NOTE

CALIFORNIA EX REL. LOCKYER v. FERC: IN WHICH THE 9TH CIRCUIT TELLS THE FERC "YES, YOU CAN"

I. INTRODUCTION

In *California ex rel. Lockyer v. FERC*,[1] the United States Court of Appeals for the Ninth Circuit ruled on yet another aspect of the legal fallout from the California electric wholesale market meltdown of 2000–2001.[2] This particular case is an appeal from a Federal Energy Regulatory Commission (FERC) adjudication in which California attacked the limits of the FERC's authority over rate-making for jurisdictional utility companies. The state made a facial attack on the FERC's authority to authorize market-based rates, claiming that the authority granted to the FERC by Congress in section 205 of the Federal Power Act (FPA),[3] did not include non-traditional market-based rates.[4] In the alternative, California argued that the FERC had not properly administered those rates, that the rates were unjust and unreasonable, and that therefore the state and its utilities were owed refunds of up to $2.8 billion.[5]

The FERC's response was to deny a substantive hearing of all of these allegations on procedural grounds. The facial attack on its authority was, it claimed, a collateral attack on all of the past FERC actions with regard to market-based rates and, as such, was impermissible.[6] Any breakdown in the administration of the rates was "essentially a compliance issue"[7] which was not subject to a retroactive refund as a remedy, and therefore the FERC had no authority to order the type of refunds that California was requesting.[8] The response of the Ninth Circuit was to uphold the FERC's authority to authorize and allow market-based rates, but to hold the FERC responsible for the proper administration and enforcement of those rates. To each claim that the FERC lacked authority to do something, be it to set market-based rates or require retroactive refunds, the response of the Ninth Circuit was to tell the FERC, "Yes, you can."

This note will give a brief factual history of the California wholesale

1. California *ex rel.* Lockyer v. FERC, 383 F.3d 1006 (9th Cir. 2004), *rev'd*, *California ex rel. Lockyer*, 99 F.E.R.C. ¶ 61,247 (2002), *reh'g denied*, 100 F.E.R.C. ¶ 61,295 (2002). It is important to note that mandate has not yet issued on this case despite its decision date of September 2004.

2. The court itself seems to show a certain level of ennui with the whole legal mess created by California's electric deregulation program, noting in its footnote 3 that "[t]his is not our first foray into the thicket of California's attempt to deregulate the power industry." *Id.* at 1009 n3.

3. Federal Power Act, 16 U.S.C. § 824d (2000).

4. *Lockyer*, 383 F.3d at 1010.

5. *Id.* It is noteworthy that since the time of the initial pleadings in this case most of the major power marketers have settled their refund liabilities for amounts significantly less than that claimed by California in this case. *See San Diego Gas & Elec. Co.*, 108 F.E.R.C. ¶ 61,002 (2004) (Williams Settlement); *San Diego Gas & Elec. Co.*, 109 F.E.R.C. ¶ 61,071 (2004) (Dynegy Settlement); *San Diego Gas & Elec. Co.*, 109 F.E.R.C. ¶ 61,257 (2005) (Duke Settlement); *San Diego Gas & Elec. Co.*, 111 F.E.R.C. ¶ 61,017 (2005) (Mirant Settlement); *San Diego Gas & Elec. Co.*, 113 F.E.R.C. ¶ 61,171 (2005) (Enron Settlement).

6. California *ex rel.* Lockyer v. FERC, 383 F.3d 1006, 1010 (9th Cir. 2004) (citing *San Diego Gas & Elec. Co.*, 93 F.E.R.C. ¶ 61,121 (2000)).

7. *Id.* at 1011 (citing *British Columbia Power Exch. Corp.*, 99 F.E.R.C. ¶ 61,247, at p. 62,068 (2002)).

