IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 01-71051, 01-71321, 01-71544, 02-70254, 02-70266,
02-70269, 02-70275, 02-70282, 02-70301, 02-72113,
03-73887, 03-74252, 03-74527, 03-74531,
03-74594, 03-74629, 04-75423, 04-73501

PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA, *et al*.,
PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION ON THE SCOPE/TRANSACTION CASES

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GLOSSARY

ALJ	Administrative law judge
CEOB	California Electricity Oversight Board
CAISO or ISO	California Independent System Operator
CAISO Br.	Opening Brief of Intervenor California Independent System Operator
Cal. Br.	Opening Brief of Petitioners California Parties
Cal Parties	California Parties
Cal PX	California Power Exchange
CDWR or DWR	California Department of Water Resources
CDWR/SWC or SWP	CDWR/State Water Contractors, previously CDWR/State Water Project
CERS	California Energy Resources Scheduling Division
CP ER	California Parties' Excerpts of Record
CSG	Competitive Supplier Group
CSG Br.	Opening Brief of Petitioners Competitive Supplier Group
Commission or FERC	Federal Energy Regulatory Commission
FERC ER	FERC's supplemental excerpts of record (filed in jurisdictional case, No. 02-02-70262, *et al.*)
FPA	Federal Power Act

GLOSSARY (Cont.)

IPE Br.	Opening Brief of Indicated Public Entity Petitioners
JER	Joint Excerpts of Record, Vols. 1 and 2 (compiling 21 FERC orders, issued between Aug. 23, 2000 and May 12, 2004)
LADWP	Petitioner City of Los Angeles Department of Water and Power
MMCP	Mitigated market clearing price
MWh	megawatt-hour
OOM	out-of-market
P	internal paragraph number within a FERC order or the ALJ decision
PG&E	Pacific Gas & Electric Company
PGA	Participating Generator Agreement
Port	Petitioner Port of Oakland
Port Br.	Opening Brief of Petitioner Port of Oakland
Puget Sound	Puget Sound Energy, Inc.
Redding	Petitioner-Intervenor City of Redding, California
SD Br.	Opening Brief of Petitioner City of San Diego
SDG&E	San Diego Gas & Electric Company
SER	Indicated Public Entity Petitioners' Excerpts of Record

GLOSSARY (Cont.)

SMUD	Petitioner Sacramento Municipal Utility District
SSER	Indicated Public Entity Petitioners' Supplemental Excerpts of Record
WSCC	Western Systems Coordinating Council

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COMMISSION ON THE SCOPE/TRANSACTION CASES

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the challenged FERC orders under 16 U.S.C. § 825*l*. Because several objections to those orders raised on briefs to this Court were not raised on rehearing before FERC, the Court lacks jurisdiction to consider those objections. 16 U.S.C. § 825*l*(b).

STATEMENT OF THE ISSUES

1. Did FERC properly set a refund effective date of October 2, 2000 in accordance with the requirements of Section 206(b) of the Federal Power Act ("FPA"), 16 U.S.C. § 824e(b), for refunds that might be issued in response to a complaint that was filed on August 2, 2000?

2. Did FERC properly define the categories of transactions subject to mitigated market clearing price methodology established in the Refund Proceeding?

STATUTES AND REGULATIONS

The applicable statutes and regulations are contained in the addendum to this brief.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

The second half of 2000 saw an energy crisis in California that brought a sharp rise in wholesale electricity prices, frequent system emergencies along with occasional blackouts, and severe financial distress to California utilities, energy customers, and other market participants. [1] In response, FERC initiated a series of

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[1] The energy crisis actually affected a number of Western states besides California, but the instant appeals are limited to California markets and prices. Other appeals of other FERC orders concerning rates charged during this same time period in Western energy markets outside California are pending before this Court in *Port of Seattle, Washington, et al. v. FERC*, 9th Cir. Nos. 03-74139, *et al*.

adjudicatory and investigative proceedings, intended both to correct structural defects in California electricity markets and to provide ratepayer relief. *See, e.g.*, *In re California Power Exchange Corp.*, 245 F.3d 1110, 1125 (9th Cir. 2001) ("*Cal PX*") (approving FERC's decision to focus first on structural remedies before turning to refunds).

The instant appeals seek review of a series of FERC orders, commencing in the summer of 2000 and continuing to the present, issued in FERC Docket Nos. EL00-95, *et al.* *See* Joint Excerpts of Record ("JER"), Vols. 1 and 2 (compiling 21 FERC orders, issued between Aug. 23, 2000 and May 12, 2004, of the more than 100 orders issued in those dockets). The FERC proceeding involved hundreds of participants from all segments of the energy industry, including energy suppliers, energy customers, and governmental institutions, and produced hundreds of thousands of pages of record evidence, and frequently is referred to as the "Refund Proceeding."

As described below, however, the Refund Proceeding is far from the only one offering refunds or remedies to California ratepayers and market participants. Other FERC proceedings – some of which are the subject of past or present appeals in this Court or the D.C. Circuit – have generated additional billions of dollars in refunds, and have produced additional market and regulatory reforms intended to avoid repetition of the 2000-2001 energy crisis. As evidenced by its orders in this and related proceedings, the Commission is committed to prompt action to remedy any conduct that undermines the competitive operation of those markets or is otherwise inconsistent with tariff obligations and commitments.

Further, the instant appeals represent just "Phase One" of the more than one hundred appeals of Refund Proceeding orders. By Order dated November 24, 2004, the Court severed 23 of the petitions for Phase One briefing on three defined issues: (1) whether sales by governmental entities into the California spot energy markets at issue are subject to the same price mitigation plan as all other sales into those markets; (2) whether October 2, 2000 was the appropriate refund effective date in this matter; and (3) whether FERC properly determined the categories of transactions subject to its price mitigation plan. All other issues raised by the 100-plus petitions before this Court remain in abeyance and await later Phase Two briefing and resolution.

A. The Commission's Refund Proceeding – Brief Overview

As initial steps in the Refund Proceeding, the Commission implemented structural and pricing reforms intended to make California and Western electricity markets more stable and less susceptible to price spikes. *See, e.g., Cal PX*, 245 F.3d at 1114-16 (explaining development and restructuring of California wholesale electricity markets). In relevant respect, the Commission established a methodology, ultimately effective June 21, 2001, for mitigating the price of electricity sold in wholesale spot markets operated by the California Independent System Operator ("CAISO") and, for a time, the California Power Exchange ("Cal PX"). *See generally* FERC April 26 Order, JER 117; *California v. Dynegy, Inc.*, 375 F.3d 831, 835-36 (9th Cir. 2004). To assure just and reasonable rates for all customers and fair and consistent treatment of all energy sales, FERC's price mitigation plan applied to all sales, including those by governmental entities, into CAISO and Cal PX spot markets.

Turning to potential refunds, the Commission set a mitigated market clearing price ("MMCP") methodology that would be used to calculate refunds for sales made into the CAISO and Cal PX markets during the period October 2, 2000 through June 20, 2001. The Commission also established an evidentiary hearing to develop a record from which to make findings of fact concerning: (1) the mitigated price in each hour of the refund period; (2) the amount of refunds owed by each supplier according to the FERC-prescribed methodology; and (3) the amount currently owed to each supplier by the CAISO, utilities, and the State of California. *See generally* July 25 Order, JER 166.

The Commission set a refund effective date of October 2, 2000 under FPA § 206(b), 16 U.S.C. § 824e(b), which limits refunds to a period commencing no earlier than 60 days after the filing of the complaint instituting the proceeding. Because the complaint instituting the Refund Proceeding was filed on August 2, 2000, October 2, 2000 was the earliest "refund effective date" allowed by the statute. While the Commission recognized it has authority to direct additional remedies (including the disgorgement of profits) for unlawful rates charged **during any time period**, it found, when it set the refund effective date, that no violation of sellers' market-based rate tariffs had yet been demonstrated. *See* July 25 Order, JER 174-75.

B. The Commission's Investigative Proceedings

In early 2002, after uncovering evidence that Enron had abused its market-based pricing tariff authority, the Commission initiated a broadly-based fact-finding investigation into whether any entity manipulated short-term prices in Western energy markets during the time period commencing January 1, 2000. *See Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 98 FERC ¶ 61,165 (Feb. 13, 2002). Commission staff obtained voluminous electronic data, written materials, and data responses from all segments of the industry as well as CAISO/PX bidding data and expert testimony and analyses. *See San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 101 FERC ¶ 61,186 (2002), *order on reh'g*, 102 FERC ¶ 61,164 (2003) (responding to this Court's August 21, 2002 Order by allowing all parties to conduct discovery into market manipulation by various sellers and specifying procedures for the submission of new evidence).

Commission staff's Final Report concluded, among other things, that the tariffs of the CAISO and Cal PX prohibit abuses of market power impairing the efficient operations of the CAISO and PX markets, and identified instances of alleged market power abuses and tariff violations. The Commission initiated a number of proceedings to examine instances of potential wrongdoing and to take remedial action as appropriate, regardless of when the wrongdoing occurred. *See American Electric Power Service Corp., et al.*, 103 FERC ¶ 61,345 (2003), *reh'g denied*, 106 FERC ¶ 61,020 (2004), *appeals pending sub nom. Dynegy Power Marketing, Inc., et al. v. FERC*, D.C. Cir. Nos. 04-1036, *et al.*; *Investigation of Anomalous Bidding Behavior and Practices in the Western Markets*, 103 FERC ¶ 61,347 (2003), JER 482, *reh'g denied*, 106 FERC ¶ 61,057 (2004), *appeal pending sub nom. City of Los Angeles Department of Water and Power v. FERC*, D.C. Cir. No. 04-1081.

C. Relief To Date

Although final refunds for the period between October 2, 2000 through June 20, 2001 are still being calculated in the Refund Proceeding,[2] after hearing, an administrative law judge ("ALJ") determined approximately $1.8 billion are owed

[2] Prospectively, prices in California spot and forward markets tumbled back to preexisting competitive levels by early June 2001, after the Commission's price mitigation plan had gone into effect, in conjunction with other measures to reduce over-reliance on volatile California spot markets. *See* June 19, 2001 Order, 95 FERC at 62,546, JER 137 (describing fall in prices).

as refunds for sales at rates in excess of a just and reasonable level. *San Diego Gas & Electric Co., et al.*, 101 FERC ¶ 63,026 (2002), JER 311. Subsequent orders, on review of the ALJ's proposed findings of refund liability, have clarified the MMCP methodology used as the baseline for calculating refunds, and have instructed the CAISO and Cal PX to recalculate bills for all sales during all hours of the post-October 2, 2000 refund period. When those recalculations are finalized, the Commission will order final refunds and close the Refund Proceeding.

The separate investigations of alleged misconduct have begun to result in settlements that provide additional relief for California ratepayers. *See, e.g., Fact-Finding Investigation Into Possible Manipulation of Electric and Natural Gas Prices*, 102 FERC ¶ 61,108 (2003), *reh'g dismissed*, 104 FERC ¶ 61,146 (2003) (agreement to pay $13.8 million in refunds for withholding of generating capacity on two days in June, 2000), *appeals pending sub nom. Pacific Gas and Electric Co., et al. v. FERC*, 9th Cir. Nos. 03-72874, *et al.*; *San Diego Gas & Electric Co. v. Sellers of Energy, et al.*, 109 FERC ¶ 61,257 (2004) (approximately $200 million in refunds to resolve all claims against Duke Energy); *San Diego Gas & Electric Co. v. Sellers of Energy, et al.*, 109 FERC ¶ 61,071 (2004) (almost $300 million in refunds to resolve all claims against Dynegy, Inc. and NRG Energy); *San Diego Gas & Electric Co. v. Sellers of Energy, et al.*, 108 FERC ¶ 61,002 (2004) (approximately $140 million in refunds in resolution of FERC claims).

Mirant Corp. announced, on January 14, 2005, a yet-unapproved settlement valued at approximately $360 million in refunds and other cash equivalents.

II. STATEMENT OF FACTS

A. Statutory And Regulatory Framework

Section 201 of the FPA, 16 U.S.C. § 824, affords the Commission jurisdiction over the rates, terms and conditions of service for the transmission and sale at wholesale of electric energy in interstate commerce. *See* 16 U.S.C. § 824(a)-(b). This grant of jurisdiction is comprehensive and exclusive. *See New York v. FERC*, 535 U.S. 1 (2002) (discussing statutory framework, and division between federal and state regulatory authority under the FPA); *see also, e.g.*, *Public Utility District No. 1 of Grays Harbor County, Washington v. Idacorp Inc.*, 379 F.3d 641, 646-47 (9th Cir. 2004) (discussing exclusive FERC jurisdiction over wholesale power sales); *Dynegy*, 375 F.3d at 849-52 (same).

All rates for or in connection with jurisdictional sales and transmission services are subject to FERC review to assure they are not unjust, unreasonable, unduly discriminatory or preferential. FPA §§ 205(a), (b), and (e), 16 U.S.C. §§ 824d(a), (b), and (e). Pending an FPA § 205 investigation, the Commission may suspend a proposed rate for a period of up to five months, at which point the proposed rate becomes effective, subject to refund. *Id.* If the Commission ultimately determines that the initially-suspended rate was not just and reasonable, FERC may order refunds of any amounts collected in excess of a just and reasonable rate. *Id.*

In contrast, complaints asserting that existing rates are unlawful are governed by FPA § 206, under which only prospective relief is available. *See Cal PX*, 245 F.3d at 1120-21 (describing statutory framework). If, after hearing on its own motion or on complaint, the Commission determines that any existing rate or charge is unjust or unreasonable, it must determine and fix by order the just and reasonable rate or charge "to be thereafter observed and in force." FPA § 206(a), 16 U.S.C. § 824e(a). The Commission "may order the [seller] to make refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate . . . ." FPA § 206(b), 16 U.S.C. § 824e(b). The refund effective date "shall not be earlier than the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period." FPA § 206(b), 16 U.S.C. § 824e(b).

B. Development Of Competitive California Energy Markets

By mid-1995, retail electricity rates in California were well above the national average, and rising. In response, California comprehensively restructured its electric energy industry, changing from a cost-based system of setting rates to a market-based system, where rates would be determined in a structured market.

E.g., *Public Utility District No. 1 of Snohomish County v. Dynegy Power Marketing, Inc*., 384 F.3d 756, 758-59 (9th Cir. 2004) ("*Snohomish*").

Restructuring was implemented by enactment of Assembly Bill ("AB") 1890 in September 1996, which "was designed to dismantle the investor-owned, government-regulated utility model and create a deregulated market in which price would be established by competition." *California v. FERC*, 383 F.3d 1006, 1008 (9th Cir. 2004). AB 1890 required California's three major investor-owned, vertically-integrated utilities to divest a substantial portion of their power generation plants and to sell the output of their remaining generation capacity to a newly created wholesale clearinghouse, known as the California Power Exchange ("Cal PX"). Cal PX would operate an auction market for the purchase and sale of electricity in the "day-ahead" and "day-of" markets, and would set market-clearing prices applicable to all bids accepted by the PX.

CAISO was also created by AB 1890 to manage the transmission network. As part of its network reliability responsibility, CAISO operated a real-time, or spot, market to balance supply and demand at precise points in time. If, for example, "customer demand for a particular hour was not met, then the ISO was required to procure power on the spot market to maintain the stability of the grid." *Snohomish*, 384 F.3d at 759.

As part of California's restructuring plan, on April 29, 1996, Pacific Gas & Electric Company ("PG&E"), San Diego Gas & Electric Company ("SDG&E"), and Southern California Edison Company ("Edison") filed applications with FERC seeking: (1) approval of the overall framework for establishing CAISO and Cal PX; (2) authority to convey operational control of their transmission facilities to CAISO; and (3) authority to sell electric energy at market based rates. In accordance with its established policy, the Commission approved their requests for market-based rate authority after finding that the companies and their affiliates did not have, or had adequately mitigated, market power. *See, e.g., Pacific Gas and Electric Co., et al.*, 81 FERC ¶ 61,122 at 61,437, 61,537, 61,572 (1997).

Applying that same standard, FERC also reviewed and approved applications by other wholesale generators and suppliers that lacked, or had adequately mitigated, market power to sell electric energy at market-based rates in the California markets. In addition, the Commission approved establishment of the CAISO and the PX as the market centers in California, and they commenced operations on March 31, 1998.

