

175 FERC ¶ 61,124
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Allison Clements,
and Mark C. Christie.

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

v.

Docket No. EL02-71-057

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

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

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

ORDER ON INITIAL DECISION

(Issued May 20, 2021)

1. This case is before the Commission on exceptions to an Initial Decision issued July 28, 2017 by the Presiding Administrative Law Judge (Presiding Judge).¹ This proceeding concerns the violations of quarterly reporting requirements of individual public utility sellers and any unjust and unreasonable rates in California during the 2000-2001 period (Western Energy Crisis or Crisis). In response to a remand of the case

¹ *Cal. ex rel. Lockyer v. Brit. Colom. Power Exch. Corp.*, 160 FERC ¶ 63,010 (2017) (Initial Decision).

by the United States Court of Appeals for the Ninth Circuit (Ninth Circuit), the Commission established hearing and settlement judge procedures to examine “whether any individual public utility seller’s violation of the Commission’s market-based rate quarterly reporting requirement led to an unjust and unreasonable rate for that particular seller in California during the 2000-2001 period.”² Specifically, the Ninth Circuit found that the Commission had erred in its earlier decisions in this proceeding by limiting the scope of the inquiry to consideration of only market-share evidence.³ The court stated that “[t]o fully consider whether a reported rate was just and reasonable, the agency must consider claims and evidence beyond the hub-and-spoke” market power screen.⁴ The court also stated that the Commission must determine whether California Parties’⁵ claims have been resolved in other proceedings.⁶ Finally, the court did not address the question of “potential refunds from sellers who were not themselves responsible for any manipulation that FERC may determine occurred, but who may have benefitted from it.”⁷ Rather, the court found that the issue was “appropriately within FERC’s province in the first instance.”⁸

2. The Initial Decision at issue here addresses the matters set for hearing as a result of the Ninth Circuit’s remand. The remaining respondents in this case are Hafslund Energy Trading L.L.C. (Hafslund) and TransCanada Energy Ltd. (TransCanada) (jointly, Respondents).

3. In this order, the Commission affirms the factual findings in the Initial Decision, as discussed below. Because we are affirming the findings in the Initial Decision, we

² *Cal. ex rel. Lockyer v. Brit. Colom. Power Exch. Corp.*, 153 FERC ¶ 61,137, at P 4 (2015) (2015 Remand Order).

³ *Cal. ex rel. Harris v. FERC*, 784 F.3d 1267, 1274-75 (9th Cir. 2015) (*Harris Remand*).

⁴ *Id.* at 1275.

⁵ For purposes of this proceeding, California Parties are the Attorney General of the State of California (California Attorney General), the Public Utilities Commission of the State of California (CPUC), Pacific Gas & Electric Company (PG&E), and Southern California Edison Company (SoCal Edison).

⁶ *Harris Remand*, 784 F.3d at 1276.

⁷ *Id.*

⁸ *Id.*

conclude that Respondents' reporting violations did not mask manipulation or market power by Respondents that resulted in unjust and unreasonable prices being charged by either Respondent. Therefore, we find that California Parties have not established a basis for ordering refunds based on quarterly reporting violations.

I. Background

A. Procedural History

4. This proceeding originated with a complaint filed by the California Attorney General on March 20, 2002, which alleged, among other things, that generators and marketers selling power into markets operated by the California Independent System Operator Corporation (CAISO) and California Power Exchange Corporation (CalPX) failed to report transaction-specific information about their sales and purchases at market-based rates as required by section 205(c) of the Federal Power Act (FPA)⁹ and Commission directives.¹⁰

5. In an order issued May 31, 2002, the Commission dismissed in part and granted in part the complaint. The Commission found that those generators and marketers selling power into the California markets that reported aggregated, rather than transaction-specific, data failed to comply with section 205(c) of the FPA and the Commission's reporting requirements.¹¹ The Commission declined to order refunds for violations of its reporting requirements, stating that FPA "section 206 bars retroactive refunds in this proceeding."¹² The Commission also reasoned that "the failure to report transactions in the format required by [the Commission] for quarterly reports is essentially a compliance issue" for which "re-filing of quarterly reports to include transaction-specific data is an appropriate and sufficient remedy."¹³ California Parties appealed the Commission's decision to not direct refunds.

⁹ 16 U.S.C. § 824d(c) (2012).

¹⁰ *Cal. ex rel. Lockyer v. Brit. Colom. Power Exch. Corp.*, 99 FERC ¶ 61,247, at 62,055 (2002) (2002 Order on Complaint).

¹¹ *Id.* at 62,065-66.

¹² *Id.* at 62,067-68.

¹³ *Id.* at 62,068.

6. On September 9, 2004, the Ninth Circuit remanded the case, holding that the Commission erred when it ruled that it lacked authority to order refunds.¹⁴ The Ninth Circuit declined to order refunds itself, but remanded the case for the Commission “to reconsider its remedial options in the first instance.”¹⁵

7. On March 21, 2008, the Commission issued an Order on Remand establishing a hearing to address “whether any individual seller’s violation of the Commission’s market-based rate quarterly reporting requirement led to an unjust and unreasonable rate for that particular seller in California during the 2000-2001 period.”¹⁶ The Commission directed the participants to apply the hub-and-spoke market power screen to determine if the sellers gained market power subsequent to the Commission’s original grant of market-based rate authority.¹⁷

8. At hearing, California Parties failed to present a hub-and-spoke analysis to support their allegations. Thus, on March 18, 2010, the presiding Administrative Law Judge (ALJ) granted respondents’ motions for summary disposition.¹⁸ On May 4, 2011, the Commission affirmed the ALJ, stating that “[w]e therefore affirm the Initial Decision’s finding that California Parties’ failure to present a hub-and-spoke analysis for any seller justifies summary disposition as to all sellers.”¹⁹ California Parties again appealed the Commission’s decision not to direct refunds, arguing that the Commission erred by requiring proof of excessive market share as a necessary condition for refunds based on quarterly reporting violations.²⁰ In April 2015, the Ninth Circuit issued the *Harris* Remand decision. The Ninth Circuit held that the Commission erred by limiting

¹⁴ *Cal. ex rel. Lockyer v. Brit. Colom. Power Exch. Corp.*, 383 F.3d 1006, 1008-9 (9th Cir. 2004).

¹⁵ *Id.* at 1018.

¹⁶ *Cal. ex rel. Bill Lockyer v. Brit. Colom. Power Exch. Corp.*, 122 FERC ¶ 61,260 at P 2.

¹⁷ *Id.* P 35, n.70.

¹⁸ *Cal. ex rel. Lockyer v. Brit. Colom. Power Exch. Corp.*, 130 FERC ¶ 63,017 (2010).

¹⁹ *Cal. ex rel. Lockyer v. Brit. Colom. Power Exch. Corp.*, 135 FERC ¶ 61,113, at P 41 (2011).

²⁰ *Harris* Remand, 784 F.3d at 1269.

its inquiry to the hub-and-spoke market power screen²¹ and remanded the case to the Commission to “determine whether a just and reasonable price was charged by each seller, with specific attention to whether reporting deficiencies masked manipulation or accumulation of market power.”²² The court stated that, if the Commission determined that reporting deficiencies masked manipulation or market power such that the prices in the underlying contracts were unjust and unreasonable, then the Commission could “elect to exercise its remedial discretion as appropriate.”²³

9. In the 2015 Remand Order, the Commission re-established a trial-type hearing before an ALJ to address whether any individual public utility seller’s violation of the Commission’s market-based rate quarterly reporting requirement led to an unjust and unreasonable rate for that particular seller in California during the 2000-2001 period. The Commission instructed that parties are not limited to presenting claims and evidence of market concentration based exclusively on the hub-and-spoke test; rather, consistent with the Ninth Circuit’s instructions in the *Harris* Remand, they are permitted to present alternative market power analyses.²⁴ The Commission directed that wholesale purchasers may present evidence demonstrating:

- (1) whether a seller violated the quarterly reporting requirement;
- (2) whether reporting deficiencies masked manipulation or accumulation of market power by that seller;
- and (3) whether this resulted in unjust and unreasonable charges being charged by that seller.²⁵

In addition, the Commission permitted parties to present evidence as to “whether sellers who were not themselves responsible for, but benefitted from, any manipulation that may have occurred should be subject to potential refunds.”²⁶

10. In an order on clarification issued March 1, 2016, the Commission clarified the scope of evidence that may be presented at the hearing ordered in the 2015 Remand

²¹ *Id.* at 1274.

²² *Id.* at 1277.

²³ *Id.*

²⁴ 2015 Remand Order, 153 FERC ¶ 61,137 at P 4.

²⁵ *Id.* P 10.

²⁶ *Id.* P 12.

Order. The Commission found that California Parties may present evidence on market manipulation and other evidence to the extent such evidence is relevant to the issue of whether reporting deficiencies masked manipulative conduct that led to unjust and unreasonable prices.²⁷ The Commission also clarified that parties that have previously settled in this proceeding may be subject to subpoenas, evidence production, and data requests, and parties may present evidence involving the settled parties' conduct to the extent such evidence is relevant to the scope of the hearing.²⁸ However, the Commission found that California Parties may not present evidence regarding issues that have been the subject of a final Commission order.²⁹ In particular, the Commission found that California Parties may not re-litigate the issue of "vicarious liability" as a basis for ordering refunds,³⁰ which was previously rejected by the Commission.³¹ Finally, the Commission reiterated that "quarterly reporting violations, by themselves, are insufficient to avoid application of the *Mobile-Sierra*³² presumption" to the underlying contracts allegedly affected by the misreporting.³³ The Commission specified that, to avoid or overcome the *Mobile-Sierra* presumption and obtain refunds:

²⁷ *Cal. ex rel. Lockyer v. Brit. Colom. Power Exch. Corp.*, 154 FERC ¶ 61,154, at P 12 (2016) (2016 Order on Clarification).

²⁸ *Id.* P 13.

²⁹ *Id.* PP 14-15.

³⁰ Vicarious liability is also referred as the "pricing umbrella" theory, according to which a large seller's exercise of market power enables other sellers, who did not exercise market power or commit tariff violations, but may have benefitted from other sellers' market power or manipulation by raising prices, resulting in potentially unjust and unreasonable rates that would justify a finding that refunds are warranted even in the case where a particular contract rate was not the direct result of market power or manipulation.

³¹ 2016 Order on Clarification, 154 FERC ¶ 61,154 at P 14 (citing *Cal. ex rel. Brown v. Powerex Corp.*, 135 FERC ¶ 61,178, at PP 32-34 (2011), *order denying reh'g*, 139 FERC ¶ 61,210 (2012)).

³² *See United Gas Pipeline Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 344 (1956) (*Mobile*); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 335 (1956) (*Sierra*).

³³ 2016 Order on Clarification, 154 FERC ¶ 61,154 at P 16 (citing *Puget Sound Energy, Inc.*, 143 FERC ¶ 61,020, at P 24 (2013)).

[T]he California Parties must show either that a seller: (1) engaged in unlawful market behavior that directly affected a particular contract rate; or (2) that the contract rate imposed an excessive burden on consumers or seriously harmed the public interest.³⁴

11. In response to requests for rehearing of the 2016 Order on Clarification, the Commission issued a second order on rehearing on October 13, 2016. In that order, the Commission affirmed its prior finding that evidence of quarterly reporting violations alone is insufficient to avoid application of the *Mobile-Sierra* presumption. The Commission also specified that evidence of unlawful activity by third parties is not relevant to the *Mobile-Sierra* inquiry.³⁵ However, the Commission clarified that pricing umbrella evidence could be introduced at hearing to the extent it was relevant to the “nexus between reporting deficiencies, market power, and market outcomes, including evidence of how reporting deficiencies may have masked manipulative behavior by sellers.”³⁶

12. In a further order on clarification, dated January 9, 2017, the Commission affirmed its prior finding that “there is no basis for liability on a pricing umbrella theory in this proceeding,”³⁷ but reiterated that pricing umbrella evidence could be introduced “for the purpose of providing greater context and depth for probative, seller-specific evidence.”³⁸ The Commission also clarified that to avoid application of the *Mobile-Sierra* presumption, the California Parties must show a nexus between a seller’s reporting violation and an unjust and unreasonable rate. The Commission again emphasized that evidence of a third party’s conduct is not relevant to this showing “because the focus of the *Mobile-Sierra* inquiry is the conduct of the seller and whether that conduct directly affected contract prices.”³⁹

³⁴ *Id.* PP 14, 16.

