).

⁷⁵ *Id.* (citing *N. Star Steel Co., LLC v. FERC*, 343 Fed. Appx. 260, 262 (9th Cir. 2009) (*North Star*) (Commission lacks jurisdiction to order a refund to a retail purchaser, citing 16 U.S.C. § 824(b)(1) “The provisions of this subchapter shall apply to . . . the sale of electric energy at wholesale in interstate commerce, but . . . shall not apply to any other sale of electric energy . . .”).

36. In response, the California AG denies the allegations of NV Energy, stating that the Complaint does not seek a remedy for retail sales of electricity, but rather requests that refunds on wholesale sales by public utility sellers to CERS be paid to CERS.⁷⁶ While admitting that the California AG is acting on behalf of the interests of California ratepayers and citizens, he states that he is not requesting the Commission to order that refunds be paid directly to those retail ratepayers. The California AG states that while any refunds awarded in this case associated with CERS' wholesale power purchases would, as a matter of California law, accrue to the benefit of California ratepayers and citizens, that fact does not divest the Commission of jurisdiction. Next, the California AG argues that *North Star* is inapposite because there the Ninth Circuit upheld the Commission's denial of an end-user's request for direct refunds for its purchases from its supplier. Here, unlike *North Star*, the California AG states that he is not requesting that the Commission direct that any refunds owed CERS be paid directly to retail ratepayers.

37. The California AG next asserts that consistent with California law,⁷⁷ federal law⁷⁸ and Commission precedent, state attorneys general and other consumer representatives may act to seek relief at the Commission on behalf of ratepayers.

Commission Determination

38. Even though we ultimately dismiss the CERS Complaint on various grounds, we find that the California AG is a proper complainant and that the Commission has jurisdiction over the Complaint. The Complaint seeks refunds from sellers engaged in short-term bilateral wholesale electricity sales to CERS at allegedly unjust and unreasonable prices. The Commission has jurisdiction over such wholesale electricity sales under FPA section 201.⁷⁹ While it is true that the California AG is filing the Complaint for the ultimate benefit of the "ratepayers," he seeks wholesale refunds – not retail refunds. Therefore, we find that *North Star*,⁸⁰ where the complainant sought retail

⁷⁶ California AG July 13, 2009 Answer at 2-5.

⁷⁷ *Id.* at 6 n.14 (citing Cal. Const. Art. V, § 13; CAL. GOV'T CODE § 12511 (2008); CAL BUS. & PROF. CODE § 16700, *et seq.*, § 17200, *et seq.* (2008)).

⁷⁸ *Id.* (citing FPA sections 306, 308, and 313; 16 U.S.C. §§ 825e, 825g (a), and 825l expressly authorizing States to file a complaint with the Commission, to seek rehearing of a Commission order, and for the Commission to admit as a party in a proceeding "any representative of interested consumers.").

⁷⁹ 16 U.S.C. § 824(b)(1) (2006).

⁸⁰ *North Star*, 343 Fed. Appx. at 262.

refunds, is inapposite. We have previously adjudicated complaints brought by state entities such as state attorneys general on behalf of state consumers.⁸¹ Additionally, the Commission has not required all parties to a contract to be added to a proceeding before agreeing to review the case.⁸² For these reasons, we deny NV's Energy's motion to dismiss based on the subject matter jurisdictional challenge and find that the motion to stay is moot.

C. Respondents' Denials of the Allegations in the Complaint

39. As a final preliminary matter, we note that each of the respondents, besides raising the specific challenges to the Complaint, discussed *infra*, expressed general denials of the California AG's allegations that they had used market power or engaged in market manipulation.

40. NV Energy denies that it made "market based" sales to DWR during the relevant period. NV Energy states that its sales under the WSPP Agreement were pursuant to the flexible-cost-based rate cap, thus, these sales would have been at cost-based rates and not subject to any market-based rate quarterly reporting requirement.

41. NV Energy, Shell and MIECO argue they should not suffer for having assisted California during the Western Energy Crisis. NV Energy states that, as the control area operator adjacent to the CAISO, it was party to certain interconnection agreements, filed with and approved by the Commission, that permitted sales of energy at negotiated rates to California for emergency assistance and that these emergency sales did not require quarterly reports.⁸³ NV Energy states that when asked, it came to California's aid.⁸⁴

⁸¹ See, e.g., *Abrams v. Tex. E. Trans. Corp.*, 25 FERC ¶ 61,027 (1983) (New York attorney general brought complaint against interstate natural gas pipeline); see also *Md. Pub. Serv. Comm'n v. PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,169 (2008) (Maryland Public Service Commission filed complaint under FPA sections 206, 306, and 309).

⁸² See, e.g., *Cal., ex rel. Lockyer*, 99 FERC ¶ 61,247 (California AG complaint related to bilateral transactions between various sellers and CERS, where CERS was not a party to the proceeding); see also *Abrams v. Tex. E. Transmission Corp.*, 25 FERC ¶ 61,027 (New York attorney general brought complaint against interstate natural gas pipeline alleging imprudent purchases via contracts with multiple producers and complaint adjudicated even though only one producer intervened).

⁸³ NV Energy September 3, 2009 Answer at 9-10.

⁸⁴ *Id.*

Similarly, Shell states that given that many of Coral's sales to CERS were at a loss (at CERS' insistence), it cannot be said that Coral was unjustly enriched by its sales to CERS or that there was any relationship between a statutory violation and unjust enrichment.⁸⁵ MIECO states that in response to pleas from DWR management, MIECO helped CERS establish a trading operation comparable to private industry, lent employees to CERS, and, in response to specific requests to locate power when it was scarcest, sold power to CERS at a price cheaper than otherwise available.⁸⁶

42. Avista states that it made very few relevant sales to CERS: Avista Utilities made 22 sales to CERS and Avista Energy made 14 sales to CERS, each of which was a bilateral sale made pursuant to the provisions of the WSPP Agreement. Avista argues that all of its transactions during 2000 and 2001 were previously reviewed and addressed in Docket No. EL02-115, and no violations were identified.⁸⁷

43. Allegheny, Commerce Energy, MIECO, Merrill Lynch, and Powerex, argue that the California AG has not alleged, let alone demonstrated that they exercised undue market power, violated the CAISO or CalPX tariffs, or engaged in market manipulation of the California markets. Commerce Energy and Merrill Lynch state that neither of them were a CAISO or CalPX spot market participant. Because they were not active in the CAISO or CalPX spot markets that were allegedly manipulated, Commerce Energy and Merrill Lynch claim neither could have manipulated those markets.⁸⁸ In addition, Commerce Energy and Merrill Lynch state that because they did not have generation assets, they could not have had market power in California during the CERS Period.

⁸⁵ Shell September 3, 2009 Answer at 4, 14.

⁸⁶ MIECO September 3, 2009 Answer and Motion to Dismiss at 3-5, 24-31.

⁸⁷ Avista September 3, 2009 Answer and Motion to Dismiss at 6 n.15 (citing *Avista Corp.*, 107 FERC ¶ 61,055 (2004)).

⁸⁸ Commerce Energy and Merrill Lynch note that they participated in the Automated Power Exchange (APX), an electronic middleman for its members that interfaced with the CalPX. As such, Commerce Energy and Merrill Lynch argue they did not know when APX was net long or short, so they did not know when APX needed to reach out to the CalPX or CAISO markets to fill a position. Merrill Lynch September 3, 2009 Answer and Motion to Dismiss at 5, 14 n.51; Commerce Energy September 3, 2009 Answer and Motion to Dismiss at 5, 12 n.51 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 101 FERC ¶ 63,026, at P 832-858 (2002) (discussing testimony and findings on how the APX markets worked during 2000-2001)).

44. According to Allegheny, even assuming that the market misconduct of other sellers impacted prices, the California AG has not explained why Allegheny, rather than the wrongdoers, must pay a “penalty” of \$190 million. Allegheny maintains that for some time, either alone or in conjunction with other California Parties, the California AG has pursued actions in California state court against those other entities based on the same allegations advanced here. Allegheny states the California AG had the opportunity to secure complete compensation for the sellers’ alleged wrongdoing, but chose to settle for lesser amounts, thus he has no right to demand that Allegheny pay any shortfall.