For over two years, the restructured, newly-competitive California electricity markets operated largely as intended. That changed in the summer of 2000, when California wholesale electricity prices increased significantly. *See Cal PX*, 245

F.3d at 1115 (describing events). CAISO declared dozens of system emergencies, resorting on several occasions to rolling blackouts to maintain the integrity of the system when it could not procure adequate supplies to match real-time demand.

C. Immediate Action By The Commission To Settle Markets

SDG&E, on August 2, 2000, filed a complaint, docketed in FERC Docket No. EL00-95-000, against all sellers of energy and ancillary services into the CAISO and PX markets, requesting that the Commission impose a $250/megawatt-hour ("MWh") price cap for all sales into those markets.

1. August 23, 2000 Order. While the Commission denied the requested price cap in an order issued August 23, 2000, on the grounds that SDG&E had not provided sufficient evidence to justify its imposition, the Commission determined it was appropriate to investigate the justness and reasonableness of the rates for all sales in the CAISO and PX markets and whether the tariffs, contracts, institutional structures and bylaws of the CAISO and PX were adversely affecting the wholesale power markets in California. *San Diego Gas & Electric Co.*, *et al*., 92 FERC ¶ 61,172 (2000), JER 1. That order also set October 29, 2000, as the refund effective date calculated as the date 60 days after Federal Register publication of notice of the order. *Id*. at 61,608, JER 7.

2. November 1, 2000 Order. Responding further to the concerns identified in SDG&E's complaint, FERC's November 1 Order proposed measures to remedy flaws in the design and operation of the CAISO and Cal PX markets. *San Diego Gas & Electric Co., et al*., 93 FERC ¶ 61,121 (2000) ("November 1 Order"), JER 11. *See also Cal PX*, 245 F.3d at 1116 (discussing order).

The November 1 Order sought to reduce over-reliance on spot markets in California, and attempted "to balance, on the one hand, holding overall rates to levels that approximate competitive market levels for the benefit of consumers, with, on the other hand, inducing sufficient investment in capacity to ensure adequate service for the benefit of consumers." JER 13. The order proposed, effective 60 days after the date of the order: (1) to eliminate the requirement that the investor-owned utilities must buy and sell power through the PX; (2) to require market participants to schedule 95 percent of their transactions in the day-ahead markets or be subjected to a penalty charge; (3) to replace the existing Cal PX and CAISO stakeholder boards with independent non-stakeholder boards; and (4) to require the filing of generator interconnection procedures.

The order also proposed additional temporary measures to mitigate prices, including use of a $150/MWh reporting breakpoint, and retention of a refund obligation for sales into the CAISO and Cal PX markets for the period October 2, 2000 through December 31, 2002. The Commission instituted a paper hearing to resolve the matters before it, allowing the submission of comments and supporting evidence. The November 1 Order granted rehearing to change the refund effective date from 60 days after publication of notice in the Federal Register (October 29, 2000) to 60 days after the date of filing of SDG&E's complaint (October 2, 2000).

3. December 8, 2000 Order. Beginning in mid-November, CAISO repeatedly experienced insufficient reserve margins and emergency conditions, forcing it to serve increasingly larger portions of its load through its real-time Imbalance Energy market. To help alleviate this problem, on December 8, 2000, CAISO filed, and the Commission accepted certain changes to CAISO's Tariff. *California Independent System Operator Corp., et al.*, 93 FERC ¶ 61,239 (2000), JER 52. First, the existing $250/MWh purchase price cap on bids in the ISO's real-time Imbalance Energy Market was changed to a $250/MWh breakpoint, similar to the one implemented in the November 1 Order. Second, generators who failed to comply with an ISO emergency dispatch order became subject to a penalty. Third, a Scheduling Coordinator with unscheduled demand or undelivered generation became liable for the cost the ISO incurred to obtain electricity through bids above the $250/MWh breakpoint or through out-of-market dispatches. *Id.*

4. December 15, 2000 Order. This order adopted many of the remedies proposed in the November 1 Order. *San Diego Gas & Electric Co., et al*., 93 FERC ¶ 61,294 (2000) ("December 15 Order"), JER 54. *See also Cal PX*, 245 F.3d at 1116-18 (discussing features of the order).

The December 15 Order balanced the need to reduce reliance on volatile spot markets with the need for incentives for increased investment in generation and transmission facilities, with an overall goal of alleviating the extreme high prices. To further that goal, the order adopted specific remedial measures. First, as a way to end over-reliance on spot markets, the Commission sought to eliminate the California PX "buy/sell" requirement, which forced investor-owned utilities to sell all of their generation into and buy all their energy needs from Cal PX, by terminating Cal PX's wholesale rate schedules. Other measures were adopted as necessary to remedy structural market flaws.

As required by the December 15 Order, Commission staff convened a technical conference on January 23, 2001 to explore options for a prospective mitigation and monitoring plan to be in place by May 2001. Staff issued its recommended plan on March 9, 2001, and sought comments from market participants.

5. March 9, 2001 Order. The March 9 Order addressed transactions above the $150 "breakpoint" reporting price that occurred in January, 2001. *San Diego Gas & Electric Co., et al.*, 94 FERC ¶ 61,245 (2000) ("March 9 Order"), JER 11. The Order established a provisional formula governing refunds for the first few months of 2001 under which approximately $69 million in January 2001 electricity sales would be subject to refund. The Order also required additional cost or other justification for sales above the breakpoint. *See Cal PX*, 245 F.3d at 1118-19 (explaining interim refund formula).

D. Forward-Going Price Mitigation

Two orders, issued on April 26, 2001 and June 19, 2001, established the basic framework for mitigating (capping) prices going forward. Those orders responded to hundreds of submissions filed by dozens of market participants, spanning all segments of the energy producing, marketing, consuming and regulatory communities.

1. April 26, 2001 Order. An April 26, 2001 Order set out a prospective mitigation and monitoring plan for wholesale sales through the organized real-time markets operated by the CAISO. *San Diego Gas & Electric Co., et al.*, 95 FERC ¶ 61,115 (2001) ("April 26 Order"), JER 117.

The remedial measures taken were intended, in the aggregate, "to reasonably balance the interests of suppliers and consumers of energy in California's wholesale markets without delaying needed investment in generation, transmission, and demand response mechanisms." *Id*. at 61,354, JER 120. Those measures, which sought "to achieve mitigation by emulating a competitive marketplace," *id*., included:

$ enhancing ISO authority to coordinate and control planned generator outages during all hours; [3]

$ requiring sellers with Participating Generator Agreements ("PGA"), as well as governmental entity generators located in California that voluntarily make sales through the ISO's markets or use the ISO's interstate transmission grid (with the exception of hydroelectric power), to offer all their available power in real time during all hours ("must offer" requirement); and

$ establishing conditions, including refund liability, for market-based rate authority to prevent anticompetitive bidding behavior in the real-time market during all hours.

The April 26 Order established a pricing mechanism for all sales (excluding those by out-of-state generators) made in CAISO's real-time market during a reserve deficiency, i.e., when reserves fall below 7 percent. This mechanism established a formula (based on the marginal cost of the last unit dispatched to serve

[3] This remedial measure was the subject of *California Department of Water Resources v. FERC*, 341 F.3d 906 (9th Cir. 2003), *reh'g denied*, 361 F.3d 517 (9th Cir. 2004).

the last increment of load during a period of reserve deficiency) that the ISO could use to establish the market clearing price. Higher bids were permitted if they could be justified.

The April 26, 2001 Order also instituted an inquiry into whether a price mitigation plan should be implemented throughout the Western Systems Coordinating Council ("WSCC"). The Commission invited comment on how such a West-wide plan could be implemented.

2. June 19, 2001 Order. On June 19, 2001, the Commission, acting on comments and requests for rehearing, expanded the scope of its prospective price mitigation and monitoring plan. *San Diego Gas & Electric Co., et al.*, 95 FERC ¶ 61,418 (2001) ("June 19 Order"), JER 136. In doing so, the Commission recognized that its multi-tiered task was "to intervene in markets in as limited a manner as possible consistent with our responsibilities to ensure just and reasonable rates under the FPA, to rely on market principles wherever we can, and to balance carefully the need for price relief against the need for price signals to attract critical supply entry." *Id*. at 62,545, JER 136.

The June 19 Order imposed price curbs on all spot market sales during all hours for the period from June 20, 2001 through September 30, 2002, retained the use of a single price auction, must-offer, and marginal cost bidding requirements when reserves are below 7 percent in the California ISO spot markets, and adopted the CAISO market clearing price as a limit on prices in all other spot market sales throughout the West (*i.e.*, bilateral transactions in the WSCC) during reserve deficiencies in California. During non-reserve deficiency hours, prices in Western spot markets could not exceed 85 percent of the highest hourly clearing price that was in effect during the most recent reserve deficiency period called by CAISO. [4]

The prospective price mitigation plan applied to all sellers that voluntarily sold power into the CAISO or WSCC spot markets, or that voluntarily used the CAISO's or other FERC-jurisdictional interstate transmission facilities. The Commission explained that it cannot assure just and reasonable rates under the FPA unless all sellers follow the same market rules. 95 FERC at 62,551-52, 62,569-70, JER 142-43, 160-61. In addition, a settlement conference before an ALJ was ordered to resolve refund issues for sales made through the CAISO and Cal PX spot markets for past periods.

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[4] Sellers in all Western spot markets were allowed to receive up to the mitigated market clearing price without further justification. Sellers (other than marketers) were allowed to justify prices above the market clearing price during reserve deficiency hours.

E. Price Mitigation For Sales From October 2, 2000 Through June 20, 2001

A subsequent two-week settlement conference was to no avail. On July 12, 2001, the Chief ALJ issued a report and recommendation regarding a refund methodology to govern sales during the refund period. *See San Diego Gas & Electric Co., et al.*, 96 FERC ¶ 63,007 (2001).

1. July 25, 2001 Order. Acting quickly in response to the Chief ALJ's report, a July 25, 2001 Order established the framework for refunds for past sales in the spot markets previously operated by the ISO and the PX. *San Diego Gas & Electric Co., et al.*, 96 FERC ¶ 61,120 (2001) ("July 25 Order"), JER 166.

The July 25 Order established a refund formula to determine MMCPs for the period October 2, 2000 through June 20, 2001. The MMCP followed the prospective price mitigation plan adopted in the June 19 Order, as modified for a past, rather than a future, period. Under the MMCP methodology, refunds would be determined by the difference between prices charged and the MMCP calculated for each hour of the refund period using the marginal costs of the last unit dispatched to meet load in the ISO's real-time market, as adjusted to reflect various inputs (natural gas prices, adders for non-fuel costs and creditworthiness concerns, and interest payments).

The Commission also ordered an evidentiary hearing to develop the record further and to determine whether, and if so how much, refunds are owed by any sellers in the California spot markets. Specifically, the Commission directed the ALJ to find: (1) the MMCP in each hour of the refund period; (2) the amount of refunds owed by each supplier according to the MMCP; and (3) the amount currently owed to each supplier by the ISO, investor-owned utilities, and the State of California.

While hearing proceedings were underway, the Commission issued lengthy orders addressing requests for rehearing of its earlier price mitigation orders.

2. December 19, 2001 Order. A December 19, 2001, Order comprehensively addressed all issues concerning mitigation of California spot market prices and conditions. *San Diego Gas & Electric Co.*, 97 FERC ¶ 61,275 (2001) ("December 19 Order"), JER 191.

Among the many issues discussed, the Commission reiterated that its price mitigation plans apply to all sales into the FERC-regulated CAISO and Cal PX spot markets. *Id*. at 62,180-89, JER 203-212. The Commission explained that this action exercised jurisdiction over all FERC-jurisdictional sales in FERC-regulated markets. *E.g.*, 97 FERC at 62,182, JER 205. In addition, the Commission further explained its reasons for choosing October 2, 2000 as the refund effective date. *See* *id*. at 62,197-200, JER 220-223. While that date limits FPA § 206 refunds, the Commission's authority allows it to provide other relief as necessary where tariff violations have been demonstrated.

3. May 15, 2002 Order. A May 15, 2002 Order denied rehearing of the December 19 Order. *San Diego Gas & Electric Co., et al.*, 99 FERC ¶ 61,160 (2002) ("May 15 Order"), JER 295. With only minor clarifications, the May 15 Order left unchanged both the market mitigation and monitoring program and the plan for setting the MMCP and re-calculating the prices of all sales in the CAISO and Cal PX spot markets.

4. March 26, 2003 Order. After hearing, the ALJ determined, in December 2002, that suppliers owe approximately $1.8 billion to CAISO and Cal PX for sales at rates in excess of a just and reasonable level. *San Diego Gas & Electric Co., et al.*, 101 FERC ¶ 63,026 (2002) ("ALJ Decision"), JER 311. [5] The Commission adopted in part, and modified in part, the ALJ's proposed findings in an order issued March 26, 2003. *San Diego Gas & Electric Co., et al.*, 102 FERC ¶ 61,317 (2002) ("March 26 Order"), JER 443.

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[5] The ALJ also determined that suppliers are owed approximately $3 billion, and, accordingly, that the net result is that suppliers are owed approximately $1.2 billion after refunds.

5. October 16, 2003 Orders. An October 16, 2003 Order addressed requests for rehearing of the March 26 Order. *San Diego Gas & Electric Co., et al*., 105 FERC ¶ 61,066 (2003), JER 504. The Commission clarified certain refund computation issues, directed CAISO and Cal PX to rerun their billing calculations, in conformance with the clarified refund methodology, and to submit their results as soon as possible.

Another October 16, 2003 Order denied in all relevant respects all requests for rehearing of the May 15 Order. *San Diego Gas & Electric Co., et al.*, 105 FERC ¶ 61,065 (2003), JER 493.

6. May 12, 2004 and Later Orders. The Commission continues to act on numerous requests for rehearing and/or clarification of its earlier orders determining the methodology for calculating refunds during the period October 2, 2000 to June 20, 2001. An order issued May 12, 2004, addressed a number of refund calculation issues, including the content and timing of filings by the ISO and PX necessary to account for various refund inputs and offsets. *San Diego Gas & Electric Co., et al*., 107 FERC ¶ 61,165 (2004), JER 538. Another order issued that same day addressed a number of issues concerning allowances for fuel costs for sales made in the ISO/PX markets, a key variable in the refund calculation. *San Diego Gas & Electric Co., et al*., 107 FERC ¶ 61,166 (2004), JER 559.

Later orders, not included in the Joint Excerpts of Record, on rehearing of the May 12, 2004 Orders, further address refund calculation and other issues. *See San Diego Gas & Electric Co., et al.*, 108 FERC ¶ 61,311 (2004), and 109 FERC ¶ 61,218 (2004), FERC ER 1-49. *See also San Diego Gas & Electric Co., et al.*, 108 FERC ¶ 61,219 (2004), *order on reh'g*, 109 FERC ¶ 61,074 (2004) (fuel cost allowance claims by independent auditors).

F. Petitions For Review

Over 100 petitions, submitted by dozens of petitioners, have been filed in this Court or the D.C. Circuit to review various combinations of Refund Proceeding Orders, commencing with the August 23 Order and continuing through to the 2004 Orders. A series of procedural orders consolidated all those petitions in this Court under the caption *Public Utilities Commission of the State of California, et al. v. FERC*, Nos. 01-71051, *et al.*[6]

By Order issued August 21, 2002, all consolidated appeals in Nos. 01-71051, *et al*., were held in abeyance to allow the Commission and the parties to adduce

[6] Several procedural orders issued over the past 18 months have consistently denied motions of certain parties, vigorously opposed by other parties, to consolidate appeals of FERC's investigative and enforcement orders with appeals of its Refund Proceeding orders. Those rulings mirror FERC's consistent decision to separate its investigative proceedings from the Refund Proceeding, rather than merge them all into one unwieldy mega-proceeding. *See, e.g.*, October 16 Order, 105 FERC at 61,394-95, JER 534-35.

additional evidence of market manipulation in Western energy markets. The August 21, 2002 Order (at 7-8) explicitly left to the Commission's discretion how best to adduce and consider new evidence, and did not require the Commission to consider any new evidence in any particular proceeding.

After conducting two case management conferences with the parties, the Court issued an order on November 24, 2004, setting 23 of the petitions for review for immediate "Phase One" briefing and decision. 18 of those petitions were consolidated under the caption *Public Utilities Commission of the State of California, et al. v. FERC*, 9th Cir. Nos. 01-71051, *et al.*, with Phase One briefing established on two scope/transaction issues: (1) the Commission's decision to set October 2, 2000 as the refund effective date for sales into California spot markets that are adjudged not just and reasonable; and (2) the categories of transactions subject to the Commission's price mitigation plan. Five other petitions were consolidated under the caption *Bonneville Power Administration, et al. v. FERC*, 9th Cir. Nos. 02-70262, *et al.*, with Phase One briefing established on one jurisdictional issue: whether sales by governmental entities into the CAISO and Cal PX spot energy markets are subject to the same price mitigation plan applicable to all other sales into those markets.