³⁵ *Cal. ex rel. Lockyer v. Brit. Colom. Power Exch. Corp.*, 157 FERC ¶ 61,023, at PP 10-13 (2016) (Order on Rehearing).

³⁶ *Id.* P 13.

³⁷ *Cal. ex rel. Lockyer v. Brit. Colom. Power Exch. Corp.*, 158 FERC ¶ 61,018, at P 8 (2017) (2017 Order on Clarification).

³⁸ *Id.*

³⁹ *Id.*

B. Initial Decision

13. After an evidentiary hearing, the Presiding Judge issued the Initial Decision on July 28, 2017. As a threshold matter, the Initial Decision denied Respondents' motions for summary disposition of the case, finding that the issue of quarterly reporting violations had not yet been addressed in any of the related Western Energy Crisis proceedings.⁴⁰

14. The Initial Decision also found that California Parties failed to adhere to the evidentiary burdens established by the Commission by attempting to use a theory of liability that relied on the unlawful activities of third parties.⁴¹

15. With regard to the merits of the case, the Initial Decision found that California Parties provided compelling evidence that Respondents filed noncompliant quarterly reports. Specifically, the Initial Decision found that Hafslund's quarterly reports for the relevant period did not include transaction-specific prices or volumes, or dates of service.⁴² The Initial Decision also found that TransCanada's quarterly reports failed to comply with the applicable requirements by not including transaction-specific volumes and prices, and by omitting transaction dates.⁴³ However, the Initial Decision found that the reporting violations did not mask market manipulation or the accumulation of market power.⁴⁴ Thus, the Initial Decision found that Respondents' noncompliant quarterly reports did not result in unjust and unreasonable rates.⁴⁵

⁴⁰ Initial Decision, 160 FERC ¶ 63,010 at PP 47-56. The relevant related proceedings are: (1) the "Summer Period" proceeding in Docket No. EL00-95-248, et al., that addressed the California Parties' claims as to Hafslund's transactions in the CAISO and CalPX markets from May 1, 2000 through October 1, 2000; and (2) the "Pacific Northwest Refund Proceeding" in Docket No. EL01-10-085, et al., that addressed the California Parties' claims against sellers in the bilateral Pacific Northwest markets for transactions entered into during the period of January 1, 2000 through June 20, 2001.

⁴¹ *Id.* PP 68, 75.

⁴² *Id.* P 84.

⁴³ *Id.* P 85.

⁴⁴ *Id.* P 88-135.

⁴⁵ *Id.* PP 136-145.

C. Briefs on Exceptions and Opposing Exceptions

16. California Parties and Commission Trial Staff (Trial Staff) filed Briefs on Exceptions. Charles River Associates, TransCanada, California Parties, and Trial Staff filed Briefs Opposing Exceptions. Arguments raised in the briefs are addressed by issue below.

II. Evidentiary Burdens

A. Initial Decision

17. The Initial Decision noted that California Parties bear the burden of proof in this proceeding. The Initial Decision explained that, in order to obtain refunds for sales in the CAISO and CalPX markets, California Parties must:

present evidence demonstrating: (1) whether a seller violated the quarterly reporting requirement; (2) whether reporting deficiencies masked manipulation or accumulation of market power by that seller; and (3) whether this resulted in unjust and unreasonable prices being charged by that seller.⁴⁶

18. The Initial Decision further explained that, for bilateral contracts entered into under the Western Systems Power Pool (WSPP) Agreement, such as TransCanada's sales to CERS, the *Mobile-Sierra* presumption of just and reasonable rates applies. Therefore, in order to obtain refunds for these sales, California Parties must also show:

either that a seller: (1) engaged in unlawful market behavior that directly affected a particular contract rate; or (2) that the contract rate imposed an excessive burden on consumers or seriously harmed the public interest.⁴⁷

19. With regard to sales into the CAISO or CalPX markets, the Initial Decision found that California Parties argue for their own formulation of the evidentiary burden, rather than adhering to the standard set forth by the Commission. Specifically, the Initial Decision stated that California Parties advocate for an evidentiary burden whereby the manipulation or accumulation of market power that is masked by misreporting can be either that of the Respondent or the Respondent's trading partner. However, the Initial Decision found that it was not necessary to resolve the question of whether to apply

⁴⁶ *Id.* P 66 (quoting 2015 Remand Order, 153 FERC ¶ 61,137 at P 10).

⁴⁷ *Id.* P 71 (quoting 2016 Order on Clarification, 154 FERC ¶ 61,154 at P 14).

California Parties' proposed standard because they were unable to meet their evidentiary burden under either formulation of the burden.⁴⁸

20. The Initial Decision concluded that California Parties' attempted to rely on a vicarious liability theory to avoid or overcome the *Mobile-Sierra* presumption. The Initial Decision stated that the Commission had specifically rejected California Parties' theory of refund liability based on the unlawful activities of third parties.⁴⁹ Thus, the Initial Decision found that California Parties' formulation of the test to avoid application of the *Mobile-Sierra* presumption was fatally flawed.⁵⁰

B. Brief on Exceptions

21. California Parties argue that the Initial Decision mistakenly confused the California Parties' statement of the issues for hearing with the burden of proof. California Parties state that, in the Order on Remand, the Commission explained that, in order to prevail against a seller, California Parties would have to demonstrate that "reporting deficiencies masked manipulation or accumulation of market power by that seller."⁵¹ California Parties contend that the only reading of that instruction that complies with the Ninth Circuit's admonition that the Commission consider "the question of potential refunds from sellers who were not themselves responsible for any manipulation ... but who may have benefitted from it,"⁵² is that the manipulation or market power masked by misreporting could be that of a Respondent or of the Respondent's trading partner. Thus, California Parties argue that they framed the issue for hearing consistent with the Ninth Circuit's instructions in the *Harris* Remand such that, once a seller was shown to have reporting deficiencies, California Parties could then prevail by showing that those deficiencies masked the manipulation or accumulation of market power of the seller or of other parties.⁵³

⁴⁸ *Id.* PP 66-68.

⁴⁹ *Id.* P 74 (quoting 2016 Order on Clarification, 154 FERC ¶ 61,154 at P 14).

⁵⁰ *Id.* PP 72-75.

⁵¹ California Parties Brief on Exceptions at 69 (quoting 2015 Remand Order, 153 FERC ¶ 61,137 at P 10).

⁵² *Id.* (quoting *Harris* Remand, 784 F.3d at 1276).

⁵³ *Id.* at 69-70.

22. California Parties assert that the Initial Decision erroneously conflated this statement of the issue with the concept of vicarious liability or “pricing umbrella theory,” concepts that the Commission had already rejected. California Parties argue that this mistaken understanding amounts to a rejection of the possibility that a seller such as TransCanada could be found liable for refunds. California Parties contend that any such rejection would be inconsistent with both the Commission’s articulation of the burden of proof and the Ninth Circuit’s instruction to the Commission on remand.⁵⁴

23. Moreover, as discussed in greater detail below, California Parties contend that the Initial Decision erred by assuming that they were required to show that compliant reports, standing alone, would have provided all the information necessary to confirm the tariff violations committed by sellers. California Parties argue that there has never been such a requirement; rather, they assert that the quarterly reports have always been a means to alert the Commission that further investigation is necessary. California Parties aver that they demonstrated that compliant reports would have provided enough information to prompt deeper investigation and, therefore, met their burden of proof on this issue.⁵⁵

24. With regard to their burden to avoid or overcome the *Mobile-Sierra* presumption, California Parties dispute the assertion that evidence showing TransCanada’s misreporting masked the market power or manipulation of others was evidence of vicarious liability. Rather, California Parties argue that TransCanada benefitted through misreporting by masking the manipulation of others, thereby contributing to the forces that allowed TransCanada to negotiate higher rates. Thus, California Parties contend that this evidence was permissible and demonstrates the necessary connection between TransCanada’s misreporting and the unjust and unreasonable rates it was able to charge.⁵⁶

25. California Parties next argue that the Initial Decision failed to recognize that the bilateral contracts at issue here were not negotiated in a vacuum, but in an environment where market power and manipulation elevated prices in the Pacific Northwest and affected the prices TransCanada was able to charge. More specifically, California Parties assert that most of TransCanada’s sales to CERS occurred at the California-Oregon border as the time for dispatch approached and the pool of suppliers consisted primarily of a limited number of suppliers who have been shown to have engaged in manipulation and/or the exercise of market power. California Parties assert that TransCanada’s misreporting directly affected contract negotiations by denying the Commission and California Parties the information necessary to determine that prices were the result of

⁵⁴ *Id.* at 70-71.

⁵⁵ *Id.* at 71-72.

⁵⁶ *Id.* at 73.

manipulation and market power. California Parties object to the Initial Decision's finding that they failed to identify specific contracts that were affected by unlawful activity. To the contrary, they argue that they showed misreporting affected all of the contract rates. Thus, California Parties claim that they have carried their burden of proof to show that unlawful activity directly affected contract rates as to TransCanada's contracts with CERS and, therefore, the *Mobile-Sierra* presumption should not apply.⁵⁷

26. California Parties likewise argue that they made a *prima facie* case regarding Hafslund's sales. They state that the Initial Decision found that Hafslund failed to file compliant reports and also that the Commission previously found that Hafslund's False Load activity elevated prices Hafslund received for sales in CAISO.⁵⁸ California Parties assert that Hafslund failed to present any evidence on any of the issues at hearing and contend that the Initial Decision should have held that Hafslund's silence constituted concession on these issues.⁵⁹

C. Briefs Opposing Exceptions

27. Trial Staff argues that the Initial Decision correctly found that California Parties failed to meet their burden of proof, even under California Parties' formulation of the standard. Trial Staff contends that Exhibit CAP-0346, upon which California Parties rely to show an hour-by-hour analysis of whether prices were unlawful as a result of Respondents' tariff violations and misreporting,⁶⁰ fails to connect any alleged tariff violation to any specific TransCanada sale to CERS. In addition, Trial Staff asserts that California Parties fail to demonstrate that Hafslund's reporting violations resulted in unjust and unreasonable rates being charged by Hafslund in the CAISO and CalPX markets. Thus, according to Trial Staff, California Parties fail to meaningfully address whether Respondents' quarterly reporting violations masked manipulation or market power.⁶¹

28. Trial Staff also asserts that California Parties formulate the issues for hearing in a manner that ignores the Commission's instructions. Trial Staff contends that California

⁵⁷ *Id.* at 76-77, 79-81.

⁵⁸ *Id.* at 78 (citing *San Diego Gas & Elec. Co.*, Opinion No. 536, 149 FERC ¶ 61,116, at P 3 (2014)).

⁵⁹ *Id.*

⁶⁰ *See id.* at 67, 75.

⁶¹ Trial Staff Brief Opposing Exceptions at 13-14.

