ORAL ARGUMENT IS SCHEDULED FOR NOVEMBER 7, 2005

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-1324

SOUTHERN CALIFORNIA WATER COMPANY,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

CYNTHIA A. MARLETTE
GENERAL COUNSEL

DENNIS LANE
SOLICITOR

CAROL J. BANTA
ATTORNEY

FOR RESPONDENT
FEDERAL ENERGY REGULATORY
COMMISSION
WASHINGTON, D.C. 20426

JULY 6, 2005
FINAL BRIEF: AUGUST 25, 2005

CIRCUIT RULE 28(A)(1) CERTIFICATE

A. Parties and Amici

The parties are as stated in Petitioners' brief.

B. Rulings Under Review

1. *Southern California Water Company*, Docket Nos. ER02-2400-000 and EL02-129-000, 100 FERC ¶ 61,373 (Sept. 27, 2002)[*];

2. *Southern California Water Company*, Docket No. EL02-129-000, 106 FERC ¶ 61,305 (Mar. 26, 2004); and

3. *Southern California Water Company*, Docket No. EL02-129-000, 108 FERC ¶ 61,168 (Aug. 9, 2004).

C. Related Cases

This case has not previously been before this Court or any other court. Counsel is not aware of any other related cases pending before this or any other court.

Carol J. Banta
Attorney

[*] The merits of this Order are not at issue and the Order is not subject to judicial review, as no party sought rehearing of this Order before the Federal Energy Regulatory Commission, as required by 16 U.S.C. § 825*l*(b).

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GLOSSARY

APX Sales	Energy sales made by SCWC through the Automated Power Exchange on March 26 and April 4, 2002
Br.	Brief for Petitioner
Clarification Order	Order Granting Late Intervention and Clarifying Prior Orders, *Southern California Water Company*, Docket No. EL02-129-001, 109 FERC ¶ 61,121 (Nov. 1, 2004), JA 336
Commission or FERC	Respondent Federal Energy Regulatory Commission
Compliance Order	Order on Compliance Filing, *Southern California Water Company*, Docket No. EL02-129-000, 106 FERC ¶ 61,305 (Mar. 26, 2004), JA 171
Dynegy	Dynegy Power Marketing, Inc.
Dynegy Baseload Purchase Contract	Power purchase agreement between SCWC and Dynegy, under which Dynegy supplied 12 MW of firm wholesale power to SCWC at $35.50/MWh from May 1, 2000 to April 30, 2001
FPA	Federal Power Act
IEP	Illinova Energy Partners, Inc., from which SCWC purchased energy at spot market prices as needed to meet excess demand
Letter Order	*Southern California Water Company*, Docket Nos. ER02-2400-000 and EL02-129-000, 100 FERC ¶ 61,373 (Sept. 27, 2002), JA 56

GLOSSARY

Mirant	Intervenor Mirant Americas Energy Marketing, LP
Mirant Baseload Purchase Contract	Power purchase agreement, entered into by SCWC and Mirant in March 2001, under which Mirant would supply 15 MW of firm wholesale power to SCWC at $95/MWh from April 1, 2001 to December 31, 2006
MW	Megawatt
MWh	Megawatt-hour
Orders	Collectively, Compliance Order and Rehearing Order
Prior Notice Order	*Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, *reh'g granted in part and den. in part*, 65 FERC ¶ 61,081 (1993)
Rehearing Order	Order Denying Rehearing, *Southern California Water Company*, Docket No. EL02-129-000, 108 FERC ¶ 61,168 (Aug. 9, 2004), JA 329
SCWC or Petitioner	Petitioner Southern California Water Company
SCWC Sale Agreement	Power purchase agreement, entered into by SCWC and Mirant in March 2001, under which SCWC sold 15 MW of wholesale power to Mirant in June 2001 at SP15–$20/MWh
SP15	South of Path 15 energy price as reported by Dow Jones Index (named for zone in southern California commonly used as a delivery point for energy)

GLOSSARY

WSPP	Western Systems Power Pool
WSPP, Inc.	Western Systems Power Pool, Inc.
WSPP Agreement	Western Systems Power Pool Agreement
WSPP Orders	Orders that approved the WSPP Agreement, with modifications: *Western Systems Power Pool*, 55 FERC ¶ 61,099, *order on reh'g*, 55 FERC ¶ 61,495 (1991)

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

1. Whether the Federal Energy Regulatory Commission ("Commission" or "FERC") properly enforced the filing requirements of the Federal Power Act, 16 U.S.C. §§ 824 *et seq.* ("FPA"), by requiring Petitioner Southern California Water Company ("SCWC") to pay a refund for making a FERC-jurisdictional sale of electricity at market-based rates in March 2001, well over a year before seeking FERC authorization to enter into market-based rate sales.

2. Whether the Commission properly calculated the amount of SCWC's

refund for its unauthorized sale.

COUNTERSTATEMENT OF JURISDICTION

The statutory prerequisites under FPA § 313(b), 16 U.S.C. § 825*l*(b), have not been met with respect to: one order for which review is sought, *Southern California Water Company*, 100 FERC ¶ 61,373 (Sept. 27, 2002), as no party requested rehearing of that order, and one issue that SCWC now raises (*see infra* page 32), but failed to raise on rehearing.

STATUTORY AND REGULATORY PROVISIONS

The pertinent 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

This case concerns FERC orders that required SCWC to pay a refund for making a wholesale sale of power at market-based rates over a year before SCWC sought market-based rate authority. Consistent with its longstanding policy, the Commission directed SCWC to refund to Mirant Americas Energy Marketing, LP ("Mirant"), the buyer, the difference between the unauthorized market-based rate that SCWC received and the cost-based rate that it would have been allowed to charge, plus interest. SCWC challenges the bases for liability and for the refund, contending that a previously filed tariff (the "WSPP Agreement") authorized it and

other members of the Western Systems Power Pool ("WSPP") to charge market-based rates. SCWC also contends that the refund should have been calculated using the spot market price for the power it sold.

In its filing seeking market-based rate authority on July 31, 2002, SCWC admitted having made two unauthorized sales at market-based rates several months prior, and requested a waiver as to those sales. Mirant intervened, contending that SCWC made yet another unauthorized sale on March 31, 2001, and seeking a refund. SCWC countered that the 2001 sale was authorized by the WSPP Agreement. The Commission opened a separate docket (EL02-129) to address the dispute.

After receiving pleadings from both SCWC and Mirant, the Commission determined that the 2001 sale was not authorized by the WSPP Agreement, which does not allow power sellers to charge market-based rates without separately obtaining FERC authorization. In accordance with its established remedy for late tariff filings, the Commission ordered SCWC to refund the difference between the market-based rate that it charged Mirant and the cost-based rate that it would have been able to charge under the WSPP Agreement, plus interest. The Commission found, for purposes of determining the cost-based rate, that SCWC's incremental cost was its contractual price for purchasing energy from Mirant, as SCWC resold the same energy back to Mirant.

The Commission denied SCWC's request for rehearing for the same reasons. This petition followed.