All other petitions for review, consolidated under the caption *Public Utilities Commission of the State of California, et al. v. FERC*, 9th Cir. Nos. 01-71934, *et al.*, and all other issues, remain in abeyance for later Phase Two briefing and resolution.

SUMMARY OF ARGUMENT

FERC's interpretation of the FPA is reviewed under *Chevron*, which looks to whether an agency's interpretation is forbidden by the statutory language or is otherwise impermissible. While questions of law are reviewed *de novo*, this Court gives deference to FERC's interpretation of the FPA. In general, FERC decisions are reviewed under the arbitrary and capricious standard. Under the FPA, FERC's findings of fact are conclusive if supported by substantial evidence.

The refund effective date of October 2, 2000 is challenged as being either too early or too late. FPA § 206(b), which governs how a refund effective date is set, requires that where a proceeding is instituted by a complaint, the refund effective date be set no earlier than 60 days after the filing of the complaint. In cases where the proceeding is instituted by FERC's own motion, the refund effective date can be set no earlier than 60 days after notice of FERC's action.

The Competitive Supplier Group ("CSG") charges that October 2 is too early because the complaint instituting the proceeding did not request a refund remedy.

FERC properly looked to the substance of the allegations, not the relief requested, to determine whether those allegations notified sellers that the complaint could lead to refunds. As the instant complaint alleged that prices charged in the CAISO and Cal PX spot markets were unjust and unreasonable, it put all sellers on notice that it could lead to an order requiring refunds. While FERC initially responded to the complaint by seeking to rectify market structural problems, that response did not subsume the separate investigation into whether prices in the spot markets were unjust and unreasonable. Accordingly, FERC properly found that the complaint instituted the Refund Proceeding, and set the refund effective date 60 days from its filing.

Cal Parties, CAISO, and City of San Diego assert, on the other hand, that October 2 was too late. In their view, FERC should have ordered refunds for all instances of unjust and unreasonable rates, regardless of date. Petitioners' assertion is based on a legal point with which FERC agreed: namely, that FERC can order retroactive remedies where it finds that a party has violated a tariff. Although Petitioners portray the decision to set a refund effective date as FERC making a legal ruling that it lacks authority to order earlier refunds, FERC recognized it had such authority, but found the factual predicate for its exercise had not been met. At the time FERC set the refund effective date, no evidence demonstrated that tariff violations had occurred. Accordingly, because the factual predicate was not satisfied, FERC did not, at that time, seek pre-October 2 remedies.

Later, when such evidence was presented, FERC ordered a host of investigations and proceedings to determine whether tariff violations occurred and to set appropriate remedies. Petitioners argue that all those matters should have been incorporated into the Refund Proceeding and subjected to the mitigation pricing methodology used there. But FERC found that creating a mega-proceeding would create more problems than it would solve, particularly in terms of added costs to small parties and inefficiencies that would slow customer relief. FERC has extremely broad discretion as how best to enforce the FPA as well as how to order its dockets. That discretion can be overturned only in the most extreme circumstances, which have not been shown here.

Following the same mitigation methodology as used in the Refund Proceeding is not the only way, as Petitioners assert, to remedy pre-October 2 tariff violations. FERC left open a broad range of possible remedies to maximize the possible relief for customers. Further, FERC has absolute discretion on whether to investigate and how to resolve possible enforcement matters, and thus those decisions are not subject to judicial review.

During the course of the California energy crisis, the Secretary of Energy, acting under FPA § 202(c), gave CAISO authority to enter what came to be known as "DOE Sales." FERC decided that DOE Sales should not be subject to mitigation and refund liability because no party had asked that the rates for DOE Sales be reviewed under FPA § 202(c). Accordingly, various parties sought to have their sales made during the relevant period classified as exempt DOE Sales. California Department of Water Resources ("CDWR") and Redding challenge the rulings that their sales were not exempt DOE Sales.

As resolution of this matter required factual development related to specific parties, the ALJ received considerable evidence at hearing before issuing a 20-page ruling that discussed the general requirements for being considered a DOE Sale, followed by review of the evidence related to individual sellers. FERC summarily adopted the ALJ's findings and conclusions.

Petitioners challenge the eligibility criteria that required either CAISO documentation or other definitive evidence that a particular transaction qualified as a DOE Sale on grounds that the chaotic conditions at the time made collection of such evidence difficult. To the contrary, both the ALJ and FERC, interpreting the Secretary's orders, found that documentation was central to such Sales because before such Sales could be made CAISO had to document that it exhausted all other supply avenues and seller had to document that they had energy in excess of that needed to serve firm load. Thus, both the ALJ and FERC found that it was not unfair to require documentation to show a particular transaction was a DOE Sale. The exclusion of certain CDWR evidence was justified, in the ALJ's view, due to the prejudice of it being submitted on cross long after written rebuttal testimony was submitted. While CDWR now claims that the delay was unavoidable, that argument was not advanced before the ALJ, and thus preclusion was justified.

Petitioners also now claim error in allowing only sales outside CAISO's markets to qualify as DOE Sales. As that claim was not raised on rehearing to FERC, the FPA precludes it from being raised on appeal. In any event, the claim is meritless, as the DOE orders required CAISO to exhaust all other supply sources before entering DOE Sales. As DOE Sales were a last resort, it was reasonable to conclude that only sales outside CAISO's markets qualified. Similarly, CDWR's claim that all its sales to CAISO during the period were DOE Sales was belied by its testimony that, regardless of the DOE orders, it was doing everything it could to help CAISO and by the terms of its PGA with CAISO, which separately required CDWR to supply energy in a system emergency.

The burden of proof was not improperly placed on those seeking an exemption from refund liability through DOE Sales. FERC had previously found that all sales into CAISO's and Cal PX's spot markets were subject to refund liability. Thus, those seeking an exemption from that ruling properly had the burden. In any event, who had the burden was immaterial because FERC found whoever had it, met it.

Petitioners City of Los Angeles Department of Water and Power ("LADWP") and Sacramento Municipal Utility District ("SMUD") assert that they should not be liable for refunds related to their participation in sleeve transactions used due to CAISO's creditworthiness problems. Although FERC had not exempted sleeve transactions from refund liability, CAISO, on its own, decided that certain sleeve transactions should not be subject to refund liability. The ALJ approved a trial stipulation to allow offers of proof on the equities that parties could use to seek reconsideration of the earlier FERC non-exemption ruling. After considering the submissions, FERC again found that sleeve transactions should be subject to refund liability.

Petitioners challenge that ruling on the basis that CAISO acted as the instigator, not the facilitator, of their sleeve transactions. But the evidence shows that the parties, at the time of the transactions, considered them to involve two sales, one from the supplier to either LADWP or SMUD and, then, another one from LADWP or SMUD to CAISO at a higher price. In addition, the supplier and LADWP or SMUD set the price and quantity of the sale between them independently of CAISO, who was then told what price it would have to pay for the quantity that it would receive. FERC reasonably viewed that pattern as similar to how other power marketers operated, and thus subject to refund. Finally, FERC appropriately considered the sleeve transactions as bilateral spot transactions.

Although LADWP and Redding claimed that certain of their sales to CAISO were multi-day transactions (exempt from refunds), the ALJ and FERC found that those transactions were really a series of spot sales that were subject to refund. That ruling was based on evidence showing the parties agreed to set the price and quantity of such sales on a daily basis, with either party having the right to decide not to make the sale on any given day.

CAISO entered out-of-market ("OOM") transactions at the last minute when grid reliability was at risk because otherwise there would not be enough supply to meet demand. As those were must-buy situations for CAISO, they represented the best opportunity for exercise of market power by sellers. Accordingly, FERC made OOM sales subject to refund. CSG argues that ruling is erroneous because FERC did not specifically find the prices for OOM transactions were unreasonable. But CSG misapprehends the import of FERC's ruling: while all OOM transactions were subject to refund liability, only those that exceed the mitigated market clearing price will actually require refunds.

CSG claims the market mitigation methodology cannot be used for OOM transactions because they are not the product of a single-price clearing auction. But the market mitigation methodology was employed for other spot transactions, not because of the single-price clearing auction, but because structural defects in the CAISO and Cal PX markets could cause conditions that allowed for market power abuse. As those same structural problems plagued the OOM transactions, applying the mitigation methodology to them was appropriate. OOM transactions were unlike bilateral transactions that were not mitigated because the OOM transactions were used to backstop spot market transactions to assure grid reliability and because they were subject to structural defects in those markets.

FERC appropriately decided to examine prices in all hours, including non-deficiency hours, under the price mitigation methodology for the possible effects of structural defects. Despite its initial view that prices in non-deficiency hours were competitive, later evidence suggested that prices in non-deficiency hours did not reflect competitive markets. That evidence prompted FERC to apply the mitigation methodology to all hours to avoid the possibility that some hours in which prices were unjust and unreasonable were overlooked. Even though all hours were examined, refunds will be owed only for those hours during which prices exceed the mitigated price.

The complaint instituting the Refund Proceeding along with subsequent FERC orders have all consistently focused on prices for sales in the CAISO and Cal PX spot markets. When a request was made to expand the scope of the proceeding to include CERS's bilateral sales made outside the CAISO and Cal PX spot markets as subject to refund liability, FERC denied the request on the basis that no party could have reasonably believed such sales were within the scope of the proceeding, and thus were not on notice that they might be liable for refunds related to CERS sales. FERC noted that parties could file a separate FPA § 206 complaint to cover those sales, which has occurred as to selected CERS transactions.

Cal Parties assert that FERC inadequately explained its decision not to make CERS sales subject to refund. But the lack of notice that such sales were subject to refund adequately explained the decision. Nor did FERC abdicate its statutory duty by investigating bilateral transactions in other proceedings, as those proceedings could provide any required relief. FERC properly distinguished the CERS bilateral transactions from the OOM bilateral transactions on grounds that the OOMs are contemplated in the CAISO tariff to backstop CAISO's auction markets and thus are linked to those markets. CERS transactions do not have that link.

The Port asserts that exclusion of bilateral sales in which it was involved from refund protection contravenes FERC's goal of encouraging greater use of bilateral contracts to reduce reliance on spot market sales. The Commission, however, found that after-the-fact expansion of the scope of transactions subject to refund in the Refund Proceeding would negatively affect the goal of encouraging bilateral contracts because sellers would be less inclined to enter into such contracts. Further, allowing refunds now could not influence a purchaser's original decision to enter bilateral transactions during a past period.

In addition, the Port fails to acknowledge the limits established by the FPA on the instant Refund Proceeding. FPA § 206 limits FERC's authority to change rates in a particular proceeding to the rates challenged in a complaint instituting the proceeding. Similarly, authorized refunds are limited to those that are the subject of that proceeding. The Refund Proceeding, instituted by SDG&E's complaint, concerns only sales in the CAISO and Cal PX spot markets, not the Port's bilateral transactions. Had the Port wanted to challenge the rates in bilateral transactions in which it was involved, it could have filed an FPA § 206 complaint.

A correlation between spot and bilateral prices, as the Port maintains, would not allow an expansion of the Refund Proceeding beyond challenges to prices in the CAISO and Cal PX spot markets. While bilateral transactions in the Pacific Northwest could potentially be eligible for refunds, that was an outgrowth of a complaint specifically addressing those transactions. If the Port believed that its bilateral transactions should be addressed by FERC, it could have filed a complaint.

CAISO and the Cal Parties assert error in limiting refunds to "spot" transactions on the basis that FERC has a duty to order refunds for any unjust and unreasonable rates, including any found in non-spot transactions. Refunds, however, are discretionary, and the FPA's proscriptions limit the scope of potential refunds in the Refund Proceeding to those rates challenged in the underlying complaint.

CAISO and the Cal Parties now claim that FERC never made a finding that unjust and unreasonable rates were limited to spot markets, or properly limited refunds to defined spot transactions when there was evidence of manipulation in other markets. But they failed to raise either argument on rehearing and, thus, cannot raise them on appeal. 16 U.S.C. § 825*l*(b).

In any event, the arguments are unavailing. SDG&E's complaint addressed spot market price volatility, and thus, spot markets are the focus of the Refund Proceeding, with market participants on notice of that focus. The existence of other evidence suggesting manipulation in other markets is being addressed in separate investigations and proceedings. How FERC decides to arrange its docket and manage its investigations is a matter wholly within its discretion, which parties have not established that FERC abused.

Cal Parties contend that certain nonmonetary CAISO exchange transactions should have been mitigated. While FERC has mitigated any excessive prices related to the energy obtained in the spot markets for exchange transactions, FERC properly denied Cal Parties' request also to mitigate the return ratios used in those exchange transactions.

FERC reasonably concluded that the stated ratio did not imply a defined price, because CAISO generally had an extended window of time in which to complete the exchange, and the price of energy to be returned could vary substantially from the price of energy received. The time window to make the in-kind return also meant that exchange transactions were conducted over periods greater than 24 hours and thus were not spot market transactions. Moreover, Cal Parties ignored the effect of a severe hydro production shortfall on return ratios. Because pricing variability depending on the timing of the return, which was largely subject to CAISO's discretionary control, changed the effective return ratio, FERC's decision not to mitigate return ratios was reasonable. The pricing variability also differentiates this situation from others with fixed costs, which FERC considered like monetary transactions.

ARGUMENT

I. STANDARD OF REVIEW

Courts review FERC's interpretation of the FPA under the test announced in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Under that test, a court must "decide (1) whether the statute unambiguously forbids the Agency interpretation, and, if not, (2) whether the interpretation, for other reasons, exceeds the bounds of the permissible." *Barnhart v. Walton*, 535 U.S. 212, 218 (2002). While a court reviews legal questions *de novo*, it must still give deference to an agency's interpretation. "The two-step *Chevron* framework thus allows this Court to defer to the Commission's interpretations of the statutory provisions it administers, but [the Court] remain[s] 'the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.'" *American Rivers v. FERC*, 201 F.3d 1186, 1194 (9th Cir. 2000)(citations omitted).

Court review "of a FERC decision is limited to whether the decision was arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, or not in accordance with the law, 5 U.S.C. § 706(2)(A)[.]" *California Dept. of Water Resources v. FERC*, 341 F.3d 906, 910 (9th Cir. 2003)(citation omitted). FERC's factual findings are conclusive if supported by substantial evidence. FPA § 313(b), 16 U.S.C. § 825*l*(b).

II. FERC PROPERLY SET OCTOBER 2, 2000 AS THE REFUND EFFECTIVE DATE

Mirror arguments are presented that the refund effective date of October 2, 2000 set in the November 1 Order, 93 FERC at 61,370, JER 33, is either too early or too late. The Competitive Supplier Group ("CSG") argues that FPA § 206(b) requires that the refund date be set on October 29, rather than on October 2. *See* CSG Br. 38-43. Cal Parties, CAISO, and San Diego argue, to the contrary, that October 2 was too late, and the Refund Proceeding should remedy all sales made since May 1, 2000. *See* Cal. Br. 53 *et seq*. and SD Br. 23 *et seq*. Both groups are wrong.

A. The Refund Effective Date Was Properly Tied To The Complaint

CSG asserts that setting October 2 as the refund date "is contrary to the FPA, since October 2, 2000 is earlier than permitted for an investigation instituted on FERC's own motion," and is arbitrary and capricious because it departs from the Commission's initial reaction and "cannot be squared with the plain language of the SDG&E complaint or FERC's rule requiring complainants to state their requests for relief with specificity." CSG Br. 42. CSG's assertions are based on its view that the remedy proposed, rather than the substantive allegations, in a complaint controls whether the Commission or a third party instituted an FPA § 206 investigation. That view has no support, and thus cannot be adopted.

CSG correctly notes (CSG Br. 38) the FPA § 206(b) distinction between a proceeding instituted by third party complaint, in which case the refund effective date is set no "earlier than the date 60 days after the filing of such complaint," and a proceeding instituted by FERC, in which case the date "shall not be earlier than the date 60 days after publication by the Commission of its intention to initiate such proceeding." FPA § 206(b). CSG also correctly notes that, initially, FERC set October 29 as the refund effective date. CSG Br. 38-39, citing JER 7. Those starting points do not, as CSG contends (CSG Br. 39), preclude the Commission from changing the refund effective date to October 2.