Parties' proffered formulation is indistinguishable from the vicarious liability or pricing umbrella theory that was previously rejected by the Commission. However, Trial Staff argues that the Initial Decision correctly determined that California Parties failed to meet their burden under this theory or under the standard set forth by the Commission.⁶²

29. Trial Staff contends that the Initial Decision correctly set forth the standard for avoiding or overcoming the *Mobile-Sierra* presumption applicable to TransCanada's sales to CERS. Trial Staff argues that California Parties' attempt to assign liability based on benefitting from others' manipulation or exercise of market power is a vicarious liability theory. Thus, Trial Staff concurs with the Initial Decision's finding that California Parties may not rely on unlawful activity by third parties to avoid application of the *Mobile-Sierra* presumption. Trial Staff notes that, while the Commission permitted California Parties to present evidence of unlawful activity by third parties,⁶³ the Commission emphasized that California Parties would not be permitted to re-litigate the issue of vicarious liability in this proceeding and that evidence of a pricing umbrella could not in itself establish refund liability.⁶⁴ Thus, Trial Staff asserts that, even if Respondents benefitted from the unlawful activities of others, such benefit does not establish the causal connection that is needed to overcome or avoid the *Mobile-Sierra* presumption.⁶⁵

30. TransCanada also argues that the Initial Decision properly determined that California Parties failed to carry their evidentiary burden with regard to avoiding or overcoming the *Mobile-Sierra* presumption. TransCanada asserts that California Parties equate misreporting in itself with unlawful market activity that directly affected contract negotiations and thereby eliminates the protection afforded by the presumption. TransCanada contends that the Commission may order refunds in connection with a bilaterally negotiated contract only when the presumption is avoided in the event of unfair dealing at the contract formation stage or when the presumption is overcome because the contract seriously harms the public interest.⁶⁶ TransCanada notes that the issue of whether its contracts with CERS seriously harmed the public interest was fully

⁶² *Id.* at 16-17.

⁶³ 2016 Order on Clarification, 154 FERC ¶ 61,154 at P 14.

⁶⁴ *Id.*; Order on Rehearing, 157 FERC ¶ 61,023 at P 13.

⁶⁵ Trial Staff Brief Opposing Exceptions at 18-21.

⁶⁶ TransCanada Brief Opposing Exceptions at 23 (citing *Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 530, 547 (2008) (*Morgan Stanley*)).

litigated in the Pacific Northwest Refund Proceeding, where the Commission rejected California Parties claims on this issue.⁶⁷

31. With regard to the standard for avoiding the *Mobile-Sierra* presumption, TransCanada argues that the Initial Decision properly rejected California Parties' position that showing a "necessary connection" between a seller's misreporting and an unjust and unreasonable rate is sufficient to avoid application of the presumption. TransCanada argues that the "necessary connection" is not a substitute for the necessary showing, but rather an additional hurdle for California Parties to cross if they could demonstrate a basis for voiding the contract under *Mobile-Sierra*. Further, TransCanada contends that California Parties' formulation of their evidentiary burden ignores the Commission's admonition that vicarious liability, or unlawful activity by third parties, could not form the basis for refunds. TransCanada claims that California Parties' theory of the case against it relies entirely on TransCanada enjoying higher prices due to the manipulation or market power of another seller, which is indistinguishable from the impermissible vicarious liability theory.⁶⁸

D. Commission Determination

32. We affirm the Initial Decision's finding that California Parties impermissibly attempted to rely on the unlawful activity of non-Respondents (i.e., sellers in the CAISO and CalPX markets other than Hafslund and TransCanada) to satisfy their burden of proof with respect to both Hafslund's sales in the CAISO and CalPX markets and TransCanada's bilateral sales to CERS. Contrary to California Parties' position, the Ninth Circuit did not resolve whether sellers who were not responsible for manipulation, but who may have benefitted from it, should be liable for refunds. Rather, the Ninth Circuit held that this issue was appropriately one for the Commission to address.⁶⁹ The Commission considered the question and expressly rejected the possibility of refunds based on a theory of vicarious liability on several occasions in this proceeding.

33. We find that California Parties failed to adhere to the Commission's instruction, in the Order on Remand that, while California Parties may present any relevant evidence at hearing, any such "evidence must be specific and the California Parties must clearly demonstrate the nexus between reporting deficiencies and manipulative conduct."⁷⁰

⁶⁷ *Id.* (citing *Puget Sound Energy, Inc.*, Opinion No. 537-A, 153 FERC ¶ 61,386, at PP 95, 118 (2015)).

⁶⁸ *Id.* at 21-28, 71.

⁶⁹ *Harris Remand*, 784 F.3.d at 1276.

⁷⁰ 2016 Order on Clarification, 154 FERC ¶ 61,154 at P 12.

Further, we find that, with regard to bilateral contracts that enjoy the *Mobile-Sierra* presumption of just and reasonable rates, the Commission emphasized that, due to the contract-specific nature of the *Mobile-Sierra* analysis, California Parties have ignored that the Commission has rejected a theory of vicarious liability as a basis for refunds.

34. In addition, while the Commission has stated that it would permit California Parties to present any legal theories and evidence to demonstrate that sellers who did not engage in manipulation were able, as a result of reporting deficiencies, to benefit from other sellers' manipulation, so long as any such issues had not been the subject of a final Commission decision, we find that California Parties have attempted to resurrect claims related to sales by TransCanada and CERS that were the subject of a final order in the Pacific Northwest Refund Proceeding in Docket No. EL01-10.⁷¹ Finally, despite the Commission's unequivocal finding that "evidence of a third party's conduct is not relevant"⁷² to the showing required under the *Mobile-Sierra* analysis, we find that California Parties have attempted here to rely on evidence of third party conduct as the basis of their theory of refund liability rather than using such evidence solely for the limited purpose of providing greater context for probative, seller-specific evidence.⁷³

35. We therefore agree with the Initial Decision's finding that California Parties' formulation of their evidentiary burden impermissibly relies on a theory of vicarious liability. We find that California Parties' framing of the issue, such that the misconduct masked by reporting violations could be that of a Respondent *or* the Respondent's trading partner, exceeds the Commission's instruction that evidence of wrongdoing by third parties could only be presented to provide greater context to the examination of how misreporting may have affected market outcomes. In essence, California Parties' theory of liability rests on the premise that, by misreporting their transactions with sellers that manipulated the market or exercised market power, Respondents "masked the price-increasing behavior of those trading partners, which, in turn, allowed TransCanada to negotiate rates far higher than would have been possible"⁷⁴ absent the noncompliant reporting. We find that this formulation of the issue is indistinguishable from the pricing umbrella, or vicarious liability, theory that the Commission has previously rejected, and California Parties have not demonstrated otherwise.

⁷¹ *Id.* P 15 (citing *Puget Sound Energy, Inc.*, Opinion No. 537, 151 FERC ¶ 61,173, at PP 145-148, 185-189, 168, 215-219 (2015), Opinion No. 537-A, 153 FERC ¶ 61,386 at PP 96-98, 103-106, 118-126).

⁷² 2017 Order on Clarification, 158 FERC ¶ 61,018 at P 8.

⁷³ *See id.*

⁷⁴ California Parties Brief on Exceptions at 74.

36. More specifically, with regard to California Parties burden under the *Mobile-Sierra* analysis, we concur with the Initial Decision's finding that California Parties have not undertaken the required contract-specific analysis to determine how TransCanada's reporting violations directly affected the negotiation of individual contracts. It is insufficient for California Parties to allege generally that Respondents' failure to comply with the reporting requirements directly affected all contract negotiations by denying the Commission information that may have led to earlier detection of manipulation and the exercise of market power by other sellers. We find that this line of argument amounts to little more than a general allegation of high prices and market dysfunction. The Commission has previously held, in a similar circumstance, that "general allegations of market dysfunction in the Pacific Northwest are an insufficient basis for overcoming the *Mobile-Sierra* presumption or finding that it is inapplicable."⁷⁵ The Commission emphasized the contract-specific nature of the *Mobile-Sierra* inquiry and explained that such an inquiry is "not about whether market dysfunction exists that would provide opportunities for unlawful activity, but whether a specific seller actually did engage in unlawful activity that directly affected a contract rate."⁷⁶ Here, California Parties' arguments focus on general market conditions that may have facilitated unlawful activity but do not address how a particular seller's conduct may have affected a specific contract rate. Thus, we find that the Commission's reasoning in the Pacific Northwest case in Docket No. EL01-10 is applicable here as well.

37. Nevertheless, even if we were to accept California Parties' formulation of the issue, we agree with the Initial Decision's conclusion that this question need not be resolved because we find that California Parties have not met their burden of proof under either their proffered formulation of the issue, or the evidentiary requirements set forth by the Commission, as discussed below. Because we find that California Parties failed to make a *prima facie* case that Hafslund's quarterly reporting violations masked manipulation or market power that resulted in unjust and unreasonable rates, we reject as moot California Parties' contention that Hafslund's failure to present evidence at hearing should constitute any concession in this case.

38. We also reject California Parties' contention that the Initial Decision erred by requiring them to demonstrate that compliant reports would have provided definitive, or complete, proof that sellers were manipulating the market or exercising market power. The Initial Decision made no such finding. Rather, the Initial Decision evaluated California Parties' evidence within the context of whether compliant quarterly reports would have revealed telltale patterns of manipulative behavior, which would have

⁷⁵ Opinion No. 537, 151 FERC ¶ 61,173 at PP 166, 216, n.376.

⁷⁶ *Id.* P 166.

prompted further Commission investigation.⁷⁷ Similarly, the Initial Decision did not require that compliant reports provide conclusive proof of the exercise of market power, but found that compliant reports could not have masked the *indicia* of market power because, among other things, the Commission was already aware of and investigating potential market power problems during the relevant period.⁷⁸

III. Quarterly Reporting Violations

A. Initial Decision

39. The Initial Decision explained that the Commission permits sellers to charge market-based rates under a two-step regulatory regime that requires an *ex ante* finding of the absence of market power and post-approval quarterly reporting so that the Commission can ensure that the rates are just and reasonable and markets are not subject to manipulation. During the relevant period, which covers Quarters 1 through 3 in 2000 and Quarters 1 and 2 in 2001, the Commission required the Respondents to file quarterly reports with both the Commission and WSPP. Pursuant to seller-specific letter orders, the Commission granted each Respondent market-based rate authority and required them to provide, to the Commission, for each market-based transaction in the prior quarter:

- 1) Identification of buyer/seller;
- 2) description of the service, *e.g.*, purchase/sale, firm/non-firm;
- 3) delivery point(s);
- 4) price(s);
- 5) quantities, *e.g.*, MWh/MW; and
- 6) dates of service⁷⁹

40. The Initial Decision stated that the quarterly reporting requirements for transactions made under the WSPP Agreement included the following non-aggregated information for each transaction:

⁷⁷ *E.g.*, Initial Decision, 160 FERC ¶ 63,010 at P 106 (“[T]he California Parties have not established that telltale patterns of manipulation schemes would have been apparent from the quarterly reports and thus triggered greater investigation.”).

⁷⁸ *Id.* PP 124-128.

⁷⁹ *Id.* P 78

- 1) seller;
- 2) buyer;
- 3) service schedule;
- 4) firm/non-firm;
- 5) volume (MW or MWh);
- 6) duration of transaction (hours/months)
- 7) \$/kW and margin above incremental cost for power and energy sales; and
- 8) mills/kWh and margin above incremental cost for power and energy sales.⁸⁰

41. The Initial Decision asserted that California Parties testified that properly filed reports would have also included additional details, including the date the agreement was reached, beginning and ending times for each transaction, and other details affecting value of the transaction.⁸¹ However, the Initial Decision found that the relevant market-based rate letter orders and the Commission reporting standards set forth in *Citizens Power & Light Corporation*⁸² do not specify that quarterly reports must include hourly transaction data. The Initial Decision disputed California Parties' claim that the "any other attributes ... which contribute to its market value" language from *Citizens* indicates the Commission's intent to require hourly transaction data, finding that this language is "too vague to have been reasonably deemed a requirement specifically calling for hourly transactions."⁸³ Consequently, the Initial Decision determined that hourly transaction data was not required in compliant quarterly reports.⁸⁴

42. Nevertheless, the Initial Decision found that Hafslund violated the Commission's quarterly reporting requirements by omitting transaction-specific prices and volumes and

⁸⁰ *Id.* P 79.

⁸¹ *Id.* P 80 (citing Ex. CAP-0016 at 61:12-62:2).

⁸² 48 FERC ¶ 61,120, at 61,778 (1989) (*Citizens*) (establishing that the following information should be provided for each purchase and sale contract: the buyer's or seller's name; a brief description of the service, including degree of firmness; the delivery points for each service; the price of each service; the quantities to be served or purchased; the contract's duration; the buyer's certification that it is paying a rate at or below its expected cost of alternative electric power; and any other attributes of the product being purchased or sold which contribute to its market value).

