107 FERC ¶ 61,165
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, and Joseph T. Kelliher

San Diego Gas & Electric Company — Docket Nos. EL00-95-087

v.

Sellers of Energy and Ancillary Services
Into Markets Operated by the California
Independent System Operator and the
California Power Exchange

Investigation of Practices of the California
Independent System Operator and the
California Power Exchange — Docket Nos. EL00-98-074

ORDER ON REQUESTS FOR REHEARING AND CLARIFICATION

(Issued May 12, 2004)

1. In this order, the Commission acts on requests for rehearing and clarification of two orders issued on October 16, 2003 concerning refunds for California.[1] The order benefits customers by further clarifying the method for calculating refunds for electricity purchases made in organized spot markets in California during the period from October 2, 2000 through June 20, 2001 (the Refund Period).

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[1] See San Diego Gas & Electric Company, et al., 105 FERC ¶ 61,066 (2003) (the October 16 Main Order) and San Diego Gas & Electric Company, et. al., 105 FERC ¶ 61,065 (2003) (the October 16 Second Order).

Background and Pleadings

2. In the October 16 Main Order, the Commission addressed requests for rehearing or clarification of its March 26, 2003 order[2] that, in turn, adopted in part and modified in part the presiding Administrative Law Judge's Proposed Findings issued on December 12, 2002.[3] The October 16 Main Order: (1) denied rehearing in part, granted rehearing in part, and granted clarification in part of the March 26 Refund Order; (2) directed the California Independent System Operator Corporation (CAISO) and the California Power Exchange Corporation (PX) to submit compliance filings containing the results of their revised reruns and directed that these compliance filings be made as soon as possible but no more than five months after the date of issuance of the order; (3) directed Williams to file its November 11, 2002 settlement agreement with the California State Releasing Parties;[4] and (4) directed Automated Power Exchange, Inc. (APX) to submit a compliance filing containing the results of its determination of the refund liability of each of its Participants as soon as possible but no later than five months after the issuance of the order.

3. The following filed timely motions for rehearing and/or requests for clarification of the October 16 Main Order: Arizona Electric Power Cooperative, Inc, (AEPCO); Automated Power Exchange, Inc. (APX); Bonneville Power Administration (BPA); California Independent System Operator Corporation (CAISO);[5] California Parties;[6] Calpine Corporation; City of Los Angeles Department of Water and Power (LADWP); City of Redding, California, and Silicon Valley Power of the City of Santa Clara,

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[2] See San Diego Gas & Electric Company, et al., 102 FERC ¶ 61,317 (2003) (March 26 Refund Order).

[3] See San Diego Gas & Electric Company, et al., 101 FERC ¶ 63,026 (2002) (ALJ's Proposed Findings).

[4] The California State Releasing Parties comprise the following: the Governor of the State of California; the State of California Department of Water Resources; the California Public Utilities Commission; the California Electricity Oversight Board; and the Attorney General of California.

[5] The CAISO pleading was the only filing addressing the October 16 Second Order.

[6] The California Parties comprise the following: The State of California ex rel. Bill Lockyer, Attorney General; the California Electricity Oversight Board (CEOB), the California Public Utilities Commission (CPUC); and Southern California Edison. Pacific Gas and Electric (PG&E) has appealed the October 16 Main Order and did not join in the California Parties' rehearing request. The CPUC joined in the rehearing request only to the extent it seeks clarification but not to the extent it seeks rehearing.

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California (jointly, Redding/SVP); City of Vernon; Cities of Anaheim, Azusa, Banning, Colton, and Riverside California (Southern Cities); El Paso Merchant Energy, L.P. (EPME); Indicated APX Market Participants;[7] Morgan Stanley Capital Group, Inc. and Merrill Lynch Capital Services, Inc. (Morgan Stanley/Merrill Lynch); and, the Northern California Power Agency.

4. In addition to these filings, a number of entities made filings in response to the October 16 Main Order that were not styled as requests for rehearing and/or clarification but request relief that, as a matter of substantive effect, render these pleadings as requests for rehearing and/or clarification. For example, in its November 11, 2003 a "Motion for Clarification," the Eugene Water & Electric Board (EWEB), asserted that it met all the criteria the Commission employed in the October 16 Main Order in finding that the Commission did not have subject matter or personal jurisdiction over the Public Utility District No. 2 of Grant County, Washington.[8] Functionally, this pleading is a request for rehearing and/or clarification and will be considered as such. Similarly, Turlock Irrigation District (Turlock) raised the Grant County jurisdictional issue, discussed infra, in its "Motion to Dismiss with Prejudice all Claims of Refund Liability and Request for Expedited Consideration," which was filed with the Commission on November 25, 2003. Turlock followed up this motion on January 23, 2004, with a "Renewed Motion" seeking the same remedy: dismissal of all claims of refund liability. Redding filed a "Request for Reconsideration or Clarification" on November 17, 2003, raising the Grant County jurisdictional issue and asserting that the Commission should also find that Redding's bilateral contracts are beyond the Commission's jurisdiction under the same factual analysis as it applied in excusing Grant County.[9] As stated above, these pleadings are the functional equivalents of requests for rehearing.[10]

5. On November 17, 2003, Allegheny Energy Supply Company, LLC (Allegheny Energy) filed a Motion to Intervene Out of Time and Request for Rehearing for the limited purpose of seeking rehearing of the October 16 Main Order. Allegheny Energy claims that, while it was an APX Participant, it was not a seller of energy or ancillary services into the CAISO or CalPX markets during the refund period, did not execute a

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[7] Indicated APX Market Participants comprise the following: Avista Energy, Inc., BP Energy Company, and Tractebel Energy Marketing, Inc.

[8] See 105 FERC ¶ 61,066 (2003) at 61,243.

[9] LADWP also raises this issue. See: Request for Rehearing of LADWP, at 2 and 5-7.

[10] The Commission has received a number of additional pleadings pertaining to the Grant County exemption and Grant County's participation in the ongoing bankruptcy proceedings of PG&E and CalPX. These pleadings seek rehearing or clarification of the October 16 Main Order and will be discussed, infra.

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Participating Generator Agreement (PGA), and that it did not have adequate notice that it might be liable for refunds as an APX Participant in lieu of APX. On December 2, 2003, APX filed a response to Allegheny Energy's Motion, asserting that Allegheny Energy should not be excused from refund liability merely because it was not named as a party to the proceedings or because it did not execute a PGA. Allegheny Energy filed a motion to strike APX's response, asserting that it was not appropriate under Commission rules as an answer to a request for rehearing. APX's December 22 response to the motion to strike stated that Allegheny Energy was a party to the proceedings when the APX liability issue was set for hearing, and that Allegheny Energy was on the service list for all subsequent pleadings. However, Allegheny Energy filed a notice of withdrawal seeking to withdraw from the case after the administrative law judge issued his Proposed Findings but before the Commission ruled on them. According to Allegheny Energy, "Merely because it had been added to the service list, Allegheny Energy has been served with several burdensome discovery requests . . . Allegheny Energy seeks to withdraw from this proceeding rather than incur the time and expense of answering these requests, which should not apply to non-sellers to the California ISO or PX."[11] Under Commission rules, Allegheny Energy's notice went into effect automatically 15 days after the date of filing, inasmuch as there were no protests to its withdrawal and the Commission did not affirmatively disallow the withdrawal.[12] The Commission will deny the out-of-time request to intervene filed by Allegheny Energy, as it has had numerous opportunities to participate in these proceedings and in fact participated until its notice of withdrawal went into effect.

Responsive Pleadings

6. A final group of pleadings involve responses by various parties to the rehearing requests of other parties. APX's December 2 Response to Motion to Intervene, Requests for Clarification, and Requests for Rehearing addressed the requests for rehearing and/or clarification filed by Allegheny Energy (which also filed a motion to intervene out-of-time), Calpine, Indicated APX Market Participants, Morgan Stanley/Merrill Lynch, and El Paso Merchant Energy. The California Generators,[13] who did not file a request for rehearing and/or clarification of the October 16 Main Order, filed a response to the

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[11] See Notice of Allegheny Energy Supply Company, L.L.C., filed January 10, 2003 in this docket, at 2.

[12] 18 C.F.R. § 385.216.

[13] The California Generators comprise the following: Duke Energy North America, LLC, Duke Energy Trading and Marketing, LLC, Reliant Resources, Inc., Reliant Energy Coolwater, Inc., et al., Dynegy Power Marketing, Inc., El Segundo Power LLC, Long Beach Generation, LLC, Cabrillo Power I LLC and Cabrillo Power II LLC, Mirant Americas Energy Marketing, LP and Mirant California, LLC, and Williams Power Company.

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requests for rehearing and/or clarification filed by the California Parties and the CAISO on December 2. In turn, the California Parties and the CAISO each filed a response to the California Generators on December 12. The California Generators filed answers to these pleadings on December 23. Finally, on February 6, 2004 the California Parties filed an answer opposing Turlock's Renewed Motion for Expedited Consideration of its Motion to Dismiss.

7. Rule 213 of the Commission's Rules of Practice and Procedure states that an answer may not be made to a request for rehearing "unless otherwise ordered by the decisional authority."[14] Because the responsive pleadings in question present information that has assisted the Commission in evaluating several issues in these proceedings, we will entertain these answers to requests for rehearing and other responsive pleadings.

8. Several parties have raised arguments on rehearing that are identical to arguments they have raised already and that the Commission has thoroughly considered and rejected. Accordingly, we will deny the requests for rehearing that generally challenge the Commission's authority to apply refunds to governmental entities in the specific circumstances delineated in our prior orders in this proceeding;[15] however, the specific exemption afforded to Grant County will be discussed infra.

9. A Motion to Intervene Out of Time for Good Cause Shown, Comment in Support of Intent to Release Information, and Request for Expedited Consideration was filed on March 17, 2003 by the People of the State of Montana, ex rel. Mike McGrath, Attorney General (Montana). Montana alleges that "it has only recently become aware of the existence of evidence of market manipulation that may have substantially affected Montana's interests."[16] Montana seeks access to information that is not publicly available but is subject to a Commission protective order. Montana alleges that its interest in the outcome of this proceeding arises from the fact that "if the market misconduct or manipulation referred to by the California Parties is proven, the circumstances in the western market show that it would likely have negatively affected the citizens of the State of Montana."[17] In addition, Montana's motion indicated that the state is considering whether to institute state court proceedings based on possible

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[14] 18 C.F.R. § 385.213(a)(2).

[15] See San Diego Gas & Electric Company et al., 96 FERC ¶ 61,006 (2000) at 61,010-11; 95 FERC ¶ 61,120 (2001), rehg, 97 FERC 61,275 (2001); and 105 FERC ¶ 61,066 (2003) at 61, 339.

[16] Motion for Leave to Intervene Out of Time for Good Cause Shown, Comment in Support of Intent to Release Information, and Request for Expedited Consideration by the People of the State of Montana, Ex Rel. Mike McGrath, Attorney General at 2.

[17] Id. at 6.

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violations of state law, and that access to protected materials in the record of this proceeding and subject to a Protective Order would assist in its determination of its future course of action in state court. Finally, Montana correctly notes that the Commission granted a motion to leave out of time by the Public Utility District of Snohomish County (Snohomish) on March 13, 2003, or four days prior to the filing of Montana's motion.[18]

10. The Commission notes that it granted the Snohomish motion without comment and, on that basis, believes it appropriate to grant Montana's motion to intervene out of time.