CSG's contentions do not validly follow the statutory language or FERC's orders. Regarding the complaint, CSG uses the requested remedy of a proposed price cap to surmise that the absence of a request for refund relief means a proceeding to allow refunds could be instituted within the meaning of FPA § 206(b) only on FERC's own motion. *Id*. at 40 & n.25. Rather than focus on the relief requested, the Commission properly examined the substantive allegations to determine whether they set the predicate -- that rates were allegedly unlawful – for possible refunds. *See, e.g.*, JER at 4 (noting that the complaint concludes the market "cannot be workably competitive if sellers are able to exact prices that are considerably above levels that would prevail in open competition" and that other reports show "the current market in California experiences problems during tight supply/high demand periods such that it may not yield just and reasonable rates").

Although FERC denied the requested price cap relief (*see* JER at 2), it did not dismiss the complaint, but, rather, required "further formal investigation" on, among other things, "whether the anomalous prices are unjust, unreasonable, unduly discriminatory or preferential," JER at 4, which left open the possibility of refunds. Because the complaint "focused on the performance of sellers in the market," *id*., it was appropriate to investigate "the justness and reasonableness" of sellers' rates as well as whether changes should be made in the markets' structures. *Id*. at 5; *see* December 19 Order, JER at 220 ("Although the August 23 Order denied SDG&E's request for summary disposition (*i.e.*, the immediate imposition of a price cap) as too narrowly focused on seller conduct and unsupported, based on the facts then available, the August 23 Order nonetheless set the issue of justness and reasonableness of sellers' rates in the ISO and PX markets for investigation.").

As the complaint challenged the reasonableness of sellers' rates, it could, under FPA § 206, "lead to an order requiring refunds," contrary to CSG's charge (CSG Br. 40). *See* FPA § 206(b), 16 U.S.C. § 824e(b)(indicating that refunds may be ordered "of any amounts paid, for the period subsequent to the refund effective date . . . , in excess of those which would have been paid under the just and reasonable rate . . . .”).

Nor is CSG correct that the refund issue was subsumed into the related question also being investigated of whether market rules or institutional factors need to be modified. CSG Br. 40-41. From the outset, the Commission separated those two matters as distinct parts of “consolidated hearing proceedings” that would “investigate the justness and reasonableness of the rates and charges” and “*also* investigate whether the tariffs and institutional structures . . . need to be modified.” JER at 2 (emphasis added); *see id*. at 5 (“we conclude that it is appropriate to investigate *not only* the justness and reasonableness of public utility sellers’ rates in the PX and ISO markets, *but also* to investigate the tariffs and agreements of the ISO and PX”)(emphasis added). *See* November 1 Order, 93 FERC at 61,357, JER 20 (noting twin objective of determining whether sellers are charging unjust and unreasonable rates and whether market structures and rules create opportunities for market power abuse). As later noted, the market structure investigation “did not supersede the rate investigation in the complaint docket; it complemented the rate investigation.” JER at 220.

Although consolidated “for purposes of hearing and decision in view of their common issues of law and fact,” *id*. at 221, the complaint proceeding remained distinct from the market structure investigation. *See id*. (denying that “the August

23 Order [JER 1] rejected SDG&E's complaint"). As the complaint "institute[d] a proceeding," within the meaning of FPA § 206(b), that questioned the lawfulness of the existing rates, and thus could result in refunds, the Commission consistent with the language of FPA § 206(b) properly set October 2, which was "60 days after the filing of such complaint," as the refund effective date.[7]

B. The Circumstances Did Not Justify Refunds Prior To October 2

The Cal Parties (Cal.Br. 53-69), CAISO (CAISO Br. 14-36), and San Diego (SD Br. 23-49) all devote large portions of their briefs to a point not in dispute: namely, that FERC has authority under the FPA to order remedies retroactively where a seller has violated its tariff. *See, e.g.*, July 25 Order, 96 FERC at 61,507-08, JER 174-75 ("We agree that the Commission may take retroactive action to address circumstances where a seller did not charge the filed rate or violated statutory or regulatory requirements or rules in applicable rate tariffs.")(footnote omitted). At that time, it was not lack of legal authority, as Petitioners claim, *e.g.*, CAISO Br. 9-10 (claiming that FERC found "it has no authority to order refunds"), but the

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[7] CSG's argument that sellers were not on notice of the possibility of refunds by the complaint or that the refunds would be due as of October 2 (CSG Br. 42-43) is not well taken. The complaint questioned the reasonableness of sellers' rates; and CSG and other sellers knew, or should have known, those allegations, if proven, could justify refunds under FPA § 206. Further, while the refund effective date was initially set as October 29, that order was subject to rehearing, and thus "any reliance by sellers on the October 29 refund effective date prior to issuance of final order was at their own risk." JER 221.

absence of the factual predicate (*i.e.*, tariff violations had occurred) that kept the Commission from considering remedies in the Refund Proceeding for the pre-October 2 period. Subsequently, when tariff violations were uncovered, FERC instituted a number of proceedings to seek relief related to those violations without affecting the Refund Proceeding. *E.g.*, *Enron Power Mrktg.*, *et al.*, 103 FERC ¶ 61,343, JER 466, and *Investigation of Anomalous Bidding Behavior and Practices in the Western Markets*, 103 FERC ¶ 61,347, JER 482.

Petitioners do not agree that those matters can be addressed separately, but assert that all pre-October 2 matters must be resolved in the same manner as refunds are being addressed in the Refund Proceeding. *See, e.g.*, Cal. Br. 69 ("The CalParties submit that the *only* answer consistent with the FPA is for FERC to institute the same market-wide relief for the Pre-October Period as it is already implementing for sales after October 1, 2000")(emphasis added). The FPA does not mandate specific procedures or remedies to resolve unlawful rates, but leaves those questions to FERC's discretion. *E.g.*, FPA § 206(b), 16 U.S.C. § 824e(b) ("the Commission may order the public utility to make refunds"). Petitioners have presented nothing to show that FERC abused its delegated discretion.

San Diego agrees that FERC has discretion as to whether to order refunds (SD Br. 42), but asserts that the Commission "refused to take a hard look at the consequences" of the July 25 Order's factual finding that "it has not been demonstrated that any conditions or limitations of sellers' market-based rate tariffs have been violated." SD Br. 47, quoting July 25 Order, JER 175. The July 25 finding must be placed in context: at that time, parties were arguing that "if a seller were found, after-the-fact, to have exercised market power, this would be deemed a violation of the seller's market rate tariffs and subject the seller to retroactive refund liability." JER 174.[8] At the time of the July 25 Order, no evidence had demonstrated individual sellers had exercised market power. Rather, prior findings showed "changed circumstances in California created the opportunity for unjust and unreasonable rates," which FERC had sought to remedy by structural changes to the markets. *Id*. Contrary to San Diego (Br. 47), the Commission took a "hard look" and moved quickly to remedy the problems that it found at that time. When the later evidence showed individual sellers might have exercised market power, FERC moved quickly to investigate those allegations.

The Cal Parties purport to find error in FERC's decision to address the 100-

[8] Other parties argued that FERC committed legal error by declining to grant the price cap requested by SDG&E's in its complaint, and thus could order pre-October refunds to correct that alleged error. JER 222 n. 154 and accompanying text. As noted above, the Commission undertook structural reforms to correct market problems that created a potential for abuse, and found no reason to add the price cap. *Id*.

day evidence in "one or more additional enforcement actions against entities found to have committed market manipulation in violation of the CAISO and PX tariffs." Cal. Br. 55, quoting JER 464. The Cal Parties contend "three critical flaws," *id.*, with that approach. First, they claim FERC never refuted their "central legal point: FERC has the authority and legal duty under the FPA to remedy pervasive tariff violations in a way that places consumers in the position they would have been absent such violations." *Id*.

There was no reason for FERC to refute that point. Even if Petitioners were correct that placing consumers in the same position was the only consideration in setting a remedy, the Commission left that open as a possible resolution of the separate proceedings. "Any such company-specific disgorgement or other appropriate remedies (including requiring the market participants(s) to make the market whole) would be in addition to the refunds" associated with the Refund Proceeding. JER 464. Making the market whole in an enforcement proceeding effectively would put customers in the same position they would have been absent violations. Indeed, the Commission contemplated a wide range of possibilities, including disgorgement, restitution, and refunds, as potential remedies depending on what the evidence showed. Thus, and contrary to Cal Parties' assertion (Br. 56), establishing multiple proceedings to examine and to resolve the pre- and post-

October problems and violations did not limit the range of remedies.

Next, the Cal Parties charge that FERC violated this Court's August 21 Order allowing additional evidence to be adduced. Cal. Br. 56-60. The August 21 Order did not, as Cal Parties claim (Br. 57), require the Commission to address the 100-day evidence in the Refund Proceeding. Indeed, as Cal Parties point out (Br. 55), the Commission had received the 100-day evidence "just six days" prior to its statements that it would review that evidence in separate proceedings. Not surprisingly, at that time, FERC's "review of these additional allegations [wa]s currently ongoing," JER 464, and thus rightly considered in separate dockets.

As the Commission later explained in rejecting Cal Parties' motion to consolidate those other cases with the Refund Proceeding, sound reasons justified different tracks:

> There remain distinct factual and legal issues in each proceeding that are in different stages of development. Consolidation would only act to delay more advanced proceedings and the resolution of discrete issues, while other proceedings are given the opportunity to catch-up. Furthermore, we find that a massive single proceeding on the scale that the California Parties propose would create more problems than it would solve and would create unnecessary administrative problems for Commission staff and resources. Finally, we find that consolidation would be highly inefficient and costly for small entities, such as various California municipalities, that would be forced to participate in a wide-ranging proceeding on issues in which they have little interest.

JER 488. Those reasons, which are not discussed by Petitioners, fully support the decision not to consolidate, and fully answer Cal Parties' charge before this Court that all possible violations must be addressed in the Refund Proceeding.

In addition, FERC has wide latitude in how to structure investigations. FPA § 307(a), 16 U.S.C. § 825f(a), and FPA § 309, 16 U.S.C. § 825h, both delegate to FERC broad investigative authority as to how to enforce the statute. Courts have recognized this wide latitude: "an agency need not solve every problem before it in the same proceeding. This applies even where the initial solution to one problem has adverse consequences for another area that the agency was addressing," particularly where the agency has given a rational reason for separate treatment. *Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos.*, 498 U.S. 211, 231 (1991). Exercise of that discretion can be upset only in the most extreme cases: "Absent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543-44 (1978)(citations and internal quotation marks omitted). Petitioners failed to present such compelling circumstances here.

Cal Parties charge that "[l]imiting the potential remedy to company-specific profit disgorgement would require consumers to pay unjust profits that exceed the filed rate to every seller whose profits were not found to cause the unlawful price in that hour." Cal Br. 60-61. While decrying the company-specific approach, the Cal Parties offer the following list of "[r]emediable abuses[:] violations of express tariff terms, violations of FERC's rules and regulations, and acts of deception, bad faith, and dishonesty." *Id*. at 61-62; *see also id*. at 64 (same). To prove those alleged abuses would require fact-specific inquiries as to the conduct of individual sellers, which was the approach taken by FERC to investigate the additional evidence of abuse.

Cal Parties' charge also ignores the full scope of potential remedies. The Commission did not limit potential liability to disgorgement of company-specific profits, but left open the possibility of "other appropriate remedies (including requiring the market participant(s) to make the market whole)," all of which are "in addition to the refunds" developed in the Refund Proceeding. JER at 464. That panoply of remedial options was designed to assure that no seller profits from "charging rates that are inflated by tariff violations," Cal. Br. 61, which Petitioners admit is all that is required.

Petitioners contend that FERC could fulfill its statutory duty to set just and reasonable rates only by "resetting the market-clearing prices for the Pre-October Period (through the use of the same MMCP methodology being used by FERC for post-October 1, 2000 sales)." Cal Br. 65; *see* CAISO Br. 19-20 (same).[9] But the FPA gives FERC broad discretion to decide the remedy, if any, that is appropriate. In *Towns of Concord, et al. v. FERC*, 955 F.2d 67, 73 (D.C. Cir. 1992), much as done here (Cal. Br. 69), petitioners claimed to

> have a right to be charged no more than that permitted by the filed rate, therefore, they are entitled to a remedy for [the seller's] violation. This argument assumes that the 'right' ceases to exist unless it is backed up by a remedy, that the Commission's denying refunds equals the Commission authorizing the utility to violate the filed rate doctrine . . . . This is good advocacy but the case cannot be decided by any such theory.

Because the filed rate doctrine "does not have a life of its own," *id*., the statutory language must be examined to determine whether it requires that remedy. The D.C. Circuit's "examination of the Federal Power Act reveals no statutory command mandating refunds when the rate charged exceeds that filed." *Id*. at 72.

Assessment of FERC's decision not to order a specific remedy must be based

[9] San Diego's claim that FERC said "it could do nothing about the unjust and unreasonable rate charged in the ISO and PX markets before October 2, 2000" (SD Br. 44) overstates that situation. While the Commission properly read the refund effective date in FPA § 206(b) as restricting its ability to order refunds, *e.g.*, JER 222, FERC also recognized the statutory limitation "can be expanded in limited circumstances (*e.g.* where sellers have charged a rate other than the filed rate. . .)." JER 171. Thus, FERC found it could do something about pre-October unjust and unreasonable rates *in particular situations*, but found, at the time of the July 25 Order, that "none of those circumstances is present here." *Id*. When it later became apparent that sellers had charged a rate other than the filed rate, FERC instituted investigations to remedy those situations.

"upon a considered analysis of the facts of this case and the precise purposes of the filed rate doctrine and rule against retroactive ratemaking." *Id*. at 75. FERC undertook such an assessment here. JER 171-78. The facts of the case as known at that time did not reveal a basis for ordering a remedy. *Id* at 171 ("in the specific situation presented, we cannot order refunds of unjust and unreasonable rates charged prior to October 2, 2000"). When more facts became know, FERC began enforcement proceedings "against entities found to have committed market manipulation in violation of the CAISO and PX tariffs." JER 464.

That action was fully consistent with the purpose behind allowing refunds, which are "a form of equitable relief, akin to restitution, and the general rule is that agencies should order restitution only when 'money was obtained in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it,'" *Towns of Concord*, 955 F.2d at 75 (citation omitted). As it became apparent that some sellers manipulated the California markets to their advantage and customers' detriment, FERC targeted those sellers for further investigation and possible refunds (which "will be in addition to refunds directed" in the Refund Proceeding, JER 534) to promote the goals of the FPA and the filed rate doctrine against unjust and unreasonable rates.

Cal Parties contend that FERC "has engaged in a procedural 'shell game'" between the Refund Proceeding and the numerous enforcement proceedings that does not provide realistic relief for the pre-October alleged violations. Cal. Br. 59. That contention apparently rests on the view that many of the pre-October investigations are non-public, *id.*, and as to 39 sellers, "FERC has terminated its investigation." *Id.* 58 & n. 177.[10] But FERC has absolute discretion as to whether to enforce in particular circumstances and how to structure its investigations, and thus such determinations are not subject to judicial review. *E.g., Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *Friends of the Cowlitz v. FERC*, 253 F.3d 1161, 1170-71 (9th Cir. 2001); *Baltimore Gas & Electric Co. v. FERC*, 252 F.3d 456, 459 (D.C. Cir. 2001).

Notwithstanding that FERC's absolute discretion in these matters derives from the congressional intent expressed in the FPA not to "establish[] priorities or meaningful guidelines" to be followed in enforcement matters, *Cowlitz*, 253 F.3d at 1171, and expressed in the APA, 5 U.S.C. § 701(a)(2), to leave them free from judicial review, *Chaney*, 470 U.S. at 832, Cal Parties contend that FERC's reliance on its non-reviewable discretion in such matters "is directly contrary to" to what Cal Parties view as this Court's August 21 Order's directive on how to proceed. Cal

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[10] To a large extent, these contentions appear to duplicate charges made by the same petitioners in *Pacific Gas & Elec. Co., et al. v. FERC,* Nos. 03-72874 *et al*. (9th Cir., oral argument held on December 8, 2004). *See* Cal. Br. 59 n. 179.

Br. 60. But, even assuming that the August 21 Order could override congressional intent and judicial precedent, the Order did not "limit the Commission's discretion to consider the 100-days evidence in other proceedings." JER 634 & n. 130 (quoting the Order's deferral "to the discretion of FERC to determine how this new evidence should be adduced").