8. *Lockyer*, 383 F.3d at 1011.

electricity markets as they unbundled rates and the procedural history specific to this case. The Analysis section will be an overview of the reasoning of the court and its implications for future FERC action with regard to the three issues of the case: the facial validity of market-based rates; the technical requirements of those rates; and, the FERC's authority when those requirements are violated.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual Background*

1. Electricity Unbundling

With FERC Order No. 888[9] in 1996, the FERC began the process of moving the wholesale electric power industry toward market-based, unbundled rates. The theory behind this unbundling was that by separating generation, transmission, and distribution functions, the industry could be functionally competitive in the markets that would support competition. The industry would still be regulated in those aspects where there was market power or a lack of competition. To that end, Order No. 888 included a series of regulations that would allow for the creation of competitive markets for wholesale electric power.[10] These included the creation of a series of independent regional transmission companies that would allow the development of a competitive electric transmission market.[11] The fundamental issue was that there be unbiased and independent access to the wholesale electricity market to allow for competition and the benefits flowing from it.[12]

2. The California Market[13]

In response to the deregulatory atmosphere at the federal level and to take advantage of the potential for lower market-based rates, the State of California created an independent system operator (CalISO).[14] California also created a wholesale clearinghouse for electricity transactions called the California Power Exchange Corporation (CalPX).[15] With these prerequisites in place, the state began to operate its electric purchasing market, through CalPX and CalISO, under the FERC authorized market-based rates in March of 1998.[16]

---

9. Order No. 888, *Promoting Wholesale Competition Through Nondiscriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, F.E.R.C. STATS. & REGS. ¶ 31,036 (1996). 61 Fed. Reg. 21,540 (1996) (to be codified at 18 C.F.R. pts. 35, 385) [hereinafter Order No. 888], *order on reh'g*, Order No. 888-A, F.E.R.C. STATS. & REGS. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 F.E.R.C. ¶ 61,248, 62 Fed. Reg. 64,688 (1997), *order on reh'g*, Order No. 888-C, 82 F.E.R.C. P 61,046 (1998), *aff'd in relevant part sub nom.*, Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom.*, New York v. FERC, 535 U.S. 1 (2002).

10. *Id.*

11. Order No. 888, *supra* note 9, at p. 31,371.

12. *Id.*

13. For a complete chronology of the events over the relevant period *see* FED. ENERGY REGULATORY COMM'N, THE WESTERN ENERGY CRISIS, THE ENRON BANKRUPTCY, AND FERC'S RESPONSE (2005), *available at* http://www.ferc.gov/industries/electric/indus-act/wec/chron/chronology.pdf.

14. California Electric Restructuring Law, 1996 Cal. Stat. 854.

15. *Id.*

16. California *ex rel.* Lockyer v. FERC, 383 F.3d 1006, 1009 (9th Cir. 2004). *See also Pac. Gas & Elec. Co.*, 81 F.E.R.C. ¶ 61,122 (1997).

In the summer of 2000, California experienced a catastrophic market failure in its wholesale electricity markets. The FERC staff identified a number of factors that led to this market failure, including a poor market structure, significant supply and demand imbalances in the natural gas and electricity markets, restrictions in both generation and transmission plant availability, and market manipulation by some market participants.[17] This market failure led to the bankruptcy of one of the largest California public utilities Pacific Gas & Electric (PG&E).[18] It also led to the California Department of Water Resources (DWR) taking over power purchasing for all state utilities in January of 2001.[19] By October of 2001, the DWR department in charge of power purchasing, the California Energy Resources Scheduler (CERS), had purchased $10 billion in power on the spot market for electricity.[20]

3. California After the Crash

During this entire period, the wholesalers who sold power into the California market (California Wholesalers) were operating under market-based rate schedules.[21] All of these market-based rates required ex-post reporting of transaction-specific data so that "the marketer's rates will be on file as required by section 205(c) of the FPA."[22] The court and the FERC both noted that the wholesalers were not in compliance with the technical requirements of the market based rates during the time of the California market failure:

> Indeed, non-compliance with [the] FERC's reporting requirements was rampant throughout California's energy crisis. FERC itself has acknowledged that during the height of the energy crisis the quarterly reports of several major wholesalers failed to include the transaction-specific data through which the agency at least theoretically could have monitored the California energy market.[23]

It was in this atmosphere of crisis that California filed a complaint at the FERC in March of 2002.[24]

B. Procedural Background

The March 2002 complaint filed against all of the California Wholesalers included a laundry list of requests. The Ninth Circuit provides a summary of the complaints, in which California urged the FERC:

> 1) [to] require California Wholesalers to comply, on a prospective basis, with Section 205 rate-filing requirements;

---

17. FED. ENERGY REGULATORY COMM'N, PRICE MANIPULATION IN WESTERN MARKETS I-9 to -18 (2003) (Docket No. PA02-2-000). *See also* John S. Moot, *Economic Theories of Regulation and Electricity Restructuring*, 25 ENERGY L.J. 273, 306–08 (2004).