II. STATEMENT OF FACTS

A. Statutory And Regulatory Background

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 generally New York v. FERC*, 535 U.S. 1 (2002); *see also, e.g., Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 723 (D.C. Cir. 2000) ("*TAPS*") (discussing exclusive FERC jurisdiction over wholesale power sales). All rates for or in connection with jurisdictional sales and transmission services are subject to FERC review to assure they are just and reasonable, and not unduly discriminatory or preferential. FPA §§ 205(a), (b), (e), 16 U.S.C. §§ 824d(a), (b), (e). To enable such FERC review, the FPA requires every public utility to file with the Commission "schedules showing all [jurisdictional] rates and charges . . . together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services." FPA § 205(c), 16 U.S.C. § 824d(c); *see* 18 C.F.R. § 35.1 (2004) (filing obligations). Any change in any jurisdictional rate, charge, or contract requires 60 days' notice to the Commission and the public, unless the

Commission orders otherwise. FPA § 205(d), 16 U.S.C. § 824d(d).

A utility must obtain approval prior to making FERC-jurisdictional sales at market-based rates, by filing an initial market-based tariff in accordance with 18 C.F.R. § 35.12 (2004), and showing that it lacks market power. *See, e.g.*, *AEP Power Mktg., Inc.*, 97 FERC ¶ 61,219 at p.61,969 (2001). *See also El Paso Elec. Co.*, 105 FERC ¶ 61,131 at P 27 (2003) (once FERC has granted market-based rate authority, "individual service agreements under the utility's market-based rate tariff will not be subjected to the same level of scrutiny when they are filed; the individual transactions (which occur at market-driven prices) are [deemed] reasonable because the Commission has determined that the utility seller does not possess market power.").

The Commission has long required payment of refunds as a remedy for violating the filing and notice requirements of FPA § 205. A series of cases in the early 1990s repeatedly confronted the problem of late tariff filings, and required refunds for sales made prior to filing in an "attempt[] to convey to the electric utility industry the seriousness with which [FERC] viewed failures to comply with the prior notice and filing requirement contained in the FPA." *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 at p.61,979 ("*Prior Notice Order*"), *reh'g granted in part & den. in part*, 65 FERC ¶ 61,081 (1993); *see generally* 64 FERC ¶ 61,139 at pp.61,973-74 (discussing

development of policy in series of cases, most notably *Central Maine Power Co.*, 56 FERC ¶ 61,200 (1991), *order on reh'g*, 57 FERC ¶ 61,083 (1991)); *id.* at p.61,981 (noting that remedial policy was issued "because of repeated violations of that important [filing] obligation by the electric utility industry").

In the *Prior Notice Order*, the Commission formally implemented a refund remedy for late filings. With regard to the "unauthorized late filing of market-based rates," the Commission would require a utility to refund "the time value of revenues collected . . . for the entire period that the rate was collected without Commission authorization," as well as "all revenues resulting from the difference, if any, between the market-based rate and a cost-justified rate." *Id.* at p.61,980; *see also id.* ("In other words, the late-filing utility will receive the equivalent of a cost-based rate, less the time value remedy applicable to the unauthorized late filing of cost-based rates, until the date of Commission authorization.").[1]

B. The Commission Proceedings And Orders

1. SCWC's Tariff Filing And Mirant's Protest

On July 31, 2002, SCWC applied for market-based rate authority. R. 1, JA 2.[2] SCWC also requested waiver of the 60-day prior notice requirement to

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[1] With regard to the late filing of cost-based rates, the remedy is the refund of the time value of revenues collected. *Id.* at pp.61,979-80.

[2] "R." refers to a record item. "JA" refers to the Joint Appendix page number. "P" refers to the internal paragraph number within a FERC order.

allow an effective date of March 26, 2002, so that the authority would encompass two previously-made, FERC-jurisdictional sales at market-based rates, on March 26 and April 4, 2002. R. 1 at 7-8, JA 8-9. Specifically, on both dates SCWC had sold excess hourly energy for resale through California power markets administered by the Automated Power Exchange (the "APX Sales"). *Id.*

Following publication of notice of SCWC's tariff filing, Mirant filed a motion to intervene and protest, contending that it had entered into a power purchase contract with SCWC in March 2001 under which SCWC had sold energy to Mirant at market-based rates (the "SCWC Sale Agreement"). R. 3, JA 16. Under that agreement, SCWC sold 15 MW of around-the-clock energy to Mirant during April 2001 at a market rate equal to $20/MWh less than the so-called "SP15" spot market price as reported by the Dow Jones Index.[3] *Id.* at 1-2, JA 16-17. Because SCWC did not have FERC authorization to sell at market-based rates at the time of the sale, Mirant contended that SCWC should be required to refund to Mirant the difference between that market-based rate and SCWC's cost for the energy, plus interest. *Id.* at 2, JA 17.

SCWC filed an answer to Mirant's protest, contending, *inter alia*, that the SCWC Sale Agreement was authorized under the WSPP Agreement, to which both

[3] SP15 is a zone in southern California ("South of Path 15") that is commonly used as a delivery point for energy.

SCWC and Mirant were parties, and thus did not require SCWC to have market-based rate authority. R. 4, JA 39.

2. Letter Order

In a letter order dated September 27, 2002, the Commission accepted SCWC's tariff, but denied the waiver; instead it allowed SCWC's market rates to become effective 60 days after filing, on September 30, 2002. *See Southern California Water Company*, Docket Nos. ER02-2400-000 and EL02-129-000, 100 FERC ¶ 61,373 at P 14 (2002) ("Letter Order"), JA 56. Even though SCWC violated the prior notice requirement by making the APX Sales, it was not ordered to pay refunds because the market-based rates of the APX Sales appeared to be lower than SCWC's variable costs. *Id.* at PP 14, 15, JA 61-62.

The Commission expressed concern about "the issues raised by Mirant in its protest concerning the earlier sales by SCWC to Mirant," and concluded that additional information was necessary to evaluate the parties' claims regarding such sales. *Id.* at P 16, JA 62. The Commission established a separate docket for that purpose, and requested specific information from SCWC related to the WSPP Agreement and the SCWC Sale Agreement. *Id.* at P 16 & n.18 (directing parties to file responsive information in FERC Docket No. EL02-129-000), JA 62; *id.* at P 17 (specifying information to be submitted), JA 62.

No party requested rehearing of the Letter Order. SCWC's arguments on

review center on the subsequent compliance proceeding and the FERC orders issued therein; thus, the merits of the Letter Order itself are not at issue (nor, indeed, subject to judicial review under FPA § 313(b)).

3. Compliance Order

After receiving filings from SCWC and Mirant, the Commission on March 26, 2004 issued its Order on Compliance Filing, *Southern California Water Company*, Docket No. EL02-129-000, 106 FERC ¶ 61,305 (2004) ("Compliance Order"), JA 171. The Commission found that "SCWC charged Mirant a market-based rate without prior Commission authorization to enter into market-based rate sales." *Id.* at P 1, JA 171. Therefore, the Commission required refunds in the amount of $644,153.55, plus interest. *Id.*; *id.* at P 17, JA 176.

Addressing SCWC's reliance on the WSPP Agreement, the Commission noted that "membership in the WSPP does not confer on an entity the right to make sales at rates other than cost-based rates," and held that SCWC had "improperly made a sale at market-based rates that exceeded the WSPP Agreement's cost-based rate" without having received market-based rate authority. *Id.* at PP 14, 15, JA 175. The Commission emphasized the importance of the filing requirement and the "firmly established" remedy of refunds for failure to file. *Id.* at P 15, JA 175. *See also id.* at P 1 ("This order benefits customers by enforcing the filing requirements of the [FPA], and the Commission's policies thereunder."), JA 171.