Commission Determination

45. As discussed in more detail below, we are dismissing the Complaint on various grounds. This being the case, in this order we are not addressing the merits of the allegations made by the California AG that these sellers used market power or engaged in market manipulation in order to improperly affect the prices in their short-term bilateral sales to CERS during the CERS period. Nor are we ruling on the merits of the factual challenges raised by the respondents to these allegations. The specific arguments raised concerning the equitable, legal and procedural underpinnings of the Complaint are discussed *infra*.

D. Sufficiency of the Complaint Under the Federal Power Act

46. In its motion to dismiss, CSG argues that even though the California AG ostensibly has filed his Complaint under authority of FPA sections 205, 206, 306, and 309, none of these provisions provide a sufficient basis of relief as sought by the California AG.⁸⁹

47. CSG contends that the California AG cannot pursue his claims under section 206, because under section 206, the very earliest effective date for refund relief would be the date of the filing of the Complaint. Thus, it notes that sales made in 2001 are beyond the reach of FPA section 206.

48. Next, CSG argues that neither FPA sections 306 nor 309 are of any avail to the California AG. This, argues CSG, is because neither section confers a private right of action on the California AG that the Commission must address. According to CSG, both sections empower the Commission only (not private parties). It continues that section 306 empowers the Commission to receive and forward to jurisdictional public utilities the

⁸⁹ CSG’s arguments in this section have been generally adopted or supported by AEP, Allegheny, Commerce Energy, Merrill Lynch, MIECO, NV Energy, Powerex, Sempra, and Shell.

complaints of any person, state, municipality or state commission, and, where “reasonable grounds” are apparent, to investigate itself (under FPA section 307)⁹⁰ such complaints that are not satisfied. Similarly, argues CSG, FPA section 309 empowers the Commission to do whatever it finds “necessary and appropriate to carry out the provisions of the Federal Power Act,” but that FPA section 309 is not itself an independent grant of authority, least of all one that confers a private right of action on the California AG.

49. Finally, argues CSG, the Complaint can only overcome the refund effective date limitation of FPA section 206 and the absence of any private right of action under FPA sections 306 and 309, by pleading a specific violation of a substantive provision of the FPA. For instance, CSG argues, if a violation of the public utility filed rate schedule requirements of FPA section 205 is pleaded, the Commission can enforce compliance with this statutory provision by taking actions “necessary and appropriate” under FPA section 309. Here, states CSG, the California AG has failed to clearly identify an action or inaction by a CSG member that is alleged to violate applicable FPA standards or regulatory requirements. Thus, CSG concludes that the failure to allege such a violation with specificity by the California AG means that there are no necessary or appropriate actions for the Commission to take under FPA section 309 to carry out the provisions of the FPA.

50. Further, AEP, Allegheny, Commerce Energy, Merrill Lynch, and NV Energy contend that FPA section 309 does not provide a remedy based on the California AG’s unsupported theory of market-wide vicarious liability. They note that the California AG claims that the relief he requests is justified by the alleged ability of sellers to profit from the “pricing umbrella” produced by the misconduct of others. However, these sellers contend that the California AG fails to cite to any cases that allow him to recover from sellers, such as Allegheny, who were alleged “situational beneficiaries” of a pricing umbrella.

51. Instead, these sellers state that the California AG elected to file a “shotgun” complaint devoid of required specificity and particularity. They posit that the California AG makes general allegations against “sellers,” “other suppliers,” “key sellers,” “numerous sellers,” and “certain sellers,” but never explains which of these broad categories, if any, a specific seller allegedly fits into, and fails to describe what actions, if any, specific sellers are to have performed. Moreover, they argue that while going to great lengths to describe the wrongdoings of Enron and others – the California AG almost universally fails to link particular respondents to particular bad acts affecting specific bilateral contracts. They conclude that if the Commission cannot reasonably ascertain the

⁹⁰ 16 U.S.C. § 825f (2006).

specific allegations of market manipulation against a respondent, and the relationship of those detailed bad acts to particular bilateral agreements, then the Commission should exercise its discretion and reject the Complaint.

52. Commerce Energy, Merrill Lynch, Powerex, Shell and TransAlta argue that FPA section 309 limits the Commission's remedial authority to provide equitable remedies that seek to disgorge a wrongdoer's unjust enrichment from its own tariff violation. These sellers argue the unjust enrichment standard does not permit the Commission to order an individual wrongdoer to pay a monetary remedy if: (1) it was not enriched; or (2) there was no relationship between the wrongdoer's enrichment and its statutory violation. Moreover, they argue that the nature of the remedy provided under section 309 must also be proportionate to the specific violation an entity is found to have committed. According to these sellers the California AG has failed to demonstrate a statutory or tariff violation by individual sellers or a nexus between the violation alleged and the remedy sought.

53. According to Powerex and Shell, the corollary to this remedial principle, i.e., unjust enrichment must relate to a statutory violation, precludes the Commission from issuing the market-wide remedy that the California AG demands. These respondents state that when Commission remedies reflect an appropriate relationship between the remedy and the violation, reviewing courts affirm. By contrast, state Shell and Powerex, a market-wide remedy, by definition, is not related to an individual party's statutory or tariff violation.

54. TransAlta argues that not only does case law support the limited scope of FPA section 309 described above, but the fundamental notice provisions of the FPA dictate the same conclusion. Quoting the Commission:

[T]he FPA is generally premised on notice to sellers and customers as to when rates may be subject to change, whether they are rate increases or potential refunds. . . [W]ith respect to violations of the FPA section 205 filed rate requirements, public utilities are charged with following Commission rules, regulations and orders and are always "on notice" that they are subject to disgorgement or penalties *if they violate the law or their filed rate tariff*. While sellers are on notice that they will be subject to penalties *for their own violations, they are not on notice (absent a notice of possible prospective refunds under section 206 of the FPA) that they will be subject to penalties for someone else's violations of their filing requirements* To require refunds of a seller that obeyed

the orders, rules and regulations and had no notice that sales would be subject to potential refunds runs counter to fundamental notice provisions of the FPA.⁹¹

55. States TransAlta, while the refund effective date provision of section 206 serves to put sellers on notice of the potential for refunds for the collection of an unjust and unreasonable rate, sellers are afforded notice of possible remedial action under section 309 only if the seller itself violates section 205 or a related Commission regulation or order. Similarly, maintains TransAlta, refunds unrelated to, or in amounts disproportionate to the violation triggering the refunds, would abrogate the notice requirement on which the FPA is premised.

56. As to FPA section 205, Allegheny posits that under the Commission's *Lockyer Order on Remand*, the relevant inquiry is whether any deficiencies in a particular seller's quarterly reports masked an accumulation of market power sufficient to make that seller's rates unjust and unreasonable. States Allegheny, the Supreme Court in its *Morgan Stanley* decision affirmed the Commission's prior holding that to disturb a bilateral contract, a causal connection must be found between a tariff violation and the allegedly improper rates the violator charged.⁹² But, according to Allegheny, the California AG has not even attempted to show how any lack of detail in Allegheny's quarterly reports masked any market power, let alone enabled Allegheny to induce CERS to pay unjust and unreasonable prices.

57. Similarly, Commerce Energy and Merrill Lynch argue that even the claim that they did not file their quarterly transaction reports correctly – which they urge is an allegation to be resolved in *Lockyer* and not here – is not one that could sustain the section 309 remedy sought in the Complaint because there is no evidence that either Commerce Energy or Merrill Lynch were unjustly enriched from any such reporting errors. Furthermore, they state that application of the MMCP to Commerce Energy's and Merrill Lynch's CERS sales would be wildly disproportionate to the alleged reporting violations. They state that the Commission has never imposed a monetary remedy for failing to file quarterly transactions reports. They claim that this is the case both under the old reporting regime and the new Electric Quarterly Reports (EQR) regime. Commerce Energy and Merrill Lynch argue that it would be arbitrary for the Commission to impose such a monetary remedy here when market participants throughout the United

⁹¹ TransAlta September 3, 2009 Answer at 30-31 (citing *Lockyer Order on Rehearing and Clarification*, 125 FERC ¶ 61,016 at P 38 (emphasis added)).

⁹² Allegheny September 3, 2009 Motion to Dismiss and Answer (citing *Morgan Stanley*, 554 U.S. at 554-55).

States have made comparable errors related to transactions in all markets since the advent of the market-based rate regime.

