

127 FERC ¶ 61,191
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

San Diego Gas & Electric Company

Docket Nos. EL00-95-202

v.

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

Investigation of Practices of the California Independent
System Operator and the California Power Exchange

EL00-98-187

ORDER DENYING REHEARING

(Issued May 29, 2009)

1. In this order, we deny rehearing of a Commission order issued on November 19, 2007,¹ clarifying language in a Commission order issued on October 19, 2007.² In the October 2007 Order, the Commission vacated its California refund orders to the extent that they subjected certain non-public utility entities³ who participated in the California Independent System Operator Corporation (CAISO) and California Power Exchange

¹ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 121 FERC ¶ 61,188 (2007) (Clarification Order).

² *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 121 FERC ¶ 61,067 (2007) (October 2007 Order).

³ Non-public utility entities include governmental entities and other non-public utilities.

Corporation (PX) markets for the period October 2, 2000 to June 20, 2001 (refund period) to the Commission's Federal Power Act (FPA) section 206⁴ refund authority. In the Clarification Order, the Commission clarified paragraph 36 of the October 2007 Order to read as follows:

California Parties assert that the Commission revised the pricing formulations contained in the CAISO/PX tariffs for the period to which the [mitigated market-clearing price (MMCP)] applies. We *do not* disagree. The *Bonneville* court found that the Commission had ordered refunds *by non-jurisdictional entities* rather than *merely* amending the CAISO/PX tariffs to reset the market clearing price during the refund period. The court further found that the Commission had acted outside its jurisdiction when ordering non-public utility entities to pay these refunds. Therefore, we vacate each of the Commission's orders in the California refund proceeding to the extent that they order non-public utility entities to pay refunds.⁵

I. Background

2. The October 2007 Order contains a detailed description of the background and history of this proceeding.⁶ In brief, the Commission ordered certain governmental entities and other non-public utilities that participated in the centralized single clearing price auction markets operated by the CAISO and the PX during the refund period to make refunds.⁷ However, the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) subsequently held that FPA section 206 did not grant the Commission refund authority over wholesale electric energy sales made by such entities during the relevant period.⁸ Accordingly, the Commission issued the October 2007 Order vacating its prior orders to the extent that they subjected governmental entities and other non-public utilities to the Commission's refund authority during the refund period.

⁴ 16 U.S.C. § 824e (2000).

⁵ Clarification Order, 121 FERC ¶ 61,188 at P 13.

⁶ October 2007 Order, 121 FERC ¶ 61,067 at P 4-16.

⁷ See *San Diego Gas & Elec. Co.*, 96 FERC ¶ 61,120, at 61,499 (2001) (Refund Order), *order on reh'g*, 97 FERC ¶ 61,275 (2001) (Refund Rehearing Order).

⁸ *Bonneville Power Admin. v. FERC*, 422 F.3d 908 (9th Cir. 2005) (*Bonneville*).

3. On October 25, 2007, the California Parties⁹ sought clarification of paragraph 36 of the October 2007 Order, which addressed the California Parties' claim that the Commission revised the pricing formulations contained in the CAISO/PX tariffs. On November 19, 2007, the Commission issued its Clarification Order, in which it granted the California Parties' motion for clarification. In the Clarification Order, the Commission corrected an inadvertent mischaracterization made in its October 2007 Order, in which the Commission failed to acknowledge that its actions in the Refund Order revised the pricing formulations contained in the CAISO/PX tariffs.¹⁰ In the Clarification Order, the Commission clarified paragraph 36 of the October 2007 Order as set forth above.¹¹

4. In response to the Clarification Order, the Indicated Public Entities (IP Entities)¹² filed a timely request for rehearing.¹³ A timely request for rehearing was also jointly filed by the Bonneville Power Administration (BPA) and the Western Area Power Administration (Western).

⁹ The California Parties are the People of the State of California *ex rel.* Edmund G. Brown Jr., Attorney General, the California Electricity Oversight Board, the Public Utilities Commission of the State of California, Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SoCal Edison), and San Diego Gas & Electric Company (SDG&E).

¹⁰ Clarification Order, 121 FERC ¶ 61,188 at P 10, 13; *see also* October 2007 Order, 121 FERC ¶ 61,067 at P 36.

¹¹ *See supra* P 1; *see also* Clarification Order, 121 FERC ¶ 61,188 at P 10, 13.