The Commission determined the refund amount by calculating the difference between the market-based rate that SCWC actually charged Mirant and the cost-based rate that SCWC would have been permitted to charge under the WSPP Agreement. *Id.* at P 17, JA 176. For a seller lacking FERC authorization to charge market-based rates, the WSPP Agreement capped the price at the seller's incremental cost plus an adder.[4] *Id.* Because SCWC owned no generation, to determine SCWC's incremental cost, the Commission looked to the energy supplies in SCWC's portfolio at the time of the sale: (1) a contract with Dynegy Power Marketing, Inc. ("Dynegy"), effective through April 30, 2001, to purchase 12 MW of around-the-clock energy at $35.50/MWh (the "Dynegy Baseload Purchase Contract"); (2) a contract with Mirant, beginning April 1, 2001, to purchase 15 MW of around-the-clock energy at $95/MWh (the "Mirant Baseload Purchase Contract")[5]; and (3) a contract with Illinova Energy Partners, Inc. ("IEP")

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[4] *See* WSPP Agreement § C-3.7, R. 22, Exhibit A at Sheet No. 88 ("[T]he price shall not exceed the Seller's forecasted Incremental Cost plus up to: $7.32/kW/month; $1.68/kW/week; 33.78¢/kW/day; 14.07 mills/kWh; or 21.11 mills/kWh for service of sixteen (16) hours or less per day."), JA 300; WSPP Agreement § 4.9, R. 22, Exhibit A at Sheet No. 8 (defining "Incremental Cost"), JA 219.

[5] In a separate proceeding, SCWC has sought modification of the Mirant Baseload Purchase Contract pursuant to FPA § 206, 16 U.S.C. § 824e, alleging that the $95/MWh rate is unjust and unreasonable. *See* R. 1 at 8 n.9, JA 9; *Nevada Power Co. v. Enron Power Mktg., Inc.*, 103 FERC ¶ 61,353 (addressing SCWC's complaint against Mirant in consolidated § 206 proceeding), *reh'g denied*, 105

to purchase, if needed, any excess daily demand, for which SCWC paid a passthrough price pegged at the spot market (SP15) price. *See id.* at P 9 n.3, JA 173.[6] Of these contracts, the Commission found SCWC's incremental cost to be the $95/MWh price under the Mirant Baseload Purchase Contract, because the SCWC Sale Agreement "simply resold energy [SCWC] was contractually committed to purchase from Mirant at $95/MW[h]." *Id.* at P 17, JA 176.

4. Rehearing Order

SCWC filed a timely request for rehearing, challenging both the legal basis for and the measure of the required refund. R. 22, JA 177. On August 9, 2004, the Commission issued an Order Denying Rehearing, *Southern California Water Company*, Docket No. EL02-129-000, 108 FERC ¶ 61,168 (2004) ("Rehearing Order," and together with the Compliance Order, the "Orders"), JA 329. The Commission rejected SCWC's characterization of the refund as remedying an excessive price for a sale under the WSPP Agreement, rather than an unauthorized sale at market-based rates. *Id.* at PP 4-6, JA 330-31. Because the refund was based on SCWC's late filing for market-based rate authority, the long-established remedy for such late filings applied and there was "no need . . . to further balance

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FERC ¶ 61,185 (2003), *appeal pending sub nom. Public Util. Dist. No. 1 of Snohomish County, Wash. v. FERC*, No. 03-74208 (9th Cir. Nov. 19, 2003).

[6] *See also* Rehearing Order (discussed below), 108 FERC ¶ 61,168 at P 12 (2004), JA 334.

the equities of the situation . . . ." *Id.* at P 7, JA 332.

The Commission also reaffirmed its determination that the appropriate cost-based price to be used in calculating the refund was $95/MWh, SCWC's cost under the Mirant Baseload Purchase Contract, rather than the spot market price. *Id.* at PP 11-14, JA 333-34. SCWC argued that its incremental cost in April 2001 was the spot market price because its retail load exceeded the 12 MW it received under the Dynegy Baseload Purchase Contract, and the 15 MW from Mirant was committed back to Mirant, so that SCWC had to purchase energy from the spot market through IEP. *See id.* at P 13, JA 334. The Commission found that 27 MW (the sum of both baseload purchase contracts) was sufficient to serve SCWC's load and that "the spot market price would only be SCWC's incremental cost once the sale to Mirant [wa]s consummated." *Id.* at P 14, JA 334.

The Commission also held that the refund amount should not be mitigated by the WSPP Agreement "adder," which "was intended to provide sellers with a contribution to their fixed costs, thus encouraging participation in the market." *Id.* at P 15, JA 334. As SCWC owned no generation resources and its incremental cost was the price of a purchase contract (the Mirant Baseload Purchase Contract), "there are no fixed costs associated with the SCWC sale to Mirant that would need to be recovered in an adder." *Id.*

5. Clarification Order

On September 2, 2004, in response to the Rehearing Order, Western Systems Power Pool, Inc. ("WSPP, Inc."), the entity that administers the WSPP Agreement, filed a Motion for Clarification and Request for Permission to Intervene Late. On November 1, 2004, the Commission issued an Order Granting Late Intervention and Clarifying Prior Orders, *Southern California Water Company*, Docket No. EL02-129-001, 109 FERC ¶ 61,121 (Nov. 1, 2004) ("Clarification Order"), JA 336.[7]

WSPP, Inc. explained that the adder provision of the WSPP Agreement does not differentiate between purchased power sources and self-generated power. *See* Clarification Order at P 6, JA 338. Accepting WSPP, Inc.'s interpretation, and underscoring that FERC's "concern in this proceeding is not to assure Mirant of any particular refund amount, but to uphold the filing requirements of the FPA," the Commission concluded the refund should reflect the adder. *Id.* at PP 12, 13, JA 339-40. Inclusion of the adder in the cost-based price that SCWC could have charged reduced its refund liability by more than $300,000. *See* Br. at 4.

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[7] Because the Clarification Order was issued after the instant petition for review was filed and was not the subject of rehearing or a petition for review, the merits of the Clarification Order are not before this Court on judicial review. FPA § 313(b). Although the Order is not part of the administrative record on appeal, it is included in the Joint Appendix for the convenience of the Court.

SUMMARY OF ARGUMENT

The Commission properly ordered a refund to remedy SCWC's unauthorized sale of power at market-based rates. Requiring a refund in this case furthers enforcement of the FPA's filing requirements and FERC's statutory responsibility to assure that rates for jurisdictional sales are just and reasonable.

First, the Commission in this case properly applied its longstanding remedy for late filings. SCWC sold wholesale power to Mirant at a market-based rate, set by reference to spot market prices, over a year before it sought market-based rate authority. The Commission has long required refunds to enforce the notice and filing requirements of FPA § 205 and to fulfill FERC's duty to protect customers; moreover, such enforcement is of particular concern with respect to market-based rates. The Commission appropriately rejected SCWC's efforts to characterize the sale as a transaction under the WSPP Agreement, as that Agreement authorizes only cost-based rates for sellers who have not independently obtained FERC approval to charge market-based rates.

Second, the Commission's findings that SCWC's incremental cost was its purchase price under the Mirant Baseload Purchase Contract, and that SCWC resold the same block of power back to Mirant, are reasonable and well-supported by the record. SCWC's incremental cost, for the purpose of pricing the sale, must be determined based on its available supplies of power and its forecasted load at

the time of the sale. Because SCWC's contractual purchases totaled 27 MW and its forecasted load was 12 MW, its incremental cost fell within those contractual supplies and it would not need to go to the spot market to make the sale to Mirant. SCWC's argument to the contrary, that the spot market price was its incremental cost of meeting additional demand after having made the sale to Mirant, disconnects the pricing of the transaction from the cost of providing the power sold. Moreover, the Commission's finding that SCWC "simply resold" to Mirant the block of power that SCWC was committed to purchase from Mirant is supported by the sale agreements themselves and by the circumstances in which SCWC made and priced the sale, and is further verified by SCWC's own representations to FERC.