Errata Filings

11. Finally, two commenters brought to our attention technical errors in the October 16 Main Order. In an October 23 "errata" filing, APX pointed out that the Commission had incorrectly described a witness, Mr. Bulk, as being a witness for Calpine, when he was a witness for APX.[19]

12. On October 24, Coral Power filed a Motion for Expeditious Issuance of Errata and Request for Waiver of Responses echoing a second issue in the APX errata filing. Coral Power and APX sought to correct certain references to Coral Power in the October 16 Main Order. Coral Power attributed the references to a "misunderstanding of the record." The misunderstanding arose in the context of an earlier motion by Coral Power concerning the March 26 Refund Order. Coral Power asked that the Commission clarify that the March 26 Refund Order did not alter the right of marketers to demonstrate that their portfolio costs exceeded their recovery of costs under the mitigated market clearing price (MMCP) methodology.[20] APX filed in support of Coral Power's filing, commenting that "[o]ne of the nation's largest power marketers that hired APX to submit schedules and bids on its behalf to the California markets during the refund period, and that owes the market millions of dollars in refunds, has informed APX that it intends to rely on the ALJ's order to fight any attempt by APX to recover refund amounts from it."[21] According to Coral Power and APX, the Commission misread this comment as an

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[18] San Diego Gas & Electric Company et al. (Docket Nos. EL00-95-000 et al. and EL00-98-000 et al. March 13, 2003) (Notice Granting Late Intervention - unpublished letter order).

[19] October 16 Main Order at ¶165.

[20] Response of Automated Power Exchange, Inc. in Docket Nos. EL00-95-045 et al., (filed April 16, 2003).

[21] Id. at 3, n.4.

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indication that Coral Power was the marketer to which APX referred, when that is not the case.[22] Coral Power asserted that it was not using APX during the period covered by the refund obligation and, thus, was not an APX Participant during the refund period. This assertion is supported by portions of Exhibit Nos. APX-12B and APX-24 in this proceeding in which APX identified the sellers that sold power through APX. Coral Power was not listed on these exhibits. The upshot of these "errata" filings is that Coral Power believes that the Commission should issue an errata to the effect that "the record shows that Coral did not use APX to schedule energy into the CAISO or PX markets during the refund period."[23] APX also confirms that Coral Power was not an APX Participant during the refund period. Accordingly, the Commission concurs that the record should reflect accurately that Coral Power was not the power marketer to which APX referred, and that it was not an APX Participant during the refund period.

MMCP and Other Refund Calculation Issues

Because there has been no proxy price established for the AEPCO units, if these units are eligible to set the MMCP, how will the proxy price be established?

Background

13. In the March 26 Refund Order, the Commission adopted Staff's proposal to modify the MMCP formula to use producing basin prices plus a tariff-rate transportation allowance, in lieu of California spot market gas prices, which Commission Staff found had been subject to manipulation. This formula was also applied to out-of-state generators that were eligible to set the MMCP, including AEPCO.[24] On rehearing, in the October 16 Second Order the Commission found that the specific basin plus transportation data series of proxy gas prices, provided in the California Parties' March 3 filing in Exhibit No. CA-16, Appendices N and O, to be reasonable and accurate. The October 16 Second Order directed the CAISO to use that data series in calculating the MMCPs.[25]

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[22] References in the October 16 Main Order to which Coral Power and APX object are in Paragraphs 162, 167, 169, and 170, and footnotes 91 and 97.

[23] Motion of Coral Power, L.L.C. for Expeditious Issuance of Errata and Request for Waiver of Responses at 4.

[24] March 26 Refund Order at page 51.

[25] October 16 Second Order at Paragraphs 6 and 7.

Comments

14. The CAISO has asked the Commission to clarify that a new data point should be established for the AEPCO units, pursuant to the Commission Staff methodology of using production basin prices along with a tariff-rate transportation allowance for AEPCO. The CAISO asserts that this is necessary and reasonable given that the current data series was devised for California units, and that the transportation allowance for AEPCO's Arizona units would be different from the transportation allowance developed for the California units. AEPCO's request for rehearing does not address the MMCP calculation but continues to argue that it should not be responsible for any refunds.

Discussion

15. The Commission will grant the CAISO's requested clarification. We believe that it is reasonable to establish a new data point for the AEPCO units. AEPCO was the only out-of-state generator that sought to have its units eligible to set the MMCP; and in the March 26 Refund Order, the Commission adopted the presiding judge's proposed finding that AEPCO's heat rate data were sufficient to allow it to set the MMCP. Establishment of a new data point based on the average gas prices at the Permian and San Juan basins plus an average transportation tariff rate on El Paso (but excluding California intrastate transport charges) consistent with the California Parties' March 3 filing in Exhibit No. CA-16, Appendix N, would be reasonable. Because AEPCO, at the time, was a full requirements customer of El Paso, it is possible that the average transportation tariff rate as reflected in Appendix N would not provide for recovery of AEPCO's fuel costs. Consistent with the Commission's decision to allow a demonstration of the need for additional fuel cost recovery, AEPCO is hereby directed to inform the Commission within 20 business days of the date of this order if it seeks to file for additional fuel cost allowance. If AEPCO pursues the additional fuel cost allowance, it will be subject to the requirements of a soon-to-be-issued order involving fuel cost adjustments.

Whether the scope of the CAISO's compliance filing should be clarified with respect to interest, invoice activity and the appropriate timeframe for making this compliance filing.

Background

16. The October 16 Main Order directed the CAISO and the PX to submit within five months compliance filings containing the results and supporting data of their respective settlements and billing processes that are the subject of this refund proceeding. The

Commission did not specify process steps concerning discovery but instructed the CAISO, in employing its proposed process, to help market participants understand the adjustments the CAISO was going to make.[26]

Comments

17. The CAISO has requested clarification of two aspects of the Commission's directives. The first involves the scope of the compliance filing. The CAISO states that, in order to determine accurately the post-refund obligations in the CAISO market, it must first correct its settlements data base by conducting preparatory reruns (discussed at length in the Amendment No. 51 Docket No. ER03-746-000, et al.[27]), and then conduct the refund rerun. Then, the CAISO must take into account various inputs and offsets, such as emissions costs attributable to transactions in the CAISO market, before arriving at final invoices showing "who owes what to whom."[28] The CAISO has asked that the Commission clarify that the Commission did not intend the five-month compliance deadline in the October 16 Main Order to be a strict deadline, and that the CAISO's estimated filing date for its compliance filing, June of 2004, would be "reasonable."

18. A second concern raised by the CAISO is the timing of its compliance filing. The CAISO believes that the five-month time frame established in the October 16 Main Order allows sufficient time only for it to complete the reruns of the settlements and billing system, and the filing would consist of those reruns plus supporting papers. The CAISO avers that five months does not provide adequate time to complete its entire refund calculation process, which includes reruns, calculations of interest and invoicing activities. Nor does this timeframe take into account that the CAISO does not have the data necessary to begin calculations related to emissions offsets and fuel cost allowances.[29] , which the CAISO estimates will take approximately nine months.[30] In addition, the CAISO cites the need for emissions cost data and data relating to fuel cost allowances as additional inputs to its calculations. For these reasons, CAISO seeks

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[26] October 16 Main Order at Paragraph 194.

[27] The Commission has addressed the CAISO Amendment 51 in the following orders: California Independent System Operator Corporation, Order Conditionally Accepting and Suspending Tariff Amendments Pending Further Commission Action, 103 FERC ¶ 61,331 (2003); Order on Rehearing and Compliance Filing, 105 FERC ¶ 61,203 (2003); and, Order Granting Clarification and Granting and Denying Rehearing, 106 FERC ¶ 61,099 (2004).

[28] California Independent System Operator Corporation Request for Clarification and/or Rehearing at 14 -- 18.

[29] Id. at 15.

[30] Id. at 14 and 15.

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clarification that the compliance filing required to be filed within the five-month timeframe established by the October 16 Main Order will only include the results of the CAISO's rerun settlements system, along with any additional supporting data. If the Commission does not grant this clarification, the CAISO requests rehearing on this issue, asking that the Commission limit the compliance filing as requested or make it clear that the CAISO has the time it needs to complete the additional steps to complete the process.

19. APX, Morgan Stanley/Merrill Lynch, and the Indicated APX Market Participants[31] also raised a timing concern, asserting that it would be difficult for APX to meet the five-month compliance filing deadline until it has had a reasonable time to review and verify the CAISO and CalPX data, rerun settlements, and to give APX market participants time to verify APX's compliance filing.

Discussion

20. The CAISO states that a significant portion of its time over the last few months has been spent in making preparatory re-run adjustments so that the CAISO would be working from a clean baseline of market settlements and market participants would not see further adjustments post refund calculations. The CAISO is undertaking these adjustments manually. According to the CAISO's most recent status report filed on March 10, 2004, the CAISO estimates May 12, 2004 as the date when the preparatory re-runs will be complete. This reflects a four week extension from the April 14 date estimated in the February status report to the Commission. The four week extension is necessary, according to the CAISO, to address overpayments and correction of records; and will thus delay the dispute period, the refund re-run production (which is estimated to take twelve weeks), and subsequent dispute period, compliance filing and financial clearing. CAISO has recently taken steps that provide transparency to its process (posting of the process and the MMCPs) to resolve disputes early and expedite the process so that refunds may be returned as soon as practicable; and has approved the hiring of additional contractors to accelerate the manual work required during the refund re-run process. Thus, the expectation is that, even though the Commission has provided for a 30 business day dispute period, market participants should avail themselves of the transparency provided in the CAISO's process to address disputes early in the processes.

21. The Commission finds the CAISO's status reports to be a valuable tool in managing this process and directs the CAISO to keep market participants and the Commission abreast of any delays in the process more frequently than the monthly status

[31] Automated Power Exchange, Inc. Request for Clarification, or in the Alternative for Rehearing at 3, 4, 12 and 13; Morgan Stanley/Merrill Lynch Request for Rehearing at 9 and 10; and, Indicated APX Market Participants Request for Rehearing and Clarification at 11 and12.

reports, as warranted. As discussed below, the Commission today takes action on the California Energy Resources Scheduling (CERS) issue -- an issue requiring resolution for the continuation of the preparatory adjustments. Through our direction today, and in forthcoming orders on the fuel cost allowance, we will have provided the CAISO with the additional guidance necessary to complete its refund calculation process. Should there be other outstanding issues, CAISO is directed to advise the Commission immediately. For example, the CAISO states that it needs emissions costs data to complete the refund calculations. CAISO is directed to provide the Commission within 10 days of the date of this order a full explanation of the form and content of the emissions costs data that it needs to complete its calculations.

22. Based on the foregoing, we grant CAISO's request for rehearing. The Commission directs the CAISO to complete all phases of its refund process and to submit its financial phase compliance filing no later than August 31, 2004, which is nearly four years after the submission of the complaint that started this proceeding. With respect to the CalPX, we note that on March 19, it filed with the Commission a filing that purports to comply with the Commission's October 16 directive to the CAISO and the CalPX to make a compliance filing "containing the results and supporting data of their respective settlements and billing processes that are the subject of this refund proceeding."[32] We have not completed our evaluation of the CalPX filing and will address its adequacy separately.