18. Moot, *supra* note 17, at 299. There were three primary purchasers in the California electricity market, PG&E, Southern California Edison and San Diego Gas & Electric. The bankruptcy of PG&E, the largest of these purchasers shows how significant the market disruption was on the energy economy in California.

19. California *ex rel.* Lockyer v. FERC, 383 F.3d 1006, 1010 (9th Cir. 2004).

20. *Id.*

21. *Lockyer*, 383 F.3d at 1014 (citing *California ex rel. Lockyer*, 99 F.E.R.C. ¶ 61,247, at p. 62,066 (2002)).

22. *Id.* (quoting *Enron Power Mktg., Inc.*, 65 F.E.R.C. ¶ 61,305 (1993)).

23. *Lockyer*, 383 F.3d at 1014.

24. *California ex rel. Lockyer*, 99 F.E.R.C. ¶ 61,247 (2002).

> 2) to the extent the information [was] not already being provided . . . require the California Wholesalers to provide transaction-specific information to FERC on all of their short-term sales to the [Cal]ISO, CalPX, and CERS for the calendar years 2000–2001;
>
> 3) to the extent that any rates for short-term power sold to [Cal]ISO, CalPX, or CERS are found to exceed just and reasonable levels, require the California Wholesalers to refund the difference between the rate charged and a just and reasonable rate, plus interest;
>
> 4) [to] issue a declaration specifying that the rates for short-term power sold to [Cal]ISO, CalPX, and CERS are not subject to the filed rate doctrine; and
>
> 5) [to] institute proceedings to determine whether any further relief is necessary or appropriate, up to and including the revocation of the California Wholesalers' market based rate authority.[25]

The FERC responded by finding that the complaints were a collateral attack on the previous rate orders issued by the Commission in almost all of its previous market based rate decisions.[26] Further, the FERC found that "the failure to report transactions in the format required by the Commission for quarterly reports is essentially a compliance issue."[27] The Commission then went further to state that a violation of this type of compliance issue does not subject the violator to a refund requirement, since re-filing in the proper format would be the appropriate remedy.[28]

In response to the Commission's order, California appealed, as of right, to the Ninth Circuit for review of the FERC administrative decision.[29] The Ninth Circuit somewhat simplified the claims in the underlying complaint into three issues for it to decide. The first issue was whether the FERC exceeded its authority under the FPA in approving market-based rates.[30] Here the court found for the FERC, holding that FPA authority for ratemaking was quite broad, that the standard of appellate review was to be deferential, and that the requirements for market-based rates set by the FERC clearly fell within its authority.[31]

The second issue was whether or not the ex-post reporting requirements of the market-based rates were an integral part of the rates, or simply a compliance requirement of the rates.[32] The court found that the reporting requirements were an integral part of the rate. They were in fact what made such a rate a legal rate under their early FPA analysis.[33] As such, the ex-post reporting requirements were an integral part of the rates as filed.

The third issue was whether or not the FERC had the authority to order retroactive refunds for the sellers' failure to meet the reporting requirements of the previously approved rates.[34] The court found that since the reporting

25. California *ex rel.* Lockyer v. FERC, 383 F.3d 1006, 1010 (9th Cir. 2004).
26. 99 F.E.R.C. ¶ 61,247, at p. 62,055.
27. *Id.* at p. 62,068.
28. 99 F.E.R.C. ¶ 61,247, at p. 62,068.
29. *Lockyer*, 383 F.3d at 1011.
30. California *ex rel.* Lockyer v. FERC, 383 F.3d 1006, 1012 (9th Cir. 2004).
31. *Id.* at 1013.
32. *Lockyer*, 383 F.3d at 1014–15.
33. *Id.* at 1015.
34. *Lockyer*, 383 F.3d at 1016–17.

requirement was an integral part of the rate, failure to file was a violation of the rate.[35] As the sellers were in violation of their filed rates, the rates were not protected by the filed rate doctrine and the charges were subject to refund and the return of unjust profits.[36] Upon these holdings, the court remanded to the FERC for appropriate action on the issue of refunds.[37]

III. ANALYSIS

A. *Can the FERC Set Market Based Rates?*

The first issue facing the court was the bare facial challenge to the FERC's authority to allow market-based rates under the section 205 of the FPA.[38] To answer this question, the court looked in two broad areas. First, it developed the history of regulation and the filed rate doctrine as it applies to the electric utility industry.[39] The court then considered the broad "just and reasonable" standard for setting rates that is granted to the FERC in section 205 of the FPA[40] and has historically been recognized by the courts.[41] These areas provided the basis for deciding that the FERC does have sufficient authority to allow market-based rates.