¹² IP Entities joining in the rehearing request are the Northern California Power Agency (NCPA); the Sacramento Municipal Utility District (SMUD); Modesto Irrigation District (Modesto); Turlock Irrigation District, the Arizona Electric Power Cooperative; the Cities of Anaheim, Azusa, Banning, Burbank, Colton, Glendale, Pasadena, Redding, Riverside, and Vernon, California; the City of Santa Clara d/b/a Silicon Valley Power; Public Utility District No. 2 of Grant County, Washington; and the Los Angeles Department of Water and Power.

¹³ IP Entities filed their initial request for rehearing on November 28, 2007 (IP Entities Rehearing Request) and an errata and supplemental request for rehearing on December 7, 2007 (IP Entities Supp. Rehearing Request).

II. Discussion

A. FPA Section 206 Authority

5. IP Entities, BPA and Western (collectively, Requesting Parties) argue that the Commission erred by suggesting it has authority under FPA section 206 to direct retroactive revisions to accepted tariffs, adding that this directly contradicts the Commission's holding in the Refund Order. The Requesting Parties state that section 206(a) only allows the Commission to order prospective changes in existing rates and tariffs, adding that, upon finding an existing rate, tariff or charge to be unjust and unreasonable, this section directs the Commission to set rates "to be thereafter observed."¹⁴ The Requesting Parties claim that section 206(b), which allows the Commission to order refunds, does not modify the prospective-only nature of the Commission's authority under section 206(a).¹⁵ Rather, the Requesting Parties contend that refunds ordered under section 206(b) are merely measured by the prospective changes ordered under section 206(a).

6. The Requesting Parties base their argument on the language in FPA section 206(b), which authorizes the Commission to order refunds of any amount paid in excess of the just and reasonable rate, which the Commission orders "to be thereafter observed." The Requesting Parties argue that use of the word "thereafter" in subsections (a) and (b) indicates that section 206(b) defines the measure of refunds, and does not permit retroactive tariff revisions.¹⁶

7. The Requesting Parties further assert that the limitation on refunds under FPA section 206(b) to a period fifteen months after the refund effective date is indicative that tariff modifications under section 206(b) are not retroactive.¹⁷ According to the Requesting Parties, if a tariff modification under FPA section 206 were retroactive, such

¹⁴ IP Entities November 28, 2007 Rehearing Request at 6-7 (IP Entities Rehearing Request); BPA and Western December 19, 2007 Rehearing Request at 4-5 (citing *FPC v. Sierra Power Company*, 350 U.S. 348, 352 (1956); *Montana-Dakota Utilities Co. v. Northwest Public Services Co.*, 341 U.S. 246, 254 (1951)) (BPA/Western Rehearing Request). BPA and Western state that, pursuant to FPA section 206, the Commission can effect no change prior to the date of the order setting rates.

¹⁵ IP Entities Rehearing Request at 7.

¹⁶ IP Entities Rehearing Request at 6-7; BPA/Western Rehearing Request at 5.

¹⁷ *Id.*

a modification would become the filed rate from that point forward, and there would be no basis for limiting refunds to a fifteen month period.

8. The Requesting Parties contend that recent Commission orders confirm that, even if tariff changes are ordered prospectively, with refunds for the fifteen month refund period, those tariff changes are not backdated to the refund effective date.¹⁸ Specifically, IP Entities states that, in *ExxonMobil v. Entergy*, the Commission recognized that statutory limitations govern the availability of refund remedies available under FPA section 206(b). IP Entities argue that the Commission in *ExxonMobil v. Entergy* noted that filed rates may only be changed pursuant to FPA section 206 and went on to distinguish time periods as they relate to the availability of refunds under the FPA. IP Entities also point to compliance tariff amendments previously accepted by the Commission, which were dated as of the date of the Commission's order approving the change, rather than backdated to the beginning of the refund period.¹⁹

9. The Requesting Parties argue that the Commission's actions in the Clarification Order violate the Commission's authority under the filed rate doctrine and the corollary rule against retroactive ratemaking by impermissibly retroactively changing an existing tariff.²⁰ BPA and Western state that the Commission's authority to fix a just and reasonable rate does not include the ability to amend pricing formulations under the