⁸³ Initial Decision, 160 FERC ¶ 63,010 at P 82.

⁸⁴ *Id.*

dates of service. The Initial Decision also found that TransCanada violated both the Commission and WSPP reporting requirements by failing to provide transaction-specific volumes and prices, and by omitting transaction dates.⁸⁵ Further, the Initial Decision found that TransCanada's WSPP reports for Quarters 1 and 2 of 2001 provide aggregated data, rather than transaction-specific data, and are therefore deficient.⁸⁶

B. Briefs on Exceptions

43. California Parties argue that the Initial Decision erred in finding that hourly transaction data was not required in compliant quarterly reports. California Parties assert that *Citizens* and other relevant precedent make clear that "detailed reporting on individual hourly transactions was required in quarterly reports for those markets in which energy was transacted on an hourly basis."⁸⁷

44. California Parties disagree with the Initial Decision's conclusion that *Citizens* is too vague to signal the requirement to report hourly data. California Parties contend that *Citizens* makes clear that all contracts are subject to reporting, regardless of the length of the transaction, and provides no suggestion that hourly transactions are excluded from the requirement. California Parties claim that *Citizens* also highlights the purpose of quarterly reporting, which was to enable the Commission to monitor a seller's ability to exercise market power and to monitor the rates being paid to a seller. Thus, California Parties argue that omitting hourly data would frustrate the purposes of reporting as set forth in *Citizens*.⁸⁸ California Parties assert that, in the years since *Citizens*, the Commission has consistently rejected requests to modify the reporting requirements and has reiterated the need to report even transactions of a very short duration.⁸⁹

45. California Parties contend that the Initial Decision erroneously attempted to distinguish the requirements set forth in *Citizens* from those discussed in the 2002 Order

⁸⁵ *Id.* PP 84-85.

⁸⁶ *Id.* P 86.

⁸⁷ California Parties Brief on Exceptions at 16-17.

⁸⁸ *Id.* at 17-19.

⁸⁹ *Id.* at 20-23 (citing, e.g., *Enron Power Mktg., Inc.*, 65 FERC ¶ 61,305 at 62,406 (1993) (*Enron I*), order on reh'g, 66 FERC ¶ 61,244 (1994) (*Enron II*); *S. Co. Servs., Inc.*, 87 FERC ¶ 61,214 (1999) (*Southern*)).

on Complaint.⁹⁰ California Parties argue that, rather than imposing new requirements, the 2002 Order on Complaint reflects the Commission's ongoing intent to require hourly data. Further, California assert that *Citizens* reemphasized that the purpose of quarterly reporting is to enable the Commission and interested parties to monitor sellers' ability to exercise market power and to provide data that enables customers or other interested parties to file complaints under FPA section 206 or to provide a basis for the Commission to request an investigation.⁹¹

46. California Parties also argue that in earlier stages of this proceeding, the Commission addressed and rejected arguments that quarterly reporting requirements permitted aggregated or abbreviated reporting. For example, California Parties state that, in the 2002 Order on Complaint the Commission found that it had "consistently required that marketers report transaction-specific information in their quarterly reports."⁹² California Parties note that in the 2002 Order on Complaint, the Commission required the Respondents to file corrected quarterly reports with transaction-specific data that included "dates/duration of service (e.g., daily, monthly, hourly)."⁹³ California Parties assert that this language eliminates any possibility that compliant quarterly reports could omit hourly data.⁹⁴

47. California Parties highlight that, in cases following *Citizens*, the Commission clearly signaled its intention to retain the reporting requirements set forth in *Citizens* by rejecting requests to modify the requirements.⁹⁵ According to California Parties, the Commission has repeatedly and consistently emphasized the need for transaction-specific reporting in order to "provide for ongoing monitoring of the marketer's ability to exercise market power."⁹⁶ California Parties contend that in these orders the Commission

⁹⁰ *Id.* at 25-26 (citing Initial Decision, 160 FERC ¶ 63,010 at P 82).

⁹¹ *Id.* at 19.

⁹² *Id.* at 24 (quoting 2002 Order on Complaint, 99 FERC at 62,065-66).

⁹³ *Id.* at 25 (quoting 2002 Order on Complaint, 99 FERC at 62,067).

⁹⁴ *Id.* at 25-27.

⁹⁵ *Id.* at 20-24 (citing *e.g.*, *Enron I*, 65 FERC at 62,406; *Enron II*, 66 FERC ¶ 61,244; *Portland Gen. Elec. Co.*, 83 FERC ¶ 61,315, at 62,288 (1998); *Southern*, 87 FERC ¶ 61,214)).

⁹⁶ *Id.* at 22 (quoting *Consol. Edison of N.Y., Inc.*, 78 FERC ¶ 61,298, at 62,286 (1997)).

expressly acknowledged that the transactions at issue were of very short duration and, therefore, California Parties assert that this line of cases demonstrates that the reporting of hourly transaction data has always been required in compliant quarterly reports.⁹⁷

48. In addition, California Parties cite screenshots from the Commission website during the Western Energy Crisis for the proposition that the reporting of hourly data has always been required.⁹⁸ California Parties acknowledge that, with the issuance of Order No. 2001,⁹⁹ which instituted electronic reporting, the reporting requirements were modified. However, California Parties argue that the Commission rejected the contention that the electronic reporting requirements imposed new or different data requirements from that required in the non-electronic reports. In particular, California Parties note that the Commission expressly explained that compliant reporting required that data for each transaction must include the exact beginning and end times of transactions. Thus, California Parties argue that Order No. 2001 refutes any assertion that hourly data was not required in compliant reports.¹⁰⁰

49. Finally, California Parties discuss the Ninth Circuit's orders in this case to dispute the Initial Decision's finding that hourly transaction information was not required. Specifically, California Parties highlight that the Ninth Circuit rejected a challenge to the Commission's market-based rate program only because of the detailed reporting requirements.¹⁰¹ California Parties assert that the Ninth Circuit's orders in this case

⁹⁷ *Id.* at 24.

⁹⁸ *Id.* at 27-29.

⁹⁹ *Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127, *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reh'g denied*, Order No. 2001-B, 100 FERC ¶ 61,342, *order directing filing*, Order No. 2001-C, 101 FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001-D, 102 FERC ¶ 61,334, *order refining filing requirements*, Order No. 2001-E, 105 FERC ¶ 61,352 (2003), *order on clarification*, Order No. 2001-F, 106 FERC ¶ 61,060 (2004), *order revising filing requirements*, Order No. 2001-G, 120 FERC ¶ 61,270, *order on reh'g and clarification*, Order No. 2001-H, 121 FERC ¶ 61,289 (2007), *order revising filing requirements*, Order No. 2001-I, FERC Stats. & Regs. ¶ 31,282 (2008).

¹⁰⁰ California Parties Brief on Exceptions at 30-31.

¹⁰¹ *Id.* at 31-32 (quoting *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1013 (9th Cir. 2004) (*Lockyer*) (“These transaction summaries include both long and short-term contracts, purportedly with reports of some sales for intervals as small as 10 minutes.”)).

demonstrate the importance of transaction-specific reporting so that the Commission can assess market power in relation to sellers' market-based rate authority. Thus, California Parties allege that the Initial Decision's finding that hourly data was not required contradicts the Ninth Circuit's orders and erodes the Ninth Circuit's basis for upholding market-based rates.¹⁰²

50. Trial Staff argues that the Initial Decision erred by finding that TransCanada violated its WSPP quarterly reporting requirements. Trial Staff contends that the Initial Decision incorrectly conflated testimony and evidence regarding TransCanada's market-based rate reporting requirements, and violations thereof, with its WSPP reporting requirements.¹⁰³ Further, Trial Staff contends that the Initial Decision relied on unsubstantiated assumptions proffered by California Parties in its finding that TransCanada aggregated its data on a monthly basis in its WSPP quarterly reports.¹⁰⁴ Trial Staff asserts that the logical and more likely alternative assumption is that TransCanada and CERS engaged in monthly or otherwise long-term transactions. Finally, Trial Staff claims that the Initial Decision incorrectly found that TransCanada's Quarter 2, 2001 WSPP reports did not contain transaction-specific margin data. Trial Staff argues that it is evident that report at issue is simply redacted to effectuate protection from public disclosure of the price information.¹⁰⁵

C. Briefs Opposing Exceptions

51. Trial Staff and TransCanada argue that the Initial Decision correctly found that compliant quarterly reports did not require hourly data. Trial Staff and TransCanada aver that none of the precedent relied upon by California Parties specifically requires hourly data. Rather, Trial Staff contends that California Parties confuse the requirement to specify the duration of the contract, which could be monthly, daily, hourly, etc., with the alleged requirement to provide hourly data for every hour of every contract regardless of the duration of that contract. Trial Staff and TransCanada aver that the Commission's use of the language "dates/duration of service (e.g., daily, monthly, hourly)"¹⁰⁶ signals the

¹⁰² *Id.* at 32-34.

¹⁰³ Trial Staff Brief on Exceptions at 9-10 (citing Initial Decision, 160 FERC ¶ 63,010 at PP 76-82, 85).

¹⁰⁴ Trial Staff Brief Opposing Exceptions at 10-11 (citing Ex. CAP-0016 at 26:15-17).

¹⁰⁵ *Id.* at 11-14.

¹⁰⁶ 2002 Order on Complaint, 99 FERC at 62,067, n.49.

Commission's intention to require hourly data only if the duration of the contract was hourly, not to require hourly reporting for transactions of daily or monthly duration.¹⁰⁷ TransCanada contends that California Parties mistakenly equate the term of a contract with the quantity and price of power transmitted in each hour under a contract, regardless of the duration of that contract.¹⁰⁸ Trial Staff and TransCanada also argue that the Initial Decision did not find that short-term transactions of an hour need not be reported individually, but only that compliant quarterly reports did not require that hourly data for every transaction be reported.¹⁰⁹

52. Trial Staff and TransCanada also argue that none of the precedent cited by California Parties requires the reporting of hourly data. TransCanada claims that, at the time *Citizens* was issued, the Commission could not have contemplated the reporting of hourly data because one-hour transactions did not become a part of the marketplace for another decade. Trial Staff and TransCanada concur with the Initial Decision's finding that the directive in *Citizens* to report "any other attributes of the product being purchased or sold which contribute to its market value" as being too vague to reasonably have been deemed a requirement to report hourly data.¹¹⁰

53. Further, TransCanada argues that Opinion No. 552¹¹¹ makes clear that individual contracts under the WSPP Agreement were defined by each individual confirmation agreement, which can be for a variety of durations.¹¹² Thus, TransCanada asserts that there is no basis for automatically treating all contracts as hourly contracts. Therefore, TransCanada contends that California Parties' insistence on the reporting of hourly data relies on an erroneous assumption.¹¹³ TransCanada points to Commission precedent that expressly requires the reporting of hourly data and argues that, when the Commission

¹⁰⁷ Trial Staff Brief Opposing Exceptions at 27-29; TransCanada's Brief Opposing Exceptions at 43-46.

¹⁰⁸ TransCanada Brief Opposing Exceptions at 48.

¹⁰⁹ Trial Staff Brief Opposing Exceptions at 21-33; TransCanada Brief Opposing Exceptions at 47.

¹¹⁰ TransCanada Brief Opposing Exceptions at 50; Trial Staff Brief Opposing Exceptions at 30.

¹¹¹ *Puget Sound Energy, Inc.*, Opinion No. 552, 157 FERC ¶ 61,026 (2016).

¹¹² *See id.* P 21.