23. With regard to timing concerns raised by APX, Morgan Stanley/Merrill Lynch, and the Indicated APX Market Participants that it would be difficult for APX to meet the five-month compliance filing deadline, we clarify that the five month deadline will not apply to APX. Based on the foregoing discussion of the CAISO's processes, the five-month timeframe initially imposed on the CAISO, CalPX and APX simply could not be met. As we understand the CAISO's process, the CAISO will share with Scheduling Coordinators the process and results of the preparatory re-runs and the refund re-run. At each of these stages, there is a dispute period. Scheduling Coordinators should avail themselves of this opportunity to raise any disputes. The CAISO will file with the Commission its refund re-run compliance filing; the filing will be noticed with opportunity for comment; the Commission will issue an order. At this point, Scheduling Coordinators and other market participants have an opportunity to raise any concerns with the Commission. The final phase is the Financial Settlement Phase, and it should reflect a culmination of all that comes before. As to how much time Scheduling Coordinators should have to reconcile statements with the market participants behind them, if such periods are not specified in a tariff (as may be the case with the PX), we believe that two weeks is reasonable, especially given the measures the CAISO has

[32] October 16 Main Order at Paragraph 194.

already taken and that two opportunities for dispute resolution came before. Scheduling Coordinators are hereby directed to inform the Commission within 10 business days from the date of this order as to whether they are otherwise bound by provisions that would prevent them from completing reconciliation and dispute resolution within two weeks as directed herein. Thus, within two weeks of the Final Financial Phase, Scheduling Coordinators should submit compliance filings to the Commission.

Whether the CAISO may use a one-hour minimum run time for combustion turbines in correcting instances in which dispatches associated with a combustion turbine's minimum run times have been mischaracterized as residual or uninstructed energy.

Background

24. In the March 26 Refund Order, the Commission adopted the finding of the administrative law judge that combustion turbines dispatched for their minimum run time can set the MMCP throughout the minimum run time, not just for the first ten minutes. This determination was based on the administrative law judge's conclusion that the energy produced by combustion turbines, when dispatched by the CAISO for their entire minimum run times, is not residual energy and should be eligible to set the MMCP. This determination was clarified in the October 16 Main Order, where the Commission directed that the CAISO must correct any instances where, in violation of its own operating procedures, it has mischaracterized a dispatch associated with a combustion turbine's minimum run time as anything other than dispatched energy.[33]

Comments

25. On rehearing, the CAISO argued that, in order to comply with the Commission's directive, the CAISO must determine a value for the minimum run times of the combustion turbines that participated in the CAISO markets during the Refund Period. The CAISO proposes to use a one-hour minimum run time for all of these combustion turbines, based on the fact that all of the generators that have provided minimum run time data for their combustion turbines have reported a one-hour minimum run time. The CAISO asserts that these data are from a majority of the combustion turbines in the Control Area. Instead of soliciting and verifying a new set of minimum run time submissions from the generators, the CAISO has asked the Commission to clarify that it may use a one hour minimum run time value in determining which dispatches from combustion turbines have been mischaracterized as anything other than dispatched energy, and therefore, which units are eligible to set the MMCP.[34]

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[33] October 16 Main Order at Paragraph 136.

[34] CAISO Request for Clarification and/or Rehearing at 21.

Discussion

26. The Commission will grant the requested clarification. The CAISO states that the majority of combustion turbines in the Control Area have provided the requested data and report a one hour minimum run time. The CAISO proposes that, for those units that have not responded, the CAISO may extrapolate a one hour minimum run time We find that the CAISO has offered a pragmatic approach that appears reasonable and is uncontested by market participants. Moreover, such a solution would help to expedite the refund reruns, while it would further delay the process for the CAISO to seek another set of minimum run time submissions.

Whether the CAISO's methodology properly accounts for interest on both overcharges and amounts unpaid, as well as adjustments to transactions that took place during the Refund Period.

Background

27. The October 16 Main Order stated that, with one exception, the CAISO's proposed method for calculating interest on unpaid amounts and refunds was appropriate. The exception pertained to the CAISO's proposal for resolving mismatches between interest receivable and interest payable. The CAISO's rationale for allocating mismatches was premised on the idea that the mismatches occur for essentially structural reasons that are not primarily attributable to either debtors or creditors. The CAISO proposed that all positive mismatches (i.e., more interest due from debtors than interest due to creditors) are allocated to debtors, while all negative mismatches (i.e., less interest due from debtors than interest due to creditors) are allocated to creditors. The October 16 Main Order found that, because the CAISO had not submitted any evidence that creditors are more responsible for the mismatches than debtors, or vice versa, for the structural defects that may lead to these mismatches, the mismatches should be allocated pro rata among both debtors and creditors.

Comments

28. On rehearing, the CAISO sought additional clarification about interest calculation and allocation, based on three statements in the October 16 Main Order which, in turn, were clarifications in response to the rehearing request by the California Generators:

1. No interest should be collected on overcharges that were never collected, while overcharges that were collected should be assessed interest from the date of collection.

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2. Because the refund associated with an uncollected overcharge will not include interest, the portion of the unpaid invoice associated with the same overcharge should not include interest either.

3. If an adjusted payment resulted in an overcharge collected on a certain date, that date should be the starting date for the calculation and assessment of interest associated with the overcharge.[35]

Regarding the first two of these clarifications in the October 16 Main Order, the Commission intended to confirm that interest calculated in this manner would be consistent with the Commission's regulations governing the calculation of interest in section 35.19a.[36] With respect to the first two clarifications, the CAISO seeks further clarification that its method of calculation will comport with the Commission's regulations. Specifically, the CAISO states that it plans to assess interest on all unpaid amounts and on all overcharges, then net all interest amounts owed and owing to Scheduling Coordinators, to arrive at a final amount of interest that is either owing to a Scheduling Coordinator by the CAISO Market, or is owed by a Scheduling Coordinator to the CAISO Market. While this calculation scheme is not the same as the process described in the first two statements in the October 16 Main Order, the CAISO asserts that the Commission's and the CAISO's calculation approaches are mathematically equivalent. [37] Moreover, the CAISO states that its methodology is faster and more reliable, because it is based on monthly invoiced amounts and all refunds associated with those amounts, while the Commission's methodology would require the CAISO to match refunds with specific periods and transactions.

29. On the third clarification, the CAISO states that it is not clear how the Commission intends the starting point for interest calculations to be determined. The CAISO states that it intends to calculate interest based on the Payment Date of the invoice on which the transactions subject to refund are billed, regardless of any subsequent adjustments made with respect to those transactions.[38] The CAISO expresses the concern that if the Commission intends that interest on refund amounts should be calculated on the date that the overcharges associated with the adjustments to the underlying transactions were collected, this will result in a significant delay in completion of the rerun process. CAISO explains that it would be required to determine, for each transaction subject to refund, whether the transaction's original price had ever

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[35] Id. at 22.

[36] October 16 Order at Paragraphs 107 and 108.

[37] CAISO Request for Clarification and/or Rehearing at 23.

[38] Id. at 26.

been adjusted. Then, for each transaction that involved a price adjustment (or adjustments), the CAISO would have to compare the transaction's original price, along with the amount of each price adjustment, to the MMCP, to determine the point at which the price of the transaction constituted an overcharge, and the amount of each overcharge in relation to the original price of the transaction. Thus, instead of calculating interest based on monthly invoiced amounts as proposed by the CAISO, it would have to perform interest calculations that track individual transactions, thus dramatically changing the amount of time needed to complete the rerun effort.

30. If the Commission does not clarify that the CAISO's proposal for calculating interest amounts on refunds, modified to allocate mismatches pro rata between creditors and debtors, does not require further modification as a result of the three clarification statements, the CAISO requests rehearing.

Discussion

31. The Commission will grant the requested clarifications. The Commission's three clarifications were intended to facilitate the CAISO's efforts and guide the process and not to raise methodological barriers to the timely completion of the CAISO's efforts to make a final determination of "who owes what to whom." The CAISO has demonstrated that the approach set forth by the Commission in the March 26 Refund Order and the approach set forth in CAISO's request for rehearing are mathematically equivalent. Thus, inasmuch as the CAISO's method appropriately calculates interest obligations, we grant the requested clarification and will allow the CAISO to utilize its proposed interest calculation process, modified to allocate interest mismatches pro rata between debtors and creditors, as directed in the October 16 Main Order.

PX Settlement Trust Account

Whether the interest rate for monies held by the PX in the Settlement Trust Account should be the actual interest rate earned on those funds or the Commission's interest rate.

Background

32. In the March 26 Refund Order, the Commission adopted the presiding judge's proposed finding that interest on refunds as well as on unpaid balances will be calculated in the manner set out in section 35.19a of the Commission's regulations.[39] On rehearing,

[39] 18 C.F.R. § 35.19a (2002). The Commission's interest rate is an average of the prime rate for each quarter. The quarterly interest rates are posted on the Commission's website at www.ferc.gov/gas/interest.htm.

the California Parties sought clarification that buyers will not, under any circumstances, be required to pay greater interest than specified in section 35.19a of the Commission's regulations. The October 16 Main Order granted this clarification.[40]

Comments

33. On rehearing, the California Parties continue to seek clarification of what the Commission believes is a straightforward application of its regulations. According to the California Parties:

> from the point that the PX is paid by the debtor forward, it is the PX who has full control of the funds, and it is the PX who should be solely responsible for interest. PX participants who timely paid the PX in the past, and who therefore owed no interest, have similarly satisfied their obligations to the PX. Since the PX is no longer in operation, if the PX is required to make up the difference, between the escrow rate and the FERC rate, it must find a method for raising funds to pay that difference, or for allocating this interest shortfall among PX participants.[41]

Thus, the California Parties seek a ruling by the Commission as to how interest shortfalls will be dealt with, inasmuch as the PX was not able to earn the FERC refund interest rate. The California Parties suggest that a reasonable approach would be to permit the PX to satisfy its interest obligation from earnings accrued in its Settlement Trust account rather than utilizing the interest rate set out in the Commission's regulations. Alternatively, they suggest that the Commission could require refunds be paid at the full section 35.19a rate, and allocate the shortfall pro rata to participants receiving refunds.[42]

Discussion

34. The Commission will grant the requested clarification. The PX is no longer in operation and has only the Settlement Trust Account to pay those of its obligations that remain to be paid. However, the Settlement Trust Account is earning interest at a level less than the rate prescribed in the Commission's regulations. Thus, there will be a shortfall in interest that requires either a method for raising funds to pay the difference in interest rates or a way of allocating the interest shortfall among PX Participants. The California Parties suggest two alternatives. The first would essentially define away the shortfall by deeming the interest rate that applies to the Settlement Trust Account to satisfy the Commission's regulations. The California Parties cite Commission precedent

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[40] October 16 Main Order at Paragraph 109.

[41] California Parties Request for Clarification or, Alternatively, Rehearing at 12.

[42] Id. at 13.

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for this approach, which the Commission finds to be apropos to the instant situation.[43] Having reviewed the precedents relied upon by the California Parties, we will adopt this proposal and allow the PX to deal with interest shortfalls by applying the interest rate applicable to the Settlement Trust account. We believe this is an equitable solution. We also believe that this approach will be more easily administered and therefore preferable to the alternative of a pro rata allocation of the shortfall.

Whether the Commission erred in adopting the basin plus transportation gas price proxy data series as an input in calculating the MMCP.

Background

35. The October 16 Main Order found the basin plus transportation gas price proxy data series advanced by the California Parties (in Exhibit No. CA-16, Appendices N and O to their March 3 filing in these proceedings) to be reasonable and accurate as an input into the calculation of the MMCP. This determination followed a May 22, 2003 technical conference at which Commission Staff heard a presentation and comments concerning this data series. The October 16 Main Order directed the CAISO and PX to use this gas price proxy data series as an input in calculating the MMCP and that suppliers use this data series as the baseline over which their fuel cost allowance claims will be calculated.[44]

Comments

36. SVP and Redding continue to oppose the use of gas proxy prices in any context on the grounds that they are "fictitious and do not realistically or legitimately represent, and may actually falsely misrepresent, the prices and costs actually paid or incurred by purchasers of natural gas."[45] They argue that, if the Commission is going to use a proxy

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[43] California Parties cite Alabama-Tennessee Natural Gas Company, et al., 32 FERC ¶ 61,085, at 61,210 (1985), (noting that a party's interest obligation would be at the Commission's interest rate, except for refunds placed in escrow, where the interest obligation would be the accrued interest in the escrow account); Champlin Petroleum Company, et al., 35 FERC ¶ 61,336 at 61,764 (1986) (finding request to use an escrow account to hold refunds reasonable, with interest accruing on such account inuring to the benefit of refund recipients; and FERC Statutes and Regulations, Regulation Preambles 1982-1985 ¶ 30,612 at 31,218, Refunds Resulting From Btu Measurement Adjustments, Order No. 399-A, November 10, 1984.