58. Finally, MIECO notes that while the Ninth Circuit in *CPUC* required the Commission to address the merits of a market-wide refund remedy under FPA section 309, it did not “prejudge how FERC should address the merits or fashion a remedy if appropriate.”⁹³ Similarly, notes MIECO, in *Lockyer*, the Ninth Circuit only concluded that retroactive refunds were legally available for violations of the reporting requirement – it never addressed the propriety of market-wide refunds in the context of a reporting violation – and even on the narrow question of whether retroactive refunds were appropriate, the Ninth Circuit declined to order refunds, finding it “more appropriate for FERC to reconsider its remedial options in the first instance.”⁹⁴

59. In their answers, the California AG and the California Parties address the various sellers’ arguments. The California AG states that the sellers’ statutory claims are simply incorrect. The California AG states that its Complaint seeks refunds from sellers under two well-articulated legal theories that are amply supported with well-pleaded facts and that properly invoke the authority of sections 205, 206, 306, and 309 of the FPA. First, argues the California AG, the market-based rates charged to CERS were not “filed rates.” The California AG argues that *Lockyer* invalidates market-based rates unless “sufficient post-approval reporting requirements” enabled the Commission to assure that the rates charged were just and reasonable.”⁹⁵ The California AG then cites its evidence that the WSPP reporting requirements were deficient and that “virtually all sellers to CERS” were noncompliant in their post-transaction reporting. In turn, sellers to CERS either possessed and exercised undue market power or were able to charge excessive rates to CERS under the “pricing umbrella” created by other sellers who did. The California Parties echo these arguments.

60. Second, the California AG and the California Parties state that sellers to CERS engaged in pervasive tariff violations, thereby justifying an award of refunds for failure to adhere to the terms of filed tariffs. The tariff violations alleged against sellers include reporting noncompliance and market manipulation.

61. The California AG then urges that both of these theories state claims under FPA sections 205, 206, 306, and 309. The California AG argues that, contrary to sellers’

⁹³ MIECO September 3, 2009 Answer at 54 (citing *CPUC*, 462 F.3d at 1051).

⁹⁴ *Id.* at 54 n.151 (citing *Lockyer*, 383 F.3d at 1018).

⁹⁵ California AG July 16, 2009 Answer at 4 (citing *Lockyer*, 383 F.3d at 1015).

arguments, the Commission has the power under section 206 to enforce an existing tariff, as the California AG requests, and such relief is not limited by the refund effective date, but instead is available for the entire time period that the existing tariffs were not followed.

62. Next, the California AG maintains that section 309 of the FPA authorizes FERC to perform the requisite acts necessary to carry out its duties. The California AG argues the courts have held that section 309 specifically authorizes the Commission to provide retroactive refund relief for tariff violations. Further, argues the California AG, the courts have held that section 309 provides complainants a basis to seek relief that is independent of sections 205 and 206, and independent of action by the Commission:

Section 309 relief is not limited by § 206. ... FERC cannot avoid adjudicating a third-party petition because it may or may not choose to commence a separate enforcement action. For these reasons, we conclude that FERC's categorical rejection of the California Parties request for § 309 relief was arbitrary, capricious, and an abuse of discretion.⁹⁶

63. Finally, posits the California AG, in fashioning a remedy for alleged wrongs, the Commission has one overarching responsibility: to select a remedy that comports with the core purposes of the FPA, including, most notably, the protection of consumers.

64. The California Parties argue that, contrary to the sellers' characterizations, FPA section 309 is not limited to cases where a jurisdictional party experiences unjust enrichment tied to a specific violation of its tariff or other act of wrongdoing. The California Parties state that the right to seek and obtain market-wide relief under section 309 was a central issue argued in *CPUC*. There, argue the California Parties, the Ninth Circuit ruled that the Commission was wrong to reject the California Parties' claims for such relief. The California Parties urge that the contention that market-wide relief is not an available remedy is nothing but an attempt to relitigate the issue that sellers already lost in *CPUC*.

65. The California Parties next argue that the sellers' contention that relief is only available against individual wrongdoers is incorrect in that it is premised on the context of traditional bilateral power-sale contracts; but in an auction market, such as the CAISO or CalPX markets, a tariff violation by any party that produces an unlawful rate for that party also causes all sellers to receive that unlawful rate. In such instances, acting pursuant to FPA section 309, the California Parties maintain that the Commission has

⁹⁶ *Id.* at 7 (citing *CPUC*, 462 F.3d at 1051).

granted market-wide relief and ordered refunds to be paid by market participants that have not violated a tariff.⁹⁷

66. The California Parties then claim that the Commission's authority and obligation under the FPA to order price correction and refunds when tariffs have been violated does not depend on questions of seller innocence or guilt, because refunds are not punishment, but rather are merely the return of money that never should have been received. The California Parties then reiterate their claim that nearly all sellers disregarded CAISO or CalPX tariffs during the Western Energy Crisis. In addition, the California Parties also echo that many suppliers failed "to provide even minimal reporting"⁹⁸ as required under their individual market-based rate tariffs, and no seller fully met its reporting obligations.

67. Finally, the California Parties argue that the vast majority of CERS short-term purchases occurred at delivery points in the Pacific Northwest on or after January 2001, and are within the scope of the *Port of Seattle* proceeding. California Parties explain that the Ninth Circuit held that the claims of CERS fell within the complaint for relief for sales in the Pacific Northwest.⁹⁹ California Parties state the prices paid by CERS for this power were not just and reasonable, the standard in section 206. California Parties urge that the sales involved, in most respects, were of power produced by the same generation resources used for the CAISO and PX transactions (that are subject to refund). They argue the same market dysfunctions, manipulation and wrongdoing that impacted CAISO/PX sales impacted CERS purchases.

Commission Determination

68. Having considered the allegations as set forth in the Compliant, irrespective of its procedural failures (discussed in the ensuing sections), we are compelled to dismiss it for several reasons: (i) the requested market-wide remedy is not available; (ii) many of the theories raised by the California AG in advancing his Complaint are not available; and

⁹⁷ California Parties September 18, 2009 Answer at 13 n.51 (citing *S. Ill. Power Coop. v. Midwest ISO*, 114 FERC ¶ 61,234, *reh'g denied*, 116 FERC ¶ 61,117 (2006); *H.Q. Energy Servs. v. N.Y. Indep. Sys. Operator*, 113 FERC ¶ 61,184 (2005); *Cities of Anaheim, Azusa, Banning, Colton, and Riverside, California v. Cal. Indep. Sys. Operator*, 94 FERC ¶ 61,268, *reh'g granted in part and denied in part*, 95 FERC ¶ 61,197 (2001).

⁹⁸ *Id.* at 15 (citing *Lockyer*, 383 F.3d at 1006).

⁹⁹ *Id.* at 17 (citing *Port of Seattle*, 499 F.3d at 1033).

(iii) to the extent that FPA section 309 might provide a legal avenue for the Complaint, the California AG has failed to sufficiently support his claims thereunder.

69. The California AG seeks retroactive refunds on a market-wide basis for short-term bilateral sales made to CERS by the respondents between January 18, 2001 and June 20, 2001 pursuant to FPA sections 205, 206, 306, and 309.

70. The California AG argues that the respondents did not have the requisite market-based rate authority to make short-term bilateral sales to CERS during the CERS period in violation of FPA section 205 during the CERS period. In addition, he alleges that several of the respondents engaged in market manipulation and various tariff violations.

71. The California AG argues that prices charged are subject to refund pursuant to the just and reasonable standard of FPA section 205 because those prices are based on sales by sellers that violated reporting requirements, thereby violating their market-based rate authority, which the Ninth Circuit held were a fundamental and essential part of the sellers' market-based tariffs in *Lockyer*. First, to the extent that the CERS Complaint is based on arguments that individual sellers' quarterly reporting violations potentially masked market power by these sellers resulting in unjust and unreasonable short-term bilateral sales to CERS during the CERS Period, those issues already are being addressed in the *Lockyer* remand proceeding, and we will not open a new complaint proceeding responding to the same issues.¹⁰⁰ The Commission controls its own dockets and has substantial discretion to manage its proceedings.¹⁰¹

¹⁰⁰ See, e.g., *Lockyer Order on Rehearing and Clarification*, 125 FERC ¶ 61,016 at P 17-19 (clarifying, at the California Parties' request, that the CERS transactions from January 2001 to June 2001 were to be included in the *Lockyer* hearing); see also California Parties, Docket No. EL00-95-000, *et al.* May 22, 2009 Motion to Consolidate at 20 ("On remand from *Lockyer*, California Parties will likewise present evidence of widespread misreporting, masking accumulations of market power that enabled massive market manipulation of other sorts."). See also note 8, *supra*.