1. The Filed Rate Doctrine

The history and development of the filed rate doctrine is important to answering this question because the implicit promise in that protection is that the rate or tariff will be on file with the regulator.[42] The relevant part of section 205 for providing this protection is codified at 16 U.S.C. § 824d(c), titled "Schedules:"

> Under such rules and regulations as the Commission shall prescribe, every public

35. *Id.* at 1016.

36. California *ex rel.* Lockyer v. FERC, 383 F.3d 1006, 1018 (9th Cir. 2004).

37. *Id.* at 1018.

38. Federal Power Act, 16 U.S.C. § 824d (2000).

39. *Lockyer*, 383 F.3d at 1011–12.

40. 16 U.S.C. § 824d(a) (2000).

41. California *ex rel.* Lockyer v. FERC, 383 F.3d 1006, 1011–12 (9th Cir. 2004) (citing Entergy, Inc. v. La. Pub. Serv. Comm'n, 539 U.S. 39 (2003) (noting that the FERC has obligation to ensure that interstate wholesale power rates are "just and reasonable") and Miss. Power & Light Co. v. Mississippi, 487 U.S. 354 (1988) (recognizing that the FERC has exclusive authority to determine whether interstate wholesale power rates are "just and reasonable")). *See also* Mobil Oil Expl. & Prod. Se. Inc. v. United Distrib. Co., 498 U.S. 211 (1991) (discussing the "just and reasonable" requirement of the FERC's FPA authority in the natural gas context).

42. The filed rate doctrine is a protection mechanism developed and recognized by the courts which protects the buyers and sellers in a regulated market. The theory is that if a regulator approves the rates that are filed with it, the seller is protected from having any liability for overcharges if it charges the filed rate. Conversely, the buyer is protected from a seller's favoritism among customers because the seller may not deviate from the filed rate. This doctrine dates back to the Interstate Commerce Commission's regulation of the railroads at the end of the 19th century. *See* N.Y., N.H., & H.R. Co. v. ICC, 200 U.S. 361 (1906). *See also* Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co., 341 U.S. 246 (1951) (applying the filed rate doctrine to the electric utility industry), Ark. La. Gas Co. v. Hall, 453 U.S. 571 (1981) (holding that once rates are filed under the FPA, deviations are only allowed by explicit waiver), Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986) (recognizing the FERC's exclusive jurisdiction over interstate wholesale power rates); Entergy, Inc. v. La. Pub. Service Comm'n 539 U.S. 39 (2003) (holding that once the FERC sets wholesale rates, state utility commissions and regulatory bodies are preempted from restricting or re-litigating those rates).

> utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.[43]

The FERC argued that the relevant information was published in real-time and available to all of the parties on the CalISO website and that it therefore met all the FPA requirements for a filed rate.[44] California argued that if the market-based rates do not explicitly include these narrowly construed statutory schedules, and only include an ex-post reporting requirement "the market-based tariff system approved by [the] FERC in this case violates the FPA because it relies on unfiled, privately negotiated rates" and these rates cannot fit into the parameters of section 205 of the FPA as tariffs.[45]

2. The Just and Reasonable Standard

The statutory language does not clearly deny the FERC the ability to set market based rates and the language is broad enough to include a wide variety of rate structures. Because the plain language of the statute does not deny the FERC authority, and the agency is to be treated deferentially, the court reviews the broader "just and reasonable" standard for rate making.[46] The court looks at the history of federal regulation and the broad deference that the FERC has been given to select the form or structure of the rates it allows, noting "that the just and reasonable standard does not compel the Commission to use any single pricing formula."[47] Specifically, the court looked at the requirements of a market-based rate as approved by the FERC. In order for market-based rates to be approved, a significant condition precedent must be met. The condition is that "approval of such tariffs [is] conditioned on the existence of a competitive market. Thus, market based applications [are] approved only if [the] FERC has made a finding that 'the seller and its affiliates [do] not have, or adequately [have] mitigated, market power.'"[48] This condition precedent is important because "[i]n a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that the price is close to marginal cost, such that a seller makes only a normal return on its investment."[49]