[44] October 16 Main Order at Paragraph 44.

[45] City of Redding, California, and Silicon Valley Power of the City of Santa Clara, California Request for Rehearing at 6, Paragraph 13.

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price, the natural gas cost inputs should be computed based on the highest natural gas prices actually paid by generators in arm's length transactions for each month of the actual refund period.[46]

Discussion

37. The October 19 Main Order denied rehearing of the Commission's decision to change the gas price indices used to calculate the MMCP.[47] Redding and SVP have not provided any new arguments that would persuade the Commission to change its determination on this issue. Accordingly, the Commission once again denies rehearing on this issue.

APX-related Issues

Whether the Commission erred in determining that APX and the APX market participants should be jointly and severally liable for all unallocated refunds.

Background

38. In the March 26 Refund Order, the Commission found that APX, like other private California Scheduling Coordinators, is liable for refunds associated with energy it scheduled on behalf of the underlying energy suppliers. This finding was based on the presiding judge's determination that the CAISO and the PX should not be thrust into the position of settling up with entities with whom they did not have a relationship through a FERC-approved tariff. Thus, in the March 26 Refund Order, the Commission found that APX, because it had a scheduling coordinator relationship with the CAISO and the CalPX through their respective tariffs, should be held liable for amounts owed by or owing to the CAISO and/or the CalPX.[48] In its request for rehearing of the March 26 Refund Order, APX opposed imposition of liability for refunds, and stated that it lacks the funds to make refunds, because it transferred the revenue associated with the sales to the CAISO and CalPX long ago. Moreover, APX argued that it could not pay any refunds unless it first obtains that revenue from the sellers that used APX as an intermediary. In the alternative, APX stated that the Commission could impose a form of joint and several liability among APX and its Participants. Under this proposal, APX

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[46] Id. at 9, Paragraph 19.

[47] See October 16 Main Order at Paragraph 166; and Refund Order at Paragraph GG.

[48] October 16 Main Order at Paragraph 159, and ALJ's Proposed Findings at Paragraph 857.

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would first allocate its Participants' amounts owed and owing as a result of the March 26 Refund Order and the CAISO and CalPX settlement reruns. However, any shortfall that remains as a result of non-payment by its Participants would be the responsibility of the Participants that failed to pay.[49]

39. The October 16 Main Order granted APX's request for rehearing on this issue, finding that APX Participants, along with scheduling coordinators such as APX, are liable for refunds. The Commission has exercised its broad discretion over refunds to assign refund liability in a way consistent with equitable considerations.[50] Moreover, the October 16 Main Order also acknowledged that the APX Participants have tariff relationships directly with the CAISO in two ways: (1) through the tariff provisions that allow the CAISO to order suppliers to increase or decrease production as part of dispatch to assure reliability and system stability; and (2) through reliability must-run contracts between the CAISO and the APX Participants. These contractual relationships and the CAISO tariff provisions were deemed by the Commission in the October 16 Main Order to be sufficient to support the finding that APX Participants should be held liable for refunds.

40. In addition, the Commission also adopted the APX proposal that refund liability for unapportioned sales should be allocated among APX Participants under the principle of joint and several liability (excluding any allocation of liability to APX).[51] The October 16 Main Order stated that: "[j]oint and several liability is traditionally used where activity of multiple parties creates harm that cannot be distinguished from one another and there is no reasonable basis for determining the contribution of each in the resulting harm."[52] Thus, the Commission held that, because APX as well as its Market Participants are energy suppliers, they should all be jointly and severally liable for refunds associated with unapportioned sales.

Comments

41. Several parties challenged the Commission's imposition of joint and several liability for refunds associated with unapportioned sales. APX continues to maintain that the Commission erred in determining that APX, as a seller of power, should be jointly and severally liable for any portion of the refunds. APX argues that its activities as a scheduling intermediary are "materially different" from its activity as the operator of a

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[49] October 16 Main Order at Paragraph 164.

[50] Id. at Paragraph 166.

[51] October 16 Main Order at Paragraph 170.

[52] Id., citing to Restatement (Second) of Torts, § 433A (1965).

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power exchange, in that it never set the price or determined the price at which energy was sold.[53] APX does not challenge the concept of joint and several liability, but it asserts that APX should not be liable for refunds for unapportioned sales.

42. The Indicated APX Market Participants, Morgan Stanley/Merrill Lynch, El Paso Merchant Energy, Calpine and Allegheny Energy all challenge the imposition of joint and several liability for unapportioned sales. The Indicated APX Market Participants assert that they did not own generation in California and thus had no contracts under the CAISO Tariff. To the extent that it is appropriate for the Commission to impose refund liability on transactions conducted through APX, the Indicated APX Market Participants assert that the proper basis for imposing such liability would be under the terms of the direct contracts between APX and its customers and not on the basis of some putative relationship with the CAISO.[54] The Indicated APX Market Participants cite section 13.3 of the APX Master Terms and Conditions of Service, which requires market participants to indemnify APX in connection with claims "caused wholly or in part by any act or omission of the Participant . . . except to the extent such claim is caused by the negligence or willful misconduct of APX."[55] Accordingly, the Indicated APX Market Participants conclude that, because the Commission's determination of refund liability rests on the contractual relationship between the APX Market Participants and APX, the allocation of refund liability must be calculated according to those contracts.

43. Calpine argues that joint and several liability is a tort law concept that is inappropriately applied when there is no contractual basis for this remedy. Echoing the comments of the Indicated APX Market Participants, Calpine asserts that there is no such basis for joint and several liability in the APX Master Terms and Conditions of Service.[56] The rehearing requests of EPME,[57] Morgan Stanley/Merrill Lynch,[58] and Allegheny Energy make essentially the same argument.[59]

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[53] APX Request for Clarification, or in the Alterative for Rehearing at 5-12.

[54] Indicated APX Market Participants Request for Rehearing and Clarification at 2, 5, 6 and 8-10.

[55] Id. at 9 (citing Exhibit No. APX-25 at 4).

[56] Calpine Corporation Request for Clarification and Rehearing at 8.

[57] El Paso Merchant Energy Request for Rehearing at 9-14.

[58] Morgan Stanley/Merrill Lynch Request for Rehearing at 2-6.

[59] Allegheny Energy Supply Corporation Motion to Intervene Out of Time and Request for Rehearing at 15 and 16.

44. In addition to opposing the Commission's decision to impose joint and several liability, Calpine asserts that it should be unnecessary to utilize this means of allocating refund responsibility. Calpine asserts that the refund obligation for each individual APX participant in the CAISO market can be calculated directly, because all of APX's transactions on behalf of its Participants in the CAISO market were settled in that market. Exhibit APX-24 reflects how the refund liability for each participant can be calculated. On the other hand, refund obligations cannot be directly calculated for the APX Participants in the CalPX pass-through market. According to Calpine, this is because APX has no data identifying which transactions were pre-matched and which transactions were passed through. The presiding judge adopted a pro rata allocation method for allocating refund obligations for these latter transactions, as proposed by Calpine.[60] Calpine seeks clarification that the Commission intends that, for the CAISO market, refunds will be calculated directly utilizing the APX methodology set out in Exhibit APX-24. For the CalPX pass-through market, the Commission should allow a pro rata allocation.

Discussion

45. The Commission previously has determined that APX, in its operation of a power exchange, is a seller of energy subject to the Commission's jurisdiction.[61] The October 16 Main Order expressed a preference for apportionment, pointing to the expectation expressed in the Proposed Findings that "bid data will be sufficiently complete in nearly all instances to permit apportionment." Nevertheless, it held that, where data are not sufficient to support apportionment, APX and the APX Participants, which have been determined to be energy suppliers, should be held jointly and severally liable for unapportioned sales.

46. We find the arguments opposing the imposition of joint and several liability to be unavailing. Commenters are correct that this concept of liability has its roots in tort law. In fact, the October 16 Main Order based its description of the concept on the Restatement (Second) of Torts. As we observed there, the concept of joint and several liability is traditionally used where the activity of multiple parties creates harms that cannot be distinguished one from another, and there is no reasonable basis for determining the contribution of each in the resulting harm.[62] Joint and several liability will only be imposed when and if the data do not support allocation to a particular APX Participant after the CAISO and CalPX complete their settlement reruns. We believe that

[60] Calpine Request for Clarification and Rehearing at 6.

[61] Automated Power Exchange, 82 FERC ¶ 61,287 (1998).

[62] October 16 Main Order at Paragraph 170.

this is an equitable solution and consistent with precedent, which provides that the Commission has broad discretion, particularly as to where and when to order refunds to ratepayers.[63]

47. With respect to Calpine's request for clarification, joint and several liability will apply only to unapportioned sales. Where liability for refunds can be established through the records of APX as Scheduling Coordinator with the CAISO, where the transactions were pre-matched, there should be no question of joint and several liability. As for refund liability as it pertains to the CalPX pass-through service, we believe the October 16 Main Order was clear. It described a clarification by Staff that pro rata allocation of refunds should be done only on the unmatched or net buy and sell transactions that were bid into and settled by the CalPX. Thus, "the use of pro rata allocation as described by the presiding judge and clarified by Staff[64] resolves the problem of refund liability apportionment for much of the energy in question."[65]

Whether the Commission erred in determining that APX is exempt from refund liability when finding other entities liable for refunds even though they served a function similar to the one served by APX in "sleeving" transactions.

Background

48. A "sleeve" transaction involves three parties: a seller, a purchaser and a creditworthy third party "sleever" or "sleeving party" who provides the financial underpinnings for the transaction. Thus, if either party to a transaction determines that it cannot buy from or sell to its commercial counterparty due to concerns about the other party's creditworthiness, the sleeving party steps in to provide the necessary financial backing so that the transaction can go forward. During the Refund Period, the CAISO experienced difficulties in purchasing power in its role as supplier of last resort, due to a lack of creditworthy counterparties. Sleevers filled the gap by purchasing power from sellers who would not sell directly to the CAISO market because of creditworthiness

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[63] See e.g., Town of Concord, et al. v. FERC 955 F.2d 67, 76 (D.C. Cir. 1992). "[A]bsent some conflict with the explicit requirements or core purposes of a statue, we have refused to constrain agency discretion . . . . The agency need only show that it 'considered relevant factors and . . . struck a reasonable accommodation among them.'" (quoting Las Cruces Cable TV v. FCC, 645 F.2d 1041, 1047 (D.C. Cir. 1981). See also Public Service Commission v. Economic Regulatory Administration, 777 F.2d 31, 34-36 (D.C. Cir. 1985). This refund authority does not conflict with the prohibition on retroactive ratemaking. See 955 F.2d at 75.

[64] See Staff IB at 13.

[65] October 16 Main Order at Paragraph 171.

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concerns, and then reselling that power to the CAISO market despite the lack of a creditworthy counterparty. Sleevers generally charged the CAISO their cost plus a premium to reflect the credit risk they bore.