¹⁰¹ See *Mobil Oil Exploration & Producing Se. Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230-31 (1991) ("An agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities....an agency need not solve every problem before it in the same proceeding. This applies even where the initial solution to one problem has adverse consequences for another area that the agency was addressing." (internal citations omitted)); *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 366 (D.C. Cir. 2003) (administrative agencies enjoy broad discretion to manage their own dockets).

72. Similarly, the California AG has failed to explain how FPA section 306 can be interpreted to provide retroactive refunds or any other remedies for the short-term bilateral sales made to CERS during the CERS period. This section empowers the Commission to investigate. In particular, the Commission can receive and forward to jurisdictional public utilities the complaints of any person, state, municipality or state commission, and, where “reasonable grounds” are apparent, to investigate (under FPA section 307) such complaints.¹⁰²

73. Further, we find FPA section 206 relief regarding the CERS transactions is not available because the Complaint was filed eight years after the CERS transactions were completed. Under FPA section 206, the Commission has authority to order refunds to maintain just, reasonable, and non-discriminatory rates.¹⁰³ However, under the FPA and the rule against retroactive ratemaking, even where rates are found unjust and unreasonable, they may only be remedied prospectively.¹⁰⁴ Specifically, at the time of

¹⁰² FPA section 306 provides:

Any person, electric utility, State, municipality, or State commission complaining of anything done or omitted to be done by any licensee, transmitting utility, or public utility in contravention of the provisions of this chapter may apply to the Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such licensee, transmitting utility, or public utility, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such licensee, transmitting utility, or public utility shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating such complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall find proper.

¹⁰³ See, e.g., *Exxon Mobil Corp. v. FERC*, 571 F.3d 1208, 1213-14 (D.C. Cir. 2009) (FPA section 206(a) provides only a mechanism to revise established rates while FPA section 206(b) provides for refund relief from amounts paid in excess of the just and reasonable rate).

¹⁰⁴ See 16 U.S.C. § 824e(b) (2006); *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 578 (1981); *Mont.-Dakota Util. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246 (1951); *Consol. Edison Co. of N.Y., Inc. v. FERC*, 347 F.3d 964, 967 (D.C. Cir. 2004).

the events at issue here, refunds by law could be ordered no earlier than 60 days after the filing of a complaint.¹⁰⁵ In 2005, this provision was amended to allow the refund effective date to be set as early as the date the complaint is filed.¹⁰⁶ Thus, “[u]nder the express language of § 206, however, FERC may not order refunds for any period prior to the filing of the complaint.”¹⁰⁷ We find that the California AG’s request for refunds for short-term bilateral sales to CERS are time-barred under FPA section 206, because the very earliest relief available would be effective as of the date of the filing of the Complaint, that is, May 22, 2009, which was long after the 2001 sales were consummated.

74. The California Parties argue that the Commission has granted market-wide relief and ordered refunds to be paid by market participants that have not violated a tariff.¹⁰⁸ However, the cases cited by the California Parties are inapposite. In each case cited by the California Parties, the Commission granted complaints pursuant to FPA section 206, and required an ISO to recalculate specific bills because the ISO had, as a matter of law, misinterpreted a discrete tariff provision in a way that directly impacted charges.¹⁰⁹ In these cases, the Commission found the relevant tariff to be just and reasonable, but that the interpretation or implementation of the tariff was in error. Accordingly, the

¹⁰⁵ See FPA section 206(b) (2001) (“Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period.”).

¹⁰⁶ See Energy Policy Act of 2005, Pub. L. No. 109-58 §§ 1261 *et seq.*, 119 Stat. 594 (2005).

¹⁰⁷ *CPUC*, 462 F.3d at 1045.

¹⁰⁸ See *supra* note 96.

¹⁰⁹ *S. Ill. Power Coop.*, 114 FERC ¶ 61,234 (the Commission found the Midwest ISO assessed specific charges to transactions under grandfathered agreements in error and required the Midwest ISO to refund those charges); *H.Q. Energy Servs.*, 113 FERC ¶ 61,184 (the Commission found that the New York ISO erroneously reset the prices for energy on two days and ordered the ISO to pay refunds and collect surcharges to reinstate the original market clearing prices); *Cities of Anaheim, Azusa, Banning, Colton, and Riverside, California*, 94 FERC ¶ 61,268 (the Commission found that the CAISO misinterpreted its tariff and applied an imbalance charge in excess of the cap on that charge as stated in its tariff).

Commission in those cases was correcting the behavior to be consistent with the tariff. By contrast, the California AG never here alleges that the contracts at issue were incorrectly applied; therefore, this line of cases has no applicability.

75. Finally, the California AG alleges that that prices charged are subject to correction pursuant to FPA section 309 because sellers violated various tariffs and market rules; such price corrections are required to restore prices to the lawful, competitive levels that the tariffs would have produced in a competitive market, absent the violations, citing *CPUC*.

76. However, FPA section 309 is not itself an independent grant of authority.¹¹⁰ We have previously stated that FPA section 309 “is designed to fill in gaps where the FPA is silent, not to rewrite the explicit congressional delegations of authority and explicit limitations on that authority.”¹¹¹ In *CPUC*, the Ninth Circuit stated that FPA section 309 provides the Commission with authority to act on “statutory or tariff violations.”¹¹² Thus, the California AG can only attain the relief he seeks under FPA section 309 (if at all) by pleading a specific violation by a specific seller of a substantive provision of the FPA or a tariff, compliance with which the Commission can enforce by taking actions “necessary and appropriate.”¹¹³ Specifically, courts have endorsed the Commission’s reliance on FPA section 309 in two separate contexts: (1) where the wrongdoer violated a filed tariff

¹¹⁰ See *Towns of Concord v. FERC*, 955 F.2d 67, 73 (D.C. Cir. 1992) (finding that the Commission’s authority to order refunds for violations of a regulated entity’s filed rate under section 309 must be based within a substantive statutory provision of the FPA); *Mobil Oil Corp* 483 F.2d 1238, 1257 (D.C. Cir. 1973) (stating that the Commission’s enforcement actions “cannot enlarge the choice of permissible procedures beyond those that may fairly be implied from the substantive sections and the functions there defined.”); 16 U.S.C. § 825h (2006) (“to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act.”).

¹¹¹ July 25, 2001 Order, 96 FERC ¶ 61,120 at 61,509.

¹¹² See *CPUC*, 462 F.3d at 1048.

¹¹³ See *CPUC*, 462 F.3d at 1058 (FPA section 309 empowers the Commission to enforce against violators’ compliance with the FPA and regulatory requirements unconstrained by FPA section 206 refund effective date).

or rate schedule (i.e., the filed rate doctrine);¹¹⁴ and (2) where the wrongdoer violated a statutory requirement other than a filed tariff or rate schedule.¹¹⁵

77. Thus, under this analysis, in the context of short-term bilateral contract sales, a market-wide refund remedy for tariff violations would be appropriate only if a complainant clearly demonstrated that all sellers had engaged in tariff violations.¹¹⁶ Otherwise, sellers following the law would be penalized because of someone else's bad conduct, an unfair and unreasonable result. The Complaint has not made such a clear demonstration justifying a market-wide remedy.

78. As we stated *supra* (paragraph 71), to the extent that the CERS Complaint is based on arguments that already are being addressed in the *Lockyer* remand proceeding, we will not open a new complaint proceeding corresponding to the same issues.

79. To the degree the Complaint is based on a theory of other tariff violations and market manipulation, the California AG has failed to provide any information to demonstrate that specific sellers performed specific tariff or statutory violations, and that

¹¹⁴ See, e.g., *N.Y. Power Authority v. Consol. Edison Co. of N.Y.*, 115 FERC ¶ 61,088, at P 15 (2006) (refunds ordered for amounts collected above filed rate); *Sw. Elec. Coop., Inc. v. Soyland Power Coop., Inc.*, 95 FERC ¶ 61,254, at 61,886 (2001) (application of formula rate in filed agreement); *Blue Ridge Power Agency v. Appalachian Power Co.*, 58 FERC ¶ 61,193, at 61,603 (1992) (whether cost of service was properly calculated in accordance with Interconnection Agreement, a filed rate schedule); *AES Southland, Inc. and Williams Energy Marketing and Trading Co.*, 94 FERC ¶ 61,248, at 61,875 (2001) (investigation into possible violations of filed tariff and contracts); *The Wash. Water Power Co.*, 83 FERC ¶ 61,282, at 62,169 (1998) (violations of a market-based rate order).