Finally, the Commission's decision to apply its well-established remedy for late filings in this case was not arbitrary or capricious. The Orders are consistent with FERC precedents holding that the refund remedy appropriately balances the need to enforce the requirements of FPA § 205 with the financial burden on the late-filing utility. The cases cited by SCWC are inapposite, as none involved a refund for a late tariff filing in violation of § 205.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g., Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). A court must satisfy itself that the agency "articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). For this purpose, the Commission's factual findings are conclusive if supported by substantial evidence. FPA § 313(b), 16 U.S.C. § 825*l*(b). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (internal quotation marks and citation omitted); *accord Consolidated Oil & Gas, Inc. v. FERC*, 806 F.2d 275, 279 (D.C. Cir. 1986). If the evidence is susceptible of more than one rational interpretation, the Court must uphold the agency's findings. *See Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966).

Deference to the Commission's decisions regarding rate issues is broad, because of "the breadth and complexity of the Commission's responsibilities."

Permian Basin Area Rate Cases, 390 U.S. 747, 790 (1968). The Commission's policy assessments are also owed "great deference." *TAPS*, 225 F.3d at 702. Additionally, under the *Chevron* standard, this Court gives substantial deference to the Commission's interpretation of filed tariffs even where the issue simply involves the proper construction of language. *See Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814 (D.C. Cir. 1998). Finally, "[a]gency discretion is often at its 'zenith' when the challenged action relates to the fashioning of remedies." *Town of Concord v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992) (citation omitted).

II. THE COMMISSION PROPERLY REQUIRED SCWC TO PAY A REFUND FOR ITS UNAUTHORIZED SALE OF POWER AT MARKET-BASED RATES

A. The Commission Applied Its Longstanding Policy Of Ordering Refunds To Remedy Violations Of The FPA's Notice And Filing Requirements

SCWC's sale to Mirant was at a market-based rate: the price was set hourly by reference to the SP15 spot market price, less $20/MWh. SCWC had not filed a market-based tariff at the time it entered into the SCWC Sale Agreement on March 31, 2001; it did not seek market-based rate authority until July 31, 2002. *See* Rehearing Order at P 5, JA 331. Based on those indisputable facts, the Commission applied its "firmly established . . . remedy" under the *Prior Notice Order* and ordered SCWC to pay a refund for the unauthorized sale. Compliance Order at P 15, JA 174-75; *see also* Rehearing Order at P 3, JA 330.

Section 205 of the FPA, 16 U.S.C. § 824d, requires that all jurisdictional rates be timely filed with the Commission. *See* 18 C.F.R. § 35.1 (2004); *see also El Paso*, 105 FERC ¶ 61,131 at PP 10-11. This is "not to be taken lightly as a mere procedural requirement." *Florida Power Corp.*, 60 FERC ¶ 61,003 at p.61,023 (1992), *quoted in PacifiCorp Elec. Operations*, 60 FERC ¶ 61,292 at p.62,036 (1992), *both cases cited in* Letter Order at P 11 & nn.7, 8, JA 60; *see also El Paso*, 105 FERC ¶ 61,131 at P 36 ("We do not consider failure to file jurisdictional agreements to be a *de minimus* violation of Section 205."). Moreover, while § 205 applies to all rates, timely filing is especially critical to FERC approval of market-based rates, as "[t]he Commission does not allow market-based rates to go into effect before a filing has been tendered with the Commission." *See, e.g.*, *El Segundo Power, LLC*, 84 FERC ¶ 61,011 at p.61,060, *order on reh'g*, 85 FERC ¶ 61,123 (1998), *order on reh'g*, 87 FERC ¶ 61,208 (1999), *order on reh'g*, 90 FERC ¶ 61,036 (2000).[8]

Failure to comply with § 205's notice and filing requirements is of particular concern because it precludes the Commission from determining whether the

[8] *See also Central Maine*, 56 FERC ¶ 61,200 at p.61,817 (noting it was "particularly troublesome" where a utility charged "nontraditional rates" without prior FERC approval) (internal quotation marks and citation omitted); *id.* at p.61,818 ("[T]his problem [of late filings] is most acute when market-based rates are requested. Timing is critical in such cases. The Commission cannot cure a defective market or market process retroactively.").

unauthorized rates are just and reasonable. *See Central Maine*, 57 FERC ¶ 61,083 at p.61,302 (1991). For that reason, the Commission "[cannot] ignore its statutory duty to determine whether rates are just and reasonable by permitting utilities to submit filings whenever convenient"; rather, it "must have the opportunity to examine proposed rates, terms, and conditions of jurisdictional service before that service commences . . . ." *El Paso*, 105 FERC ¶ 61,131 at P 14 (discussing *Central Maine*), *quoted in* Compliance Order at P 15, JA 175-76. *See also PacifiCorp*, 60 FERC ¶ 61,292 at p.62,036 ("[T]he prior notice and filing requirement is intended to facilitate the Commission's responsibilities under section 205 of the FPA to ensure that all rates and charges for jurisdictional service are just and reasonable and not unduly discriminatory."); Letter Order at P 11, JA 60.

To fulfill its statutory obligations regarding late tariff filings, the Commission has, for well over a decade, imposed a refund remedy on the grounds that such a remedy deters late filings, furthers the Commission's statutory goals, and benefits customers. The refund remedy deters late filings by subjecting noncompliance to real consequences, and thus provides a meaningful incentive for utilities to take the requirements of § 205 seriously. *See Prior Notice Order*, 64 FERC at p.61,980 ("In our judgment, this remedy for the late filing of . . . rates will encourage respect for and compliance with the prior notice and filing requirement . . . .").

In so doing, the remedy also strengthens the Commission's ability to protect customers, as late filing impedes "the Commission's ability to enforce FPA Section 205's requirement that there be prior notice and that the rates charged be just and reasonable at the time that they are being charged." *El Paso*, 105 FERC ¶ 61,131 at P 21 (citing *Carolina Power & Light Co.*, 87 FERC ¶ 61,083 at p.61,356 (1999)), *quoted in* Compliance Order at P 16 & n.12, JA 175; *cf.* Rehearing Order at P 6 n.8 (noting the timely filing requirement "allows the Commission the opportunity to review the proposed rates before they are charged, and so to ensure that customers are not charged unjust and unreasonable rates. The failure of the timely filing of a rate, in contrast, leaves the customer without the protection that the [FPA] expressly provides."), JA 331.[9] *See also California ex. rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004), which held that post-approval reporting requirements were integral to FERC's oversight of market-based rates:

> If the ability to monitor the market, or gauge the "just and reasonable" nature of the rates is eliminated, then effective federal regulation is removed altogether. . . . The power to order retroactive refunds when a

[9] The refund remedy also gives teeth to the filed rate doctrine. That doctrine "forbids a regulated entity from charging rates for its services other than those properly filed with the appropriate federal regulatory authority." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981); *see also Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951).

> company's non-compliance has been so egregious that it eviscerates the tariff is inherent in FERC's authority to approve a market-based tariff in the first instance.

Id. at 1015-16.