¹¹³ TransCanada Brief Opposing Exceptions at 48-49.

requires the reporting of data on an hourly basis, it expresses that requirement with specificity.¹¹⁴

54. Trial Staff asserts that nothing in the Initial Decision eviscerates the Ninth Circuit's basis for upholding market-based rates or the importance of quarterly reporting to the market-based rate program.¹¹⁵

55. California Parties argue that the Initial Decision correctly concluded that TransCanada did not comply with the WSPP reporting requirement for Q1 and Q2 of 2001. California Parties contend that, under the WSPP reporting requirements, TransCanada had an obligation to report transactions individually, but claim that TransCanada obviously aggregated its sales in the reports at issue. California Parties claim that Exhibit CAP-0021 provides evidence that, contrary to Trial Staff's assertions, all of TransCanada's sales to CERS were day-of sales in increments of 50 MW or less, with no longer term transactions. California Parties aver that TransCanada's own witness, Dr. John R. Morris, corroborated this fact.¹¹⁶ Thus, California Parties assert that Trial Staff's assumption that the sales figures reported represents longer term transactions is unfounded.¹¹⁷

D. Commission Determination

56. We affirm the Initial Decision's finding that Hafslund violated its quarterly reporting requirements. As noted in the Initial Decision, Hafslund's quarterly reports for the relevant period did not include the required transaction-specific prices or volumes, or dates of service.¹¹⁸

57. We also concur with the Initial Decision's finding that TransCanada reported its sales to CERS during the relevant period on an aggregated, as opposed to a transaction-specific, basis. By its own admission, TransCanada reported in summary

¹¹⁴ *Id.* at 49-50.

¹¹⁵ Trial Staff Brief Opposing Exceptions at 34-35.

¹¹⁶ California Parties Brief Opposing Exceptions at 9 (quoting Ex. TC-001 at 102:3-14 (Morris Testimony) ("TransCanada typically sold 100 percent of the available energy, about 50 MWs per hour or less, to CERS.")).

¹¹⁷ *Id.*

¹¹⁸ Initial Decision, 160 FERC ¶ 63,010 at P 84 (citing Ex. S-002 at 84-94).

form.¹¹⁹ Further, TransCanada witness Morris testified that most of TransCanada's sales to CERS were in increments of 50 MW per hour or less.¹²⁰ Thus, we find no merit in Trial Staff's assertion that the volumes reported by TransCanada represent monthly or otherwise long-term transactions between TransCanada and CERS. We find that the absence of transaction-specific data constitutes a violation of TransCanada's WSPP reporting requirement. With regard to Trial Staff's claim that the omission of margin data is merely a redaction, and not a substantive deficiency, we find that the Initial Decision's finding was not based on the absence of margin data but rather on TransCanada's failure to provide the required transaction-specific volumes and prices, as well as transaction dates.¹²¹

58. With regard to the question of whether the reporting of hourly sales data was required, we agree with the Initial Decision's finding that the requirement set forth in *Citizens* to report "any other attributes ... which contribute to [a transaction's] market value"¹²² is too vague to have been reasonably deemed a requirement to report data for every hour of every transaction regardless of the duration of the contract. However, we find that the Commission has consistently emphasized the need to provide transaction-specific data in quarterly reports. For example, as correctly noted by California Parties, in the 2002 Order on Complaint, the Commission stated that it had "consistently required that marketers report transaction-specific in their quarterly reports,"¹²³ and required the submission of corrected quarterly reports with transaction-specific data that included "dates/duration of service (e.g., daily, monthly, hourly)."¹²⁴ Thus, to the extent the duration of a specific contract was one hour, the information for that sale had to be reported on an hourly basis, and not aggregated with other sales. Accordingly, any

¹¹⁹ Ex. TC-001 at 31:20-32:1 (Morris Testimony) ("TransCanada did not report individual trades in its original quarterly reports filed with the Commission; rather, TransCanada reported quarterly summaries of its purchases and sales by counterparty.").

¹²⁰ *Id.* at 102:13-14.

¹²¹ Initial Decision, 160 FERC ¶ 63,010 at P 85. Moreover, we note that TransCanada appears to have submitted an unredacted version of the report at issue that disclosed the margin information. Ex. S-006 at 21.

¹²² Initial Decision, 160 FERC ¶ 63,010 (quoting *Citizens*, 48 FERC ¶ 61,210 at 61,778).

¹²³ 2002 Order on Complaint, 99 FERC at 62,065-66.

¹²⁴ *Id.* at 62,067.

omission of such data would constitute a violation of the quarterly reporting requirements.

59. We are unpersuaded by California Parties' contention, however, that the importance of compliant quarterly reports demonstrates the existence of an established hourly reporting requirement during the relevant period. We acknowledge the importance of compliant quarterly reporting, but find that California Parties have failed to draw a connection between the purpose and importance of this reporting and any purported requirement to report all transactions on an hourly basis. Moreover, given the Commission's consistent emphasis on the need for transaction-specific reporting, we find that nothing in the Initial Decision's findings on this issue diminishes the importance of compliant quarterly reporting and the essential role it plays in the Commission's market-based rate program.

IV. Impact of Reporting Violations on Rates

A. Initial Decision

60. The Initial Decision found that Respondents' reporting violations did not mask manipulation or the accumulation of market power.

61. The Initial Decision stated that California Parties did not allege that TransCanada manipulated the market or exercised market power; rather, California Parties asserted that "TransCanada's misreporting masked the market manipulation and market power of its many trading partners."¹²⁵ The Initial Decision found that, because California Parties presented neither arguments nor evidence that TransCanada manipulated the market or exercised market power, there were no grounds to find that TransCanada's reporting deficiencies masked manipulation or the accumulation of market power by TransCanada. Although California Parties contended that Hafslund and its trading partners manipulated the market and exercised market power, the Initial Decision found that California Parties failed to demonstrate that Hafslund's misreporting masked any unlawful conduct.¹²⁶

62. Moreover, the Initial Decision found that, because California Parties relied on evidence and data that would not have been included in compliant quarterly reports, California Parties' did not show that compliant reports would have revealed patterns of, or facilitated the discovery of, manipulative strategies. In particular, the Initial Decision

¹²⁵ Initial Decision, 160 FERC ¶ 63,010 at P 89 (quoting California Parties Initial Brief at 18).

¹²⁶ *Id.* PP 89-90.

stated that California Parties identified three manipulative practices – False Export,¹²⁷ Phantom Ancillary Services,¹²⁸ and False Load,¹²⁹ that allegedly could have been discovered at an earlier date had Respondents filed compliant quarterly reports.¹³⁰ However, the Initial Decision rejected California Parties’ arguments related to these strategies.

63. As for False Export, the Initial Decision rejected California Parties’ argument that compliant quarterly reports would have shown a “telltale pattern of numerous hourly transactions” would have made False Export activities “apparent to an analyst.”¹³¹ The Initial Decision found that California Parties’ argument relied on information such as Hours Ending Data, which was not required in compliant quarterly reports.¹³²

64. With regard to Phantom Ancillary Services sales, the Initial Decision found that California Parties relied on evidence such as an excerpt from notes, emails, and phone conversations between trading staff at non-Respondent companies to explain and identify the alleged manipulative activity. The Initial Decision found that this type of information would not have been included in compliant quarterly reports. Moreover, the Initial Decision found that identification of Phantom Ancillary Services activity would have required bid data, which was also not required in compliant quarterly reports. Finally, the Initial Decision stated that, according to California Parties, a telltale pattern of manipulative activity was a Day-Ahead sale of ancillary services and their repurchase in

¹²⁷ False Export was a trading strategy involving a seller scheduling an “export” of electricity from CAISO and a simultaneous “import” of electricity back into CAISO in order to hide the true source of the electricity and take advantage of higher prices. California Parties Brief on Exceptions at 44-45.

¹²⁸ Phantom Ancillary Services sales were a fraud-based manipulation strategy that involved a seller making a commitment to sell energy from reserves when the seller did not have the necessary reserve capacity available. *Id.* at 48-49.

¹²⁹ False Load was a manipulation strategy that involved a seller misrepresenting to CAISO how much load the seller intended to serve, despite the CAISO tariff requirement that sellers were to submit schedules that balanced load and generation, thereby resulting in CAISO paying the higher real time price for energy that was ineligible for sale in the real time market. *Id.* at 50-51.

¹³⁰ Initial Decision, 160 FERC ¶ 63,010 at PP 91-95.

¹³¹ *Id.* P 97.

¹³² *Id.*

the Hour-Ahead market. The Initial Decision found that compliant quarterly reports did not require identification of whether transactions occurred in the Day-Ahead or Hour-Ahead market.¹³³

65. Similarly, for False Load, the Initial Decision found that California Parties relied on information that could not have been gathered from quarterly reports to identify and explain this manipulative strategy. For example, the Initial Decision found that California Parties relied on a response to a data request and an analysis that indicates the hour of the transaction, which would not have been required in compliant quarterly reports.¹³⁴

66. Moreover, the Initial Decision asserted that, because strategies such as False Export and False Load were not considered tariff violations during the relevant time period, California Parties' argument that the Commission or others could have discovered them earlier through compliant quarterly reporting is not credible.¹³⁵

67. With regard to the accumulation of market power, the Initial Decision rejected California Parties' argument that compliant quarterly reporting would have provided enough evidence of market power that the Commission "would have taken a closer look."¹³⁶ Further, the Initial Decision found that Respondents did, in fact, provide some of the alleged critical information and also that compliant quarterly reports did not require the other alleged critical information to detect market power.¹³⁷ Specifically, the Initial Decision found that, despite TransCanada's submission of aggregated data, its quarterly reports still revealed high prices and margin data, both of which are identified by California Parties as critical to detecting market power.¹³⁸

68. On the other hand, the Initial Decision stated that California Parties do not allege that quarterly reports required market share data, but instead describe how information not required in quarterly reports, such as hourly transaction data, was used to calculate market shares. Additionally, the Initial Decision cited testimony indicating that the

¹³³ *Id.* PP 98-102.

¹³⁴ *Id.* PP 103-105.

¹³⁵ *Id.* P 108.

¹³⁶ *Id.* P 111.

¹³⁷ *Id.*

¹³⁸ *Id.* PP 112-114.

primary pieces of data needed to detect either physical or economic withholding, such as bid data, ramping rates, generator input costs, and generator marginal cost, were not required in quarterly reports. Thus, the Initial Decision determined that “it is unlikely that noncompliant quarterly reports could have masked the exercise of market power.”¹³⁹

69. Further, the Initial Decision found that relevant information for detecting market power was contemporaneously available through CAISO and other public sources. Thus, the Initial Decision found that it cannot be determined that noncompliant quarterly reports masked the indicators of market power.¹⁴⁰ In addition, the Initial Decision described numerous reports prepared by the Commission before and during the relevant period that identified market power problems, including the fact that withholding was raising prices. The Initial Decision found that these investigations and reports indicate that the Commission was aware of market power issues even without compliant quarterly reports and, therefore, any argument that noncompliant quarterly reports prevented the Commission from discovering the accumulation of market power is not persuasive.¹⁴¹

70. Finally, the Initial Decision found that certain data available in the quarterly reports are not strong indicators of market power. For example, the Initial Decision cited testimony by Respondents’ rebuttal witnesses indicating that margin data alone, even if reported on a transaction-specific basis, would not be a reliable indicator of market power because a large margin observed for a particular transaction could be consistent with a variety of innocuous scenarios such as scarcity conditions.¹⁴²

71. While the Initial Decision found, despite Trial Staff’s argument that quarterly reports that were filed in paper format during the Crisis made broad market power analysis difficult, the quarterly reports were filed in a useful format. The Initial Decision noted that Trial Staff’s reasoning could suggest that no analysis of reported information could have been performed by the Commission prior to the use of electronic databases. However, the Initial Decision also found that it did not appear that the Commission or third parties primarily relied on quarterly reports to detect manipulation or market power. For example, the Initial Decision explained that the Commission never rejected the quarterly reports or informed sellers that the submission of aggregated data was noncompliant. Significantly, the Initial Decision noted that Dr. Hildebrandt, manager of

¹³⁹ *Id.* P 118.

¹⁴⁰ *Id.* PP 119-122.

¹⁴¹ *Id.* PP 124-128.