¹¹⁵ See, e.g., *Central Me. Power Co.*, 56 FERC ¶ 61,200, *reh'g denied*, 57 FERC ¶ 61,083 (1991) (rate agreements filed after service thereunder had already expired); *Prior Notice and Filing Requirements under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, *clarified*, 65 FERC ¶ 61,081 (1993) (implementing 18 C.F.R. § 35.19a).

¹¹⁶ As we stated in Section IV.A, *supra*, short-term bilateral contract sales to CERS are unlike sales in an organized auction market such as the CAISO or CalPX, where a tariff violation by any party that produces an unlawful rate for that party also causes all sellers to receive that unlawful rate.

those violations resulted in unjust and unreasonable rates for the short-term bilateral sales to CERS that need to be remedied.¹¹⁷

80. In the main, the Complaint is based upon vague, generalized and unsupported allegations. For instance, allegations that during the Western Energy Crisis, “virtually all sellers” – both tariff violators as well as “situational beneficiaries” – reaped unjust and unreasonable windfalls from such alleged violations do not satisfy the specificity required to invoke FPA section 309 remedial action. Neither do general allegations against “sellers,” “other suppliers,” “key sellers,” “numerous sellers,” and “certain sellers.” The Complaint describes some wrongdoings of Enron and others at length – but alleges virtually no specific links between the specific respondents and specific bad acts affecting specific bilateral contracts. We do not accept the California AG’s unsupported theory of vicarious liability under FPA section 309 under the premise of a “pricing umbrella.” Without allegations of specific violations affecting specific bilateral contracts, we are left with no necessary or appropriate actions for the Commission to take under FPA section 309 to carry out the provisions of the FPA.

81. There are a few instances in the Complaint where the California AG has made more specific charges of tariff violations.¹¹⁸ Nevertheless, these allegations remain

¹¹⁷ See 18 C.F.R. § 385.206(b) (2010) (The requirement that a complaint should identify particular actions or inactions by specific sellers alleged to violate applicable FPA standards or regulatory requirements.). This rule is intended to “ensure that the Commission and all parties to a dispute have as much information as early in the complaint process as possible to evaluate their respective positions.” *Complaint Procedures*, Order No. 602, FERC Stats. & Regs. ¶ 31,071, at 30,756 (1999). See also *Citizens’ Alliance v. Nat’l Fuel Gas Co.*, 26 FERC ¶ 61,386, at 61,862 (1984) (dismissing a complaint that was “vague and insufficiently supported by specific factual allegations to warrant an investigation”); *Regulations Implementing Refund Procedures Under Subpart K of Part 271 for Production-Related Costs*, Order No. 333, FERC Stats. & Regs., Regulations Preambles 1982-1985, ¶ 30,494, at 30,664 (1983) (“If a person or party wishes to file a complaint with the Commission, [then] the complaint should be specific and supportable with regard to the facts”); *Union Elec. Co., d/b/a/ AmerenUE*, 93 FERC ¶ 61,158, at 61,529 (2000) (“[w]hile trial-type procedural measures may be used to develop a record and resolve issues of fact, they are not intended to be used as a cure for a complaint that fails to inform the Commission completely and clearly as to the issues and factual disputes”).

¹¹⁸ For example, the California AG alleges that Powerex and Sempra were pivotal suppliers that exercised market power in violation of their market-based rate tariffs; PNM improperly provided parking services; Powerex, Sempra, Coral, and TransAlta engaged

(continued...)

insufficient to sustain the Complaint. Even if we were to accept as true, for the sake of argument, all of the California AG's allegations of tariff violations, even the more generalized ones, the California AG nevertheless has failed to demonstrate the critical nexus between these alleged violations and the prices charged under any specific short-term bilateral contract with CERS. Therefore, we find that Complaint is insufficient because the Commission cannot reasonably ascertain the specific allegations of market manipulation against any particular respondent, and the relationship of those detailed bad acts to particular bilateral agreements.

82. Finally, to the extent the California AG attempts to obtain relief, in effect retroactive refunds on a market-wide basis, by conflating our authority under a hybrid combination of FPA sections 206 and 309, his attempt fails. As noted above, FPA section 309 is not in itself an independent grant of authority and we do not read into *CPUC* a mandate that section 309 obviates the remaining provisions of the FPA.¹¹⁹ In particular, the California AG cannot circumvent the temporal limitation of FPA section 206 by seeking relief under FPA section 309.¹²⁰ Rather, each of these FPA sections contains its own requirements. As discussed *supra*, claims for relief for the short-term bilateral CERS sales made during the CERS Period are time-barred under FPA section 206. We also find that the California AG is not entitled to relief under FPA section 309

in false exports, parking and various other manipulative gaming strategies in violation of the Monitoring and Information Protocol (MMIP) and the scheduling and bidding provisions of the CAISO tariff and their market-based rate tariffs.

¹¹⁹ See *New England Power Co. v. FPC*, 467 F.2d 425, 430-31 (D.C. Cir. 1972), *aff'd*, 415 U.S. 345 (1974) (FPA section 309 does not “confer independent authority to act”) and *Mobil Oil v. FPC*, 483 F.2d at 1257 (parallel section of Natural Gas Act is implementary of other substantive provisions, but not independent source of authority)). See also *Comcast Corp. v. FCC*, 2010 U.S. App. LEXIS 7039, at 2-3 (D.C. Cir. Apr. 6, 2010) (parallel section (4(i)) of Communications Act of 1934 (47 U.S.C. § 154(i)), authorizing the FCC to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions,” is not a sufficient mandate for FCC to regulate certain internet practices over which FCC has no other express statutory authority).

¹²⁰ See *CPUC*, 462 F.3d at 1045, 1048 (“Unlike refund proceedings commenced under § 206, no time limits apply to remedial actions filed pursuant to § 309.”) Our discussion here that FPA section 309 does not broaden FPA section 206 does not run afoul of the court’s concern that the Commission might be attempting to apply the time limits of FPA section 206 to FPA section 309 proceedings. *Id.* at 1049.

for the same sales, because the CERS Complaint has failed to make the requisite showing under that statutory provision; accordingly, we dismiss the CERS Complaint.

E. Mobile-Sierra

83. Various sellers¹²¹ argue that, aside from the other alleged infirmities with the complaint, in this instance the California AG has not adequately pleaded or otherwise advanced evidence sufficient to overcome the *Mobile-Sierra* presumption regarding contract modification. They state that the CERS purchases at issue were made bilaterally under the framework of the WSPP agreement, and the Commission has found that the WSPP agreement contains a *Mobile-Sierra* clause.¹²² As a result, these sellers posit that the contract rates at issue are presumed just and reasonable and may be set aside only upon a finding of “extraordinary circumstances” involving “unequivocal public necessity.”¹²³ Moreover, according to these sellers, the California AG justifies his request for resetting the bilaterally-agreed upon rates by alleging that nearly all sellers engaged in market manipulation and that the California markets at the time were dysfunctional.

84. These sellers assert, however, that the Court stressed in *Morgan Stanley* that market dysfunction is an insufficient basis to overcome the *Mobile-Sierra* presumption of the reasonableness of bilateral contracts.¹²⁴ Thus, they argue, neither of these allegations

¹²¹ These sellers include: CSG, Avista, TransCanada, PNM, Shell Energy, Tucson Electric, Merrill Lynch, TransAlta, and Allegheny.

¹²² See Sec. 6.1 WSPP Agreement, which provides that the parties to the contract may make “joint application” to the Commission under section 205 of the FPA to change the rates agreed upon in the contract; *PacifiCorp. v. Reliant Energy Servs., Inc.*, 103 FERC ¶ 61,355, at P 29, *reh’g denied*, 105 FERC ¶ 61,184 (2003) (finding that contracts entered into pursuant to the terms and conditions set forth in the WSPP Agreement are subject to the *Mobile-Sierra* clause); *Nevada Power Co. v. Enron Power Mktg., Inc.*, 103 FERC ¶ 61,353, at P 36, *reh’g denied*, 105 FERC ¶ 61,185 (2003), *rev’d sub nom.*, *Pub. Util. Dist. No. 1 v. FERC*, 471 F.3d 1053 (9th Cir. 2006), *rev’d sub nom.*, *Morgan Stanley*, 554 U.S. 527 (9th Cir. 2006).