III. FERC PROPERLY AFFIRMED THE ALJ DECISION THAT SALES BY CDWR/SWP AND MID DID NOT QUALIFY AS DOE SALES

Under FPA § 202(c), 16 U.S.C. § 824a(c), the Secretary of Energy can declare an emergency and require "by order such temporary connections of facilities and such generation, delivery, interchange, or transmission of electric energy as in [the Secretary's] judgment will best meet the emergency and serve the public interest." *Id*. During the period December 2000-February 2001, the Secretary issued several orders declaring an emergency in California requiring certain listed entities during specified time periods "to generate, deliver, interchange, and transmit electric energy when, as, and in such amounts as may be requested by" the CAISO, but only in such amounts as are "available in excess of electricity needed by each entity to render service to its firm customers." SSER 465; *see generally id*. 459-99 ("DOE Sales Stipulation"). Below, those transactions were called "DOE Sales."

FPA § 202(c) provides that if the parties to such sales "fail to agree upon the terms of the arrangement between them," the matter will be sent to FERC, which after hearing, may set the just and reasonable terms for the arrangement. 16 U.S.C. § 824a(c). No such referrals were made for the DOE Sales. JER 183 ("The Secretary has not referred any sales to this Commission for a rate determination"). As a result, the Commission found that the rates for the DOE Sales were "outside the scope of" the Refund Proceeding, which was concerned with refunds of rates set under FPA § 205. *Id*. "Consistent with this direction, the presiding judge held a hearing to determine whether and to what extent the participants made transactions under [FPA] Section 202(c) during the Refund Period and, thus, were not subject to the Commission's mitigated pricing methodology." JER 453.

As FERC's directive required a seller-by-seller analysis, considerable time and effort were put into the DOE Sales issue at the hearing. *See* ALJ Decision, 101 FERC ¶ 63,026 at 65,170, JER 357 (noting that the "Section 202(c) hearing record includes more than 300 pre-filed exhibits, 24 cross-examination exhibits, [and] several uncontested trial stipulations"). The ALJ's 20-page discussion, JER 356-76, thoroughly analyzed the evidence and arguments, first addressing generally applicable matters, *id*. 356-67, before turning to each entity's claim that its sales to CAISO during the relevant period should be exempt from refunds as DOE Sales. *See id.* at 371 *and* 375 (discussing claims of Petitioners Modesto Irrigation District

("MID") and CDWR/State Water Project ("CDWR/SWP")).

The Commission summarily adopted the ALJ's proposed findings on this issue. March 26 Order, JER 444 P 5.L and JER 453 P 64 and P 66. On rehearing, the Commission indicated that it had "relied on the extensive hearing testimony and written submission in the record" in summarily adopting the ALJ findings on this issue. October 16 Order, JER 514 P 61. On rehearing "concerning the eligibility of specific transactions to be exempt under Section 202(c)," FERC found that "the presiding judge's consideration of all of the evidence concerning specific transactions was thorough and correct," and, accordingly, denied requests, such as those by Petitioners, "on whether specific transactions were made pursuant to Section 202(c)." *Id.*

A. The Eligibility Criteria Adopted Were Reasonable

Petitioners charge that the Commission failed to give reasoned consideration to their concerns that the eligibility criteria adopted "would expose bona fide DOE sales to refund exposure." IPE Br. 27. Regarding the criterion that a sale be designated by CAISO as a DOE Sale, Petitioners claim that such designations were not routinely done because no procedures were in place. *Id.* Petitioners claim the criterion requiring "definitive evidence" that a sale was made pursuant to the DOE Orders would "work a hardship" because of the lack of procedures and the circumstances at the time. *Id.* Despite Petitioners' claims to the contrary, the Commission and the ALJ addressed both points and found them lacking.

On the claim that requiring a CAISO designation "creates an unfair penalty because suppliers had no reason to believe that documentation of each transaction would be necessary," JER 514 P 62, FERC disagreed on the grounds given by the ALJ that such "requirements were 'central' to each DOE Order." *Id.* The ALJ quoted from the DOE Orders, JER 358-59, and found that central to those Orders was, among other things, a requirement that CAISO inform each participant from whom it was seeking a DOE Sale "the amount and type of energy or services required by a specified time of the day ahead of the requested service." JER 359 P 279; *see* JER 361 P 291 (accepting CAISO testimony that "DOE wanted documentation of the specific transactions being provided under the DOE order"); *see also* JER 363 P 304 (same). Thus, the Commission and the ALJ properly found that the DOE Orders made documentation of each transaction a necessary part of a DOE Sale. As those Orders were available prior to DOE Sales being made, suppliers knew or should have known the importance of documentation, and thus it worked no unfairness for such documentation to be used as proof of a DOE Sale.

As to the charge that "chaotic circumstances" would "work a hardship" on Petitioner's ability to document their DOE Sales by alternative evidence, IPE Br.

27, the Commission and ALJ, albeit as related to another seller, did not find such claims convincing. *See* JER 453 P 70 (seller argues for exemption on basis that "sales were made in an environment of exigency and confusion, in good faith . . . before the detailed language of the [DOE Order] was available"). FERC indicated it was "sensitive to [those] arguments," but that the intent of the DOE Orders must control. JER 454 P 73.

Similarly, here, the DOE Orders specify that suppliers are "only required to sell electricity to the [CAISO] that is available in excess of electricity needed by each entity to render service to its firm customers." December 14 DOE Order, SSER 465. The ALJ found that process was "fairly characterized" as requiring suppliers to "inform the ISO of their anticipated excess energy for a trade date, [after which] the ISO would request energy from suppliers, and suppliers were then required to provide that energy, if in fact it was excess." JER 363 P 304; *see also* JER 361 P 291 (testimony that "DOE wanted documentation of the specific transactions being provided under the DOE order"). Thus, despite alleged chaotic conditions, some documentation was required to effectuate DOE Sales, and adopting identification criteria, *see* JER 364 P 308, to specify such documentation at hearing was reasonable.

CDWR/SWC claims that the exclusion of certain evidence that they sought to introduce on cross-examination of a CAISO rebuttal witness "constituted an unreasonable treatment of relevant evidence." IPE Br. 29. Although CDWR/SWC later claimed that the delay in introducing that evidence was unavoidable, *id*. and *see* SSER 374, they did not argue that point to the ALJ during the motion to strike the evidence. *See* SSER 799 (counsel relies on three reasons – proper cross, no surprise, and consistency with other testimony – as grounds for inclusion of evidence); *see also* SSER 800-05 (expanding points).

CDWR/SWC's failure to raise unavoidable delay is telling because the motion to strike was granted to avoid the prejudice to other parties caused by the failure to introduce the evidence until after written rebuttal testimony had been filed. *See* SSER 811-12 (ALJ indicates introducing testimony on cross "is a classic example of trying to sandbag parties and tilt the level playing field" and that its introduction "weeks after the date for rebuttal, [] thereby deprive[s] other participants of the opportunity to provide timely testimony"). Those circumstances fully justified preclusion of the evidence, particularly given that CDWR/SWP had not "properly responded on discovery to this," *id.; see* SSER 805-06 (FERC staff counsel explaining inadequacy of discovery response).

B. Only Transactions Outside ISO Markets Qualified As DOE Sales

Petitioners assert it was unreasonable that only transactions outside of the ISO's organized markets qualified as DOE Sales. IPE Br. 31. Petitioners did not raise this objection on rehearing to FERC, *see* SER 307-08 (MID specification of errors raised on rehearing) *and* SER 361-63 (CDWR/SWC specification of errors); *see also* IPE Br. 31 n. 72 (no reference to rehearing requests), and thus cannot now raise it on appeal. FPA § 313(b), 16 U.S.C. § 825*l*(b). In any event, the assertion lacks merit because, as both FERC and the ALJ found, under the terms of the DOE Orders, only transactions outside the ISO markets could qualify as DOE Sales.

As the ALJ found, the DOE Orders were "a mechanism of last resort for the ISO. It was 'to be used only after market opportunities proved deficient.'" JER 361 P 289 (citation omitted). As part of its certification to DOE to obtain FPA § 202(c) relief, CAISO stated that it "ha[d] endeavored to obtain needed supplies, to the maximum extent possible, through existing market mechanisms." *Id.*; citation omitted; *see id*. P 287 (same). The DOE Orders further required CAISO "to inform each Attachment A entity of the amount and type of energy or services requested by a specific time on the day ahead of the requested service," JER 359 P 279, which would necessarily require that CAISO had exhausted sources from its organized markets to satisfy forecasted load. Those factors, characterized by FERC as “central” to the DOE Orders, JER 514 P 62, reasonably support the view that only transactions outside CAISO’s organized markets could be DOE Sales.

CDWR/SWP contends FERC ignored evidence that CDWR/SWC’s sales during the period in which the DOE Orders were in effect all DOE Sales. IPE Br. 33-34. As purported support for that contention, CDWR/SWP states the ALJ ruled that since it “has signed a PGA, CDWR/SWP could not have made DOE sales.” *Id*. 33. That improperly reverses the ALJ’s finding: the ALJ found that most of the entities, including CDWR/SWP, listed in Attachment A to the DOE Orders also “had PGA agreements with the ISO.” JER 364 P 312. As the PGA agreements “obligated those suppliers to provide energy or service in a system emergency,” *id*., the question arose whether listing on Attachment A automatically made all sales by that entity DOE Sales despite the suppliers’ PGA obligation.

Based on those facts, and contrary to Petitioner’s claim, the ALJ did not find a PGA precluded a DOE Sale, but, rather, that inclusion on Attachment A did not automatically make all sales DOE sales. “‘Inclusion on Attachment A merely subjected an entity to the *possibility* that the ISO might request excess energy from it pursuant to the DOE Orders. If an entity voluntarily chose to provide energy to the ISO without the necessity of an actual request,’” then such energy was not a DOE Sale. JER 364 P 313 (emphasis in original; citation omitted).

The ALJ examined the specific facts related to CDWR/SWP, and found three factors demonstrated its sales during the period were not DOE Sales. First, CDWR's (CERS) witness testified that the DOE Orders had almost no effect because CERS "'was doing everything it could to assist the state in the energy crisis'" both before and after the Orders issued. JER 375 P 413. Next, the ALJ agreed that because CDWR/SWP had a PGA, the CAISO "'would not have called on this generation under the DOE Orders when it already had the ability to call on the generation under the PGA.'" *Id*. p 414. Finally, the pricing of the relevant sales were made under "'the pricing options contained in the PGA.'" *Id*. Those findings fully support the conclusion that none of the transactions claimed as DOE Sales were made "in response to a request of the ISO under the DOE Orders." *Id*. P 415.

C. Who Held The Burden Of Proof Is Immaterial

MID asserts that the burden of proof was improperly imposed on it and others who sought to have their sales qualified as DOE Sales, as a means of exempting those sales from refund liability. IPE Br. 34-35. But MID's assertion ignores the fact that MID was seeking an exemption from the refund liability that had already been imposed, and thus it had to justify the exemption.

> [T]he sellers who claim that their transactions were made under the DOE Orders and Section 202(c) are seeking an exemption from the mitigated market pricing and refund liability required by the Commission's July 25 and December 19 Orders to transactions subject

> to Section 205 of the Federal Power Act. As such, each seller is the proponent of a claim and, under the Administrative Procedure Act of 1946, 5 U.S.C. §§ 552 *et seq.*, as well as the [FPA], has the burden of establishing a *prima facie* case in support of its claim, and the ultimate burden of persuasion.

JER 358 P 273.

That analysis recognizes the force of the earlier orders establishing the need for refunds. Even though MID is a "named Respondent" in that proceeding (IPE Br. 35), once the complainants met the burden for showing refunds were due, as they did, the burden shifted to Respondents if they wanted to show they should be exempt from that ruling. *See* JER 514 P 63 ("If a seller argues that it is not a respondent in this proceeding, the burden of proof falls on that seller to show that it is outside the scope of the proceeding."). Even if the burden were on the complainants to show that sellers had not made DOE Sales, and thus were liable for refunds, complainants met that burden "for all transactions that do not fit" the DOE Sale qualification criteria. JER 453 P 69. Thus, the question of who has the burden is immaterial because whoever had it, the required showing was made.

IV. SLEEVE TRANSACTIONS WERE PROPERLY MITIGATED

Petitioners LADWP and SMUD assert that the sleeve transactions in which they participated "were not spot market transactions in which the sleeving party acted as a seller of energy." IPE Br. 36. Although they have several variations, Petitioners contend generally that FERC erred by rejecting their arguments that they, as the sleeving party, should not be liable for refunds related to those transactions. *Id*. at 37-51. Petitioners' contentions are wrong.

Sleeve transactions arose here because, due to creditworthiness questions, CAISO had difficulties with some sellers in buying energy. "As a way to address this problem, certain creditworthy entities purchased from sellers who would not sell directly in the CAISO market, and resold to the CAISO market despite the lack of a creditworthy counter party. Generally, these parties charged the CAISO their cost plus some premium to reflect the credit risk." JER 521 P 114. This statement is consistent with CAISO's reporting of such transactions in which the sleeving party was listed as the seller. *E.g.*, CP ER, Vol. XIII, 3185. Because of what it considered the equities of the situation, CAISO, though it "cannot point to any exemption in the Commission orders," decided that certain sleeving transactions should not be subject to mitigation. *Id*. 3184. Thus, the testimony on this issue was, in effect, seeking reconsideration of FERC's orders, based on equitable grounds.

Petitioners mischaracterize the ALJ's ruling on motions to strike by suggesting that the ruling "excluded" such testimony. IPE Br. 37, citing JER 321-22. As that passage of the ALJ's decision indicates, the testimony was not excluded; rather, the "trial participants entered into trial stipulations, which [the

ALJ] adopted, that stipulated to the withdrawal of testimony pertaining to these [sleeve and other] transactions and resulted in offers of proof." JER 322 P 19. The offers of proof provided evidentiary support for the parties' claims as to why FERC should reverse its earlier ruling.

Although Petitioners charge that FERC did not address their offers of proof or findings, IPE Br. 37 and *see id*. 48, FERC referred expressly to SMUD's comments as contending that it "should not be held liable for refunds related to sleeve transactions," summarized comments pointing to two ALJ decisions concluding that "sleeve transactions should not be subject to refund," (*see* IPE Br. 50, referring to same two ALJ decisions), and noted equitable arguments that "since the sleeve transactions were done at the behest of the CAISO, for the express benefit of California, and provide little financial reward to the sleeving party, they should not be subject to refund and mitigation,"[11] or, alternatively, mitigation and refunds should be paid by a party other than the sleeving party. JER 521, P 115. Thus, FERC considered the points raised by Petitioners and others as purported support for a change in the earlier ruling.

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11 The claim of "little financial reward" is belied by the testimony presented at IPE Br. 39 in which Sacramento Municipal Utility District ("SMUD") accepts $50 per MW (SMUD buys for 450 and sells to CAISO at 500) "reward" for one sleeving transaction.

After considering the testimony and comments, FERC did not agree the equities favored granting an exemption for sleeving transactions from refund and mitigation. As FERC saw it, sleeve transactions were similar to other sales by power marketers: "We find that these parties assumed the risks associated with making these spot energy sales to the CAISO, including the risk of refund liability, just like any power marketer," *id*. P 117. Petitioners claim that it "defies logic" to think they, as sleeving parties, "knowingly would also submit to the risk of owing refunds" having already accepted the risk that they would not be paid by CAISO. IPE Br. 45. Yet, any power marketer would face both risks in any situation where the marketer's sale price is unjust and unreasonable and the buyer might prove to be uncreditworthy. It does not defy logic that Petitioners, or other power marketers, would have to accept both risks because refunds are designed to protect customers from having to pay excessive rates, as distinct from the risk that the buyer is uncreditworthy.

Petitioners assert that the evidence concerning their sleeving transactions "flatly contradicts FERC's finding that 'the CAISO acted only as *a facilitator to the parties involved in those transactions.*'" IPE Br. 44, citing JER 521 P 117 (emphasis added by Petitioners). Yet, the testimony they cite, and, more important, what they omitted (IPE Br. 39-43), supports FERC's view. For example, for their claim that CAISO "not LADWP – then set up a three-way call between the ISO, Powerex and LADWP," Petitioners proffer an edited version of a transcript between CAISO and LADWP. IPE 41, citing SSER 948-49. Yet, when the entire portion of that transcript is reviewed, it appears more like an Alphonse and Gaston routine than support for Petitioners' view of CAISO taking the lead.