¹⁴² *Id.* P 130 (citing Ex. SNA-0025 at 60:9-12, 19-20; Ex. S-013 at 10:5-16 (listing five scenarios, only one of which relates to the exercise of market power)).

market monitoring for CAISO during the Crisis, testified that neither he nor his staff was aware of the quarterly reports at the time.¹⁴³

72. For all of the foregoing reasons, the Initial Decision concluded that noncompliant reporting did not result in unjust and unreasonable rates. Despite California Parties' calculation that Hafslund benefitted by \$41,122,002 due to artificially elevated prices allegedly made possible by misreporting and misconduct, the Initial Decision found that, because Respondents' noncompliant quarterly reports did not mask market power or manipulation, misreporting did not result in Hafslund charging unjust and reasonable rates.¹⁴⁴

73. As to TransCanada, the Initial Decision found that, because TransCanada made no sales in the California ISO or CalPX markets, misreporting could not have resulted in unjust and unreasonable prices received by TransCanada. The Initial Decision also found that California Parties failed to make the necessary showing to avoid or overcome the *Mobile-Sierra* presumption with regard to TransCanada's bilateral sales to CERS in the Pacific Northwest market. Specifically, the Initial Decision found that California Parties did not demonstrate that TransCanada's misreporting "directly affected contract prices,"¹⁴⁵ nor did they show that there is a necessary connection between TransCanada's reporting violations and its alleged unjust and unreasonable rates.¹⁴⁶ Moreover, the Initial Decision explained that the *Mobile-Sierra* analysis is contract-specific,¹⁴⁷ and found that California Parties' evidence is not contract-specific. Therefore, the Initial Decision found that California Parties' evidence is not sufficient to avoid application of the *Mobile-Sierra* presumption to the contracts at issue.¹⁴⁸

¹⁴³ *Id.* PP 132-135.

¹⁴⁴ *Id.* PP 136-137.

¹⁴⁵ *Id.* P 142 (quoting Order on Rehearing, 157 FERC ¶ 61,023 at P 14).

¹⁴⁶ *Id.* P 142. The Presiding Judge notes that the question of whether TransCanada's contract price imposed an excessive burden on consumers or seriously harms the public interest was addressed in a final Commission order in the Pacific Northwest Refund Proceeding. Opinion No. 537-A, 153 FERC ¶ 61,386 at PP 95, 118.

¹⁴⁷ *Id.* P 144 (citing 2016 Order on Clarification, 154 FERC ¶ 61,154 at P 14; Opinion No. 552, 157 FERC ¶ 61,026 at P 20).

¹⁴⁸ *Id.* PP 143-145.

B. Briefs on Exceptions

74. California Parties argue that the Initial Decision incorrectly found that compliant quarterly reports did not require hourly data and that this erroneous fining tainted the Initial Decision's conclusions regarding whether noncompliant reports masked tariff violations and market power. California Parties contend that, had Respondents' quarterly reports included hourly data, the reports would have provided indicia of False Export violations, Phantom Ancillary Services violations, and False Load violations. California Parties note that the Initial Decision did not dispute that evidence of these trading strategies could have been discovered using the allegedly required hourly data. Further, California Parties assert that hourly data would have shown indicia of the accumulation of market power.¹⁴⁹

75. California Parties also argue that the Initial Decision erroneously conflated the need to show the indicia of tariff violations in quarterly reports with the need to demonstrate absolute proof of a violation. California Parties contend that they were only required to demonstrate that compliant quarterly reports would have shown indicia that would have led to further investigation rather than containing complete proof of violations. California Parties therefore assert that it is irrelevant that their evidence of tariff violations relied in part on information such as emails, excerpts from notes, transcripts of phone calls, and bid data that would not have been included in compliant quarterly reports. Rather, California Parties insist that, had Respondents filed compliant quarterly reports, the Commission would have been able to detect telltale patterns of unlawful trading behavior and would have engaged in further investigation to discover the additional evidence that would not have been provided in compliant quarterly reports.¹⁵⁰

76. In addition, California Parties contend that the Initial Decision's rationale that, because the Commission had not yet discovered trading strategies such as False Export, or determined that such strategies were tariff violations, compliant reports would not have resulted in earlier detection of manipulation, fails. Rather, California Parties argue that they presented evidence of suspicious trading patterns and anomalies that would have been apparent in compliant quarterly reports, which could have led to earlier discovery of these strategies. California Parties also assert that CAISO understood the possibility of False Export-type strategies even before the Commission uncovered evidence to prove the unlawful activity.¹⁵¹

¹⁴⁹ California Parties Brief on Exceptions at 35-37.

¹⁵⁰ *Id.* at 38-40.

¹⁵¹ *Id.* at 40-42.

77. With regard to False Export activities, California Parties argue that they presented evidence that TransCanada transacted with multiple entities that engaged in this strategy. California Parties contend that they demonstrated that, had non-aggregated data been included in quarterly reports, the telltale pattern of False Export activities would have been apparent to an analyst. Further, California Parties assert that there was no other source that would have provided the transaction-specific details that would have been in compliant quarterly reports and, therefore, noncompliant quarterly reports prevented CAISO and the Commission from detecting the manipulative trades that were occurring.¹⁵²

78. Similarly, California Parties contend that, had the Initial Decision found that compliant quarterly reports would have included hourly data, California Parties' evidence would have shown that compliant quarterly reports could have afforded the Commission an earlier opportunity to detect the Phantom Ancillary Services strategy.¹⁵³

79. In addition, California Parties argue that the Initial Decision erred by finding that compliant quarterly reports would not have allowed the Commission to discover False Load violations sooner. California Parties assert that they demonstrated that Hafslund manipulated the market using False Load, and that TransCanada transacted with multiple entities that engaged in False Load, thereby raising the prices Respondents received. California Parties claim that either hourly transaction data or transaction date data would have allowed for the identification of the indicia of False Load.¹⁵⁴

80. California Parties object that the Initial Decision failed to address two other violations – Anomalous Bidding and Circular Scheduling¹⁵⁵ – other than in a single footnote stated these violations would have required information such as congestion and bid data that would not be included in compliant quarterly reports. California Parties contend that hourly data in quarterly reports would have enabled the Commission to discover the other violations discussed above which would, in turn, have led to deeper

¹⁵² *Id.* at 47-48.

¹⁵³ *Id.* at 48-49.

¹⁵⁴ *Id.* at 50-52.

¹⁵⁵ Anomalous Bidding involved economic withholding designed to drive prices higher and Circular Scheduling involved deceit about power flow in order to receive a congestion relief payment from CAISO. *Id.* at 52-53.

investigation through which these violations may have been revealed.¹⁵⁶

81. As with indicia of tariff violations, California Parties argue that the Initial Decision improperly expected that quarterly reports would contain complete proof of market power rather than indicia that would lead to further investigation. California Parties claim that compliant quarterly reports would have allowed the Commission to see sustained high margins and compute actual market shares, which could have indicated the exercise of market power. Thus, California Parties contend that their reliance on data responses, emails, transcripts of trader tapes, bid information, and hourly transaction data does not mean that they did not meet their burden of proof to demonstrate that noncompliant quarterly reports masked market power. California Parties assert that discerning indicia of market power was one of the primary purposes of quarterly reporting and they proved that indicia of market power would have been easy to spot in compliant reports.¹⁵⁷

82. California Parties also assert that the Initial Decision's finding that "the use of margins alone"¹⁵⁸ is not necessarily indicative of the exercise of market power misstates the burden. Moreover, California Parties aver that they did not take the position that high margins alone would have determined market power, but rather that evidence of sustained high margins would have motivated further investigation. Thus, California Parties argue that the Initial Decision erred by failing to evaluate whether, had large margins been disclosed in compliant quarterly reports, market power and market manipulation could have been discovered sooner.¹⁵⁹

83. With regard to specific evidence of indicia of market power, California Parties challenge the Initial Decision's conclusion that Mr. Taylor's use of transaction market shares, as opposed to generation capacity shares, to evaluate market power failed to "entirely account[] for the complexity of market shares."¹⁶⁰ California Parties assert that this finding ignores both Commission precedent that connects transaction market shares to indicia of a market power concerns and the Ninth Circuit's rejection of the proposition that the assessment of market power must rest solely upon shares of generation

¹⁵⁶ *Id.* at 53.

¹⁵⁷ *Id.* at 42-43, 55-58.

¹⁵⁸ Initial Decision, 160 FERC ¶ 63,010 at P 130.

¹⁵⁹ California Parties Brief on Exceptions at 60-61.

¹⁶⁰ *Id.* at 59 (quoting Initial Decision, 160 FERC ¶ 63,010 at P 131).

capacity.¹⁶¹

84. Additionally, California Parties argue that the Initial Decision erred by finding that, because some of the information that would have been in compliant reports may have been available from other sources, noncompliant reports did not mask market power and manipulation. California Parties contend that, even if true, that point is irrelevant because sellers were required to put all of the information into the quarterly reports but failed to do so. California Parties note that, following the Crisis, the Commission supplemented its market-wide analysis with an analysis of individual seller behavior. California Parties assert that, had individual sellers filed compliant reports, this “missing piece of the puzzle”¹⁶² would have been available for Commission analysis as early as April 2000, which could have accelerated remediation of the problems that caused the Crisis. California Parties contend that it is likewise irrelevant that the Commission did not, prior to a complaint being filed, criticize or reject sellers’ quarterly reports. California Parties posit that whether the Commission was focused on quarterly reports or other issues does not mean that compliant reports would not have been useful.¹⁶³

85. California Parties assert that evidence in this proceeding demonstrates that, during the Crisis, tariff violations that were masked by misreporting resulted in much higher rates than before and after the crisis.¹⁶⁴ Specifically, California Parties discuss the price analysis performed by Dr. Fox-Penner, using the same economic models affirmed in Opinion No. 536. California Parties assert that this analysis measured whether each tariff violation, on an hourly basis for every day during the Crisis, increased the bilateral contract price or market-clearing price. California Parties assert that, based on this analysis, Dr. Fox-Penner found that Hafslund engaged in tariff-violating transactions that increased prices.¹⁶⁵ California Parties also contend that they demonstrated that numerous other sellers engaged in market manipulation that increased the prices that Respondents received.¹⁶⁶ Further, California Parties argue that evidence presented showed that tariff violations also had inter-temporal and inter-seller impacts that “contributed to an

¹⁶¹ *Id.* at 59-60.

¹⁶² *Id.* at 63.

¹⁶³ *Id.* at 62-63.

¹⁶⁴ *Id.* at 64 (citing Ex. CAP-0001 at 15 (Taylor Direct Testimony)).

¹⁶⁵ *Id.* at 64-65 (citing Ex. CAP-0155 at 6:11-7:16, 8:6-14, 8:16-9:2. (Fox-Penner Direct Testimony)).

¹⁶⁶ *Id.* at 65-66.

environment where more tariff violations were possible and profitable, and in fact did occur.”¹⁶⁷ California Parties contend that this evidence shows that misreporting, manipulation, and market power affected virtually every hour of every day during the Crisis. Thus, California Parties aver that the Initial Decision erred by finding that California Parties failed to show a nexus between misreporting and high prices.¹⁶⁸

86. Trial Staff agrees with the Initial Decision’s finding that reporting deficiencies did not mask market power or manipulation, but takes issue with the Initial Decision’s characterization of Trial Staff’s reasoning regarding the usefulness of paper format quarterly reports. Trial Staff emphasizes that it did not suggest that paper format reports were useless, but merely addressed the practical difficulties of using quarterly reports in a paper format that were not uploaded into an electronic data base.¹⁶⁹

C. Briefs Opposing Exceptions

87. Trial Staff and TransCanada argue that the Initial Decision evaluated the record and correctly found that deficient quarterly reports did not mask manipulation. With regard to each of the specific tariff violations analyzed in the Initial Decision, Trial Staff and TransCanada contend that compliant reports would not have included the information necessary to detect telltale patterns of unlawful activity. TransCanada emphasizes that, by relying on data that it provided to California Parties in 2009, pursuant to a data request in Docket No. PA02-2, which included many categories information not required in compliant quarterly reports, California Parties effectively show that the filing of disaggregated quarterly reports by TransCanada would not have included the data points necessary to prompt further investigation by the Commission.¹⁷⁰ Trial Staff likewise disputes California Parties’ claim that the record does not support a finding that compliant quarterly reports would have indicated a need for deeper investigation by the Commission. Moreover, Trial Staff points out that quarterly reports for Q2 of 2000 would not have been submitted by sellers until July 31, 2000 and therefore would not have aided the Commission in determining that deeper investigation was warranted prior to that time. Finally, Trial Staff asserts that a chronology of the measures undertaken by the Commission during the Crisis shows that the Commission was aware of potential

¹⁶⁷ *Id.* at 66 (citing CAP-0155 at 10:8-10 (Fox-Penner Direct Testimony)).