¹²³ See *Morgan Stanley*, 554 U.S. at 550-51.

¹²⁴ See *id.* at 2747 (“But the mere fact that the market is imperfect, or even chaotic, is no reason to undermine the stabilizing force of contracts that the FPA embraced as an alternative to ‘purely tariff-based regulation.’”) (quoting *Verizon Commc’n Inc. v. FCC*, 535 U.S. 467, 479 (2002)).

removes these agreements from the *Mobile-Sierra* presumption. They assert that the Supreme Court in *Morgan Stanley* squarely rejected the “perverse” notion that this presumption does not apply to bilateral contracts formed “in an environment of market dysfunction.”¹²⁵

85. The sellers also aver that generalized allegations of “unlawful market manipulation” do not displace the *Mobile-Sierra* presumption.¹²⁶ Instead, they state that the Court held there must be a “clear” showing that the unlawful actions were specific to the selling party and the wholesale energy contract at issue, and that the unlawful acts, in and of themselves, skewed the parties’ negotiation process and directly caused a disparity in the contract rate, making it unjust and unreasonable.

86. In response to this *Mobile-Sierra* line of argument, the California AG raises two main arguments in defense. First, argues the California AG, no precedent at the Commission or the courts has ever held that *Mobile-Sierra* limits relief under FPA sections 205 or 309 for tariff violations. Here the California AG repeats that, with regard to the CERS transactions, none of the sellers complied with the reporting requirements of their tariffs. Second, the California AG responds that these transactions were entered into after a proceeding had been commenced under FPA section 206. This being the case, the California AG argues that the sellers “were on notice” that the prices were subject to mitigation based on a just and reasonable standard.

Commission Determination

87. To the extent that the Complaint is requesting that the Commission modify the short-term bilateral contract rates with CERS because those rates were not just and reasonable, the Complaint does not sufficiently address the *Mobile-Sierra* presumption regarding contract modification. The CERS purchases were made bilaterally under the framework of the WSPP agreement, which contains a *Mobile-Sierra* clause. Indeed, the short-term bilateral sales contracts at issue here are a type of agreement to which the Supreme Court has found that the *Mobile-Sierra* presumption generally applies, absent language therein to the contrary.¹²⁷ Thus, the rates set in those contracts are to be presumed just and reasonable, and that presumption may be overcome only if the

¹²⁵ See *id.* at 2746 (“It would be a perverse rule that rendered contracts less likely to be enforced when there is volatility in the market”).

¹²⁶ See *id.* at 2750-51.

¹²⁷ *Morgan Stanley*, 128 S.Ct at 2745-47.

Commission concludes that the contract seriously harms the public interest.¹²⁸ As discussed further below, the Complaint's general allegations of market dysfunction are an insufficient basis to overcome the *Mobile-Sierra* presumption or find that it is inapplicable.¹²⁹

88. The Complaint focuses on the alleged duplicity of sellers as a class and the alleged lack of oversight by the Commission.¹³⁰ We find that these general arguments are insufficient to overcome the *Mobile-Sierra* presumption. The Court found in *Morgan Stanley*, that a contract formed through the wrongdoing of one of the *signatories* enjoys no presumption of validity.¹³¹ However, the Court did not adopt the approach espoused by the California AG here — that generalized allegations of wrongdoing of “virtually all sellers” should strip each and every seller of the presumption that its contract rates were just and reasonable in a specific case. Indeed, the Court indicated that there must be a specific causal connection between the unlawful activity of one party and the contract rate.¹³²

89. Similarly, although the Complaint presents arguments about sellers' alleged reporting failures, the California AG has neither provided information sufficient to demonstrate that specific tariff or statutory violations occurred, nor made any specific allegations as to how such failures or violations may have improperly affected the contract rates at issue here. In light of the Supreme Court's decision in *Morgan Stanley*,

¹²⁸ See, e.g., *NRG Power Mktg., LLC v. Me. PUC*, 130 S. Ct. 693 (2010).

¹²⁹ *Morgan Stanley* at 2747 (“The mere fact that the market is imperfect, or even chaotic, is no reason to undermine the stabilizing force of contracts that the FPA embraced as an alternative to purely tariff-based regulation.”)

¹³⁰ See, e.g., Complaint at 4 (“The above actions of sellers and the Commission dramatically increased the prices of virtually all spot market electricity sales made to CERS.”).

¹³¹ *Morgan Stanley*, 554 U.S. at 547 (“if the ‘dysfunctional’ market conditions under which the contract was formed were caused by illegal action of one of the parties, FERC should not apply the *Mobile-Sierra* presumption”).

¹³² See *id.*; see also *id.* at 2751 (“We **emphasize** that the mere fact of a party's engaging in unlawful activity in the spot market does not deprive its forward contracts of the benefit of the *Mobile-Sierra* presumption. There is no reason why FERC should be able to abrogate a contract on these grounds without finding a causal connection between unlawful activity and the contract rate.”) (Emphasis in original).

the Commission explained that complainants must present evidence demonstrating “that a particular seller engaged in unlawful manipulation in the spot market *and* that such manipulation directly affected the particular contract or contracts to which the seller was a party.”¹³³ The California AG simply has not demonstrated such a nexus with respect to the short-term bilateral sales to CERS.¹³⁴

90. We also disagree with the California AG’s argument that he need not address the *Mobile-Sierra* presumption because sellers to CERS were “on notice” that the contract rates were subject to mitigation based on a “just and reasonable” standard by virtue of a pending FPA section 206 action. As the Supreme Court stated in *Morgan Stanley*, “[t]here is only one statutory standard for assessing wholesale electricity rates, whether set by contract or tariff – the just-and-reasonable standard.”¹³⁵ Even assuming, *arguendo*, that being “on notice” was determinative, the Ninth Circuit stated in no uncertain terms that that “the SDG&E [FPA section 206] complaint was not sufficient to put the CERS transaction participants on notice....”¹³⁶

91. For these reasons, to the extent that the Complaint is requesting that the Commission modify the short-term bilateral contract rates with CERS because those rates were not just and reasonable, we find that the Complaint does not sufficiently address the *Mobile-Sierra* presumption.

¹³³ *Nevada Power Co.*, 125 FERC ¶ 61,312, at P 28 (2008) (emphasis in original).

¹³⁴ Moreover, to the extent that the Complaint relies on a factual foundation of whether any seller’s improper or untimely filing of its quarterly transaction reports masked an accumulation of market power such that the market rates were unjust and unreasonable in the CAISO or CalPX markets from January 1, 2000 to October 1, 2000, or in sales to CERS from January 18, 2001 to June 20, 2001, those issues are already being addressed in the *Lockyer* remand, and the Commission will not establish a new proceeding covering the same issues. *See infra* P 72.

¹³⁵ *Morgan Stanley*, 554 U.S. at 545.

¹³⁶ *CPUC*, 462 F.3d at 1064.

F. Time Bars

1. Statutes of Limitations

a. WSPP Agreement Time Limitation

92. PNM and Tucson argue that section 9.4 of the WSPP Agreement bars the Complaint because it provides that a “party’s right to dispute the accuracy of any bill” ends two years after the date of bill receipt.¹³⁷ They assert that CERS failed to dispute its bills within the two-year period.

Commission Determination

93. We find that Section 9.4 of the WSPP Agreement is not applicable here. The Complaint seeks a market-wide remedy for alleged tariff violation under the FPA; it is not a dispute regarding the clerical accuracy of bills.¹³⁸

b. Federal/State Statutes of Limitations

94. Allegheny argues that the California AG waited too long to seek relief and that a federal statute of limitations bars the CERS Complaint. Allegheny states that in his Complaint, the California AG seeks not the disgorgement of profits that Allegheny allegedly wrongfully earned on its CERS sales, but rather the difference between the sales prices negotiated with CERS and the MMCP. According to Allegheny, this amounts to the imposition of a penalty or forfeiture. Citing 28 U.S.C. § 2462, Allegheny states an action seeking penalties had to be brought within five years of the CERS sales. In this, Allegheny argues the California AG was three years too late. Moreover, asserts Allegheny, the five-year statute of limitations was not tolled during the pendency of the CPUC appeal. Assuming any tolling applies, Allegheny states that applicable law required that the California AG initiate a new complaint within one year from the 2006 issuance of the CPUC opinion. In any event, Allegheny argues the California AG has

¹³⁷ Western Systems Power Pool, Rate Schedule FERC No. 6, First Revised Sheet No. 21 superseding original sheet No. 21, effective July 1, 2001, § 9.4.