¹⁸ IP Entities Rehearing Request at 7-8 (citing *ExxonMobil Corp. v. Entergy Servs., Inc.*, 119 FERC ¶ 61,261, at P 8, 20-22 (2007) (*ExxonMobil v. Entergy*); *Miss. Delta Energy Agency v. Entergy Servs., Inc.*, 119 FERC ¶ 61,269 (2007) (*Miss. Delta v. Entergy*); *Tenaska Ala. II Partners, L.P. v. Ala. Power Co.*, 118 FERC ¶ 61,037 (2007), *order on reh'g*, 119 FERC ¶ 61,315 (2007), *order on compliance*, 121 FERC ¶ 61,124 (2007) (*Tenaska v. Ala. Power*); *Union Power Partners, L.P. v. Entergy Servs., Inc.*, 118 FERC ¶ 61,134 (2007), *reh'g denied*, 119 FERC ¶ 61,328 (2007) (*Union Power v. Entergy*); and *Mirant Las Vegas, LLC v. Nev. Power Co.*, 118 FERC ¶ 61,034 (2007), *order on reh'g*, 120 FERC ¶ 61,002 (2007) (*Mirant v. Nev. Power*)).

¹⁹ IP Entities Rehearing Request at 9 (citing Revisions to Interconnection and Operating Agreement, Transmittal Letter at 6 and Attachments A and B, Docket No. ER07-1145-000 (July 11, 2007)); *see also Entergy Servs., Inc.*, Docket No. ER07-1145-000 (Aug. 23, 2007) (unpublished letter order) (accepting compliance filing in response to *Miss. Delta v. Entergy*)).

²⁰ The rule against retroactive rate ratemaking is an outgrowth of the filed rate doctrine, and prohibits the Commission from adjusting current rates to make up for over- or under-collections of costs in prior periods. *See Associated Gas Distributors v. FERC*, 898 F.2d 809, 810 (D.C. Cir. 1990).

CAISO/PX tariffs for non-jurisdictional sellers. BPA and Western add that FPA section 206 proceedings do not permit retroactive amendments of a tariff itself, but rather only provide a mechanism for the Commission to impose refunds on jurisdictional entities as a matter of discretion.²¹ As such, BPA and Western state that ordering refunds does not create an amended tariff because refunds “simply involve the Commission’s equitable discretion.”²²

10. BPA and Western argue that the Commission’s actions in the Refund Order, namely the establishment of a revised method for calculating a just and reasonable rate and the Commission’s exercise of refund authority over all sellers in the CAISO/PX markets, are proof that the Commission did not intend to amend the CAISO/PX tariffs. BPA and Western further assert that the *Bonneville* court’s rejection of the Commission’s exercise of refund authority over non-public utilities makes it impossible for the Commission to argue that the Refund Order revises the market clearing prices applicable to all market participants.

11. BPA and Western further argue that, in the Refund Order, the Commission recognized its lack of authority to retroactively amend the CAISO/PX tariffs. Specifically, they point to the Commission’s holding that Congress did not give the Commission authority to modify unjust and unreasonable rates retroactively, adding that this constitutes an express rejection of the retroactive rate adjustment directed in the Refund Order.²³

12. Therefore, the Requesting Parties argue that the Commission must revise paragraph 36 of the October 2007 Order to reflect that the Commission did not retroactively amend the CAISO/PX tariffs when it ordered refunds under FPA section 206.

13. IP Entities argue that the Clarification Order, issued November 19, 2007, would subject entities to after-the-fact rate adjustments when it would be impossible for parties to change their market-related decisions to sell. IP Entities state that the Regulatory Fairness Act, which gives the Commission limited authority to order refunds, provides

²¹ BPA/Western Rehearing Request at 6.

²² *Id.* (citing *Towns of Concord, Norwood, and Wellesley v. FERC*, 955 F.2d 67, 73, 76 (D.C. Cir. 1992)).

²³ *Id.* at 11 (citing Refund Order, 96 FERC ¶ 61,120 at 61,505); *see also* IP Entities Supp. Rehearing Request at 4-6 (citing Refund Order, 96 FERC ¶ 61,120 at 61,505).

for refunds only if they are limited in temporal scope and provide entities at least 60 days notice within which to adapt their challenged sales.²⁴ IP Entities argue that the Commission is required to provide notice to every seller whose rates will be affected at the initiation of a FPA section 206 proceeding.²⁵

14. IP Entities state that, earlier in these proceedings, the Commission stated its intention to apply refund liability to public utility sellers subject to Commission jurisdiction and disclaimed any legal authority to require non-public utility sellers to pay refunds.²⁶ IP Entities further state that the complaints that initiated this proceeding, as well as prior Commission orders, only dealt with public utility sellers selling into the CAISO and PX markets. IP Entities add that the Commission did not indicate its intention to make the rates it developed applicable to entities exempt from the Commission's rate jurisdiction until it issued the Refund Order. IP Entities contend that, by that time, governmental entities could no longer choose to exit the market and avoid potential litigation. Therefore, IP Entities conclude that the prior notice limitations imposed by Congress in FPA section 206 were not met and that non-public utility sellers were not put on notice that their rates were at issue, as required. As a result, IP Entities claim that they are not subject to the Commission's FPA section 206 refund authority.