This reasoning is all the more powerful in situations, as here, where the Commission has not yet found that a utility lacks, or has sufficiently mitigated, market power, which is the prerequisite for granting market-based rate authority. Therefore, strict measures to remedy the late filing of *initial* market-based rate tariffs, like SCWC's here, are all the more critical. The Orders requiring SCWC to pay a refund for having charged unauthorized market-based rates are thus reasonable and consistent with the FPA and FERC precedent.

B. The WSPP Agreement Did Not Authorize SCWC To Charge Market-Based Rates Absent FERC Approval

Because the refund remedy for late filings is so well-established, SCWC's challenge to the Orders attempts to recast its Mirant sale as being made under, and consistent with, a previously-filed rate — to wit, the *cost-based* rate provided in the WSPP Agreement. *See* Br. 18-19, 35. But the Commission's rejection of SCWC's efforts reasonably interpreted the WSPP Agreement under the facts of this case and was well-founded.

Though SCWC was a WSPP member in March 2001, such membership by itself does not confer a right to make sales at market-based rates (Compliance Order at P 14, JA 174; Rehearing Order at P 6, JA 331), as the Commission held in

its orders approving the WSPP Agreement. *Western Sys. Power Pool*, 55 FERC ¶ 61,099, *order on reh'g*, 55 FERC ¶ 61,495 (1991) (together, the "*WSPP Orders*"), *aff'd sub nom. Environmental Action & Consumer Fed'n v. FERC*, 996 F.2d 401 (D.C. Cir. 1993).

Starting in the late 1980s, the WSPP had experimented for several years with flexible pricing capped by liberal ceilings, but in 1990 the Commission ruled that, to extend the pool operation, the WSPP members would have to propose a permanent arrangement that "either provides for cost-based rates or provides for market-based rates that include measures to ensure that the rates fall within a zone of reasonableness." *Pacific Gas & Elec. Co.*, 50 FERC ¶ 61,339 at p.62,003 (1990), *quoted in* 55 FERC ¶ 61,099 at p.61,315.[10] In response, WSPP proposed to implement market pricing, subject to price caps, that would allow its individual members to take advantage of flexible pricing without having individually to obtain prior FERC authorization. *Id.* at p.61,315. But the first of the *WSPP Orders* rejected the proposed across-the-board market pricing without the requisite showing that each individual seller lacked market power:

> The Commission does not believe that the WSPP has met

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[10] *See also Environmental Action*, 996 F.2d at 404-05 (describing experiment and observing that "[b]y the time of the WSPP application . . .[FERC] had expressed uneasiness over the high experimental price ceilings and the possibility that sellers of services under the Pool Agreement could wield 'market power' to the disadvantage of buyers.").

> its burden in requesting market-based rates of explaining either that WSPP participants lack, or have adequately mitigated, market power in generation or transmission. Thus, we cannot find that the market-based price ceilings in the WSPP Agreement would ensure that the resulting rates would be just and reasonable under the FPA.

Id. at p.61,319, *quoted in* Compliance Order at P 14 & n.6, JA 174. While generally approving the WSPP Agreement on the basis that its "umbrella nature" facilitated trading and furthered competition, 55 FERC ¶ 61,099 at p.61,313, the Commission rejected the WSPP's proposal to allow market-based pricing for all members, and required modification to provide for cost-based rates. *Id.* at pp.61,321-22; *see also id.* at p.61,321 (requiring "cost-based pricing" and suggesting acceptable rate would be "the sellers' forecasted incremental cost plus" specified adders).

On rehearing (in the second of the *WSPP Orders*), the Commission further elaborated that allowing blanket authority for market-based pricing would be "a radical departure from [FERC's] procedures" of requiring individual sellers to demonstrate lack of market power as a prerequisite for obtaining market-based rate authorization. 55 FERC ¶ 61,495 at pp. 62,713-15, *cited in* Compliance Order at P 14 n.6, JA 174.

This Court affirmed the *WSPP Orders* against challenges that sought even less flexibility than allowed by the incremental-cost-plus-adder approach. *Environmental Action*, 996 F.2d 401. SCWC attempts to use this Court's opinion

to reframe FERC's action as "approv[al of] market-based rates subject to cost-based rate ceilings" (Br. at 34); in fact, the Court only noted that the approved WSPP Agreement allowed some degree of pricing flexibility under the cost-based ceilings. *See* 996 F.2d at 409. SCWC's attempted transformation cannot be reconciled with the *WSPP Orders* themselves, which explicitly and repeatedly rejected market-based pricing and insisted upon cost-based rates. *E.g.,* 55 FERC ¶ 61,099 at pp.61,319-22; 55 FERC ¶ 61,495 at pp. 62,713-15, 62,719.

SCWC correctly contends that utilities without individual market-based rate authority may sell power under the WSPP Agreement "subject to the rate caps." Br. at 34. Indeed, SCWC cites a subsequent FERC order that relied, for that proposition, on the Compliance Order challenged here. *See Northpoint Energy Solutions, Inc.*, 107 FERC ¶ 61,181 (2004), *cited in* Br. at 34. *Northpoint* did not involve a market-based rate, but rejected as unnecessary a proposed *cost-based* tariff filed by a WSPP member. *See* 107 FERC ¶ 61,181 at P 7. The instant Compliance Order was cited as precedent that "membership in the WSPP confers on an entity the right to make sales *at cost-based rates but not at market-based rates*." *Id.* at P 7 n.5 (emphasis added).[11]

[11] The other case SCWC cites (Br. at 34), *El Paso Elec. Co.*, 105 FERC ¶ 61,107 (2003), says nothing different. It approved El Paso's proposed methodology for determining its forecasted incremental cost for the purpose of setting its cost-based price caps under the WSPP Agreement. *See id.* at PP 2, 8.

Attempting to fit within those rulings, SCWC makes the claim that its sale price of the SP15 spot market index price, less $20/MWh, is nonetheless a cost-based rate. *See* Br. at 23. SCWC's contention rests on its view that the applicable incremental cost was the cost of its purchases from IEP, *see supra* p.12, involving a passthrough of the SP15 spot price. Br. at 23. Under this theory, for purposes of the WSPP Agreement, the IEP passthrough cost was the same as the spot market rate, so that, by definition, the market-based rate it negotiated with Mirant (at $20/MWh below the spot market price) fell below the WSPP cost-based rate ceiling.[12] As discussed *infra* in Part III, the Commission's rejection of that argument was both based on a reasonable interpretation of the WSPP Agreement and supported by the record.

[12] Notably, SCWC's argument would effectively read out of the WSPP Agreement the provision that exempts sellers with FERC-granted market-based rate authority from the cost-plus-adder rate caps that apply to sellers without such authority. *See* WSPP Agreement § C-3.6(1), R. 22, Exhibit A at Sheet No. 88, JA 300; Br. at 34 (citing provision). *See generally Mesa Air Group v. DOT*, 87 F.3d 498, 507 (D.C. Cir. 1996) (rejecting interpretation of contract term that would render another term "superfluous, in contradiction of the basic principle that 'an interpretation which gives a[n] . . . effective meaning to all the terms is preferred to an interpretation which leaves a part . . . of no effect.'") (quoting Restatement (Second) of Contracts § 203 (1981)) (alterations in original).

III. THE COMMISSION PROPERLY DETERMINED THE COST-BASED RATE SCWC WAS ALLOWED TO CHARGE

A. The Commission's Finding That SCWC's Incremental Cost Was The Price Under The Mirant Baseload Purchase Contract Is Reasonable And Supported By The Record

The WSPP Agreement defines "Incremental Cost" as "[t]he forecasted expense incurred by the Seller in providing an additional increment of energy or capacity during a given hour." WSPP Agreement § 4.9, R. 22, Exhibit A at Sheet No. 8, JA 219. The crux of SCWC's challenge is whether this provision refers to the last increment of energy sold based on the Seller's existing forecasted load at the time of the sale, without including the contemplated sale, or to an additional increment of energy sold *after* the contemplated sale is taken into account in the forecast. SCWC would choose the latter (*see* Br. at 11, 22), while the Commission selected the former.