3. Supreme Court Precedent: *Maislin* and *MCI*

The Ninth Circuit specifically looked at two U.S. Supreme Court cases that California advanced to support its claim that market-based rates were in violation

43. Federal Power Act, 16 U.S.C. § 824d(c) (2000).

44. Respondent's Opening Brief at 13, California *ex rel.* Lockyer v. FERC, 383 F.3d 1006, No. 02-73093 (9th Cir. 2004).

45. California *ex rel.* Lockyer v. FERC, 383 F.3d 1006, 1012 (9th Cir. 2004).

46. *Id.* at 1012.

47. *Lockyer*, 383 F.3d at 1012 (quoting Mobil Oil Expl. & Prod. Se. Inc. v. United Distrib. Co., 498 U.S. 211, 224 (1991)).

48. *Id.* at 1012 (quoting La. Energy and Power Auth. v. FERC, 141 F.3d 364, 365 (D.C. Cir. 1998)).

49. *Lockyer*, 383 F.3d at 1013 (9th Cir. 2004) (quoting Tejas Power Corp. v. FERC, 908 F.2d 998, 1004 (D.C. Cir. 1990)).

of the FERC's statutory authority. These cases, *Maislin*[50] and *MCI*,[51] both indicate that deviations from filing fixed rate tariffs would be a violation of an agency's authority. In *Maislin*, the Interstate Commerce Commission (ICC) had allowed shipping companies to negotiate rates that were lower than their filed tariffs.[52] The ICC did not specifically authorize these rates, nor were they monitored by the ICC.[53] These privately negotiated rates were simply charged by the shipper without any direct intervention by the ICC. The Court held that this abdication of regulatory authority was not authorized by the statutory authority granted to the ICC and that the subsequent rates were not protected as filed rates.[54]

In *MCI*, the Federal Communications Commission (FCC) specifically authorized the "non-dominant" telecommunications companies (like MCI) to charge rates without filing a tariff.[55] The FCC still required AT&T, as the dominant provider, to file a rate tariff and collect the rates set under those tariffs.[56] Again in *MCI*, the agency had no oversight or monitoring role in the rates charged by the non-dominant carriers. The Court in *MCI* found that the statutory authority granted to the FCC to modify its rates did not extend to effectively deregulating part of the telecommunications industry by completely abdicating its oversight role.[57]

In the present case, the Ninth Circuit found that the requirements of the FERC's market-based rates clearly distinguished them from the rates that were overturned in both *Maislin* and *MCI*.[58] The two major distinguishing factors were the FERC's "finding that the applicant lacks market power (or has taken sufficient steps to mitigate market power), coupled with strict reporting requirements to ensure that the rate is 'just and reasonable' and that the markets are not subject to manipulation."[59] These factors indicated that the FERC had not abdicated its authority to regulate nor given up oversight of its jurisdictional market participants and therefore had "approved a tariff within the scope of its FPA authority."[60] Since the market-based rates did fall within the FERC's FPA authority, "California's facial challenge to market-based rates fails."[61]

B. Do I really have to file all that paperwork?

Having affirmed the right of the FERC to allow market-based rates, the Court turned to the regulation of those rates. The rates authorized by the FERC required periodic filing of transaction specific reports. All parties concerned agreed, that for some sellers at least, these reports were frequently absent,

50. Maislin Indus. U.S. v. Primary Steel Inc., 497 U.S. 116 (1990).
51. MCI Telecomms. Corp. v. AT&T, 512 U.S. 218 (1994).
52. *Maislin*, 479 U.S. at 121–22.
53. *Id.* at 122.
54. *Maislin*, 479 U.S. at 135–36.
55. *MCI*, 512 U.S. at 221–22.
56. MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 221 (1994).
57. *Id.* at 234–35.
58. California *ex rel.* Lockyer v. FERC, 383 F.3d 1006, 1013 (9th Cir. 2004).
59. *Id.* at 1013.
60. *Lockyer*, 383 F.3d at 1013.
61. *Id.* at 1013.

inadequate, or clearly erroneous.[62] The issue before the court then became, what level of importance should be granted to violations of the ex-post reporting requirements. California claimed that the sellers' violations of the reporting requirements violated the FERC's market-based rates and that the rates were therefore unlawful and unjust.[63] However, "[the] FERC's position here is that violation of the tariff reporting requirements is *merely a technical 'compliance issue'*"[64] since the data is publicly available on the CalISO website.[65]

The court's analysis of this issue consisted of two primary parts. It first looks at the FERC's own reasoning in mandating ex-post reporting in previous FERC adjudications. The court then relates the FERC's own language to the analysis the court had used to distinguish the FERC's market-based rates from those in the *Maislin* and *MCI* cases.