Commission Determination

15. We will deny rehearing. We disagree with the Requesting Parties' narrow interpretation of FPA section 206, which leads to their conclusion that the Commission lacks authority under section 206 to reset the market clearing prices for spot market sales. The Commission's actions in this proceeding are well within the authority granted to it under section 206, which specifically provides that the Commission may reset prices in Commission-jurisdictional tariffs and order refunds back to the refund effective date.²⁷

²⁴ IP Entities Rehearing Request at 10-11 (citing Regulatory Fairness Act, Pub. L. No. 100-473, 102 Stat. 2299 (1988)).

²⁵ *Id.*

²⁶ *Id.* at 11 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 92 FERC ¶ 61,172, at 61,603, 61,606, 61,608-09 (2000) (August 2000 Order); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 93 FERC ¶ 61,121, at 61,350, 61,367, 61,370 (2000) (November 2000 Order); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 94 FERC ¶ 61,245, at 61,864 (2001) (March 2001 Order)).

²⁷ *See* 16 U.S.C. § 824e(b) (2006).

16. FPA section 206(a) provides:

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission . . . is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract *to be thereafter observed* and in force, and shall fix the same by order.²⁸

While it is true that section 206(a) directs the Commission to set rates or charges “to be thereafter observed,” this language does not stand alone and must be read together with section 206(b), which expressly provides that, whenever the Commission institutes a proceeding under FPA section 206, it is obligated to establish a refund effective date and may order refunds “for the period subsequent to the refund effective date through a date fifteen months after such refund effective date . . . under the just and reasonable rate . . . which the Commission orders to be thereafter observed and in force.”²⁹ FPA section 206(b) thus specifically provides that the Commission may order refunds of amounts paid in excess of those which would have been paid under the just and reasonable rate or charge, as determined by the Commission.

17. In 1988, in the Regulatory Fairness Act, Congress amended FPA section 206 to grant the Commission authority to order refunds for rates found to be unjust and unreasonable.³⁰ Under FPA section 206, as amended by the Regulatory Fairness Act, upon instituting a proceeding under section 206, the Commission establishes a refund effective date and may order refunds, commencing with the refund effective date and for up to 15 months thereafter, if it finds an existing rate to be unjust, unreasonable or unduly discriminatory or preferential.³¹

18. Contrary to the Requesting Parties’ argument, the Commission, in its Clarification Order, is not engaging in impermissible retroactive action with respect to rate changes to

²⁸ 16 U.S.C. § 824e(a) (2006) (emphasis added).

²⁹ See 16 U.S.C. § 824e(b) (2006).

³⁰ See Regulatory Fairness Act, Pub. L. No. 100-473, 102 Stat. 2299 (1988).

³¹ See S. Rep. No. 100-491 at 3-4 (1988); accord H. Rep. No. 100-384 at 2-3 (1987); see also November 2000 Order, 93 FERC ¶ 61,121 at 61,377, 61,379.

previously-accepted jurisdictional tariffs. Rather, in the November 2000 Order, we determined rates charged under the jurisdictional CAISO/PX tariffs to be unjust and unreasonable.³² Pursuant to the statutory requirement placed upon the Commission by Congress under FPA section 206(b), we established a refund effective date of October 2, 2000.³³ FPA section 206(b) also permits the Commission to order refunds for the period subsequent to the refund effective date through a date fifteen months after such refund effective date.³⁴ That is what occurred here.

19. Essential to our ability to exercise refund authority during the fifteen-month refund period is the identification for that period of the rate determined by the Commission to be just and reasonable. Indeed, it would be problematic for this Commission to develop a refund that would withstand scrutiny unless we were able to rely on a measure of what a just and reasonable rate would be for the refund period. This measure for calculating refunds is the revised just and reasonable rate determined by the Commission. Indeed, the Senate Report on the Regulatory Fairness Act, as well as the November 2000 Order, make clear that any potential refund is limited to the difference between the rate charged and the rate determined to be just and reasonable.³⁵ To suggest, as the Requesting Parties do, that the Commission may not reset prices would, in effect, bar the Commission from ever ordering refunds because the ordering of refunds by its very nature involves the resetting of rates in a past period.