49. The March 26 Refund Order did not address sleeve transactions, because the Commission had determined previously that sleeve transactions would not be excluded from mitigation and refund liability in an order issued on May 15, 2002.[66] The October 16 Main Order denied the rehearing requests of the California Generators and others who argued that, because the sleeve transactions were done at the behest of the CAISO, for the express benefit of California, and provide little financial reward for the sleeving parties, they should not be subject to mitigation and refund. The October 16 Main Order stated:

> 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, because of the contractual relationship through the CAISO Tariff that these parties had with the CAISO. Furthermore, we find that the CAISO acted only as a facilitator to the parties involved in these transactions and that these parties were ultimately responsible for negotiating their transactions with other power sellers,[67] and, in most cases, these parties received monetary consideration in the form of a risk premium for these transactions.[68]

The October 16 Main Order concluded that there was nothing new in the various requests for rehearing on the sleeving issue that convinced the Commission to create an exception from the mitigation and refund obligations for sleeving transactions.[69]

Comments

50. On rehearing, El Paso Merchant Energy (EPME) seeks to have the Commission assess refund liability on APX based on what it asserts is an inconsistency between the way the Commission treated sleeving transactions and APX. EPME points out that APX serves as a Scheduling Coordinator pursuant to a contract with the CAISO and is the

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[66] See San Diego Gas & Electric Co., et al., 99 FERC ¶ 61,160 (2002).

[67] October 16 Main Order at footnote 59 states that "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 on the final terms of these purchases and sales."

[68] October 16 Main Order at Paragraph 117.

[69] Id.

seller of record in the CAISO's books. This is sufficient, under EPME's reasoning, to warrant a finding that APX must be responsible for its sales to the CAISO as would any other Scheduling Coordinator, including responsibility for refunds:

> Yet in connection with the refund liability of the APX, the Commission concluded a functionally equivalent relationship between the APX and CAISO or CalPX warranted, for the sake of equity, that refund liability not attach to the APX – despite its contractual privity with CAISO and CalPX – but instead [should attach] to APX customers. The two decisions cannot be squared.[70]

EPME requests that the Commission assess refund liability on APX.

Discussion

51. As stated above, the Commission's October 16 Main Order found that APX, as a supplier of energy, will be jointly and severally liable (with its Market Participants) for refunds pertaining to all unapportioned sales. The October 16 Main Order's determination was based on the Commission's broad discretion to order equitable relief in the form of refunds to customers, and that the facts of this case warrant a finding that APX Participants be held jointly and severally liable with APX. The October 16 Main Order concluded that, because APX has more similarities to the CalPX, as a scheduler of power, than with power marketers, who assumed the risk for a premium, APX should not be held solely liable. EPME has not adduced additional arguments supporting a grant of rehearing. Accordingly, we will deny rehearing on this issue.

Whether the arbitration provisions of the agreements between APX and the APX Participants will govern the resolution of disputes arising from the APX compliance filing.

Background

52. The October 16 Main Order found that, "to the extent that APX Participants are owed payments for defaults and misapplied charges, they should try to resolve these payment issues in accordance with their agreements with APX."[71]

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[70] El Paso Merchant Energy Request for Rehearing at 6.

[71] October 16 Main Order at Paragraph 172.

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Comments

53. The Indicated APX Market Participants seek clarification that the Commission intends that the arbitration provisions of the agreements between APX and its customers would govern any such disputes.[72]

Discussion

54. We will grant the Indicated Market Participants' request for clarification. Because these agreements are between APX and its customers, APX and the parties should resolve these disputes over payments for defaults and misapplied charges.

CERS-Related Issues

Whether the CAISO has complied with the Commission's requirement that CERS be treated as the Scheduling Coordinator for the net short load of the California IOUs; and whether treating CERS as the Scheduling Coordinator alters the CAISO's responsibility to allocate the cost of imbalance energy to all market participants, including the generators.

Background

55. The October 16 Main Order reverses the March 26 Refund Order on this issue and required CAISO to adhere to the Commission's directive in the November 7, 2001 Order[73] to correct its accounting to reflect CERS as the Scheduling Coordinator for the IOUs' net-short load.

Comments

56. The CAISO requests clarification that it has already complied with the Commission's requirement that CERS be treated as the Scheduling Coordinator for the net-short loads of the IOUs. CAISO argues that the November 7 Order, and the October 16 order by reference, addressed the issue of "to whom should the [CA]ISO issue invoices for the Energy purchased by the [CA]ISO in real time to meet the IOUs' net short load?" CAISO states that it complied with this directive in a compliance filing, and that the Commission accepted the compliance filing in an order issued March 27. CAISO states that to the extent the Commission intends to impose any requirement on the

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[72] Indicated APX Market Participants Request for Rehearing and Clarification at 12.

[73] California Independent System Operator Corp., 97 FERC ¶ 61,151 at 61,659 (2001).

CAISO beyond the direct invoicing of CERS that the CAISO has already taken in compliance with the November 7 Order, the CAISO seeks rehearing. The CAISO asserts that rehearing is especially warranted if the Commission intended to require the CAISO to change anything about the way transactions associated with the net short load of the IOUs now appear in the settlement data base. CAISO states that if this is the Commission's intent, the settlement data base would have to be revised manually to change the Scheduling Coordinator of record from the IOUs to CERS and that it would require hundreds of hours of effort, thereby delaying the completion of the refund re-run by several months. In addition to this argument, CAISO asserts that CERS, as a single Scheduling Coordinator: (1) provided Imbalance Energy to the market; and, (2) as a result of the November 7 Order, has been found to be directly financially responsible for the costs of Imbalance Energy allocated to the IOUs' net short load. There was no direct relationship between the sellers and the CAISO Market; rather, CERS agreed directly with generators or other sellers to pay them for producing energy. These transactions nonetheless benefited the entire Market (and not just the net short load), and the CAISO argues that the entire market should share in the cost.

57. California Parties' request for clarification, or in the alternative rehearing, is largely similar to the requests of the CAISO. Specifically, California Parties request that treatment of CERS as a Scheduling Coordinator for the net short load of the IOUs does not mean that all CERS-supplied energy is to be treated as energy scheduled to and consumed by the IOUs. California Parties state that CERS activity fell into three broad categories: (1) bilateral purchases by CERS from sellers that CERS scheduled on a day-ahead basis through the CAISO markets in order to meet the net short of the IOUs; (2) bilateral purchases by CERS from sellers made at the instruction of the CAISO in order to provide imbalance energy needed by the CAISO in real time to maintain grid reliability; and, (3) purchases by the CAISO from sellers in real time in order to serve the net short of the IOUs, for which CERS agreed to provide credit backing. Of these three, CERS is appropriately treated as the Scheduling Coordinator for the IOUs' net short for the bilateral purchases on a day-ahead basis and the purchases by the CAISO in real time. With respect to the bilateral purchases made at the instruction of the CAISO, however, California Parties state these purchases were needed by the market (in part the net short load and in part to serve loads other than the IOUs' customers), because the CAISO experienced a shortfall in real time due to numerous generators failing to deliver scheduled quantities in real time.

58. California Generators in response, contend that, consistent with the October 16 Main Order, the CAISO is required to correct its accounting by treating CERS energy as a third-party purchase scheduled to meet its own load, not as a sale to the CAISO. California Generators submit that CAISO is seeking to give CERS special status by treating CERS energy as a sale to the CAISO that is not subject to mitigation, something that was rejected by the Commission. In response, California Parties argue that California Generators' request for rehearing of a previous order appears to argue that

treatment of CERS as a Scheduling Coordinator for the net-short load removes financial responsibility from generators and non-IOU loads for all CERS-supplied Imbalance Energy.[74] Such a treatment of CERS-supplied Imbalance Energy, argues California Parties, would result in a totally unwarranted windfall to the California Generators and other non-IOUs. To the extent the Commission declines clarification, the California Parties request rehearing.

Discussion

59. There are two issues before the Commission: (1) whether the Commission intended that the CAISO only change the invoicing for the IOUs' net short load from the IOUs to CERS; and (2) whether the Commission intended for the CAISO to not only charge the invoiced party but to also require the CAISO to correct its settlement data base to reflect the Scheduling Coordinator of record from the IOUs to CERS. The practical effect of which would be to allow the CERS transactions to be included in the settlement data base as sales of energy in the CAISO's imbalance market, with the cost of such allocated to both the IOUs' net short load and other non-IOU market participants.[75]

60. We clarify that CAISO has complied with the Commission's directive to change the invoicing to reflect CERS and not the IOUs as the responsible financial entity. We further clarify that the October 16 Order's directive that the "CAISO must correct its accounting for the IOUs' net short load so as to accurately reflect CERS as the Scheduling Coordinator for the IOUs' net short load" was not limited to the simple exchange of names on an invoice. Unfortunately, as California Parties state,[76] there is confusion as to CERS' activity in the CAISO markets during the refund period. Neither DWR (nor CERS) nor the CAISO have provided a clear understanding vis-à-vis the tariff to this Commission as to the transactional relationship between CERS and the CAISO during the refund period. Nevertheless, we find sufficient information exists to provide direction to the CAISO such that the spirit and the intent of the refund proceeding is maintained. The Commission in its December 19 Order, in explaining its decision not to extend refund liability to DWR transactions, stated that:

> DWR transactions are negotiated bilateral contracts for the procurement of energy on behalf of California IOUs, and are distinctly beyond the realm of the [CA]ISO and PX centralized market operations that have been the subject of this proceeding

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[74] California Generators Joint Request for Rehearing and Clarification, filed April 25, 2003, to which the Commission was responding in the October 16 Main Order at Paragraph 113.

[75] According to pleadings, the approximately $270 million of the $2.9 billion in total CERS energy costs would be charged to non-IOU market participants.

[76] California Parties' Request for Clarification or, Alternatively, Rehearing at 6.

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> since its inception. Whether or not DWR could have conducted its transactions through the [CA]ISO is immaterial. In addition, although some of DWR's contracts may have been in the spot market, most were not; indeed the intent of DWR's involvement in the market was to enter into long-term contracts.

CERS signed a Scheduling Coordinator Agreement with the CAISO that requires it to adhere to the CAISO Tariff; CERS entered into bilateral agreements with generators to cover the IOUs' net-short load. Section 2.2.7.2 of the CAISO Tariff requires a Scheduling Coordinator to submit balanced schedules to the CAISO. Energy in a balanced schedule is not considered to be sold into the CAISO market but, instead, is treated as supply necessary to meet expected load. The Commission has held that such bilateral transactions should remain outside the scope of the Commission's refund orders, because these transactions represent bargained-for exchanges between willing buyers and sellers.[77] Thus, these transactions should not be treated as Imbalance Energy. California Parties recognize as much.[78] California Parties contend however that CERS also "acquired energy from third parties and supplied it to the [CA]ISO for the [CA]ISO's real time imbalance energy needs because the [CA]ISO was not able to acquire sufficient power on its own."[79]

61. As a general matter, we believe that the cost of Imbalance Energy should be borne by the parties responsible for the imbalance. We note however that by CAISO including what are admittedly bilateral sales outside of the CAISO imbalance market as transactions in that market, CAISO has treated CERS' energy as an unmitigated sale to the CAISO. The Commission has previously ruled that sales into the CAISO market for the period October 2, 2000 through June 20, 2001 are to be mitigated.[80] CAISO has not done so. In failing to do so, CAISO is effectively seeking to pass on to non-IOU loads the cost of bilateral transactions or the unmitigated price of imbalance energy. Neither of these is a reasonable outcome. We appreciate the CAISO's dilemma here -- to revise its settlement systems to account for these transactions properly may require additional time and effort, which would delay the processing of refunds. However, the reported sum of $270 million is substantial, and we cannot overlook the effect of improperly accounting for these transactions. Moreover, the CAISO has not demonstrated what, if any of this, is attributable to non-IOUs. California Generators in its December 30, 2003 Answer to the California Parties' and CAISO's Reply offer three approaches to implementing the

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[77] 96 FERC at 61,515.