> Mr. Solis (LADWP): Yeah, you disconnected me, Bob. Are you there?
> Bob (CAISO): Yeah, I'm here.
> Mr. Solis: What's going on?
> Bob: I thought we were going to talk to – I thought you were going to conference BC Hydro or you want me to conference?
> Mr. Solis: You were going to conference them.
> Bob: Well, that's not what you said. Okay, hang on a second. Hang on.
> Mr. Solis: Oh, no, no. Yeah, I said are you going to conference us. No wonder. I'm waiting, and you're waiting. We're both sitting here like two Do-Do birds.
> Bob: Yeah, okay. Let me get them.

SSER 948.

Likewise, Petitioners rely on only part of the next segment of that same call as support for the proposition that the transaction involved a sale "of energy by Powerex directly to the ISO." Br. 43, citing SSER 949-50. Yet, the end of that entire conversation shows the parties viewed that as a sale by Powerex directly to LADWP:

> Jeff (Powerex): Yeah. And the second thing is we are seeing this as just a sale to L.A. as per a WSPP.
> Bob (CAISO): Right. Right.
> Jeff: Okay. That's clear with you Solis?

> Bob: We're in, and we're paying back L.A. That's all – That's between us.
> Mr. Solis (LADWP): That's correct. That's correct, Jeff.

SSER 951. Contrary to Petitioners, the parties saw the transaction, as did FERC, as involving two sales—one from Powerex to LADWP and one from LADWP to CAISO.

That view was confirmed in another sale between LADWP and Powerex during calls in which CAISO was not a participant. SSER 952-54. Powerex indicated it would "definitely set aside 250 megawatts that *I will sell to L.A. directly then*." SSER 954 (emphasis added); *see also* SSER 961:

> Ralph (Powerex): . . . I was selling [power] to Dale [Champion of LADWP], and I believe he sold *some* of that just straight to the ISO. So what we were doing is we were selling it at quite a high price to him, and he was probably taking a little extra money and-
> Mr. Rivera (LADWP): Yeah.
> Ralph: - selling it down to the ISO.

Later, Mr. Rivera calls CAISO and tells them that he "talked to the Powerex people. 200 megawatts, they're going to sell it to me for 900 mils. I'm going to sell it to you for 915." SSER 962; *see* SSER 964 (LADWP and Powerex change the deal and LADWP tells CAISO that Powerex is "willing to sell 200 megawatts to L.A. at 925, 925 mils, and I'll sell it to you at 940 mils"); *see also* 968 (on another deal, Mr.

Rivera told CAISO "They sold me 200 at 975. I can sell it to you for 990.").[12]

Although Petitioners assert that the controlling issue should be whether CAISO requested the power, *see* IPE Br. 43-44 (indicating that deals were done at CAISO's request), they do not explain how that differs from situations where a marketer responds to a buyer's request to procure power. Rather than look to who started the process (*i.e.*, acted as a facilitator), FERC looked to who finished the process as controlling. "While the CAISO acted as a facilitator to these transactions, it was the responsibility of these parties that sold power to the CAISO to negotiate, agree to conditions and terms, and close the final terms of these purchases and sales." JER 521 n. 59. As the above-noted transcripts show, LADWP and Powerex set the amount and price for the sale between them, and then LADWP told CAISO the amount and price of power that it would sell to CAISO. Further, the parties themselves considered the transactions to involve two separate sales.[13] Thus, the evidence supported FERC's view that CAISO facilitated the transactions that were finalized by, here, LADWP and SMUD.

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[12] These statements also refute the claim that "the ISO and the sellers negotiated" the prices. IPE Br. 47.

[13] The parties to the SMUD/Washington Water Power transaction, relied upon IPE Br. 39-40, also considered it to involve two sales. *See* SSER 1163 (Washington Water talking to SMUD states "I'll sell [the power] to you at 450 if you want to make 50 bucks" for reselling it to CAISO at 500, to which SMUD replied, "I'm up for that.").

Petitioners assert that FERC erred by not considering their offers of proof showing that their sleeve transactions "were individually negotiated transactions that did *not* take place in the single-price auction market," and thus were not subject to refund. IPE Br. 48 (emphasis in brief). There was no reason for FERC to consider Petitioners' offers of proof on this point because, as the ALJ ruled, earlier orders had already specified that bilateral spot sales of the type involved in the sleeve transactions were subject to refund. "And the Commission has been quite specific in its orders with regard to bilateral transactions, and it exempted one category of bilateral transactions, those involving DWR and [CERS], and made it abundantly clear that all other bilateral transactions are subject to price mitigation. And then it made a further specific reference in its December 19th order, in a footnote, that certain bilateral transactions between governmental entities other than DWR and [RUS] finance cooperatives are subject to mitigation, to the extent they're involved in the ISO spot market." CP ER 3249, citing 96 FERC ¶ 61,120 at 61,515-16, JER 182-83 and 97 FERC ¶ 61,275 at 62,195, JER 218, and at 62,252 n. 440, JER 275. Thus, Petitioners' claim that the bilateral spot nature of their sleeve transactions relieved them of refund liability (IPE Br. 48) had already been considered and decided in earlier FERC orders that made bilateral spot sales subject to refund liability, as the ALJ's ruling recognized.[14]

V. FERC PROPERLY FOUND CERTAIN LADWP AND REDDING TRANSACTIONS WERE SPOT, NOT MULTI-DAY, SALES

A. LADWP

LADWP alleges that the uncontroverted evidence showed the parties' intent to be that Transactions E, F, H, I, and K between it and CAISO were "multi-day, non-spot transaction[s] that should not be subject to price mitigation under FERC orders." IPE Br. 53 (footnote omitted). According to LADWP, "[t]he ALJ recounted, but completely failed to consider this uncontroverted evidence," *id*. at 55, and FERC compounded the ALJ's ruling by summarily affirming the ALJ's decision, which, LADWP contends, "ignored the record evidence [and] merely asserted the ALJ's own conclusions regarding the parties' intent," *id*. at 56-58. The ALJ's finding on this point was not so constricted, but, rather, considered all the evidence, and thus was properly affirmed by FERC.

While some evidence did state the Transactions were multi-day, other evidence demonstrated that they were spot sales. *See* ALJ Decision, JER 387 P 497 (noting Dr. Berry's testimony that the Transactions are "spot transactions because

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[14] The sleeve transactions at issue were all spot sales. *See, e.g.,* SSER 953 (reference to "Let's do hour-by-hour."); 954 ("I'll put it in just that way for Hour ending 21."); 957 ("I'll put that 300 in at 915 for Hour ending 22"); 959 ("So one more hour").

the price and quantity were not locked-in in advance of the transmission."). The testimony supporting that view is found in Exh. DWP 23, SSER 660-83; in particular, in response to a query by the ISO employee: "can I buy this 200 on a forward basis using the spot daily gas prices and then if for some reason, it skyrockets, get off it," JER 387 P 499, quoting SSER 867, the LADWP employee responded: "we can adjust it daily, meaning whatever the spot gas [price] is. We plug that into our calculator, and will spit out a price." *Id*. The LADWP employee then confirmed that a daily pricing of the gas quantity was agreeable so long as CAISO "let us know like Monday through Friday in the morning." *Id*. at 868; *see* JER 387 P 499 (Dr. Berry states "there was a need for the two parties to communicate every morning to reconfirm whether are not they were going forward")(citation omitted).

The same exhibit also showed that LADWP would shut down the generating unit used to serve CAISO's request on a day that CAISO declined to take power:

> Mr. Codero (LADWP): . . . . Yeah, we can just price them like that every day, depending on what unit made it that day.
> Mr. Garris (CAISO): That sounds great.
> Mr. Codero; (inaudible)
> Mr. Garris: . . . once prices stabilize – and the only thing I'm counting on is that, if prices look like they are going to spike up or something, you guys give us a call, so we can lock in.
> Mr. Codero: Right, Exactly, Right.
> * * *
> Mr. Codero: . . . You know that these are on a day by day basis. Right?

> Mr. Garris: Right.
> Mr. Codero: Okay. And that any day that you decide not to take it, we'll probably bring the [generating] unit down.
> Mr. Garris: Yeah.

SSER 871; *see also* SSER 881-82 (CAISO and LADWP employees reiterate that amount and price is contingent on daily gas price "which is what we have been doing. Seems to have been working okay so far.").

LADWP did not refute that evidence (which, of course, it had proffered), but, instead, argued it should be overlooked and the ALJ should have accepted its testimony concerning the intent of the parties. IPE Br. 55-56. The ALJ came to a different conclusion after reviewing "the transcript of the conversations in EX. DWP-23E between ISO and LADWP operating personnel," quoted in part above, and on which Dr. Berry relied. JER 388 P 501. As those conversations showed what the parties proposed to do and "have been doing"; that is, making daily decisions in the morning on whether, in CAISO's case, to buy the power that day at a price tied to the daily spot price of natural gas and, in LADWP's case, on whether to bring up the generating unit based on the ISO's decision, *e.g.*, SSER 871, the ALJ reasonably inferred the actual sales were made on a daily (spot) basis. JER 387 P 493. The reasonableness of the ruling is suggested also by the ALJ's differentiation between the Transactions and others that he considered "multi-day transactions which are not subject to mitigation." *Id.* and JER 388 P 501.

FERC could properly rely on the ALJ's analysis of all the evidence in summarily affirming the decision on this point. While LADWP claims there is no record of FERC's consideration of its evidence, the ALJ's decision fairly summarized LADWP's and other evidence supporting its view, JER 387 PP 494-96 and 500, and came to a different conclusion. FERC expressly relied on the ALJ's entire discussion in summarily affirming. JER 445 P 5.M(4). There was no need for FERC to do anything else, once it agreed with the ALJ.

B. Redding

Redding claims the ALJ and FERC erred by finding that "two of Redding's transactions were spot transactions." IPE Br. 60. Redding asserts that "FERC made no attempt to explain its ruling in light of Redding's sworn testimony, phone transcripts showing Redding and the ISO entering into the multi-day agreements, confirmation by the ISO's logs, the ISO's interpretation of those records during cross-examination testimony, and even the ISO's unequivocal agreement on brief that the transactions were multi-day." *Id* at 51. Despite such sweeping statements, even Redding's arguments on brief show the same inconsistency that led the ALJ to find those two transactions were not multi-day sales.

Redding refers to its "Reply Testimony" as showing that the transactions were bilateral and that the price was based on Redding's gas price. IPE Br. 62. The

ALJ recognized that Redding put in such testimony in its rebuttal case, JER 390 P 521, but found that inconsistent with Redding's initial testimony in which the transactions were described as being "arranged on a daily basis, [without] a single multi-day transaction in which quantity and price were arranged more than 24 hours in advance." *Id*. P 523. Redding's initial testimony also indicated that "early each day the [CAISO] would call to see what generation Redding may have available." *Id*. P 520. If Redding had generation available, it would determine if CAISO "wanted Redding to check on gas availability" to run the generation units. *Id.* Only after Redding determined what units were available for the day and the availability and price of gas to run the unit, did Redding call the ISO back at which time "both parties would agree upon the power delivery schedule and price." *Id*. Finally, upon conclusion of those arrangements, "Redding would make the natural gas purchases necessary to run the Redding generators to make the agreed-upon sales." *Id*. 519; *see* SSER 914 and 917 (testimony on same).

Redding's initial testimony described the arrangement between it and CAISO for the period December 2000 through February 2001: "The new procedures called for the [CAISO] dispatcher to call each assisting municipal utility early in the morning and ask if and/or how much generation would be available and the price for such generation. The assisting municipal utility, after obtaining natural gas data, would give the [CAISO] a quote and the [CAISO] dispatcher would either agree to purchase at the quoted price, or decline the purchase." SSER 918. Redding also had the option not to enter a transaction for a particular day, if, for example, environmental constraints precluded it from running a unit. JER 390 P 520. Indeed, it appears that on some days the ISO was calling for Redding to bring up or to bring down generation on an almost hourly basis. *See* SSER 831-32 (Redding indicates it "can't double start a unit, keep shutting them off at night, start it, shut it off in the day, then restart[] it.") and 833 ("we don't want to . . . . start at 5:00 am, shut them off at 10:00, start again at 1600").

The ALJ found that Redding had not explained the inconsistencies between its testimony and exhibits. JER 390 P 524. Turning to the December 5 sale, Redding alleges CAISO's "contemporaneous logs match the phone transcripts," IPE Br. 63. The log states that the transaction is for 28 MW over seven days from 12/05 through 12/12, SSER 837; *see* SSER 933 (referring to "28 MW strip of energy to be supplied from Redding's 28 MW gas-fired steam unit"), but the transcript shows the transaction involves 14 MW and five days. *See* SSER 829 (Redding (Paul) states "we start at 1800 tonight with that 14 MW," and later refers to Redding having "gas for *the* five days at the $31")(emphasis added).

Likewise, the ALJ found an inconsistency between Redding's testimony, SSER 933, which did not identify a limit on the hours related to a sale beginning on December 7, with the log, SRE 838, which limited the sales to “hours ending 0600 through 2200.” JER 390 P 523. Further, the transcript, SSER 836, and the log both seem to refer to several single-day sales (“24MW unit HE 6 through 22, Friday, Saturday, Sunday, Monday”) that are priced separately depending on the price of gas on each day (“cost plus basis”), rather than a single sale over multiple days with a fixed price.

The ALJ also relied on the uncertainty expressed by CAISO’s witness as to the exact nature of these transactions. JER 390 P 523. Redding contends that the uncertainty “was negated by the ISO’s subsequent representation on brief that its review confirmed that the December 5 and 7 transactions were non-spot, multi-day transactions.” IPE Br. 66. The simple answer to that contention is that a witness’ testimony cannot be rehabilitated on brief with counsel representations. Nor does the ALJ’s treatment of an allegedly similar situation require, as Redding seems to think (IPE Br. 66-67), that the instant situation receive the same treatment, because the ALJ reasonably could find the facts differed so as to require different results.

Nor is there any validity to Redding’s contention that “FERC improperly presumes that all transactions mitigated by the ISO were spot market transactions, and thereby impermissibly shifts the burden of proof to responding parties, such as

Redding and LADWP." IPE Br. 68. The statement's invalidity is demonstrated by a comparison of CAISO's treatment of certain transactions with how the ALJ treated the same transactions. JER 387-88 PP 493-501. In that situation, CAISO considered "all 13 transactions were non-spot transactions that should not have been mitigated." *Id.* P 494. Yet, the ALJ found one subset of that group to be spot transactions that should be mitigated. *Id*. P 493. Thus, neither the ALJ nor FERC accepted CAISO's treatment of transactions as necessarily controlling for purposes of whether those transactions should be mitigated, but examined the underlying circumstances of each transaction to decide whether it should be mitigated.

VI. FERC REASONABLY MADE OUT-OF-MARKET SPOT TRANSACTIONS SUBJECT TO REFUND

CAISO's out-of-market ("OOM") purchases were last-minute (*i.e.*, 24 hours or less before delivery) transactions, made when grid reliability was at risk because supply was insufficient to meet market demand. JER 7, 182, 218. Because CAISO's OOM calls were needed to backstop its spot markets, potential suppliers knew CAISO was in a must-buy situation, which offered an opportunity to take advantage of the California markets' flawed structure and rules to obtain unjust and unreasonable rates. JER 7, 182. As the Commission saw it, OOM transactions provided the best opportunity for extracting unjust and unreasonable prices and, therefore, it made them subject to potential refund. JER 182-83.

CSG argues that FERC ordered refunds for CAISO OOM transactions generally without finding they all specifically were entered into at unjust and unreasonable rates. Br. at 51. That argument is premised on the erroneous notion that FERC ordered refunds for all OOM transactions. Rather, because the conditions under which CAISO OOM spot transactions were entered into made it likely that the rates for those transactions were unjust and unreasonable, FERC required that all transactions be examined to decide which ones would be subject to potential refund. That examination means all OOM spot transactions would be reviewed under the same MMCP methodology used in the Refund Proceeding. Those OOM sales that exceeded the maximum price allowed by the mitigation methodology would be considered unlawful and subject to refund, while sales below that level would have no refund liability. JER 182-83.

Thus, like all other transactions the Commission found subject to potential refund, the Commission determined that OOM spot transactions at rates above the hourly mitigated price level were unjust and unreasonable, and the excessive amount would have to be refunded. Conversely, OOM spot transactions at rates at or below the hourly mitigated price were just and reasonable and would not require any refund. *See*, *e.g.*, JER 241 ("While our solution requires review for all hours, that does not mean that this will result in refunds for all hours.").