¹³⁸ See *Carnegie Natural Gas Co.*, 63 FERC ¶ 61,103 (1993) (tariff clauses limiting the time in which “billing errors” can be challenged may not be used to bar a party from challenging other defects that go to the “propriety” of the rate charged); *Nw. Pipeline Corp.*, 43 FERC ¶ 61,281 (1988) (one-year tariff limit did not bar pipeline from recovering interest on overpayment because pipeline was not seeking interest under the tariff as an administrative “billing error,” but rather under Commission orders).

been on notice since 2001 that any claim seeking relief for the CERS trades required a new complaint, but he elected to ignore the Commission's ruling and the California AG chose to sit on whatever rights he had at his peril.

95. NV Energy makes similar arguments, relying instead on the four-year Utah statute of limitations, Utah Code Ann. § 70A-2-725(1) (incorporated by reference into the WSPP Agreement). However, NV Energy argues that under either law, the Complaint is time-barred.

96. The California Parties argue that the relief the California AG seeks is not a penalty, but a refund and thus the federal statute is inapplicable. The California Parties further assert that, even assuming the application of either statute of limitations, the statute was equitably tolled until April 2009 when the mandate in *CPUC* was issued.¹³⁹

Commission Determination

97. Regarding the justification of the application of a statute of limitations, the courts have reasoned:

A federal cause of action “brought at any distance of time” would be “utterly repugnant to the genius of our laws.” Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost. In compelling circumstances, even wrongdoers are entitled to assume that their sins may be forgotten.¹⁴⁰

98. Neither section 205 nor 309 contain an express statute of limitations.¹⁴¹ When a federal statute is silent on the issue of the applicable statute of limitations, the statute is implied from other law.¹⁴²

¹³⁹ California Parties September 18 Response at 37 (citing Utah Code Ann. § 70A-2-725(3)).

¹⁴⁰ *Wilson v. Garcia*, 471 U.S. 261, 271 (1985) (citing *Adams v. Woods*, 2 Cranch 336, 342 (1805)).

¹⁴¹ See 16 U.S.C. §§ 824d and 825h; see also *Prohibition of Energy Market Manipulation*, 114 FERC ¶ 61,300, at P 62 (2006) (noting that “no statute of limitations of general applicability appears in the NGA or FPA”). One would not expect section 206 to contain a statute of limitations since, as discussed *infra*, it operates prospectively only.

99. Federal law has two potentially applicable “catchall” statutes of limitations. The first, 28 U.S.C. § 1658 (2006), imposes a four-year commencement limit, but it only applies civil actions arising under an Act of Congress enacted after 1991. Thus the federal four-year statute does not directly apply to complaints brought pursuant to the venerable FPA. The second federal statute sets a five-year limit for “an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise.”¹⁴³ We believe that this five-year federal statute provides a proper analog to be implied and appropriately applied here.

100. In this case, the sales to CERS concluded by June 20, 2001, but the Complaint was not filed until May 2009. As we have discussed, unlike the case of organized auction markets, were we to impose market-wide relief in the context of short-term bilateral sales to CERS irrespective of an individual seller’s wrongdoing (as requested by the California AG), the results could be punitive and confiscatory. This being the case, we find the federal statute of limitations is operative and the Complaint is time-barred.

101. Notwithstanding the California AG’s repeated claim that he is seeking a “refund” and that such a refund “is not punitive,” (e.g., Complaint at 5), we find that what he is demanding is a confiscation because it would affect all of the sellers to CERS regardless of culpability. As noted in our discussion above of FPA section 309, the cases applying section 309 of the FPA speak in terms of disgorgement of profits.¹⁴⁴ Disgorgement of

¹⁴² See *Bowdry v. United Air Lines, Inc.*, 956 F.2d 999, 1004 (10th Cir. 1992) (where Congress is silent, either a state or federal law statute of limitations will be implied). The Commission has already incorporated a statute of limitations for FPA actions involving civil penalties. See 28 U.S.C. § 2462 (2006); *Prohibition of Energy Market Manipulation*, 114 FERC ¶ 61,300 at P 62 (stating that the five-year statute of limitations applies to FERC action seeking civil penalties). In other contexts, when federal law is silent regarding a statute of limitations, the Supreme Court has urged courts to select the state statute of limitations “most analogous” and “most appropriate” to the particular federal action, so long as the chosen limitations period was consistent with federal law and policy. *Owens v. Okure*, 488 U.S. 235, 239 (1989).

¹⁴³ See 28 U.S.C. § 2462 (2006) (federal statute of limitations); see also *Prohibition of Energy Market Manipulation*, 114 FERC ¶ 61,300 at P 62 (stating that the five-year statute of limitations applies to FERC action seeking civil penalties).

¹⁴⁴ See *CPUC* 462 F.3d at 1048 (“FERC also has remedial authority to require that entities violating the Federal Power Act pay restitution for profits gained as a result of a statutory or tariff violation.”); see also *Lockyer Order on Remand*, 122 FERC ¶ 61,260 at P 2 n.2 (“‘refunds’ refers to monies returned to customers as a result of a Commission order to reset the rate to make it just and reasonable. . . . A disgorgement of unjust profits

(continued...)

profits typically is not viewed as a punishment (for purposes of the federal statute of limitations) since it forces the wrongdoer to relinquish the fruits of its illegal conduct.¹⁴⁵ Also, disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing, not beyond.¹⁴⁶ On the other hand, going beyond the disgorgement of profits is viewed as punitive, and claims seeking such relief are subject to a five-year statute of limitations.¹⁴⁷

102. Here, the California AG is not seeking disgorgement of the profits earned by specific sellers arising from specific short-term bilateral sales to CERS. Instead, his complaint requests the establishment of an MMCP to be used as a basis to calculate market-wide refunds from all sellers regardless of whether there have been allegations, let alone findings, of tariff violations on the part of an individual seller leading to unjust or unreasonable rates in a particular CERS contract. Far from restoring the *status quo*, this would penalize sellers that followed the law on account of the bad conduct of others (an unfair and unreasonable result). Here, the California AG has not made sufficient allegations of tariff violations demonstrating that the respondent sellers caused the alleged harm.¹⁴⁸

. . . relates to a violation of a rule, statute, regulation, or order which has a causal connection to unjust profits obtained by the violator as a result of its violation.”); *Investigation of Anomalous Bidding Behavior and Practices in the Western Markets*, 103 FERC ¶ 61,347, at P 2 (2003) (“the remedy for these tariff violations, if found to exist, would be the disgorgement of any unjust profits attributable to these tariff violations”); *Am. Elec. Power Servs. Corp.*, 103 FERC ¶ 61,345, at 62,328 (2003) (finding that participation in gaming practices warrants “a monetary remedy of disgorgement of unjust profits”) (Gaming Show Cause Order).

¹⁴⁵ See *Zacharias v. SEC*, 569 F.3d 458, 472 (D.C. Cir. 2009) (“Disgorgement deprives wrongdoers of the profits obtained from their violations.”).

¹⁴⁶ *SEC v. MacDonald*, 699 F.2d 47, 54 (1st Cir. 1983).

¹⁴⁷ See *SEC v. Williams*, 884 F. Supp. 28, 30 (D. Mass. 1995) (“A defining feature of disgorgement actions is that the amounts disgorged may not exceed the amount of the illicit gain.”).

¹⁴⁸ See *U.S. v. Telluride*, 146 F.3d 1241, 1246 (10th Cir. 1998) (interpreting the term “penalty” “as a sanction or punishment imposed for violating a public law which goes beyond compensation for the injury *caused by the defendant.*”) (emphasis added); see also *SEC v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989) (stating that a disgorgement order might amount to a penalty if it was not “causally related to the

(continued...)