[78] California Parties' Request for Clarification or, Alternatively, Rehearing at 6.

[79] Id. at 7.

[80] See San Diego Gas & Electric Company, et al., 96 FERC ¶ 61,120 (2001) (July 25 Order) at 61,499; and San Diego Gas & Electric Company, et al. 97 FERC ¶ 61,275 (2001) (December 19 Order) at 62,172.

Rehearing Order that reportedly eliminate most, if not all, of the current inaccuracy from the settlements perspective.

62. To avoid delay, the Commission directs the CAISO to proceed with the refund process under the California Generators' third approach, which requires that the CAISO leave the settlement record as-is, treat all of the CERS energy as Imbalance Energy, but mitigate all of the sales at the MMCP like any other imbalance sale. We recognize that this may result in a temporary improper accounting of approximately $22 million, but it also allows the California refund proceeding to move forward.

63. To address the improper accounting and ensure that only those who received the benefit of the Imbalance Energy will pay for it, the CAISO is directed to develop a surcharge for imposition after its refund process is complete. Once the CAISO has determined who owes what to whom and refunds have been distributed, the CAISO should surcharge the appropriate customers for any amounts that were inappropriately accounted for in treating (and thus mitigating) all CERS energy as Imbalance Energy. The Commission believes that the CAISO's methodology should be based on a correction of the CAISO's settlement record accounting so that only bilateral purchases by CERS from sellers made at the instruction of the CAISO in order to provide imbalance energy needed by the CAISO in real time to maintain grid reliability is recorded as Imbalance Energy. CAISO must remove the mischaracterization as Imbalance Energy of both (1) bilateral purchases by CERS from sellers that CERS scheduled on a day-ahead basis through the CAISO markets in order to meet the net short load of the IOUs; and, (2) purchases by the CAISO from sellers in real time in order to serve the net short load of the IOUs. When these corrections are completed, we direct the CAISO to submit a separate compliance filing detailing the necessary surcharge, surcharge levels, and allocation of surcharges.

64. The CAISO must notify the Commission within five business days of the date of this order of its anticipated timeline for submitting the compliance filing. Also, within five business days of the date of this order, the CAISO may propose an alternative solution that will neither delay the immediate refund proceeding nor ignore the improper accounting of all CERS energy as Imbalance Energy.

Fuel Cost Allowance Issues

Whether during the CERS period, the fuel cost allowance associated with the IOUs' gross control area load should be an offset to the CERS refunds; and, whether the additional fuel cost allowance should be allocated to customers as an offset to refunds in proportion to customers' Gross Control Area Load, as is the case with emissions cost offsets.

Background

63. The October 16 Main Order on Rehearing clarified that the fuel cost allowance will be allocated to customers as an offset to refunds in proportion to customers' Gross Control Area Load in the same manner as emissions costs offsets.

Comments

64. The California Parties request that the fuel cost allowance associated with the IOUs' Gross Control Area Load be an offset to the CERS refund. The California Parties argue that the IOUs continued to serve substantial load in the CAISO Control Area using their own generation resources and bilateral contracts during the CERS period, but were effectively barred by the Commission's creditworthiness orders from purchasing power in the CAISO and CalPX spot markets that are subject to refund. They assert that CERS, and not the IOUs, will receive refunds associated with spot market purchases needed to serve the IOUs' net-short load during the CERS period. California Parties argue that it would be both inequitable and confiscatory to require the IOUs to pay the fuel cost allowance associated with the spot market that they were prohibited from purchasing, and for which they receive no refunds.

65. Redding/SVP argue that the fuel cost allowance must be netted against the refunds resulting from mitigation. Redding/SVP also assert that fuel costs should not be equated with the emission costs. Emissions offsets were allocated by Gross Control Area Load due to their prospective use and their application during hours when a generator's price was not mitigated, so there is no match between refunds and emission costs. In contrast, the additional fuel cost allowance is collectable only for a seller's mitigated sales for specific mitigated transactions. Redding/SVP argue that allocation by Gross Control Area Load fails to match gas costs to the transaction for which they were incurred, and fails to match the costs with the beneficiaries of the costs.

66. City of Vernon and Northern California Power Agency both argue that the fuel cost allowance should be an hour-by-hour offset against refunds owed by a particular seller. The City of Vernon and Northern California Power Agency argue that the fuel cost allowance and emissions cost allowance differ in significant respects critical to proper allocation. City of Vernon and Northern California Power Agency assert that, emissions costs are monthly, prospective, and not attributable to specific hourly sales of energy. By contrast, the fuel cost allowance of specific energy sales can be tied to specific spot market customers. City of Vernon and Northern California Power Agency also argue that allocation of the additional fuel cost allowance based on customers' Gross Control Area Load would be inequitable: entities that met the bulk of their energy needs through scheduling of resources they arranged would have to share the costs caused by other market participants who used the CAISO to make up, through spot purchases, enormous shortfalls in their schedules.

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Discussion

67. We will grant, in part, the California Parties' requested clarification: the fuel cost allowance should not be allocated directly to the IOUs, but rather to CERS. As the California Parties pointed out, "It is CERS, and not the IOUs, that will receive refunds associated with spot market purchases needed to serve the IOUs' net short load during the CERS period. And those refunds will be based on the new gas proxy price that gave rise to the fuel-cost allowance.[81] However, we will defer consideration of the requests for rehearing on the issue of whether Gross Control Area Load is the proper allocation factor for the fuel allowance cost. This will be addressed in the forthcoming Commission order on the fuel cost allowance.

Grant County Jurisdictional Issue

Whether the Commission erred in determining that it lacks subject matter jurisdiction over Grant County's transactions, while finding that it has jurisdiction over other governmental entities' transactions.

Background

68. The October 16 Main Order reiterated prior determinations in this proceeding and denied requests for rehearing that generally challenged the Commission's authority to apply refunds to sales by governmental entities in the specific circumstances of this proceeding.[82] However, the October 16 Main Order granted rehearing to Public Utility District No. 2 of Grant County (Grant County) with respect to the Commission's jurisdiction over the Grant County's sales to the CAISO. The Commission found that certain circumstances related to Grant County do not provide the Commission with jurisdiction. This determination was based on the following circumstances: Grant County did not make sales under the CAISO Tariff into the CAISO's centralized, single clearing price auction markets under which all sellers received the same price for a given sale; and, Grant County did not enter into any arrangement with the CAISO, such as a Scheduling Coordinator Agreement or a Participating Generator Agreement, that explicitly acknowledged the Commission's jurisdiction over CAISO sales. Under these circumstances, the October 16 Main Order granted the request for rehearing of Grant County.[83]

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[81] California Parties' Request for Clarification or, Alternatively, Rehearing at 11.

[82] October 16 Main Order at Paragraph 176, citing San Diego Gas & Electric Company et al., 96 FERC ¶ 61,120 (2001), reh'g, 97 FERC ¶ 61,275 (2002).

[83] Id.

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69. The October 16 Main Order decided that it was unnecessary to reach Grant County's argument that its sales to the CAISO market were not Out-of-Market (OOM) sales subject to mitigation but instead were bilateral sales exempt from mitigation.[84] Grant County's OOM argument was based on two earlier orders that addressed the CAISO's ability to direct participating generators to supply energy outside of the CAISO markets (referred to as "OOM calls").[85] Grant County sought a Commission determination that only bilateral sales by a participating generator (i.e., a generator with a Participating Generator Agreement with the CAISO) should be considered OOM sales and therefore subject to mitigation, and that bilateral sales by a non-participating generator should not be considered OOM sales subject to mitigation. Because the Commission found that Grant County was exempt from the Commission's jurisdiction, the October 16 Main Order stated that "we need not address Grant County's argument that its bilateral sales to the CAISO were mischaracterized as OOM sales."

Comments

70. Several parties' rehearing requests argue that their circumstances fit precisely the circumstances upon which the Commission based its determination that it lacked jurisdiction over Grant County's transactions. The Eugene Water & Electric Board's (EWEB) motion for clarification states that the Commission should clarify that its Grant County jurisdictional determination applies also to EWEB: it is a governmental entity that only entered into bilateral, negotiated sales with the CAISO and did not conduct any wholesale power transactions under the CAISO Tariff into the CAISO's organized markets during the Refund Period or any other time; and EWEB was not a signatory either to a Scheduling Coordinator Agreement or a Participating Generator Agreement applicable to the CalPX Markets.[86] Similarly, in its request for reconsideration or clarification, Redding argues that its circumstances are indistinguishable from those of Grant County and that the Commission erred and lacked reasoned decisionmaking in failing to determine that it lacks jurisdiction over Redding. As in Grant County's case, Redding asserts that all of its sales to the CAISO during the Refund Period were individually negotiated bilateral transactions and were not made in the CAISO centralized, single price auction. Redding also states that it was not and is not a signatory to any of the CAISO's standard agreements, such as a Scheduling Coordinator Agreement or a Participating Generator Agreement, that acknowledge the Commission's jurisdiction.[87]

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[84] Id. at Paragraph 177.

[85] Citing 90 FERC ¶ 61,006 at 61,010-11 (2000) and 95 FERC ¶ 61,159 at 61,516 (2001).

[86] The Eugene Water & Electric Board Motion for Clarification at 3 and 4.

[87] The City of Redding, California Request for Reconsideration or Clarification at 5-8.

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71. On November 25, 2003, Turlock Irrigation District (Turlock) filed a motion seeking dismissal with prejudice from all refund liability in these proceedings.[88] Turlock asserts that it, too, meets the criteria on which Grant County was exempted from jurisdiction and refund liability: all Turlock's sales to the CAISO during the Refund Period were bilateral transactions and not made in the CAISO centralized auction, and Turlock was not signatory to any of the CAISO's standard agreements that explicitly acknowledge the Commission's jurisdiction.[89]

72. Turlock's November 25 Motion drew two responses, from the APX and from the California Parties. APX's primary concern was with whether Turlock's motion contravened Turlock's refund liability as an APX Participant, which was imposed by the October 16 Main Order.[90] Turlock's December 17 Reply to the APX pleading made it clear that Turlock agrees with APX that, to the extent that the October 16 Main Order requires Turlock as an APX Participant to pay refunds and APX is due refunds, it will be obligated to do so.

73. The California Parties also filed a response opposing Turlock's motion to dismiss, and arguing that the Commission's orders:

> have made clear that out-of-market ("OOM") purchases by the [CA]ISO are subject to refund liability. Section 2.3.5.1.5 of the ISO Tariff authorizes the [CA]ISO to enter into OOM transactions if necessary for reliability purposes. Such purchases are thus executed under the [CA]ISO Tariff, and sellers that provide energy to the [CA]ISO in this manner submit to the terms and conditions of the [CA]ISO Tariff – irrespective of whether they have signed any formal agreement to that effect.[91]

Turlock renewed its request for dismissal in a motion filed with the Commission on January 23, 2004. Turlock asserts that the October 16 Main Order renders it unnecessary to address the issue of whether Turlock's transactions were OOM sales, because it meets

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[88] Turlock did not seek rehearing of the October 16 Main Order.

[89] See Turlock's Motion to Dismiss with Prejudice All Claims of Refund Liability and Request for Expedited Consideration at 3-14; and Turlock's Renewed Motion for Expedited Consideration of its Motion to Dismiss at 2 and 3.