¹⁶⁸ *Id.* at 66-67.

¹⁶⁹ Trial Staff Brief on Exceptions at 15-16.

¹⁷⁰ TransCanada Brief Opposing Exceptions at 52-55.

issues and was already investigating the price increases by July 2000.¹⁷¹

88. Likewise, Trial Staff contends that Respondents' reporting violations did not mask either the indicia or definitive proof of the existence or exercise of market power. Trial Staff avers that the record shows that the relevant information was either not required in compliant quarterly reports, was properly provided to the Commission in the noncompliant quarterly reports, or was otherwise available to the Commission through CAISO and public sources. Trial Staff also claims that the Commission and CAISO were aware of the general indicia of market power early on in the Crisis. Thus, Trial Staff asserts that noncompliant quarterly reports had no effect on the Commission's ability to understand or detect market power.¹⁷²

89. More specifically, Trial Staff and TransCanada challenge California Parties' argument that compliant quarterly reports would have shown indicia of market power such as high prices, high margins, and large market shares, which would have prompted deeper investigation. As to high prices, Trial Staff and TransCanada assert that high prices were apparent even from noncompliant reports and also available to the Commission via CAISO and CalPX bid data that was provided to the Commission in a more timely fashion than quarterly reports. Regarding margins, Trial Staff and TransCanada concur with the Initial Decision's finding that margins were properly reported. Similarly, Trial Staff and TransCanada agree with the Initial Decision's finding that market shares were unreliably calculated by California Parties and, regardless, are also not a strong indicator of market power. TransCanada asserts that, because non-jurisdictional sellers were not required to file quarterly reports, market share calculations based on quarterly reports would have been inaccurate. Also, TransCanada notes that market share analyses are an *ex ante* method for determining whether a seller may exercise market power, not a proper means for determining whether a seller has exercised market power in the past. Moreover, Trial Staff and TransCanada contend that the general existence of market power problems was already well known to the Commission prior to and in the early stages of the Crisis. Trial Staff argues that noncompliant reporting could not have masked facts the Commission was already aware of and that Commission's awareness of market power issues further decreases the practical value of any high price, high margin, or large market share that might have been

¹⁷¹ Trial Staff Brief Opposing Exceptions at 37-43; TransCanada Brief Opposing Exceptions at 53-55; 68-70.

¹⁷² Trial Staff Brief Opposing Exceptions at 44.

derived from compliant quarterly reports.¹⁷³

90. Trial Staff argues that California Parties' emphasis on the purpose of quarterly reporting is a "straw man"¹⁷⁴ because it ignores factual considerations regarding whether misreporting masked market power. Further, Trial Staff asserts that the Initial Decision nowhere claims or implies that compliant reporting would have been useless to detecting market power but instead properly considered whether noncompliant reports prevented the Commission from accessing pertinent information that could have resulted in the earlier discovery of market power problems.¹⁷⁵

91. TransCanada argues that the Initial Decision correctly found that California Parties failed to show a nexus between any misreporting by TransCanada and any specific act of manipulation or exercise of market power by any other seller. TransCanada contends that California Parties' reliance on Exhibit CAP-0346 is misplaced because nothing in the exhibit itself or supporting testimony purports to show how specific missing details in TransCanada's reports would have provided information that would have led an analyst to conclude that TransCanada's counterparty to a sale, or some other seller, might have engaged in misconduct. According to TransCanada, Exhibit CAP-0346 merely shows dates when sellers other than TransCanada are alleged to have engaged in False Exports or False Load, but does not attempt to match the day and hour of the alleged misconduct with the date when any such seller transacted with TransCanada.¹⁷⁶ TransCanada avers that California Parties' evidence does not show a single hour when TransCanada transacted with a counterparty and the counterparty is alleged to have engaged in an act of misconduct.¹⁷⁷ Thus, TransCanada argues that the evidence shows no causal connection between a quarterly report filed by TransCanada and the masking of a specific act of misconduct by another seller.¹⁷⁸

¹⁷³ Trial Staff Brief Opposing Exceptions at 44-52; TransCanada Brief Opposing Exceptions at 55-66, 71-72.

¹⁷⁴ Trial Staff Brief Opposing Exceptions at 53.

¹⁷⁵ *Id.* at 53-54.

¹⁷⁶ TransCanada Brief Opposing Exceptions at 30 (citing Tr. 473:15-20 (Taylor Testimony)).

¹⁷⁷ *Id.* (citing Tr. 470:20-471:24, 472:5-9, 473:15-20 (Taylor Testimony); Ex. TC-0076).

¹⁷⁸ *Id.* at 31, 73-74.

92. TransCanada also asserts that it never participated in the CAISO or CalPX markets and, therefore, the Enron-style trading strategies and alleged exercises of market power that were discussed by California Parties have nothing to do with TransCanada's trading activity in the Pacific Northwest bilateral market. In addition, TransCanada argues that the testimony of California Parties' witness, Dr. Reynolds, is inapposite as to whether withholding took place in the Pacific Northwest or that actions in the California markets affected prices in the Pacific Northwest. First, TransCanada criticizes Dr. Reynolds' analysis because it focuses solely on five generators in California and did not include any of the numerous marketers located in the Pacific Northwest. In addition, TransCanada claims that behavior cited by Dr. Reynolds as withholding is consistent with behavior in a workably competitive market that is experiencing shortages. For example, TransCanada contends that Dr. Reynolds' analysis does not account for variables such as start-up costs, infra marginal heat rates, opportunity costs, or credit risks.¹⁷⁹ TransCanada additionally argues that Dr. Reynolds' analysis ignores that electricity prices in the Pacific Northwest during the relevant period were largely explained by market fundamentals such as a prolonged drought, increase in electricity consumption and, consequently, an escalation in natural gas-fired generation use. Further, TransCanada asserts that supply and demand in California were skewed due to retail price caps causing a disconnect between the retail and wholesale electric markets.¹⁸⁰

93. Additionally, TransCanada argues that California Parties' reliance on the mitigated market clearing price (MMCP)¹⁸¹ as a benchmark for what just and reasonable prices would have been in the Pacific Northwest is in error. TransCanada states that the Commission has already rejected California Parties' efforts to equate MMCPs to the bilateral contract prices in the Pacific Northwest market.¹⁸²

94. TransCanada also contends that the Initial Decision correctly found that missing details about TransCanada's transactions would not have been useful for detecting manipulation or market power because TransCanada's transactions were too *de minimis*. TransCanada asserts that California Parties' own evidence shows that TransCanada's spot

¹⁷⁹ *Id.* at 32-36.

¹⁸⁰ *Id.* at 37-41.

¹⁸¹ The MMCP was developed as a remedy in the California Refund Proceeding to re-set prices to competitive level. The MMCP is a proxy price based on the marginal cost of the most expensive unit dispatched to serve load in CAISO's real-time imbalance market. *See, e.g., San Diego Gas & Elec. Co.*, 97 FERC ¶ 61,275, at 62,201 (2001).

¹⁸² TransCanada Brief Opposing Exceptions at 36 (citing Opinion No. 537, 151 FERC ¶ 61,173 at PP 42-43).

market transactions with alleged wrongdoers, from which TransCanada allegedly benefitted, accounted for only one percent of total demand during the relevant period.¹⁸³ Moreover, TransCanada claims that California Parties witness Taylor admitted that TransCanada's quarterly reports individually were unnecessary to detect manipulation or market power.¹⁸⁴

95. TransCanada disputes California Parties' claims that if quarterly reports containing hourly data would have been filed, the outcome in the proceeding would have been different. First, TransCanada asserts that municipalities and governmental entities, which had no reporting obligation, had a much greater share of the market (about 15%) than did TransCanada (less than one percent). Thus, TransCanada contends that compliant quarterly reports would not have provided a complete picture of the market. Second, TransCanada argues that, as Trial Staff witness Norman testified, there is no indication that the Commission attempted to use the quarterly reports to analyze the market during the Crisis. TransCanada asserts that the Commission's reluctance to use the quarterly reports for this purpose is logical considering the lag between the negotiation of contracts and the filing of reports, the fact that reports were submitted in paper format, and the availability of more timely and thorough data available through CAISO. Finally, TransCanada argues that Mr. Taylor's assertion that compliant reports would have enabled the Commission to identify manipulation or market power more quickly is tainted by hindsight bias. TransCanada contends that searching for market anomalies that indicated trading strategies yet unknown to the Commission would have taken much longer than the timeline suggested by California Parties.¹⁸⁵

96. Finally, TransCanada challenges California Parties "persistence" theory, according to which price effects of market misconduct persisted for days and influenced other markets.¹⁸⁶ TransCanada claims that such effects could not have been possible as they pertain to TransCanada because many of the examples of misconduct alleged by California Parties took place before TransCanada's sales to CERS commenced in January 2001. Moreover, TransCanada argues that California Parties' "persistence" theory essentially recycles the "co-integration" theory proffered by the City of Seattle and rejected by the Commission in the Pacific Northwest Refund Proceeding in Docket

¹⁸³ *Id.* at 41 (citing Ex. CAP-0144).

¹⁸⁴ *Id.* (citing Tr. 486:21-487:11 (Taylor Testimony)).

¹⁸⁵ *Id.* at 65-68, 70-71.

¹⁸⁶ California Parties Brief on Exceptions at 66, 75.

No. EL01-10.¹⁸⁷ TransCanada also argues that Dr. Goldberg’s calculations to support the “persistence” theory ignored fundamental factors such as weather and forward prices which, when accounted for, eliminate any statistically significant correlation between price trends in other regions and TransCanada’s prices.¹⁸⁸

97. California Parties contend that the Initial Decision correctly rejected Trial Staff’s argument that the Commission could not have used compliant paper-format quarterly reports to monitor the markets. California Parties concede that electronic filings would have been easier to use than paper reports. However, California Parties assert that the Commission and market participants have, for decades, found ways to make use of paper submittals. California Parties characterize Trial Staff’s position as an attempt to resurrect a claim that has previously been rejected by the Ninth Circuit; namely, that the need to file compliant quarterly reports is a mere compliance obligation.¹⁸⁹ California Parties argue that accepting Trial Staff’s position would contradict the Commission’s repeated assertions to the Ninth Circuit that the quarterly reporting requirements are essential to the justness and reasonableness of the market-based rate program. California Parties reiterate the Ninth Circuit’s admonition that a market-based rate tariff complies with the FPA so long as there is “enforceable post-approval reporting that would enable [the Commission] to determine whether the rates were ‘just and reasonable’ and whether market forces were truly determining rates.”¹⁹⁰

D. Commission Determination

98. We affirm the Initial Decision’s finding that Respondents’ reporting violations did not mask manipulation or market power by Respondents that resulted in unjust and unreasonable prices being charged by either Respondent. Regardless of whether the reporting of hourly data was required, as argued by California Parties, we find that the Initial Decision correctly relied upon numerous other grounds for finding either that: (1) compliant quarterly reports would not have provided the information necessary to detect the telltale patterns of manipulation or the indicia of market power; or (2) the Commission had other more timely and thorough sources of the necessary information or was otherwise aware of the potential problems.

¹⁸⁷ Opinion No. 537, 151 FERC ¶ 61,173 at PP 63, 77.

¹⁸⁸ TransCanada Brief Opposing Exceptions at 74-76.