The Commission held that the relevant incremental cost was "SCWC's incremental cost *at the time of the sale* . . . ." Rehearing Order at P 14 (emphasis in original), JA 334; *see also WSPP*, 55 FERC ¶ 61,495 at p.62,718 ("clarify[ing] that the seller's incremental cost for setting ceiling prices should be forecasted at the time of specific transactions under an agreement to reflect the actual cost with greater certainty."). Here, because SCWC did not generate power, the WSPP Agreement definition required consideration of the supplies available under SCWC's power purchase contracts:

> The WSPP Agreement presumes that, at the time of the contract, the seller assesses its available resources and determines its 'forecasted incremental cost.' A seller that owns generating resources, for example, would be able to forecast which plant would be *needed to provide energy to the buyer* and would estimate its incremental cost accordingly. In this case, however, SCWC owns no generating resources. Instead, we must assess, and did assess, the resources it was contractually committed to purchase at the time of the sale.

Rehearing Order at P 11 n.14 (emphasis added), JA 333.[13]

At the time SCWC entered into the SCWC Sale Agreement, the energy supplies available were: (1) a 12-MW block of around-the-clock power under the Dynegy Baseload Purchase Contract, priced at $35.50/MWh; (2) a 15-MW block of around-the-clock power under the Mirant Baseload Purchase Contract, priced at $95/MWh; (3) for any excess hourly demand not met by those contracts, a daily purchasing agreement to procure power through IEP at the spot market price. *See* Rehearing Order at P 12, JA 334; Compliance Order at P 9 n.3, JA 173. In March 2001, SCWC's forecasted load during April 2001 was 12 MW, with small upward swings during peaks. *See* R. 22, Exhibit B, JA 310-23. Thus, at the time of the sale, SCWC's incremental cost fell within its two contractual blocks of purchased

[13] Though WSPP, Inc. disputed the Commission's reading of the adder provision, it has not otherwise contested the Commission's interpretation of the WSPP Agreement in this case.

power.[14] For that reason, the Commission found that, at the time of the sale, "SCWC did not need to go to the spot market," *i.e.*, to the third (IEP) of the above-listed sources. Rehearing Order at P 11, JA 333.

Unless and until SCWC made the 15-MW sale to Mirant, its total forecasted demand would not rise to 27 MW, meaning at the time of the sale CWC did not have to use the IEP option to provide the next increment of its forecasted load. *Cf.* Br. at 11 ("*After* adding SCWC's 15-MW around-the-clock sale to Mirant, SCWC's *total forecasted retail and wholesale sales* in April 2001 were 27 MW or more in all hours.") (emphases added); *id.* at 22 ("*If SCWC made that sale*, its total retail and wholesale sales in April 2001 would become 27 MW or more in all hours.") (emphasis added). Thus, the Commission found that "the spot market price would only be SCWC's incremental cost once the sale to Mirant is consummated." Rehearing Order at P 14, JA 334; *see id.* (absent sale to Mirant, SCWC "would have no need for spot market purchases").

The Commission also found SCWC's incremental cost theory faulty because it failed to follow the WSPP Agreement's premise that the forecasted incremental cost is linked to the particular, rather than any, sale at issue. *See* Rehearing Order

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[14] Neither SCWC's forecasted nor actual retail load, at any time in April 2001, approached the whole 27 MW available to SCWC under its baseload purchase contracts; the actual retail load often was below 12 MW. *See* R. 22, Exhibit B, JA 310-23.

at P 11 n.14 ("The WSPP Agreement presumes that, at the time of the contract, the seller assesses its available resources and determines its 'forecasted incremental cost' [for that sale]."), JA 333. Determining "forecasted incremental cost" under the Agreement for a seller that has its own generation facilities would require that seller "to forecast which plant would be needed to provide energy to the buyer and [to] estimate its incremental cost accordingly." *Id*. In other words, the incremental cost forecast links the specific projected sale to the specific resources used to make *that* sale; it does not, as SCWC posits, determine the highest incremental cost for any possible sale made during the period.

Because SCWC has no generating facilities, the Commission looked to which of the three sources of purchased power available to SCWC would be used to serve the Mirant sale. *See* Rehearing Order at P 11 n.14 (FERC "must assess, and did assess, the resources [SCWC] was contractually committed to purchase at the time of the sale"), JA 333; *see also id.* at P 11 (to make sale to Mirant "SCWC did not need to go to the spot market" because it "was already contractually committed to purchase energy at the time of the sale"), JA 333. In this respect, SCWC's purchased power sources were analogous to available generating facilities in that for the incremental cost determination, the question is which of the available purchased power sources (in place of existing generating facilities) would be used to make the sale to Mirant. As use of that power (whether purchased or

generated) is directly linked to the sale in question (here, to Mirant), the "forecasted incremental cost" under the WSPP Agreement would be the cost of the power used to make that specific sale.

Here, the Commission found that SCWC's 15-MW sale to Mirant was directly linked to the second of the three listed sources of purchased power available at the time of the sale to SCWC, *viz.*, "the purchase contract with Mirant for an additional 15 MW of firm energy at $95/MWh." Rehearing Order at P 12, JA 334. Not only is the amount of that block of purchased power equal to the amount sold to Mirant, but the pricing of the sale (SP15 spot market price less $20/MWh) only makes sense with the price of this block of power ($95/MWh) as the "forecasted incremental cost." SCWC's alternative incremental price — the SP15 spot market price — means it would have forecasted losing $20 per MWh on the sale to Mirant, hardly an incentive to make the sale.[15] "SCWC's position, if adopted, would effectively produce the unreasonable result of SCWC simultaneously selling energy to Mirant at the SP15–$20/MWh price and then having to purchase IEP energy at the SP15 price." *Id.* at P 14, JA 334.

SCWC, in effect, argues (*see* Br. at 11, 22) that its forecasted incremental

[15] As the refund calculation shows, using the second block of power at $95/MWh to service the sale to Mirant meant that SCWC obtained several hundred thousand dollars above the purchase price to make this specific sale. That would appear to create more incentive to enter the sale than losing $20/MWh.

cost should not be linked to the sale to Mirant, but should be the incremental price for any sale that it makes to any buyer during the term of the sale to Mirant. *See also* Br. at 30 ("SCWC . . . expected to be paying [IEP] at spot-market prices to meet SCWC's hourly retail loads."). But, as explained above, the WSPP Agreement contemplates that forecasted incremental cost will be tied to the sale in question, not to any other sale that might happen to be made in the same period. To state SCWC's argument is to expose its fallacy: that, because it had to purchase power from IEP at spot market prices to serve its retail load, it should be permitted to use those spot market prices to determine the incremental cost for its sale to Mirant. SCWC's theory contains a fundamental disconnect between cost and price.

Consistent with the WSPP Agreement, the Commission focused on the source of the power SCWC sold to Mirant, finding that "SCWC did not procure the energy it sold to Mirant from the spot market (or self-generate), but simply resold energy it was contractually committed to purchase from Mirant at $95/MW[h]." Compliance Order at P 17, JA 176. As the Commission noted, it was concerned, not with what price SCWC was charging for sales to other customers, but only with the price SCWC could charge for the sale to Mirant: "While SCWC may have had spot market purchases from IEP during the hours it sold energy to Mirant, these purchases were independent of its sale agreement with Mirant." *Id*.