103. The California AG insists that the relief he seeks is appropriate because it would make the ratepayers of California whole.¹⁴⁹ However, the Commission does not have the authority to order a utility to pay such “reparations.”¹⁵⁰ Moreover, the goal of covering alleged ratepayer losses is not what disgorgement contemplates, but rather “[t]he primary purpose of disgorgement [and other equitable remedies] is not to refund others for losses suffered but rather to ‘deprive the wrongdoer of his ill-gotten gain.’”¹⁵¹

104. Even assuming, for the sake of argument, that this federal statute of limitations does not directly apply, the policy behind its enactment is persuasive when assessing the most analogous and appropriate statute. Moreover, if we did not apply the five-year federal statute of limitations, based on federal practice,¹⁵² we would be compelled to invoke the state four-year statute of limitations¹⁵³ as the most analogous and appropriate. We emphasize that the California Parties do not disagree with the premise that a statute of limitations of some sort applies to the Complaint; they instead state that “[t]he Complaint is timely as a matter of law under potentially applicable statutes.”¹⁵⁴

105. Accordingly, the California AG has suggested that any statute of limitations was tolled while the *CPUC* appeal was pending, since one of the issues on appeal was whether the Commission correctly excluded the CERS sales from the refund

wrongdoing” at issue); *compare Lockyer Order on Remand*, 122 FERC ¶ 61,260 at P 2 n.2 (“A disgorgement of unjust profits, although it also may result in a return of monies to customers, relates to a violation of a rule, statute, regulation, or order which has a causal connection to unjust profits by the violator as a result of its violation.”).

¹⁴⁹ See Complaint at 50 (referencing resetting rates to “what they would have been in a competitive market”).

¹⁵⁰ See *Mont.-Dakota Utils. Co. v. Pub. Serv. Comm’n*, 341 U.S. 246, 254 n.9 (citing S. Rep. No. 621, 74th Cong., 1st Sess. 20 (1935)).

¹⁵¹ *Zacharias v. SEC*, 569 F.3d at 471 (quoting *SEC v. Bilzerain*, 29 F.3d 689, 696 (D.C. Cir. 1994)).

¹⁵² See *supra* note 142.

¹⁵³ Utah Code Ann. § 70A-2-725(1) (incorporated by reference into the WSPP Agreement).

¹⁵⁴ California Parties’ September 18, 2009 Response at 36.

proceedings.¹⁵⁵ The implication is that the limitations clock would have not resumed until April 2009, when the Ninth Circuit issued its mandate in the case. However, the Commission believes that the California AG should have restarted the “clock” much earlier.

106. We find that regardless of whether section 2462 is subject to equitable tolling,¹⁵⁶ the cases applying the concept of equitable tolling generally have done so to delay the commencement of the limitations clock based on the defendant’s concealment of relevant facts.¹⁵⁷ In this case, the California AG has not alleged concealment by any of the respondents.

107. Further, there is no question about the California AG’s knowledge of a potential claim more than five years ago. The Commission rejected adding the CERS transactions to the scope of the EL00-95 refund proceeding in 2001.¹⁵⁸ The California AG was not only aware of alleged deficiencies in quarterly reports no later than 2002, but he also joined in the complaint the California Parties filed in Docket No. EL02-71 seeking relief because of those alleged deficiencies. The California AG further had compiled evidence of alleged market manipulation by March 2003.¹⁵⁹

108. The Commission must look to applicable state law for tolling guidelines.¹⁶⁰ In this case, Utah would provide those principles, by contractual agreement. The California AG has acknowledged elsewhere that the sales to CERS were conducted under the auspices

¹⁵⁵ California AG July 16, 2009 Answer at 3 (noting that the complaint in this action was filed weeks after the Ninth Circuit issued its mandate in *CPUC*).

¹⁵⁶ See *Rotella v. Wood*, 528 U.S. 549, 560 (2000); accord *FEC v. Williams*, 104 F.3d 237, 241 (9th Cir. 1996) (“federal statutes of limitations are generally subject to equitable principles of tolling”).

¹⁵⁷ See *id.*

¹⁵⁸ See July 25, 2001 Order, 96 FERC ¶ 61,120 at 61,515.

¹⁵⁹ See California Parties, Supplemental Evidence of Market Manipulation by Sellers, Docket No. EL00-95 (filed March 3, 2003).

¹⁶⁰ See *Johnson v. Railway Exp. Agency, Inc.*, 421 U.S. 454, 465 (1975) (stating that state tolling principles are the “primary guide” of federal courts).

of the WSPP Agreement.¹⁶¹ The WSPP Agreement includes a Utah choice of law provision.¹⁶²

109. Utah courts have held that the statute of limitations will be tolled during an appeal of a case involving the right at issue.¹⁶³ Thus, assuming equitable tolling applies, the CPUC appeal may have stopped the running of the federal five-year statute of limitations as to any claims involving CERS' purchases from respondents. However, the limitations clock would have restarted on the day the CPUC decision was entered — August 2, 2006. With the CPUC decision, the Ninth Circuit affirmed the Commission's exclusion of the CERS transactions from the scope of the refund proceedings.

110. As a result, the ultimate issuance of the mandate in April 2009 was irrelevant for purposes of tolling. As of August 2, 2006, the California AG was on notice that he had to commence a separate action based on the CERS sales. Under Utah's savings statute, the statute of limitations is not stopped during the period of the earlier suit; instead, the clock is reset to one year commencing with the adverse court decision. Specifically, the plaintiff may "commence a new action within one year after the reversal or failure."¹⁶⁴ The California AG thus had until August 2, 2007, to file a complaint with the Commission. He was over eighteen months too late.¹⁶⁵

¹⁶¹ See, e.g., California Parties, Answer to Motions to Dismiss and Answers to Motions for Refunds, Docket No. EL01-68, at 10-11 (filed July 31, 2009).

¹⁶² The WSPP Agreement (§ 24) provides:

This Agreement and any Confirmation Agreement shall be governed by and construed in accordance with the laws of the State of Utah, without regard to the conflicts of laws rules thereof. The foregoing notwithstanding, (1) if both the Seller and Purchaser are organized under the laws of Canada, then the laws of the province of the Seller shall govern, or (2) if the Seller is an agency of or part of the United States Government, then the laws of the United States of America shall govern.

¹⁶³ See *Sittner v. Schriever*, 22 P.3d 784, 788 (Utah App. 2001).

¹⁶⁴ Utah Code § 78B-2-111 (2009).

¹⁶⁵ If we were to apply the four-year Utah statute of limitations, the Complaint would be deemed twelve months tardier.

111. As a result, as an alternative ground to dismiss the Complaint, we find the claims advanced in the Complaint are untimely under the federal statute of limitations and must be dismissed for this reason as well.

2. Equitable Laches

112. CSG and other sellers assert the Complaint should be dismissed or denied as untimely under the doctrine of laches – the equitable doctrine designed to prevent unfairness to a party caused by a second party’s unexcused or unreasonable delay in asserting a claim.

Commission Determination

113. Having found sufficient grounds to dismiss the complaint in law under the federal statute of limitations, the Commission need not decide the question of timeliness under the equitable doctrine of laches.

G. Failure to Join Necessary Parties/Motion for More Definitive Statement

114. Various sellers¹⁶⁶ argue that while the CERS Complaint accuses the respondents in tandem with the California IOUs, none of these IOUs are joined. Similarly, they note that while the California AG seeks relief for harm caused by large in-state electric power generators whom he accuses of withholding in-state generating capacity, none of these in-state generators are joined as a party. These sellers therefore request dismissal under the Federal Rules of Civil Procedure (FRCP).

115. Certain sellers move,¹⁶⁷ absent dismissal of the Complaint, the Commission should find that the CERS Complaint lacks the specificity and particularity required by Commission’s Rule 206(b),¹⁶⁸ and require the California AG to provide a more definite statement of its claims against individual sellers. They also urge that claims not made more definite, in turn, should be stricken.

¹⁶⁶ These sellers include: AEP, CSG, NV Energy, Powerex, and TransCanada.

¹⁶⁷ These sellers include: Avista, CSG, Merrill Lynch, MIECO, NV Energy, PNM, Sempra, Shell Energy, TransAlta, TransCanada, and Tucson Electric.

¹⁶⁸ 18 C.F.R. § 385.206(b) (2011).

Commission Determination

116. We note that the Commission is not strictly bound by the FRCP.¹⁶⁹ Given our dismissal of the Complaint, these issues are moot.

V. Conclusion

117. Due to the deficiencies in the CERS Complaint outlined herein, we find that it should be dismissed.

The Commission orders:

The CERS Complaint is hereby dismissed, for the reasons discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁶⁹ *Cf. Corpus Christi Mgmt. Co.*, 28 FERC ¶ 62,284 (1984) (referencing FRCP 19 and 21 as to joinder of parties in another context).

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