¹⁸⁹ California Parties Brief Opposing Exceptions at 11-12 (citing, *e.g.*, *Lockyer*, 383 F.3d at 1017).

¹⁹⁰ *Id.* at 15-16 (quoting *Lockyer*, 383 F.3d at 1014).

99. We also find unconvincing California Parties' argument that, had the Initial Decision found that hourly data was required in the compliant reports the outcome would have been different. Although the Initial Decision did find that hourly data would have been necessary to detect the signs of manipulative trading schemes, the Initial Decision also emphasized that California Parties relied on numerous other sources of information, such as data responses, email communications, transcripts of trader tapes, and bid information, that would not have been included in compliant quarterly reports.¹⁹¹ Thus, we find that the Initial Decision correctly concluded that noncompliant quarterly reports did not inhibit the Commission's identification of manipulative trading strategies in this case.

100. Regarding False Exports, Trial Staff's testimony makes clear that information not required in compliant quarterly reports, even beyond hourly data, would have been necessary to detect the telltale pattern of False Export activity, particularly the parking component of such a transaction.¹⁹² We find Trial Staff's testimony persuasive in this regard. As for Phantom Ancillary Services violations, the Initial Decision correctly found that California Parties' evidence demonstrates that Mr. Taylor relied upon trader notes and emails and also would have required CAISO bid data and information about whether the sale at issue occurred in the Day-Ahead or Hour-Ahead market.¹⁹³ Not only would that information not have been included in compliant quarterly reports, but evidence shows that the Commission already had access to more timely bid data.¹⁹⁴ Deficient quarterly reports could not have prevented the Commission from obtaining information to which the Commission otherwise had access. Likewise, we find that the Initial Decision correctly determined that telltale patterns of False Load activity would not have been detectable from information provided in compliant quarterly reports, but instead required the information provided in a subsequent data request in addition to

¹⁹¹ Initial Decision, 160 FERC ¶ 63,010 at P 93.

¹⁹² Ex. S-007 at 15:10-21:1 (Steffy Testimony) (explaining that California Parties witness Mr. Taylor relied upon information provided to the Commission in a data request, which included many data fields not required in compliant reports and describing additional adjustments Mr. Taylor made to that data in order to detect the pattern of False Export activity).

¹⁹³ Initial Decision, 160 FERC ¶ 63,010 at PP 100-102.

¹⁹⁴ Trial Staff Brief Opposing Exceptions at 47-48 (citing Tr. 1063:19-1066:11; Ex. S-013 at 7:19-8B:17).

hourly transaction data.¹⁹⁵

101. We reject California Parties' argument that, although information required in compliant quarterly reports would not have resulted in the detection of Anomalous Bidding and Circular Scheduling, compliant reporting would have revealed telltale patterns of other manipulative trading behavior and therefore led to deeper investigations of those trading strategies and eventually resulted in the discovery of these violations. We find that this line of argument is speculative and attenuated, and is not supported by record evidence.

102. As discussed above,¹⁹⁶ we find no merit in California Parties' contention that the Initial Decision erroneously required a showing that compliant reports would have provided definitive proof of manipulation or market power. That is a mischaracterization of the Initial Decision's findings. We find that the Initial Decision properly evaluated the evidence in the context of whether compliant reports would have provided enough indicia of either manipulation or market power to prompt deeper investigation.¹⁹⁷

103. Additionally, we find no merit in California Parties' objection to the Initial Decision's consideration of the fact that, at the time of the submission of the Q1 and Q2 2001 quarterly reports, the Commission had not yet discovered the trading schemes discussed above or determined that they constituted tariff violations. Even assuming *arguendo* that compliant quarterly reports may have provided indicia of market manipulation, California Parties offer no evidence to support their claims that the Commission would have discovered and ruled upon such violations at an earlier date absent quarterly reporting violations.

104. With regard to indicia of market power, we also find that the Initial Decision correctly determined that Respondents' quarterly reporting violations did not inhibit the Commission's detection of potential market power issues. First, as noted in the Initial Decision, TransCanada's aggregated quarterly reports did reveal high prices and, in addition, TransCanada's WSPP quarterly reports properly provided margin data.¹⁹⁸ California Parties acknowledge that, while high prices and high margins can provide

¹⁹⁵ Initial Decision, 160 FERC ¶ 63,010 at PP 101-105.

¹⁹⁶ *See supra* P 38.

¹⁹⁷ Initial Decision, 160 FERC ¶ 63,010 at PP 106, 124-128.

¹⁹⁸ *Id.* PP 113-114.

evidence of market power,¹⁹⁹ they do not satisfactorily explain how misreporting masked indicia of market power when, in fact, the reports submitted included much of the information that may have motivated the Commission to investigate further. Moreover, as with the data that would have been required to detect telltale signs of manipulation, several key pieces of data necessary to detect physical or economic withholding, such as bid data and generator marginal costs, were not required in compliant quarterly reports.²⁰⁰ Because some of the essential information that would have provided indicia of market power was included in the quarterly reports, and because not all of the data necessary to compute market shares was required in quarterly reports, we find it unnecessary to further consider whether Mr. Taylor's use of transaction market shares, as opposed to generation market shares, constitutes an appropriate way to evaluate market power.

105. We also find persuasive the Initial Decision's finding that relevant and critical information, which would have alerted the Commission to potential market power issues, was available to the Commission through CAISO and other public sources. We find no merit in California Parties' argument that the availability of the necessary data through sources other than compliant quarterly reports is irrelevant. To the contrary, we find that the Commission's access to this data through CAISO and other public sources undermines California Parties' position. The central question at issue here is whether noncompliant reports masked telltale signs of manipulation or indicia of market power, thereby resulting in Respondents charging unjust and unreasonable prices. Noncompliant reports could not have prevented the Commission from obtaining information about which it was already aware. That compliant reports may have contributed similar or additional information is not relevant to the question of whether California Parties have satisfied their evidentiary burden given the specific issues set for hearing.

106. We find that California Parties' reliance on the price analysis performed by Dr. Fox-Penner is misplaced. The issue here is not whether Respondents' or other sellers' tariff violations increased prices, but whether noncompliant reporting masked those violations, thereby resulting in unjust and unreasonable prices. Thus, even though the MMCP benchmark price used by Dr. Fox-Penner may be a suitable proxy for what reasonable prices for Hafslund's sales in the CAISO and CalPX markets would have been, the mere fact of Hafslund engaging in tariff violations or charging unjust and unreasonable prices²⁰¹ does not demonstrate the required nexus between misreporting and

¹⁹⁹ Ex. CAP-0016 at 101:6-7, 11-13.

²⁰⁰ Initial Decision, 160 FERC ¶ 63,010 at PP 115-118.

²⁰¹ We note that the issue of Hafslund's CAISO and CalPX tariff violations has been fully litigated in the Summer Period proceeding in Docket No. EL00-95 and,

any unjust and unreasonable prices. With regard to TransCanada's sales to CERS, we find Dr. Fox-Penner's price analysis to be inapposite because, as the Commission has already explained, as the Commission has previously found, the MMCP is not an appropriate benchmark for just and reasonable prices for bilateral contracts in the Pacific Northwest market.²⁰²

107. We also reject California Parties' argument regarding the inter-temporal and inter-seller impacts on the market. We find that this theory of refund liability is indistinguishable from a theory of general price trends or market dysfunction. As noted above, general market dysfunction is not sufficient grounds for avoiding or overcoming application of the *Mobile-Sierra* presumption.²⁰³ Moreover, the Commission has previously rejected a similar line of argument in the Pacific Northwest Refund Proceeding. There, the City of Seattle proffered a "co-integration" theory, which purported to demonstrate the interrelated nature of prices in the centralized California markets and the bilateral Pacific Northwest market. The Commission found that the co-integration theory represented evidence of general price trends that did not demonstrate specific tariff violations or violations of the FPA.²⁰⁴ We find that the same rationale applies here, because California Parties had the burden to show a causal nexus between specific violations, misreporting, and unjust and unreasonable rates. This they failed to do.

108. We reject as moot Trial Staff's objections to the Initial Decision's characterization of the usefulness of paper format quarterly reports. The Initial Decision merely offered one possible interpretation of Trial Staff's reasoning,²⁰⁵ but ultimately found that, despite the practical difficulties associated with using paper format reports, the quarterly reports were filed in a usable format.²⁰⁶ Thus, we find that the Initial Decision's hypothesis

therefore, is not subject to re-litigation here. 2016 Order on Clarification, 154 FERC ¶ 61,154 at PP 14-15.

²⁰² *E.g.*, Opinion No. 537, 151 FERC ¶ 61,173 at PP 42-43.

²⁰³ *See supra* P 36.

²⁰⁴ Opinion No. 537, 151 FERC ¶ 61,173 at PP 63, 77.

²⁰⁵ Initial Decision, 160 FERC ¶ 63,010 at P 135 ("Moreover, with Trial Staff's reasoning, *it could be suggested* that no analysis of reported information could even have been done by the Commission prior to the use of electronic databases.") (emphasis added).

²⁰⁶ *Id.* PP 134-135.

regarding Trial Staff's position has no bearing on the outcome of this proceeding.

V. Miscellaneous

A. Brief On Exceptions

109. In footnote 172 of their Brief on Exceptions, California Parties assert that, “[t]o the extent that the Initial Decision relied, in part, on the February 1, 2017 prepared answering testimony of economist Dr. David Hunger on behalf of Shell, as well as Dr. Hunger’s testimony at trial ... the Commission should not have.”²⁰⁷ California Parties reiterate arguments made in their February 17, 2017 Motion to Strike that Dr. Hunger should not have been permitted to testify because of his previous involvement in related matters.²⁰⁸

B. Brief Opposing Exceptions

110. Charles River Associates argue that California Parties’ failed to take exception, pursuant to the requirements set forth in Rule 711 of the Commission’s Rules of Practice and Procedure,²⁰⁹ to the Initial Decision’s potential reliance on Dr. Hunger’s testimony. Further, regardless of whether California Parties properly preserved the exception, Charles River Associates state that California Parties misrepresent the Initial Decision’s findings in the order denying their Motion to Strike²¹⁰ and do not explain how the Initial Decision erred in denying the Motion to Strike. Charles River Associates contend that, in order to prevail, California Parties had the burden to demonstrate that Dr. Hunger’s participation in the investigation in Docket No. PA02-2 was essentially personal and substantial work on the same matter as this proceeding. Charles River Associates assert that California Parties’ argument that the Initial Decision’s ruling was based on the mere fact of different docket numbers ignores Dr. Hunger’s evidence on the matter and the Initial Decision’s extensive analysis of the relevant proceedings. Charles River Associates claim that the evidence shows that Dr. Hunger’s work on Docket No. PA02-2 was limited to investigating natural gas trading and price reporting, and did not relate to quarterly reporting issues addressed in this proceeding.²¹¹

²⁰⁷ California Parties Brief on Exceptions at 54, n.172.

²⁰⁸ *Id.*

²⁰⁹ 18 C.F.R. § 385.711(b)(2)(ii) (2019).

²¹⁰ Order Denying Motion to Strike, Docket No. EL02-71-057 (April 13, 2017).

²¹¹ Charles River Associates Brief Opposing Exceptions at 4-11.

C. Commission Determination

111. We agree with Charles River Associates that California Parties' renewed objection to Dr. Hunger's testimony was not properly preserved as an exception pursuant to the requirements of Rule 711 of the Commission's Rules of Practice and Procedure. California Parties did not specify this alleged error in their list of exceptions but merely inserted it as a footnote. Moreover, California Parties fail to explain how the Initial Decision erred in denying the Motion to Strike. We therefore dismiss California Parties' objection.

The Commission orders:

The Initial Decision's findings of fact are hereby affirmed, as discussed in the body of this order. Because we affirm the Initial Decision's findings, we conclude that Respondents' reporting violations did not result in unjust and unreasonable prices being charged by either Respondent and find no basis for ordering refunds.

By the Commission. Chairman Glick and Commissioner Danly are not participating.

(S E A L)

Kimberly D. Bose,
Secretary.