SCWC argues for the first time on appeal that this finding is "so ambiguous that it is unclear what the Commission meant . . . ." Br. at 25. Having failed to raise this contention on rehearing, SCWC is barred from raising it now. *See* Request for Rehearing of Southern California Water Company at 15-17 (Apr. 26, 2004) (challenging finding as being unsupported by the record, without questioning its clarity or meaning), R. 22, JA 191-93; FPA § 313(b). In any event, the meaning is clear: forecasted incremental cost is based on what resources (purchased power) SCWC used to service the sale to Mirant, not on what resources it used to service other sales in the same period.[16]

SCWC ultimately abandons any pretense that the price under the SCWC Sale Agreement was "cost-based" at all, conceding that it was instead designed to hedge SCWC's market exposure. *See* Br. at 30 ("SCWC and Mirant entered into this arrangement to offset the risks associated with SCWC's spot-market contract with [IEP].").

B. The Commission Reasonably Found That SCWC Simply Resold The Block Of Power It Was Obligated To Buy From Mirant Back To Mirant

The Commission's conclusion that SCWC's incremental cost was $95/MWh

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[16] SCWC in fact acknowledges this very point, stating that "[t]he WSPP Agreement by terms requires that the incremental cost to be forecasted is the cost of providing the service . . . ." Br. at 29 (emphasis deleted). Here, the service at issue is the sale to Mirant.

rested on the finding that SCWC resold back to Mirant the same 15-MW block of power that it bought from Mirant: "SCWC did not procure the energy it sold to Mirant from the spot market (or self-generate), but simply resold energy it was contractually committed to purchase from Mirant at $95/MW[h]." Compliance Order at P 17, JA 176. That finding is reasonable and supported by the record, including not only the agreements themselves and the circumstances in which they were entered, but also SCWC's own explanation of the transaction.

First, the agreements on their face make plain that SCWC's resale to Mirant consisted of the same 15 MW of around-the-clock power purchased from Mirant. Each set of agreements purports to sell an identical amount and type of energy, at the same delivery point and at exactly the same hours and days, for an overlapping period starting April 1, 2001. *See* R.3, Attachment B (reflecting sales by Mirant to SCWC), JA 33-34; R.3, Attachment C (reflecting sales by SCWC to Mirant), JA 36-37. Second, reselling the energy back to Mirant was rational. The new Mirant Baseload Purchase Contract gave SCWC a 15-MW block of energy on April 1, even though the Dynegy Baseload Purchase Contract (at 12 MW) remained in effect through April 30. The resulting overlap meant that in April SCWC would have more than twice the energy needed to meet its typical load and

would more than quadruple its total baseload purchase costs.[17] Selling back to Mirant for the month, as the Commission found, therefore made financial sense.

This conclusion is also supported by the pricing of the sale to Mirant. SCWC purchased the power from Mirant at $95/MWh and resold it to Mirant at the higher rate of SP15–$20/MWh (allowing Mirant to sell it a second time, on the spot market, at SP15). Under SCWC's theory, its incremental cost for the sale was the SP15 spot price, which guarantees a loss ($20/MWh below the SP15 spot price). *See* Rehearing Order at P 14 (describing such built-in loss as an "unreasonable result"), JA 334.

SCWC *itself* repeatedly made the linkage of the Mirant transactions explicit. Though SCWC now contends (Br. at 24, 25) that its purchase from and resale to Mirant were not linked, it repeatedly told the Commission that the resale was for the purpose of ridding itself of the unneeded 15 MW in the month that its two baseload contracts overlapped. *See, e.g.*, Southern California Water Company's Request for Leave to File Answer and Answer to the Protest of Mirant Americas Energy Marketing, LP at 13 ("Mirant readily agreed to buy the 15 MW of block

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[17] This is based on SCWC's typical load of 12 MW and its April contractual around-the-clock purchases totaling 27 MW. The hourly cost of all contractual MW under the existing Dynegy contract, for 12 MW of power at $35.50/MWh, was $426 ($35.50 x 12), while the Mirant contract, for 15 MW of power at $95/MWh, had an hourly cost of $1425 ($95 x 15). *See* Rehearing Order at PP 12-14, JA 334; Compliance Order at P 9 n.3, JA 173.

power that SCWC did not need *back from SCWC*.") (emphasis added), R. 4, JA 51. In fact, by its own account, SCWC never even took delivery of the 15 MW it resold to Mirant:

> [D]uring April 2001, SCWC had two power supply resources that were used to meet its scheduled load: its 12-MW block purchase from Dynegy and other energy purchased from or through Dynegy.[18] To SCWC's knowledge, these were the resources that were used to meet SCWC's load during April 2001 and *Mirant never delivered any of the 15-MW block to SCWC* or to Dynegy on SCWC's behalf.[19]

R.4 at 12 (emphasis added), JA 50. SCWC testimony in a separate FERC proceeding concerning the Mirant Baseload Purchase Contract[20] (which SCWC also submitted in the instant FERC proceeding) explained that "Mirant agreed to purchase from SCWC the 15-MW block that SCWC did not need during April 2001 (because of its existing Dynegy contract, which did not expire until the end of April) . . . ." Rebuttal Testimony of Joel A. Dickson at 6:9-11, *Nevada Power Co. v. Duke Energy Trading & Mktg., L.L.C.*, FERC Docket Nos. EL02-26-000, *et al.*

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[18] This reference ("other energy purchased from or through Dynegy") is to SCWC's spot market purchases through its daily purchasing agreement with IEP. Dynegy later succeeded IEP and assumed its obligations under the contract. *See* Br. at 6 n.2.

[19] In its Brief (at 6), SCWC explains that, ordinarily, Mirant was to deliver the 15 MW to Dynegy, acting as SCWC's scheduling coordinator, in the SP15 zone.

[20] FERC Docket No. EL02-26-000, where SCWC is seeking to modify the terms of the Mirant Baseload Purchase Contract on the ground that $95/MWh is unjust and unreasonable.

(undated excerpt), R.11, Exhibit K, JA 166.

In sum, the Commission's finding that SCWC simply resold to Mirant the same 15 MW that it purchased from Mirant is well-supported by the record, including verification by SCWC.

IV. APPLYING FERC'S ESTABLISHED REFUND REMEDY IN THIS CASE WAS NOT ARBITRARY OR CAPRICIOUS

A. The Commission Properly Applied Its Longstanding Refund Remedy For Late Tariff Filings

SCWC's argument that ordering a refund was arbitrary and capricious is based on its core premise that the remedy was imposed, not for a late filing for market-based rate authority, but for a power sale under the WSPP Agreement at a price that exceeded the permissible cost-based rate under that Agreement. Br. at 35-36. Indeed, SCWC apparently concedes that, if the relevant violation was a late tariff filing, then a refund in accordance with the *Prior Notice Order* was appropriate. *See* Br. at 35 ("[T]hat remedy would be appropriate only if the WSPP Agreement did not permit sales at negotiated rates."). As discussed *supra* in Part II, however, the Commission's rationale for treating the SCWC Sale Agreement as an unauthorized sale at market-based rates was reasonable and supported by the record.