1. What the FERC Said Before

In determining that market-based rates were an effective and efficient method of deregulating the electric utility market the FERC has held numerous hearings and adjudications. The Ninth Circuit looks at two of these prior FERC cases to get a sense of how the Commission had previously viewed the ex-post reporting requirements.

The first FERC case they cite is early power marketing adjudication, *Enron Power Marketing, Inc.*, in which the Commission commented on the nature of reporting requirements early in the movement to deregulate electricity markets.[66] The Ninth Circuit in particular noted a FERC comment in *Enron* that the ex-post reporting requirements for market-based rates "[are] necessary so that the marketer's rates will be on file as required by section 205(c) of the FPA, to evaluate the reasonableness of charges, and to provide for ongoing monitoring of the marketer's ability to exercise market power."[67] In *Enron,* the FERC used that rationale for refusing to grant the power marketer a waiver of their reporting requirements, clearly establishing that it considered the reporting requirement as an important part of its regulatory function.[68]

The court next looked at a comprehensive rule, Order No. 2001, *Revised Public Utility Filing Requirements*,[69] which laid out the reasoning and requirements for ex-post monitoring reports among other filing requirements. The court cites the FERC's comment that "transaction-specific data is the 'minimum needed for market monitoring purposes.'"[70] The FERC itself goes

62. *Lockyer*, 383 F.3d at 1014.

63. Petitioner's Opening Brief at 38–39, California *ex rel.* Lockyer v. FERC, 383 F.3d 1006, No. 02-73093 (9th Cir. 2004).

64. California *ex rel.* Lockyer v. FERC, 383 F.3d 1006, 1015 (9th Cir. 2004) (emphasis added).

65. Respondent's Opening Brief at 13, California *ex rel.* Lockyer v. FERC, 383 F.3d 1006, No. 02-73093 (9th Cir. 2004).

66. *Enron Power Mktg., Inc.*, 65 F.E.R.C. ¶ 61,305 (1993).

67. *Lockyer*, 383 F.3d at 1014 (quoting 65 F.E.R.C. ¶ 61,305, at p. 62,406).

68. 65 F.E.R.C. ¶ 61,305, at pp. 62,401–02.

69. Order No. 2001, *Revised Public Utility Filing Requirements*, F.E.R.C. STATS. & REGS. ¶ 31,127, 67 Fed. Reg. 31,403 (2002) (codified at 18 C.F.R. pts. 2, 35) [hereinafter Order No. 2001]. It should be noted that this is the first time that the FERC had clearly mandated how reporting requirements for market-based rates were to be met and that it issued in 2002, after the events at issue in this case.

70. California *ex rel.* Lockyer v. FERC, 383 F.3d 1006, 1014 (9th Cir. 2004) (quoting Order No. 2001, *supra* note 69, at pp. 30,135–36).

further than that stating that these filings "fulfill the public utilities' responsibility under FPA section 205(c) to have rates on file."[71] In fact, Order No. 2001 includes over five pages of comments and discussion of the way in which the ex-post reporting requirements are the FERC's method of ensuring that the utilities and marketers are in compliance with section 205(c) of the FPA.[72]

Clearly in both of these situations, one prior to the crisis and one after, the FERC had considered the ex-post reporting requirements to be actual requirements. They made clear in both cases that the reporting was the way in which the section 205(c) FPA requirement was met and that it was part of the statutory basis for market based rates.