Next, CSG contends FERC did not adequately explain how the mitigation methodology for single-clearing price spot market transactions could be applied to bilateral CAISO OOM spot transactions. Br. at 54-55. CSG's contention turns on CSG's erroneous assumption that individual seller analysis was not required for single-clearing price spot market transactions "because 'a single market clearing price applied to any given sale' and, therefore, '[a]ll sellers received the same price.'" Br. 54 (quoting JER 241 (CSG's added emphasis omitted)). In fact, however, a market-wide mitigation methodology was needed in the CAISO and Cal PX auction markets because systemic dysfunctions caused by structural problems in those markets had the potential to cause unjust and unreasonable rates "'independent of any conclusive showing of a specific abuse of market power.'" JER 241 (citation omitted). In addition, a showing of market power abuse is not a prerequisite for finding rates are outside the zone of reasonableness, and, therefore, unjust and unreasonable. *Id.*[15]

Likewise, the Commission found CAISO's OOM purchases "were no different" from auction market purchases in that both "are made by the ISO in order

[15] To be sure, a separate justification for using the mitigation methodology was that all sellers received the same price. JER 241 ("Individual seller analysis was not required to find the rates unjust and unreasonable here, particularly as a single market clearing price applied to any given sale."). But that reason only followed after determining specific showings of market power abuse were not required.

to procure the resources necessary to reliably operate the grid." The same structural flaws adversely affecting the auction markets had the same great potential to cause CAISO OOM spot transactions to be at unjust and unreasonable rates. JER 182.[16] Accordingly, the Commission's fundamental justification applies equally to both CAISO single clearing price spot market and CAISO OOM spot transactions.

CSG also asserts that CAISO OOM spot market transactions were no different from other bilateral transactions that were ruled outside the scope of this proceeding. Br. at 55-57. CSG's assertion ignores that, unlike other bilateral transactions, OOM spot transactions were only employed when necessary to backstop the single clearing price spot markets. JER 182, 218.

> [CA]ISO OOM transactions, [unlike other bilateral transactions], are purchases for the purpose of maintaining reliability on the ISO-controlled grid and are necessarily purchases of short-term energy. They are contemplated in the ISO Tariff as a backstop to the ISO's auction markets. It is only when the ISO market produces insufficient resources that the ISO must resort to out of market purchases. It follows that if the price in these markets is subject to refund, then the price for the OOM transaction (which is a purchase of last resort in lieu of a market purchase) is subject to refund also.

JER 218.

Moreover, the Commission found the CAISO structural flaws adversely

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[16] *See Cal PX*, 245 F.3d at 1116 (recognizing "central structural flaw of California restructuring plan, according to FERC, was its over-reliance on the spot market").

affected CAISO OOM spot transactions at least as much as they did auction market transactions.

> ‘[T]he electric market structure and market rules for wholesale sales of electric energy in California are seriously flawed and these structures and rules, in conjunction with an imbalance of supply and demand in California, have caused, and continue to have the potential to cause, unjust and unreasonable rates for short-term energy . . . under certain conditions.’ [In addition] the ‘California market structure and rules provide the opportunity for sellers to exerciser market power when supply is tight and can result in unjust and unreasonable rates under the FPA.’ These statements are most true with respect to the ISO’s daily OOM purchases for obtaining the resources it needs to reliably operate the grid.

JER 182 (quoting JER 12, 13). Those considerations rendered immaterial, as they had in the auction market, the need for specific market power abuse showings as part of an unjust and unreasonable rate finding.

Nor is there merit to CSG’s claim (Br. at 57-58) that FERC erred in finding that the October 2, 2000 refund effective date applied to CAISO OOM spot transactions. FERC did not “select” October 2, 2000 as the refund effective date for these transactions, as CSG posits (Br. at 58). Rather, in response to queries whether CAISO OOM spot transactions were encompassed within the scope of the SDG&E complaint proceeding, the Commission clarified they were. JER 218 (“The July 25 Order did not expand the scope of the proceeding but merely clarified that the OOM transactions are within suppliers’ refund liability.”). Any transaction within the scope of the proceeding is subject to the refund effective date for that proceeding. JER 218 ("Thus, the appropriate refund effective date for ISO OOM transactions is October 2, 2000, the same date as for all ISO and PX spot market transactions.").

VII. FERC REASONABLY DETERMINED THAT POTENTIAL REFUNDS APPLIED TO SPOT MARKET SALES IN ALL HOURS DURING THE REFUND PERIOD

CSG contends FERC improperly ordered refunds for "non-reserve deficiency hours" or "non-emergency hours" without first finding the rates charged in those hours were unjust and unreasonable. Br. at 44-51. This argument, like CSG's above-discussed claim, is premised on the erroneous notion that FERC ordered refunds for all spot market transactions.

Rather, the Commission determined that, while spot transactions in all hours, including non-reserve deficiency hours, should be examined for *potential* refund, only those transactions with rates above the hourly mitigated market clearing price (the rate that would have occurred in a competitive market) would be unjust and unreasonable and subject to *actual* refund. JER 241 ("structural problems which existed in all hours, had the potential to cause market prices to exceed that which one would expect in a competitive market. While our solution requires review for all hours, that does not mean that this will result in refunds for all hours."); JER 269-70.

CSG also claims error based on its earlier FERC statements that prices in non-deficiency reserve hours should be competitive. Br. at 46-48. FERC explained, however, while it initially expected prices in non-reserve deficiency hours would be competitive, and, therefore, just and reasonable, that expectation proved untrue:

> At [the time of the March 9 and April 26 Orders], the Commission believed that limiting price mitigation to emergency conditions would be sufficient because (1) during non-emergency conditions, a supplier has less of an incentive to bid a high price since it cannot be sure it will be dispatched when other suppliers might offer lower bids; and (2) suppliers have less incentive to withhold capacity in other than emergency conditions, since they would risk forcing an emergency condition in which price mitigation would apply.[[17]]
>
> Despite the additional, incremental steps taken in the April 26 Order to ensure just and reasonable rates and adequate supply, the Commission became concerned that markets remained dysfunctional in all hours. For example, during March 2001, there were indications that prices in non-emergency periods did not reflect competitive markets.[[18]] As noted above, the Commission had previously believed that suppliers would have less incentive to bid high prices in non-emergency periods since they risked not being dispatched. However, during non-emergency periods where there were no excess supplies in the market and all suppliers would be dispatched, the incentive to bid high prices remained. Accordingly, in the June 19 Order, the Commission expanded the market monitoring and mitigation plan to produce spot market prices in all hours that are just and reasonable and

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[17] Citing April 26 Order at 61,361, JER 127.

[18] Citing, *e.g.*, Request for Rehearing of the Oversight Board filed May 29, 2001.

emulate those that would be produced in a competitive market.[[19]]

JER 269-70.

VIII. FERC REASONABLY DETERMINED THAT CERS'S BILATERAL TRANSACTIONS WERE NOT SUBJECT TO REFUND

SDG&E's August 2, 2000 complaint was against "Sellers of Energy and Ancillary Services *Into Markets Operated by the [CAISO] and the [Cal PX]*." CP ER at 570 (emphasis added). The complaint alleged that the "design and structure *of the markets conducted by the [CAISO] and the [Cal PX]* are fundamentally flawed and inherently incapable of producing workable competition to protect the interest of consumers." *Id.* (emphasis added). The complaint requested, therefore, that "the Commission find that rates in excess of $250.00 per MWh *for sales into the markets for energy and ancillary services operated by the [CAISO] and the [Cal PX]* are unjust and unreasonable and that it condition the authorization to make sales *into those markets* at market-based rates accordingly." *Id.* at 588 (emphases added). After reviewing the complaint and responsive comments, the Commission determined it was appropriate to investigate not only the justness and reasonableness of the "rates in the PX and ISO markets but also to investigate the tariffs and agreements of the ISO and PX to determine whether market rules or institutional factors embodied in those tariffs and agreements need to be modified."

[19] Citing June 19 Order at 62,558, JER 149.

JER 5.

The December 15 Order prospectively changed some Cal PX and CAISO market rules. JER 56. For example, the Commission established, for an interim period, a $150/MW breakpoint for sales into the centralized, single-clearing price spot markets. JER 57. Thus, the complaint, investigation, and prospective relief were limited to sales into the Cal PX and CAISO markets, and sellers were on notice that their sales into those markets were subject to refund. JER 205-06. *See* JER 218 (scope of this proceeding "limited to spot markets operated by the [CAISO] and [Cal PX]").

On March 1, 2001, the California Electricity Oversight Board ("CEOB") requested clarification "that the refund potential provisions within the December 15, 2000 Order apply to energy transactions entered into within California outside of the [CAISO] and [Cal PX] markets . . . ." CP ER 1876. Noting that "[p]roducers seem to interpret the Commission's order as subjecting only sales directly into the CAISO or Cal PX as being subject to any potential review or refund," CP ER 1878, CEOB wanted the *bilateral purchases made outside of the Cal PX and CAISO markets* by CERS, a division of DWR, to be included in the scope of transactions subject to potential refunds under the December 15 Order. CP ER 1879.

The Commission denied the motion and rehearing thereon, finding bilateral purchases made outside of the Cal PX and CAISO markets beyond "the limited scope of the proceeding" here. JER 218; *see also* JER 182. "DWR transactions are negotiated bilateral contracts for the procurement of energy on behalf of California [investor-owned utilities ("IOUs")], and are distinctly beyond the realm of ISO and PX centralized market operations that have been the subject of this proceeding since its inception. . . . No party could reasonably have believed that the Commission intended the proceeding to be broader." JER 218. The Commission noted that "if DWR or another party believes that any of its contracts are unjust and unreasonable, it may file a complaint under FPA Section 206 . . . ." JER 218. In fact, complaints were filed, a hearing held, FERC orders issued, and appeals taken on those CERS bilateral transactions that were challenged in separate complaints. *See Public Utilis. Comm'n of State of Cal., et al. v. FERC*, Nos. 03-74207, *et al*. (9th Cir., oral argument held Dec. 8, 2004).

Cal Parties erroneously claim that FERC did not provide a principled explanation for its decision to limit potential refunds in this proceeding to Cal PX and CAISO spot market sales (Br. at 77), and that it was irrelevant that CERS bilateral purchases were made outside the PX and ISO markets (Br. at 70). But this proceeding, since its inception, has been limited to CAISO and Cal PX centralized market operations with parties on notice that only their sales in those markets were subject to refund. JER 182, 218. As no notice was provided in this proceeding that bilateral transactions not involving CAISO or Cal PX would be subject to refund, this proceeding could not include refunds related to such transactions, as doing so would violate the filed rate doctrine. Parties could file their own complaints under FPA § 206 (as they did) if they were concerned that the rates under the CERS transactions were unjust and unreasonable.[20] JER 218.

By choosing to resolve potential claims regarding CERS transactions in other proceedings, FERC did not abdicate its statutory responsibility to assure that sellers' rates were just and reasonable[21] (Br. at 71) or refuse to consider refunds for

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[20] On November 20, 2001, the Commission instituted a proceeding "to investigate the justness and reasonableness of the terms and conditions of market-based rate tariffs and authorizations of public utilities that sell electric energy and ancillary services at wholesale in interstate commerce." *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 97 FERC ¶ 61,220 at P 1 (2001)(footnote omitted). In that proceeding, the Commission conditioned sellers' market-based rate authorizations on compliance with certain Market Behavioral Rules and on potential refund liability for any violation of their authority. *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003), *order on reh'g*, 107 FERC ¶ 61,175 (2004).

[21] In support of its "abdication of statutory responsibility" argument, Cal Parties note FERC's finding that "unjust and unreasonable rates were charged and could continue to be charged unless remedies are implemented," Br. at 74 (quoting December 15 Order, JER 73 and quoting similar statement at JER 85). That finding was limited to the rates for sales into the Cal PX and CAISO markets and does not support Cal Parties' arguments regarding bilateral transactions outside the Cal PX and CAISO.

bilateral transactions outside the Cal PX and CAISO as California Parties assert (Br. at 74). Bilateral transactions outside the Cal PX and CAISO markets, while simply beyond the scope of the instant proceeding, may be, and were, considered in other proceedings.

Moreover, even if it were true, as Cal Parties assert, that "FERC created the circumstances that allowed sellers to insist on spot market sales to CERS" (Br. at 72 (capitalization in heading altered)), that would not place sellers on notice in the proceeding that their rates for anything other than sales into the Cal PX and CAISO markets were subject to refund. The same is true for Cal Parties' and Intervenor CAISO's claims that: (1) CERS "could not purchase power in the centralized PX and ISO markets" and therefore entered into bilateral transactions outside those markets (Cal Br. at 76); (2) FERC ignored evidence regarding bilateral transaction sellers' market manipulation (*id.* at 77-79); and (3) FERC erred in its discussion of the equities regarding CERS purchases[22] (*Id.* at 81-89, 93-94; CAISO Br. at 43-48). None of these arguments brings CERS bilateral transactions entered into outside the Cal PX and CAISO markets within the scope of this limited Refund Proceeding.

Cal Parties (Br. at 79-81, 89-92) and CAISO (Br. at 36-41) contend that CERS' bilateral transactions outside the CAISO and Cal PX markets were virtually indistinguishable from CAISO's OOM spot market transactions which the Commission found subject to refund. The Commission, however, found critical distinctions between these two types of transactions. JER 218.

CERS transactions involved "the procurement of energy on behalf of California IOUs, and [were] distinctly beyond the realm of ISO and PX centralized market operations." JER 218. By contrast, CAISO OOM spot transactions "are contemplated in the ISO Tariff as a backstop to the ISO's auction markets" and were "purchases for the purpose of maintaining reliability on the ISO-controlled

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[22] After finding CERS bilateral transactions beyond the scope of the Refund Proceeding, the Commission commented that there also was "no equitable rationale that supports making DWR's bilateral contracts subject to refund" because: "[e]xpanding the scope of transactions subject to refund over the period October 2, 2000 through June 20, 2001, to include transactions outside the ISO and PX centralized markets would simply hinder the ability of parties to enter into new bilateral contracts"; "DWR has had access to the ISO's control room . . . providing DWR a competitive advantage in entering into its bilateral contracts"; and "by voluntarily entering into bilateral transactions outside the ISO and PX, DWR made a conscious decision to forego the refund protection that the Commission provided through the ISO and PX." JER 182; *see also* JER 218-19.

grid."[23] JER 218. CAISO's Tariff specifically contemplates CAISO going outside its auction markets to obtain energy to balance demand in those markets, providing the necessary connection between CAISO's OOM spot purchases and CAISO's spot markets to allow for potential refunds. The CERS transactions lacked that necessary connection. *Id.*

IX. OAKLAND'S BILATERAL TRANSACTIONS WERE REASONABLY EXCLUDED FROM POTENTIAL REFUNDS

The Port of Oakland ("Port") first contends, Port Br. 9-11, that exclusion of bilateral sales in which it was involved from refund protection reflects a lack of reasoned decision-making. The Commission, however, clearly considered the ramifications of expanding the scope of transactions subject to refund to bilateral sales before deciding that "imposing after-the-fact refund liability on California transactions outside of the centralized ISO and PX markets [wa]s unjustified." July 25 Order, JER 182. This was particularly true because "the Commission consistently encouraged California load serving entities to acquire a balanced portfolio of short, medium and long-term contracts. Expanding the scope of

[23] While CAISO OOM spot transactions occur outside the CAISO spot market, "they still fall under the aegis of the FERC-approved CAISO Tariff as sales into the CAISO market." JER 556 P 84. All OOM spot transactions were entered into, and payment for them was made, pursuant to FERC-jurisdictional CAISO Tariff Section 2.3.5.1.5. November 23 Order at P 66, FERC ER 30; JER 218, 556 P 85. In fact, unlike the CERS transactions, those "sales could only be made pursuant to the CAISO Tariff." JER 556 P 83.

transactions subject to refund over the period October 2, 2000, through June 20, 2001 to include transactions outside the ISO and PX centralized markets would simply hinder the ability of parties to enter into new bilateral contracts." *Id.* In short, to include bilateral transactions in refund liability for past periods would negatively affect the Commission's goal of encouraging greater use of bilateral contracts to reduce the heavy reliance on the spot market to serve California's load.