20. The Requesting Parties' claim that FPA section 206 only permits the Commission to order *prospective changes* in existing rates and tariffs discounts the need to reset the rate in order to exercise our authority under FPA section 206(b) to order refunds during the fifteen-month refund period. The Requesting Parties' suggestion that the language in FPA section 206(a) trumps that of section 206(b) effectively reads section 206(b) out of the statute and would be directly contrary to the very purpose of Congress in giving the Commission additional refund authority for rates found not to be just and reasonable. We believe this interpretation of the statute, ignoring section 206(b), must fail. On the contrary, as intended by Congress, FPA section 206(b) exists for the purpose of expanding the ability of the Commission to order refunds under the FPA for rates found

³² *Id.* at 61,349-50.

³³ *Id.* at 61,350.

³⁴ *See* 16 U.S.C. § 824e(b) (2006).

³⁵ *See* S. Rep. No. 100-491 at 6 (1988); *see also* November 2000 Order, 93 FERC ¶ 61,121 at 61,377.

not to be just and reasonable.³⁶ FPA section 206(b) does not change our ability to order prospective relief for unjust and unreasonable rates, but instead provides the Commission with additional authority to order refunds.³⁷ For the Commission to effectively implement this limited grant of refund authority, however, it must in practice use the just and reasonable rate to calculate “refunds of any amounts paid . . . *in excess of those which would have been paid under the just and reasonable rate . . . to be thereafter observed and in force.*”³⁸ Absent our resetting of rates during the refund period, we would be unable to determine what amount would be in excess of a just and reasonable rate, and, therefore, we would be incapable of complying with our statutory obligations under FPA section 206(b). Therefore, we reject the Requesting Parties’ argument that the Commission lacks authority under FPA section 206 to reset the market clearing prices for all spot market sales once we established a refund effective date.

21. We disagree with the Requesting Parties that the limitation on refunds under FPA section 206(b) to a period fifteen months after the refund effective date implicitly indicates that the Commission may not revise pricing formulations contained in the CAISO/PX tariffs prior to the date of the Refund Order. To the contrary, the common sense application of sections 206(a) and (b) taken together, as intended by Congress, is that the Commission resets the just and reasonable rate as of the refund effective date but is limited in its discretion to order refunds for no more than 15 months of the period between the refund effective date and the date the Commission issues its order determining the just and reasonable rate. Tariffs and rates can have a defined lifespan

³⁶ Congress enacted FPA section 206(b) to overcome disincentives facing electric utilities to speedily resolve section 206 cases. The Senate Report on the Regulatory Fairness Act points out that resolution of section 206 proceedings required two years on average, noting that public utilities had little incentive to settle section 206 complaints because any relief was prospective. Congress intended to correct this problem by giving the Commission the authority to establish a refund effective date and to make an existing rate subject to refund during the pendency of a section 206 proceeding for a period of up to 15 months from the refund effective date. *See* S. Rep. No. 100-491 at 3-4 (1988); *see also* H. Rep. No. 100-384 at 2 (1987); *see also East Tennessee Natural Gas Co. v. FERC*, 863 F.2d 932, n.21 (D.C. Cir. 1988); November 2000 Order, 93 FERC ¶ 61,121 at 61,379.

³⁷ H. Rep. No. 100-384 at 2 (1987).

³⁸ 16 U.S.C. § 824e(b) (2006) (emphasis added).

with not only a beginning date, but also an end date.³⁹ As such, a tariff revision and rate change can have a 15-month life, coincident with the 15 months following a refund effective date.

22. Moreover, Congress, in passing the Regulatory Fairness Act, recognized that it would in many instances take the Commission longer than fifteen months to resolve proceedings initiated under FPA section 206. The Senate and House Reports on the Regulatory Fairness Act acknowledge that resolution of FPA section 206 proceedings requires two years on average.⁴⁰ Contrary to the Requesting Parties' assertion, then, the fifteen-month period was not a limit on tariff changes, but instead serves the distinctly different purpose of limiting the length of time that public utilities may be subject to potential refunds when the Commission takes more time to act, as is the case here, including where the Commission issues its order establishing just and reasonable rates several years subsequent to a complaint. Therefore, we reject the Requesting Parties' argument with respect to the fifteen-month refund period.