3. How Did We Distinguish *Maislan* and *MCI* Earlier?

The court next looks at the analysis it had performed earlier, distinguishing *Maislin* and *MCI* from the market based rates in this case. In that analysis the court found the ex-post reporting requirement to be one of two significant differences that made the FERC's market-based rates allowable. So in looking at the FERC's attitude towards the reporting requirements the court found that "the very mechanism that distinguished [the] FERC's tariff from those prohibited by the Supreme Court in *MCI* and *Maislin* was, for all practical purposes, non-existent while energy prices skyrocketed and rolling brown-outs threatened California's businesses and citizens."[73] The net effect of allowing the lack of reporting was that the FERC was "abdicating its regulatory responsibility."[74]

On the basis of these two prongs of analysis, the court held that "because the reporting requirements were an integral part of a market based tariff that could pass legal muster, [the] FERC cannot dismiss the requirements as mere punctilio."[75] Further, "[p]ragmatically, under the circumstances, there is no filed tariff in place at all."[76] Finally, the court concludes that:

> If the tariff is interpreted as [the] FERC urges here, then the tariff runs afoul of *Maislin*, the purpose of the filed rate doctrine, and the FPA. If, on the other hand, we view the reporting requirements as integral to the tariff, with implied enforcement mechanisms sufficient to provide substitute remedies for the obtaining of refunds for the imposition of unjust, unreasonable and discriminatory rates, then a market-based tariff is permitted. *FERC cannot have it both ways*. The FPA does not permit it.[77]

So, yes, you do have to file all that paperwork, at least if you want to have a statutorily valid tariff.

C. So What if I Don't File All That Paperwork?

Once the court decided that the reporting requirement was an integral part of the tariff and that violation of that requirement made the rates unjust and unreasonable, it swiftly moved through the FERC's authority to remediate the

71. Order No. 2001, *supra* note 69, at p. 30,123.

72. *Id.* at pp. 30,123–29.

73. *Lockyer*, 383 F.3d at 1014.

74. *Id.* at 1015.

75. California *ex rel.* Lockyer v. FERC, 383 F.3d 1006, 1015 (9th Cir. 2004).

76. *Id.* at 1016.

77. *Lockyer*, 383 F.3d at 1016 (emphasis added).

situation. California was seeking refunds from the court, thereby avoiding any further hearings at the FERC.[78] The FERC, on the other hand, claimed they lacked statutory authority to order any type of retroactive refunds for failure to file ex-post reports under market-based rates.[79]

1. What the FERC Said Before, Redux

The court again begins with the FERC's own language from prior hearing orders that are on point. The two cases they cite are *Washington Water Power Co.*[80] and *Delmarva Power & Light Co.*,[81] both cases in which the FERC exercised the retroactive refund authority they disclaim in this case.

The *Washington Water Power* case involved a series of market-based rate transactions between affiliated companies Washington Water Power Co. and Avista, its power marketing subsidiary. The two companies did not file the appropriate reports, and additionally Avista received preferential pricing on the Washington Water Power system. To remedy this violation of Avista's market-based rate (which required non-preferential pricing and ex-post reporting), the FERC ordered Avista to reprice all of the transactions during the relevant term of the violation and to disgorge any profits that accrued from those sales. Additionally, Avista had its market-based rate suspended for a period of sixty days as an additional punishment.[82] Thus, in *Washington Water Power*, the FERC had no qualms about exercising the power of retroactive refund that it disclaims in this case.[83]

Delmarva Power involved, among other issues, the retroactive refund of fuel cost adjustment revenues collected under past rate filings. The court cites the conclusory language of the FERC in that order.[84] In the *Delmarva Power* case itself, the Commission clearly opines that it does have retroactive refund authority, stating "[t]he Commission has, in the past, ordered refunds for periods prior to the filed rates at issue. To do otherwise would allow companies to flout our regulations, and overcharge customers with impunity."[85]

2. If the Language Is Clear, *Chevron* Does Not Apply

From the clear language and holdings of the FERC in their previous cases, the court clearly feels that retroactive refunds are within the Commission's statutory authority.[86] As a last defense, the FERC claims that the court owes it deference on its administrative decision to decline to order refunds under the *Chevron*[87] standard.[88] That standard is clearly laid out at the beginning of *Chevron*:

78. *Id.* at 1018.

79. *Lockyer*, 383 F.3d at 1015.

80. *Wash. Water Power Co.*, 83 F.E.R.C. ¶ 61,282 (1998).

81. *Delmarva Power & Light Co.*, 24 F.E.R.C. ¶ 61,199 (1983), *modified, Delmarva Power & Light Co.*, 24 F.E.R.C. ¶ 61,380, *appeal denied sub nom.*, City of Newark v. FERC, 763 F.2d 533 (3rd Cir. 1985).