Ordering a refund here is consistent with the principles of the *Prior Notice Order* and with FERC precedents issued both before and after the *Order*. The

Prior Notice Order determined, as a matter of policy, that refunds were an effective measure for enforcing filing requirements in a manner that appropriately balanced the need to promote compliance with the financial burden on rates. 64 FERC ¶ 61,139 at pp.61,979-80[21]; *see also id.* at p.61,972 (seeking "to balance respect for the statutory requirement of prior notice and filing with the market realities of the public utilities we regulate under the FPA"). That conclusion was consistent with precedent. *See Central Maine,* 57 FERC ¶ 61,083 at p.61,304 (refund "reasonably addresse[d] the nature and degree of the violation" by not rewarding the utility for its noncompliance but still allowing it to recover its costs).

Likewise, *Carolina Power* rejected arguments similar to SCWC's here, emphasizing both the significance of the § 205 violation and the fairness of the remedy. *See* 87 FERC ¶ 61,083 at p.61,356 ("[the utility's] failure to timely file its rate schedules did not constitute a minor infraction of the law"); *id.* at p. 61,357 (explaining refund involved return of funds that utility was never authorized to receive but "with a floor to protect the company from operating at a loss").

Consistent with those precedents, imposing a refund in the instant case was

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[21] The Commission considered arguments, similar to those now raised by SCWC, that, where the customer agreed to the original rate, a refund would be a "windfall" to the buyer, and that, if the seller had credited the revenues to its cost-of-service, its customers received a financial benefit. *Id.* at p.61,979. Nevertheless, the Commission chose to implement the refund policy as an appropriate remedy for § 205 violations.

done, not to make Mirant whole, but to vindicate FERC's statutory responsibilities:

> [w]hether or not Mirant actually suffered any harm is irrelevant . . . . [T]he injury being remedied by refunds for late filing is not merely redress for the customer, but particularly directed to "the Commission's ability to enforce FPA Section 205's requirement that there be prior notice and that the rates charged be just and reasonable at the time they are being charged."

Compliance Order at P 16 (quoting *El Paso*, 105 FERC ¶ 61,131 at P 21 (citing *Carolina Power*)), JA 175. Nothing was presented to show those general principles were inapplicable in the instant case. As the Commission "had previously weighed the public interest of the notice and filing requirements of the FPA against the impact of the remedy on offenders" in implementing the refund requirement through the *Prior Notice Order* proceeding, "there was no need for the [Compliance] Order to further balance the equities of the situation." Rehearing Order at P 7 & n.9, JA 332.

The Commission's reasonableness is further confirmed by its rulings not to require refunds for the unauthorized APX Sales and to correct its interpretation of the adder provision under the WSPP Agreement, thereby substantially reducing (by 40 percent) the amount of the refund ordered for the unauthorized SCWC Sale Agreement. *See* Letter Order at P 15, JA 61-62; Clarification Order at PP 12-13, JA 339-40. FERC's actions in each instance were designed to further its stated policy goals. *See id.* at P 12 ("[I]t bears emphasis that the Commission's concern

in this proceeding is not to assure Mirant of any particular refund amount, but to uphold the filing requirements of the FPA."), JA 340.

Finally, SCWC's argument that equitable considerations would weigh against requiring a refund must be tempered by its lack of clean hands. *See generally Udall v. Littell*, 366 F.2d 668, 675 (D.C. Cir. 1966) ("It is elementary, of course, that one seeking equity must do equity and must show 'clean hands' at the threshold."); *Rocky Mountain Natural Gas Co. v. FERC*, 114 F.3d 297, 299 (D.C. Cir. 1997) (noting FERC's "established practice of treating unclean hands as a *de facto* bar to equitable relief"). SCWC sought market-based rate authorization, admitting the two unauthorized APX Sales, but failing to notify FERC of the earlier, far more substantial sale to Mirant. Having made three prior unauthorized sales, and having initially disclosed only the two smaller, unprofitable transactions while omitting the most significant, profitable one, SCWC by its own actions undermined its appeal to equity.

B. Cases Cited By SCWC Are Inapposite

The cases cited by SCWC (Br. at 36-38) do not require reversal of the instant Orders. First, none involved a party that had charged market-based rates without prior FERC authorization; rather, all involved errors made under existing, filed tariffs, where FERC found utilities had charged unjust and unreasonable rates. *See, e.g., Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810 (D.C. Cir. 1998)

(accounting system violated tariff provisions).[22] None of those cases addressed notice and filing requirements for tariffs under FPA § 205, FERC's efforts to enforce those requirements, or the particular aims of the refund remedy established in the *Prior Notice Order*. For those reasons, the Commission has previously rejected similar arguments that a refund for late filing was inequitable. *See Carolina Power*, 87 FERC ¶ 61,083 at p.61,356 ("*Koch* and the other cases . . . cite[d] are inapposite. . . . *The equities are different in a case such as this* where . . . the injury is in the first instance to the Commission's ability to enforce the prior notice requirement . . . ."") (emphasis added); *see also id.* at pp.61,356-57 (distinguishing *Koch* (136 F.3d at 817), where, in contrast to late filing context, refund did not promote purposes of the filed rate doctrine).

Moreover, the cases cited by SCWC are further distinguishable from the instant case by the different degrees of the violations or the procedural posture of the remedy issue. *Koch* and *Gulf Power* involved minor violations of complex and disputed tariff provisions and FERC regulations, unlike SCWC's unauthorized and unreported sale of power in contravention of clear statutory and regulatory

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[22] *See also Laclede Gas Co. v. FERC*, 997 F.2d 936 (D.C. Cir. 1993) (overcharges violated tariff's purchase gas adjustment clause); *Gulf Power Co. v. FERC*, 983 F.2d 1095 (D.C. Cir. 1993) (cost passthrough under tariff's fuel adjustment clause required waiver of applicable FERC regulations); *Town of Concord v. FERC*, 955 F.2d 67 (D.C. Cir. 1992) (funds improperly collected under tariff's fuel adjustment clause).

directives. *Cf. Koch* 136 F.3d at 815 (recognizing petitioner's "suggested interpretations are possible readings of the tariff provision"); *id.* at 817 (violation was "technical error"); *Gulf Power*, 983 F.2d at 1098 (noting ambiguity of accounting regulation); *id.* at 1099 (failure to seek timely waiver had been "ministerial error"). And *Laclede* did not even concern a refund order, but, instead, centered on FERC's approval of a contested settlement over a party's objection. *See* 997 F.2d at 945-48.

Town of Concord, on which SCWC places particular emphasis (Br. at 36), is no more helpful to its argument. In that case, customers argued that refunds were mandated by the statute, and that the Commission's decision not to require refunds undermined enforcement of the FPA. 955 F.2d at 68, 76. The Court disagreed, finding the Commission's view reasonable: that, rather than a "brazen violation" of FERC regulations, the matter was "highly technical, confusing, and still contested . . . ." *Id.* at 76. As the Court made clear, whether to order a refund falls within FERC's discretion. *See id.* ("As to the necessity of refunds to deter violations of the statute, the [FPA] leaves this determination to the Commission's expert judgment."). Therefore, *Town of Concord* supports deference to the Commission's judgment, in accordance with the *Prior Notice Order*, that a refund is appropriate in the instant case to enforce the filing requirements of FPA § 205.

CONCLUSION

For the reasons stated, the challenged FERC Orders should be affirmed in all respects.

Respectfully submitted,

Cynthia A. Marlette
General Counsel

Dennis Lane
Solicitor

Carol J. Banta
Attorney

Federal Energy Regulatory
Commission
Washington, DC 20426
TEL: (202) 502-6433
FAX: (202) 273-0901

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