The Port, though, asserts that the exclusion actually creates a perverse incentive contrary to FERC's policy goal, *see* Port Br. 11, by rewarding spot market purchasers with possible refunds while purchasers who entered into bilateral contracts may receive no refunds even if they paid unjust and unreasonable rates.[24] That assertion ignores the limits of the instant Refund Proceeding to sales on the spot markets, as well as a purchaser's ability to file an FPA § 206 complaint at any time to seek redress for unjust and unreasonable rates. *See* July 25 Order, JER 182

[24] The Port's argument that the Commission's decision cannot be justified on fairness grounds, *see* Port Br. 11, is not properly before this Court because the Port failed to raise it on rehearing. *See* 16 U.S.C. § 825*l*(b) ("No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing . . . ."). In any case, the Commission's decision to deny refunds to bilateral transactions sought to increase the number of bilateral contracts, as a means to provide stability and protection to energy customers, *see* JER 56 (noting that bilateral contracts mitigate cost exposure and are critical to limiting extreme price volatility of spot markets). Hence, FERC clearly had customer interests in mind when it made its decision.

n.59 (observing that any party that "believes any of its contracts are unjust and unreasonable . . . may file a complaint under FPA Section 206").

In addition, as the Port asserts that refunds should be ordered for bilateral transactions that occurred in the past, from October 2, 2000, to June 20, 2001, it is difficult to see how that remedy could have affected a purchaser's original decision to enter into a bilateral transaction during the past period. *See Sithe New England Holdings, LLC v. FERC*, 308 F.3d 71, 78 (1st Cir. 2002) (noting that modifying rates "for a past period obviously cannot alter the utilities' behavior in that period").

The Port is also mistaken in alleging that the Commission disregarded FPA's statutory directive by focusing on the type of contract rather than the level of the rate paid. *See* Port Br. 12. Although the FPA grants the Commission the power to establish a just and reasonable rate, that power is not unfettered.

FERC's authority to change rates in a particular proceeding is limited to the rates challenged in the complaint or by FERC's own motion. *See* FPA § 206(a) ("Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein."). *See also* FPA § 306, 16 U.S.C. § 825e (same). The same holds true for refunds; they "shall be made, with interest, to those persons who have paid those rates or charges *which are the subject of the proceeding*." FPA § 206(b) (emphasis added). Therefore, contrary to the Port, *see* Br. 15, FPA § 206(a) actually limits refunds to the rates that were the subject of the complaint instituting the Refund Proceeding.

Here, the Commission concluded that the bilateral transactions are beyond the scope of the SDG&E proceeding. SDG&E's initial complaint targeted only "the prices at which sellers subject to its jurisdiction may bid energy or ancillary services into California's two large bulk-power markets – those operated by the PX and the ISO." SDG&E Complaint at 1, CP ER 570; *see id.* at 19, JER 588 (same). In short, the complaint limited the issue to rates charged for sales in the Cal PX and CAISO markets, and the Commission's decision to exclude bilateral transactions on that basis conformed to the FPA.

The Port's reliance on *California v. FERC*, 383 F.3d 1006 (9th Cir. 2004), *see* Port Br. 12-13, is unavailing. The key issue in *California* was whether FERC "properly authorized and administered market-based energy tariffs." *Id.* at 1008. This Court concluded that market-based tariffs do not *per se* violate the FPA, *see id.* at 1014, but found that certain reporting requirements, which were an integral part of a market-based tariff regime, had not been followed, *see id.* at 1015-16. Violations of those reporting requirements, thus, provided FERC with remedial powers, including the ability to order retroactive refunds to rectify the tariff violations. *See id.* at 1018. Here, the Port has failed to show a tariff violation; instead, it makes an unsupported allegation that bilateral transactions "took place in a dysfunctional wholesale market in which competitive rates did not exist." Port Br. 14. The orders challenged here found the CAISO and Cal PX spot markets were dysfunctional and may have led to unjust and unreasonable rates in some conditions, *e.g.*, JER 167, but they say nothing about bilateral transactions.

The Port repeats its earlier error in arguing that a correlation between spot and bilateral prices requires any proceeding involving ISO and PX spot market transactions to implicate bilateral contracts in California, especially those whose rates are derived from or directly tied to spot market rates. *See* Port Br. 16-19. But the Commission could not order refunds after-the-fact for bilateral transactions that were not named in the complaint or otherwise identified as within the scope of the Refund Proceeding. Besides the plain language of SDG&E's complaint limiting the scope to CAISO and Cal PX spot markets, the Commission has repeatedly focused on spot transactions in the CAISO and Cal PX markets. *See* JER 2 ("[W]e are instituting consolidated hearing proceedings pursuant to Section 206 of the Federal Power Act to investigate the justness and reasonableness of the rates and charges of public utilities that sell energy and ancillary services to or through the California

ISO and PX . . . ."); JER 111 ("On August 23, 2000, the Commission issued an order instituting formal hearing proceedings under Section 206 of the Federal Power Act to investigate the justness and reasonableness of the rates of public utility sellers into the California Independent System Operator (ISO) and the California Power Exchange (PX) markets . . . ."); JER 117 (same); JER 140 (same); JER 166 ("The Commission makes clear that transactions subject to refund are limited to spot transactions in the organized markets operated by the ISO and PX during the period October 2, 2000 through June 20, 2001 . . . ."); JER 246 ("The SDG&E complaint concerned rates for SDG&E's purchases through the ISO and PX markets in California."); JER 218 ("PG&E's selection of a single reference to 'California wholesale markets' not specifically limited to spot markets operated by the ISO and PX ignores the dozens of other references prior to, subsequent to, and within, the November 1 Order that acknowledged the limited scope of the proceeding.")

Whether the spot and bilateral market prices are correlated is irrelevant to what matters can be addressed in the Refund Proceeding. While SDG&E's allegations did not include bilateral transactions, the Port was free at any time to bring its own FPA § 206 complaint charging the rates in its bilateral transactions were unjust and unreasonable.

Although, as the Port notes, *see* Port Br. 19-20,[25] FERC initially did find that bilateral transactions in the Pacific Northwest could potentially be eligible for refunds,[26] that in no way supports the Port's contention that its bilateral transactions should have been included in the Refund Proceeding.

Critically, the bilateral transactions in the Pacific Northwest were an outgrowth of a separate complaint instituted to address those transactions, *see* JER 166 (separate Docket No. EL01-10-000) and 169-70 (discussing Docket No. EL01-10-000), and which was addressed in a separate proceeding, *see* JER 187 ("we will establish a separate preliminary evidentiary proceeding pertaining to the Northwest"). The Puget Sound complaint expressly permitted potential refunds for

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[25] The Commission also permitted refunds for CAISO's OOM transactions. *See* Port Br. 19, 21. The Port, however, never raised on rehearing an argument that allowing OOM refunds required refunds for its (or any other) bilateral transactions. Hence, it cannot raise the argument on appeal. *Domtar*, 347 F.3d at 312-13 (rejecting argument not adequately addressed in rehearing request). In any event, the argument is unavailing. FERC reasonably found CAISO's OOM transactions were "no different than purchases through its markets. Both types of purchases are made by the ISO in order to procure the resources necessary to reliably operate the grid," as a reason to make them subject to refund. JER 182. Unlike CAISO, the Port was not forced to enter its bilateral transactions to assure reliability of the California grid, and thus, the two situations differ.

[26] The Commission ultimately denied retroactive refunds for spot market bilateral sales in the Pacific Northwest. *See Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity at Wholesale into Electric Energy and/or Capacity Markets in the Pacific Northwest, Including Parties to the Western Systems Power Pool Agreement*, 103 FERC ¶ 61,348 at P 3 (2003).

bilateral transactions, *see* 103 FERC ¶ 61,348 at P 4 (2003) (discussing Puget Sound's complaint). As a result, while the SDG&E complaint limited the refund proceeding to spot market transactions in the CAISO and Cal PX markets, the Puget Sound complaint addressed bilateral transactions in the Pacific Northwest. That treatment suggests, had the Port brought a complaint to challenge its bilateral transactions, FERC could, and likely would, have investigated those charges. The Port, however, cannot avoid the consequences of its failure by now seeking to expand the Refund Proceeding to include its still unsupported and untested allegations.

X. THE COMMISSION REASONABLY DEFINED AND LIMITED REFUNDS TO SPOT TRANSACTIONS

CAISO and the Cal Parties contend that the Commission erred in limiting refunds to "spot" transactions. *See* Cal Br. 95-99; CAISO Br. 48-51. That contention is without merit.

CAISO and the Cal Parties contend that FERC's statutory duty to assure all jurisdictional rates are just and reasonable requires that transactions beyond the spot market be included. *See* CAISO Br. 49; Cal Br. 97. FPA § 206 refund authority, as previously discussed, is discretionary and limited to those rates challenged as the subject of a proceeding. *See* JER 7.

CAISO's and the Cal Parties' other claims of error, *see* CAISO Br. 49-51, Cal Br. 96, 98-99, were not raised by either party on rehearing and must be dismissed. *See* 16 U.S.C. § 825*l*(b); *Domtar*, 347 F.3d at 312-13. In any event, those claims are unsupported.

For example, contrary to CAISO's assertions that the Refund Proceeding always encompassed all sales, not just spot sales, *see* CAISO Br. 49-50, "[t]he spot markets were the only markets in which the Commission determined that rates may be unjust and unreasonable," JER 245. From its institution, the Commission defined the scope of the Refund Proceeding to transactions of a specific, narrow timeframe, consistent with SDG&E's complaint, which sought to reduce "spot market price volatility." JER 6. After reviewing FERC staff's investigation report on bulk power markets, particularly with respect to California and the Western region, *see* JER 12, the November 1 Order concluded: "[T]he electric market structure and market rules for wholesale sales of electric energy in California are seriously flawed and that these structures and rules, in conjunction with an imbalance of supply and demand in California, have caused, and continue to have the potential to cause, unjust and unreasonable rates for *short-term energy (Day-Ahead, Day-of, Ancillary Services, and real-time energy sales)* under certain conditions." JER 12-13. The Commission further advised all market participants that "[r]ates charged by public utilities for sales into the *ISO's markets and into the*

PX's day-ahead and hour-ahead markets will remain subject to the refund conditions set forth in the August 23 Order . . . ." JER 13 (emphasis added). "Spot" market was defined as "sales that are 24 hours or less and that are entered into the day of or day prior to delivery", JER 136, consistent with the description of the short-term energy market, *see* JER 245 n. 278, utilized in subsequent orders, *see* JER 268. Thus, from the institution of the Refund Proceeding, market participants were on notice that the Refund Proceeding would be limited to sales in the CAISO and Cal PX spot markets.

Cal Parties' new argument, *see* Cal Br. 96, 98-99, not raised on rehearing, *see* CP ER 2657-2718 (Cal Parties' Request for Rehearing), alleges that the Commission did not fully explain the rationale behind its definition of "spot" transactions and limiting refunds to that definition. As it was not raised on rehearing, this argument cannot be raised now. 16 U.S.C. § 825*l*(b). In any event, the Refund Proceeding addressed potential problems in the CAISO and Cal PX spot markets that needed to be corrected. *E.g.*, JER 167. The Commission also began other investigations and other proceedings to address other problems found in other markets or related to other transactions. *See, e.g.*, JER 466 (discussing FERC Staff fact-finding investigation). As how to order its dockets is a matter wholly within FERC's discretion and Cal Parties do not show an abuse of that discretion, there are no valid grounds for requiring that all issues involving all markets and transactions be considered in the Refund Proceeding, rather than separately.

XI. THE COMMISSION PROPERLY DECLINED TO MITIGATE THE RETURN RATIOS USED IN EXCHANGE TRANSACTIONS

Cal Parties contend that nonmonetary transactions, in which the CAISO obtained energy from certain sellers in exchange for returning a specified amount of energy at a later time, should also have been mitigated.[27] (Cal. Br. 99-106). Contrary to arguments (*id.* at 101-02), the Commission did not hold that such exchange transactions were not "sales" or were not jurisdictional; nor did the Commission ignore the potential impact of dysfunctional markets on CAISO's exchange transactions. Instead, the Commission determined that, to the extent CAISO paid excessive prices in the spot markets to obtain energy needed for the in-kind returns, those prices will be subject to mitigation. *See* JER 465 P 154.

The Commission, however, properly denied Cal Parties' request to mitigate the return ratios used in these exchange transactions. (*See* Cal. Br. 104). First, the Commission disagreed that the return ratio implied a defined price (*id.*), because the exchange transactions did not require CAISO to return the energy at specified

[27] This issue may more appropriately be considered at a later time, as it goes to refund methodology, not to scope. It appears that the subject of exchange transactions first arose in the ALJ hearing regarding refund methodology; the Commission addressed it as one of "certain additional arguments [that] have been raised regarding the refund methodology in this proceeding." JER 464 at P 150.

prices or times. JER 465 at P 154. Because CAISO generally had a window of one to two weeks in which to complete the exchange, the price of the energy to be returned could vary from the price of the energy that CAISO received. *Id.* For example, the price of energy can vary substantially between peak and off-peak times. As CAISO received energy during daily peak periods, energy returned during off-peak would have lower prices. *See id.* (explaining that the exchange transactions "had no up-front stipulated hour for return of energy"). Cal Parties' argument assumes CAISO's cost for returned energy will necessarily be the same multiple as the ratio; that is, if the ratio is 2:1, the cost of returned energy will be twice the cost of energy received. That assumption fails to account for pricing variability or for CAISO's latitude in choosing the timing of returns, both of which could lower the effective exchange ratio. Further, as the price for the returned gas will be subject to mitigation under the MMCP methodology, its effective cost may be reduced even more.

Given that CAISO had an extended time window to make the required returns, the Commission reasonably concluded that the transactions were conducted over periods greater than 24 hours, and thus would not be considered spot market transactions subject to mitigation. Cal Parties liken the return periods to time lags between when energy is delivered and when payment for it is made in conventional cash transactions (Cal. Br. at 106), but the in-kind returns at issue here were not delayed payments of specified amounts. Rather, they were reciprocal, nonmonetary transfers that the CAISO could deliver at times of its choosing, taking into account its own energy needs and variations in the availability and cost of the energy to be returned. *See also* CP ER, Vol. XIII at 3302 ("The transactions have a nonmonetary component in order for them to be complete. It all wasn't made at the same time. The return was over different periods, as the Staff witness points out."). Unlike a cash transaction, the exact cost was not known, and the exchange transaction was not complete, until the CAISO made the return.

The Commission further noted that Cal Parties' claims "completely ignore[d] the severe energy shortfall in the Pacific Northwest," where most of the exchange transactions originated, which resulted from decreased hydro generation in 2001. JER 465 P 154. Cal Parties' proffered evidence regarding exchange ratios failed to consider the record shortfall in hydro production, which reduced the amount of hydro power available for exchange and, as the Commission understood, affected its cost and thus the return ratios for exchange transactions.

The Commission's determination here that these exchanges are not like monetary sales is not inconsistent with prior decisions finding other exchanges are like monetary sales. *See* Cal. Br. at 102-03 n.282. Here, as discussed above, the exact price for the returned energy would not be known until the return is made, and is largely subject to CAISO's discretionary control. Given the variability of energy prices, the cost of returned energy could differ substantially from the cost of received energy. Such differences could not have occurred in *Green Mountain Power Corp.*, 61 FERC ¶ 61,203 (1992), and *United Illuminating Co.*, 61 FERC ¶ 61,027 (1992), *cited in* Cal. Br. at 102-03 n.282, because those transactions involved exchanges of capacity, which has a fixed price. Capacity (or reservation) charges reflect the fixed costs incurred in building and operating the capacity. Because those costs are fixed, they do not vary from time to time (*e.g.*, from peak to off-peak), as do the costs of energy that was involved in the CAISO exchange transactions. Consequently, in *Green Mountain* and *United Illuminating*, both of which involved the exchange of capacity, the fixed price of that capacity could be determined, and the exchange could be priced based on that fixed charge.[28]

Thus, those cases presented situations where exchanges were like monetary sales because the price of the received and returned capacity was the same and could, before the exchange was made, be reduced to a sum certain. In contrast, the

[28] *See Green Mountain*, 61 FERC at 61,756 (noting capacity charge was $3/kW/year and fixing price of exchange at that amount). In *United Illuminating*, the Commission could not determine the figure from the data in the record, so it directed United to develop and justify a specific formula to set the value of exchange capacity. *See* 61 FERC at 61,151.

CAISO energy exchanges did not have those characteristics, but were subject to pricing variability depending on the timing of the return. That meant prices for received and returned energy could differ, thus making it impossible to reduce the cost of the transaction to a sum certain before the exchange was made, unlike a monetary sale.

CONCLUSION

For the reasons stated, the Commission's determinations as to scope and transactions should be affirmed in all respects.

Respectfully submitted,

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