[90] APX's December 4 Response to Turlock's November 25 Motion to Dismiss at 2.

[91] California Parties' December 10 Answer to Turlock's Motion to Dismiss at 4.

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the criteria for exemption from jurisdiction applied to Grant County.[92] This pleading and the California Parties' response largely reiterate arguments from their prior pleadings.

74. LADWP asserts on rehearing that its circumstances are the same as Grant County's: LADWP did not make sales into the CAISO's centralized, single price auction, but, instead, made sales pursuant to negotiated bilateral transactions pursuant to the parties' Interconnected Control Area Operating Agreement (ICAOA) and not subject to the terms of the CAISO Tariff.[93] In addition, LADWP asserts that, like Grant County, it had no Participating Generator Agreement or any other agreement that would impose on LADWP an obligation to sell power to the CAISO under the rates, terms and conditions of the CAISO Tariff or that explicitly recognizes the Commission's jurisdiction. Although LADWP acknowledges that it has a Scheduling Coordinator Agreement, it asserts that this fact is not controlling, because its sales under the ICAOA were not "centralized transactions."[94] In drawing parallels with Grant County's sales, LADWP states that "[b]oth were bilateral transactions negotiated outside the [CA]ISO's single price auction markets . . . . Both were negotiated under contracts in which the governmental entity did not accede to Commission jurisdiction."[95]

75. On March 12, the CAISO filed a motion seeking clarification of Paragraph 177 of the October 16 Main Order where the Commission found that the circumstances of Grant County's sales provided the Commission "with neither personal jurisdiction over Grant County nor subject matter jurisdiction over its CAISO sales." According to the CAISO, its request was prompted by Grant County's participation in the ongoing CalPX bankruptcy proceeding and the CAISO's concern that the CalPX may argue that Grant County's recourse for payment for its sales during the Refund Period is against the CAISO. For this reason, the CAISO asks that the Commission clarify that nothing in the

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[92] Turlock's January 23 Renewed Motion for Expedited Consideration of its Motion to Dismiss at 6.

[93] LADWP's Request for Rehearing, at 1-5, addresses another jurisdictional issue in the October 16 Main Order – arguing once again that the Commission erred in asserting jurisdiction over a government-owned entity within the meaning of section 210(f) of the Federal Power Act. Bonneville Power Administration's Request for Rehearing focuses solely on this issue, agreeing with LADWP that the Commission has no jurisdiction over a government-owned entity. LADWP acknowledges that it has petitioned for review of this determination, referring to the pending proceeding in U.S. Ct. App. 9th Cir. No. 02-70294, consolidated with No. 01-71051. Having denied rehearing on this issue previously, we do not intend to address it again in the instant order.

[94] Id. at 14, footnote 47.

[95] Id. at 15.

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October 16 Main Order was intended to alter "the fundamental framework governing all procurement of energy by the CAISO, which is described in section 2.1.1 of the CAISO Tariff . . ."[96]

76. The CAISO's motion prompted a series of answers and other replies by Grant County, Puget Sound Energy, the CalPX, Powerex and IDACORP (jointly as the "Indicated Sellers"), and two pleadings by the California Parties. Grant County's March 29 answer asserts that "since the Commission has held that it does not have jurisdiction over the transactions at issue, it can adjudicate neither Grant County's rights nor its obligations with respect to these transactions."[97] It urges the Commission not to address the obligations of the CAISO vis-à-vis Grant County but to clarify that the CalPX, as a Scheduling Coordinator, is bound by the CAISO Tariff to pay for the energy obtained on its behalf by the CAISO.

77. On March 29, Puget Sound Energy (Puget) filed an answer opposing the CAISO's motion, asserting that the CAISO Tariff does not apply to sales to the CAISO under the WSPP Agreement, such as those made by Puget and by Grant County. Puget also correctly notes that the CAISO did not seek rehearing of the Commission's determination that it lacks jurisdiction over Grant County's sales. Puget's position is similar to Grant County's: the CAISO's motion is an attempt to shift the responsibility for paying for these transactions to the Scheduling Coordinators.

78. The CalPX also filed an answer opposing the CAISO motion, because of its concern that Grant County's participation in the CalPX bankruptcy might result in Grant County moving to the head of the line for repayment from the Settlement Clearing Account. Moreover, CalPX asserts, this result would disrupt the orderly process of determining "who owes what to whom" by disbursing payment to Grant County while CalPX and CAISO participants must await further Commission orders approving their refunds.[98] The March 29 answer of the Indicated Sellers echoes CalPX's concern that the October 16 Main Order not be used by Grant County to gain an advantage over other creditors in the refund queue: "Grant County should not be paid on a priority basis by the CalPX prior to any other CalPX creditor with outstanding receivables for the same months in which the CalPX may be deemed to owe money to Grant County."[99]

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[96] California Independent System Operator Corporation Motion for Clarification at 9.

[97] Public Utility District No. 2 of Grant County, Washington, Response to the California Independent System Operator Corporation's Motion for Clarification at 4.

[98] California Power Exchange, Answer to CAISO's March 12, 2003 Motion for Clarification at 10.

[99] Indicated Sellers, Answer to the Motion of the California Independent System Operator Corporation at 3.

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79. The California Parties submitted two pleadings in response to the CAISO motion. In their March 29 answer, the California Parties assert that there is no case or controversy for the Commission to decide at this point. This is because the CAISO motion was predicated on non-specific information that the CalPX "may" use as a defense in its bankruptcy proceeding the Commission's finding that Grant County's sales to the CAISO are not subject to the Commission's jurisdiction.[100]

80. On April 1, the California Parties filed a supplemental response addressing concern about the CalPX's position on the exemption for Grant County's transactions. While the California Parties remain opposed to any early distribution of refunds to Grant County as a result of the October 16 Main Order, they oppose any finding that the CalPX has no obligation to Grant County and that its only recourse is to sue the CAISO in civil court. Such a result would be "untenable."[101] Accordingly, the California Parties urge the Commission to clarify the October 16 Main Order and find that "the proper treatment of the Grant County transactions is to treat them like any other OOM sale to the [CA]IS)."[102] On April 15, Grant County filed a motion to strike the California Parties's Supplemental Response as an untimely request for rehearing of the October 16 Main Order.

Discussion

81. Upon further consideration, the Commission finds that the prior analysis related to Grant County was based on an incomplete understanding of the transactions in question and their role in the CAISO market. The Commission previously determined that short-term bilateral transactions, other than OOM transactions, are not subject to refund in this proceeding.[103] Grant County argued that the Commission had no jurisdiction over its transactions, because Grant County did not have any agreement with the CAISO that explicitly acknowledged the Commission's jurisdiction, and that it made only bilateral sales to the CAISO and did not participate in the CAISO's single price auction market.

82. The Commission's determination that refund liability should extend to all sales of energy in the California ISO and PX markets was originally set out in the July 25 Order, where we analyzed our statutory authority under the Federal Power Act in the particular

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[100] California Parties, Answer to Motion of the California Independent System Operator Corporation for Clarification at 2.

[101] Id. at 4.

[102] Id.

[103] See 96 FERC ¶ 61,120 (2001) at 61,349, and 97 FERC ¶ 61,275 (2001) at 62,197.

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circumstances presented in these proceedings.[104] The Commission concluded that, under the specific circumstances presented, it may properly assert subject matter jurisdiction over all sales made in the CAISO and CalPX markets, including those made by governmental entities:

> Under the single price auction mechanism that operated in the centralized [CA]ISO and PX spot markets, all sellers agreed to accept the same clearing price for any given sale. From the time the Commission acted on SDG&E's complaint, all sellers into those markets were on notice that those clearing prices, and the market rules that set the clearing prices, were subject to change if they were found to be unjust and unreasonable.[105]

The December 19 Order, addressing requests for rehearing and clarification of the July 25 Order, provided further explanation:

> Moreover, governmental entities that made sales in the PX and [CA]ISO spot markets waived any exemption they otherwise may have had from the Commission's personal jurisdiction regarding those sales. Because the markets did not exist prior to FERC authorization and operate according to FERC rules, all those who participated in them reasonably had to recognize the controlling weight of FERC authority.[106]

Thus, the Commission further justified its decision that sales in the CAISO and CalPX markets by governmental entities fell within FERC's jurisdiction on the fact that these entities were engaged in transactions in FERC-sanctioned markets, including a single price centralized auction in which the sellers all agreed to the same clearing price.

83. Grant County did not challenge this general assertion of jurisdiction over sales by governmental entities but cited its own unique circumstances as warranting a finding that the Commission lacks jurisdiction over certain sales by Grant County: its sales were negotiated under the WSPP Agreement and not the CAISO Tariff; it did not bid in the FERC-regulated centralized auction; it was not a scheduling coordinator and had not signed an agreement recognizing the Commission's jurisdiction; and, the WSPP Agreement specifically disclaims that FERC jurisdiction would attach based on sales to the CAISO under the Agreement. While those factors might be indicia of whether particular sales by governmental entities fall under FERC jurisdiction, they are not, we now realize, determinative of the question. Rather, the key issue is whether particular sales could only be made pursuant to the CAISO Tariff.

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[104] 96 FERC ¶ 61,120 (2001) at 61,511.

[105] Id. at 61,512.

[106] See 97 FERC ¶ 61,275 (2001) at 62,182 (citation omitted).

84. Our earlier orders focused on spot sales made by governmental entities into the CAISO and PX markets, as they represented the bulk of the transactions that took place, but those were not the only transactions that were made pursuant to the CAISO Tariff. In particular, under the CAISO Tariff, OOM transactions are short-term energy purchases necessary to maintain reliability on the CAISO-controlled grid. While those transactions occur outside the CAISO spot market, and thus the price need not be tied to the spot market, but may be cost-based, they still fall under the aegis of the FERC-approved CAISO Tariff as sales into the CAISO market. Because OOM transactions were authorized by the Commission and operate according to our rules, such transactions involving governmental entities, like spot market transactions involving governmental entities, fall under the Commission's jurisdiction.

85 On rehearing, we realize that the unique circumstances cited by Grant County do not, in themselves, control the jurisdictional question. Rather, even if those factors were present, the Commission would have jurisdiction over any OOM transactions made by Grant County (or other governmental entities), because those entities knew or should have known that such transactions were governed by the FERC-approved CAISO Tariff. This would be true for individual transactions, even if a governmental entity had not signed a Participating Generator Agreement with the CAISO, so long as the CAISO invoked its OOM tariff authority to call upon a non-participating generator to provide short-term energy for reliability purposes on the CAISO-controlled grid. This is consistent with our approach that the nature of the transaction, rather than the nature of the generator, determines whether the Commission has jurisdiction. As stated above, the Commission previously decided that OOM transactions would be subject to mitigation. Thus, a determination that the Grant County transactions were OOM transactions would lead to a determination that they are subject to FERC jurisdiction, and thus to mitigation. So, too, other OOM transactions by governmental entities would be subject to our jurisdiction and to mitigation.

86. The July 25 and December 19 Orders determined that short-term bilateral transactions, other than OOM transactions, are not subject to mitigation or refund. Grant County states that it submitted testimony that its transactions do not meet the Commission's definition of the OOM transactions, but that the Presiding ALJ granted motions to strike this testimony.[107] The March 26 Refund Order accepted the ALJ's ruling, which Grant County alleges is error and leaves a legitimately disputed factual issue unaddressed. Because Grant County alleges that determining whether its transactions are OOM or bilateral transactions will have a substantial financial impact, [108]

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[107] Grant County Request for Rehearing of the March 26 Refund Order at 6.