82. 83 F.E.R.C. ¶ 61,282, at p. 62,169.

83. California *ex rel.* Lockyer v. FERC, 383 F.3d 1006, 1015 (9th Cir. 2004).

84. *Id.* at 1015.

85. 24 F.E.R.C. ¶ 61,199 at p. 61,461.

86. *Lockyer*, 383 F.3d at 1016.

87. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

88. California *ex rel.* Lockyer v. FERC, 383 F.3d 1006, 1016 (9th Cir. 2004).

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court must give effect to the unambiguously expressed intent of Congress. If, however, the court determines that Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of administrative interpretation. Rather if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[89]

The FERC claim was that its interpretation of its statutory authority was owed deference under *Chevron*, as they were an agency construing a statute (section 205 of the FPA) that they administer. The court did not grant this deference since the FERC's reasoning failed the first prong of the test laid out in *Chevron*.[90] The court found that the Congress had spoken to the direct point here and that the court must follow Congress' intent.[91] The FPA could be interpreted "in the context of the entire governing statute, presuming congressional intent to create a 'symmetrical and coherent regulatory scheme.'"[92] In that context, no deference was due the FERC with regard to its remediation authority. The court summed up its reasoning on this issue:

> In this instance, our statutory construction of [the] FERC's authority is dictated by the plain language and words of the [FPA], and by a common sense application of the principles underlying the FPA. To cabin [the] FERC's section 205 refund authority under the circumstances of this case would be manifestly contrary to the fundamental purpose and structure of the FPA and cannot be sustained under *Maislin* and *MCI*. .... The FPA cannot be construed to immunize those who overcharge and manipulate markets in violation of the FPA. In short, the governing statute can be easily construed in accordance with the principles articulated by the Supreme Court in *Brown & Williamson*. Therefore, [the] FERC's *Chevron* argument necessarily fails.[93]

IV. CONCLUSION

Lockyer is, in essence, an attempt by California and its electricity consumers to recover from the California Wholesalers the claimed cost overcharges that occurred during the May to October 2000 period of the western market failure. The state's basic problem was that, at least nominally, the rates were protected by the filed rate doctrine. The underlying complaint to the FERC by the petitioners was an attempt to get the FERC to order refunds by claiming violations of the filed rates, thus negating the California Wholesalers' protection under the filed rate doctrine. When the FERC rejected this attempt, California filed at the Ninth Circuit, adding the bombshell claim that all of the market-based rates approved by the FERC were facially invalid.

The result of *Lockyer* is that the Ninth Circuit clarified the situation for all sides and protected several important policies. It protects the court system by not opening the floodgates to the courtroom, a certain result of facially

89. *Chevron*, 467 U.S. at 842–43 (footnotes omitted).

90. *Lockyer*, 383 F.3d at 1016.

91. *Id.*

92. *Lockyer*, 383 F.3d at 1016 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).

93. *Id.* at 1017.

invalidating all FERC-approved market-based rates. It upholds the basic principle that the FERC has broad ratemaking power within the "just and reasonable" standard. And in the interests of fairness, it provides the California energy purchasers an opportunity to be heard in seeking refunds for any overcharges that occurred during the California power market meltdown.[94]

This case sends strong signals to all of the parties in this case and in future ones. The court tells the FERC that while it does have broad ratemaking authority within the "just and reasonable" standard, it has to live with the rates and rules it sets. This includes proper monitoring and maintenance of all ex-post filings and reporting requirements. The breadth of the FERC's power does not allow it to excuse jurisdictional parties from fulfilling all of the requirements of a filed rate without waiving those parties' protection under the filed rate doctrine. This holding also serves notice to both the FERC and rate filers to follow the letter of their rate requirements if they wish to retain the protection of the filed rate doctrine. Finally, this holding is a reminder to the FERC, as the regulator in this market that, "Yes, you can" protect the participants and end-users in its jurisdiction.

Bryan Harrington

94. For a discussion of some the market activities, including "round trip trades," "hockey stick bidding," and such colorfully named market manipulations as "Fat Boy," "The Death Star," and "Get Shorty," all of which were observed during the failure of the Western Electric market, *see* California *ex rel.* Lockyer v. FERC, 383 F.3d 1006, 1014–16 nn.6–8 (9th Cir. 2004).