[108] Id., citing to the ALJ's Proposed Findings, Appendix at 3.

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we have decided to reopen the record to evaluate whether the stricken evidence supports Grant County's assertion that its transactions with the CAISO were not OOM transactions. Thus, the Commission directs the parties to submit briefs, not to exceed 20 pages, addressing this issue within 10 days of the issuance of this order. In addition, because the pleadings filed by Turlock and responses to those pleadings filed by the California Parties dispute whether Turlock's transactions were bilateral or OOM, and their pleadings do not provide sufficient factual basis to enable the Commission to make a determination, we will allow these parties to file briefs within the same 10 day period, not to exceed 20 pages, on this issue with specific references to facts already in the record.

87. Based on the discussion above, the Commission denies the requests for rehearing filed by EWEB, Redding, and LADWP seeking a finding that their transactions fall within the exemption for sales by Grant County in the October 16 Main Order. In addition, the Commission finds that the concerns expressed by the CAISO in its March 12 Motion, as well as the various requests for clarification and concerns expressed in the answers to CAISO's motion and other related pleadings, need not be addressed at this time but may be renewed in the briefs authorized above.

Motions and Pleadings Relating to Settlements

- **CPUC v. El Paso**

Whether the Commission should grant the motion of Duke Energy North America and Duke Energy Trading and Marketing to lodge as evidence in the instant proceeding the contested settlement in the CPUC v. El Paso complaint proceeding (Docket No. RP00-241-000, et al.).

Background

88. On November 14, 2003, the Commission issued an order approving, with several modifications, a contested settlement in Docket No. RP00-241, et al., CPUC v. El Paso, which was initiated by the CPUC in an April 4, 2000 complaint. The CPUC's complaint alleged that the El Paso companies manipulated California energy markets by withholding pipeline transportation capacity into California in order to drive up natural gas prices immediately before and during the California energy crisis in 2000-2001. The Settling Parties in that proceeding are the CPUC, PG&E, SoCal Edison, the City of Los Angeles, and the El Paso Companies (the "Settling Parties"). The settlement will result in the payment by El Paso of some $1.69 billion.

89. On November 26, 2003, Duke Energy Trading and Marketing (DETM) filed a motion urging that the Commission consider as "new evidence" in this proceeding the El Paso Master Settlement and Allocation Agreements in Public Utilities Commission of the

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State of California v. El Paso Natural Gas Company, El Paso Merchant Energy - Gas, L.P., and El Paso Merchant Energy Company, Docket Nos. RP00-241-000, RP00-241-006 and RP00-241-008. The thrust of DETM's motion is that the payment by El Paso to California electricity customers under the Master Settlement and Allocation Agreements in that proceeding "constitutes substantial restoration to them of just and reasonable rates, as defined by the Commission in the California Refund proceeding." DETM alleges that this payment duplicates refunds ordered in the California Refund proceeding. It thus urges the Commission to consider this "new evidence" to vacate or offset refunds under the gas proxy price methodology, and to institute proceedings to prevent the collection of refunds that duplicate the restoration of just and reasonable prices already received by California electricity customers under the El Paso settlement.

Comments

90. Salt River Project Agricultural Improvement and Power District and the California Parties filed responses in opposition to DETM's motion. The Modesto Irrigation District and the Competitive Supplier Group (CSG)[109] filed a response in support of DETM's motion. Duke filed a response to the California Parties' answer.

Discussion

91. The Commission denies the DETM motion, having spoken to the issue in the Order on Contested Settlement:

> As the Commission has stated repeatedly throughout this order, its approval of the JSA [Joint Settlement Agreement], as modified, resolves only the complaint proceeding in Docket Nos. RP00-241-000, RP00-241-006 and RP00-241-008. Neither the Commission's action here nor the agreements among the Settling Parties reviewed along with the JSA can be deemed to resolve any issue pending in any other proceeding before the Commission, in particular the proceedings in Docket No. EL00-95-045, et al. Likewise, the Commission's action in approving the JSA, as modified, cannot be used to foreclose in any manner the rights of the non-settling parties to assert their positions in Docket No. EL00-95-045, et al., or other proceedings.[110]

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[109] The CSG's response identifies the following entities as comprising CSG: Avista Energy, Inc.; Coral Power, L.L.C.; IDACORP Energy, L.P.; Powerex Corp.; PPL Montana, LLC; Puget Sound Energy, Inc.; Sempra Energy Trading Corp.; TransAlta Energy Marketing (CA) Inc.; and TransAlta Energy Marketing (US) Inc.

[110] See Public Utilities Commission of the State of California v. El Paso Natural Gas Company, El Paso Merchant Energy – Gas, L.P., and El Paso Merchant Energy Company, 105 FERC ¶ 61,201 (2003) at 62,049

- **El Paso Corporation**

Background and Pleadings

92. EPME's Request for Rehearing raised four issues, three of which involve APX and have been discussed supra. However, EPME also raised concerns that the October 16 Main Order would preclude EPME from gaining the full benefit of its settlement with the California Parties and Indicated Attorneys General. As stated above, the Master Settlement Agreement resolved the claims of the California Parties and the Indicated Attorneys General against El Paso Corporation and named El Paso affiliates, including EPME. On August 8, 2003, the California Parties, the Indicated Attorneys General and El Paso (Movants) filed a motion to dismiss with prejudice El Paso and El Paso Releases[111] from the instant proceedings as to the California Parties and the Indicated Attorneys General. APX responded to the motion and seeks assurance that its liability as a Scheduling Coordinator should be adjusted to reflect the release of the seller's underlying obligation.

Discussion

93. On January 6, the Commission issued an order that granted the motion of El Paso, the California Parties and Indicated Attorneys General and granted APX's request for clarification of the impact of El Paso's partial dismissal on its refund obligations. The Commission stated that "we will clarify that, to the extent any liability is imposed on APX in the Refund Proceeding in connection with El Paso's sales, its liability should be adjusted to reflect the elimination of El Paso refund amounts as to the California Parties and the Indicated AGs."[112] Thus, the Commission's January 6 Order renders moot EPME's request for rehearing on the effect of the October 16 Main Order on its settlement.

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[111] According to the Movants, "El Paso Releases" are defined in the Master Settlement Agreement as including an entity's current or former directors, officers, employees, affiliates, parents, subsidiaries, predecessors, successors, assigns, and attorneys.

[112] 106 FERC ¶ 61,005 (2004), at 61,015.

- **Portland General Electric Company**

Whether the Commission should grant the motion of Portland General Electric Company (Portland) to strike from the instant dockets comments in opposition to its settlement with Commission Staff in Docket No. EL03-65.

Background and Pleadings

94. On June 25, 2003, the Commission issued to multiple respondents, including Portland, an Order to Show Cause Concerning Gaming and/orAnomalous Market Behavior (the Gaming Order).[113] The Gaming Order instituted 42 show cause proceedings and directed the Identified Entities, including Portland, to show cause why their behavior during the period from January 1, 2000 to June 20, 2001 does not constitute gaming and/or anomalous behavior as defined by the CAISO and CalPX Tariffs. The Gaming Order required the CAISO to provide transaction-specific data of the gaming and/or anomalous behavior, and the Identified Entities were provided an opportunity to respond to the CAISO data and to show why they should not be required to disgorge profits resulting from gaming or anomalous market behavior.

95. On August 27, 2003, the Commission's Trial Staff and Portland filed a Stipulation and Agreement (Portland Agreement) for certification to the Commission. Portland states that the Portland Agreement resolves all issues that have been raised in the proceeding regarding allegations of gaming or anomalous market behavior by Portland. The Portland Agreement was filed only in Docket Nos. EL03-165 and EL03-137, which were the dockets established by the Gaming Order to deal with the Portland's individual show cause proceedings.[114]

96. On September 30, the California Parties filed Comments in Opposition to Certification and Approval of Agreement and Stipulation and The Declaration of Dr. Fox-Penner, which discusses the "ricochet" gaming strategy described in the Gaming Order. The California Parties oppose the Agreement, alleging that it is unjust and unreasonable and ignores disputed issues of material fact that remain to be examined concerning the activities of PacifiCorp, another of the Identified Entities, during the period in question. The California Parties filed their Comments in Opposition in a number of dockets, including the following: PacifiCorp, EL03-163-000 (consolidated with American Electric Power Service Corporation, Docket No. EL03-137-000, et al.); Portland General Electric Company, Docket No. EL03-165; San Diego Gas & Electric

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[113] See American Electric Power Service Corporation, et al., 103 FERC ¶ 61,345 (2003).

[114] Id.

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Company, Docket No. EL00-95-045, et al.; Investigation of Practices of California Independent System Operator and the California Power Exchange, Docket No. EL00-98-042, et al.; and, Fact Finding Investigation Into Possible Manipulation of Electric and Natural Gas Prices, Docket No. PA02-2-000.

97. Portland's Motion to Strike asserts that the Comments of the California Parties were inappropriately filed in the instant proceedings, because the Portland Agreement was prepared and filed only in response to the Commission's Gaming Order. Accordingly, Portland asserts that the California Parties' comments on the Portland Agreement have no place in the instant dockets and should be stricken from the record of these proceedings.

Discussion

98. The Commission will grant the motion to strike the California Parties' September 30 Comments. We agree that they are inappropriately filed in the instant docket, which pertains to the calculation and allocation of refunds that resulted from unjust and unreasonable prices in the CAISO and CalPX markets during the Refund Period. The behaviors that resulted in the need for the refunds are being addressed elsewhere in the show cause proceedings that were initiated with the Gaming Order and the Collusion Order.[115] We note that the California Parties have filed their Comments on the Agreement in other dockets where they clearly are relevant, so they will not be disadvantaged by the Commission's determination to grant the motion to strike the Comments from the instant proceedings.

The Commission orders:

(A) The Commission hereby denies rehearing in part, grants rehearing in part and grants rehearing in part of the October 16 Main Order, as discussed in the body of this order.

(B) The Commission hereby grants the CAISO's request for clarification of the October 16 Second Order, as discussed in the body of this order.

(C) The Commission directs the CAISO to provide a full explanation of the form and content of the emissions cost data it needs to complete its calculations, as discussed in the body of this order.

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[115] See Order to Show Cause Concerning Gaming and/or Anomalous Behavior Through the Use of Partnerships, Alliances or Other Arrangements and Directing Submission of Information, 103 FERC ¶ 61,347 (2003).

(D) The Commission directs the CAISO to submit compliance filings under the revised schedule, as discussed in the body of this order.

(E) The Commission directs APX to submit a compliance filing as soon as possible but no more than 60 days after the date the Commission accepts the CAISO compliance filings required in Ordering Paragraph (C), as discussed in the body of this order.

(F) The Commission directs Scheduling Coordinators to inform the Commission within 10 business days whether they will be able to complete reconciliation and dispute resolution within the two week time frame set by the order.

(G) The Commission directs AEPCO to inform the Commission within 20 business days of the date of this order if it seeks to file for additional fuel cost allowance, as provided in the body of this order.

(H) The Commission directs the parties to submit briefs, not to exceed 20 pages, addressing whether Grant County's transactions with the CAISO were bilateral or OOM transactions, with reference to evidence stricken by the presiding administrative law judge or to evidence already in the record, as provided in the body of this order.

(I) The Commission directs the parties to submit briefs, not to exceed 20 pages, addressing whether Turlock's transactions with the CAISO were bilateral or OOM transactions, with specific reference to facts already in the record, as provided in the body of this order.

By the Commission. Commissioner Kelly not participating.

(S E A L)

Magalie R. Salas,
Secretary.