23. IP Entities cite to several Commission orders, which they argue support their contention that, even if tariff changes are ordered prospectively with refunds for the fifteen month period under FPA section 206(b), those tariff changes are not backdated to the refund effective date. IP Entities, however, misconstrue the Commission's actions in the instant proceeding as they relate to prospective tariff changes under FPA section 206. While it is true that changes to filed rates may only be made by the Commission or parties other than the utility charging the rate pursuant to FPA section 206,⁴¹ here the Commission is well within its authority under FPA section 206 to reset pricing formulations during the refund period. As we explain above,⁴² essential to our ability to exercise our statutory authority to order refunds for the refund period is the application during that period of the new rate determined by the Commission to be just and reasonable. Interpreting FPA section 206, as IP Entities do, to mean that the Commission lacks the ability to reset rates during the refund period could in effect eliminate refunds because the ordering of refunds requires the determination of just and reasonable rates and their application to the refund period. As such, we reject IP Entities' argument that

³⁹ Cf. 18 C.F.R. § 35.15(b)(2) (2008) (providing for automatic termination, without the need for a Commission filing, of certain power sales contracts).

⁴⁰ See S. Rep. No. 100-491 at 3 (1988); see also H. Rep. No. 100-384 at 2.

⁴¹ See *Entergy Gulf States, Inc.*, 119 FERC ¶ 61,051, at P 19 (2007).

⁴² See *supra* P 21.

past Commission orders indicate that the Commission may not reset rates during the refund period.

24. IP Entities contend that certain compliance tariff amendments previously accepted by the Commission were dated as of the date of the Commission's order approving the change, rather than backdated to the refund effective date, and argue that this indicates that the Commission could not have reset formulations under the CAISO/PX tariffs going back to the refund effective date. We believe this to be a tortured reading of our prior order.⁴³ In *Miss. Delta v. Entergy*, the Commission established a refund effective date of July 4, 2004, and directed Entergy to pay refunds, in the form of transmission credits, accrued from the refund effective date through a date fifteen months subsequent to that date, with interest.⁴⁴ The Commission also directed Entergy to provide transmission credits on a prospective basis from the date of the Commission order, and to revise its interconnection agreements accordingly.⁴⁵ IP Entities' interpretation of the Commission's direction that Entergy revise its interconnection agreements on a prospective basis suggests that, *sub silentio*, the Commission reversed everything else said in *Miss. Delta v. Entergy* with respect to ordering of refunds during the refund period. In that order, the Commission was accepting a tariff for prospective application to determine what the going-forward rate would be with respect to transmission credits. In directing Entergy to revise its interconnection agreements to provide for transmission credits on a prospective basis, the Commission was not implicitly reversing our previous direction to Entergy with respect to payment of refunds, with interest, for the refund period. Therefore, we reject IP Entities' argument with respect to application of *Miss. Delta v. Entergy*. For the same reason, we reject IP Entities' identical claims with respect to the Commission's determinations in *ExxonMobil v. Entergy*, *Tenaska v. Ala. Power*, *Union Power v. Entergy*, and *Mirant v. Nev. Power*.⁴⁶

⁴³ See *Entergy Servs., Inc.*, Docket No. ER07-1145-000 (Aug. 23, 2007) (unpublished letter order).

⁴⁴ See *Miss. Delta v. Entergy*, 119 FERC ¶ 61,269 at P 39. The Commission provided similar direction in *ExxonMobil v. Entergy*, 119 FERC ¶ 61,261 at P 8, 20-22; *Tenaska v. Ala. Power*, 118 FERC ¶ 61,037 at P 24; *Union Power v. Entergy*, 118 FERC ¶ 61,134 at P 15; and *Mirant v. Nev. Power*, 118 FERC ¶ 61,034 at P 20.

⁴⁵ See *Miss. Delta v. Entergy*, 119 FERC ¶ 61,269 at P 39.

⁴⁶ See *Miss. Delta v. Entergy*, 119 FERC ¶ 61,269 at P 39; *ExxonMobil v. Entergy*, 119 FERC ¶ 61,261 at P 8, 20-22; *Tenaska v. Ala. Power*, 118 FERC ¶ 61,037 at P 24; *Union Power v. Entergy*, 118 FERC ¶ 61,134 at P 15; and *Mirant v. Nev. Power*, 118 FERC ¶ 61,034 at P 20.

25. We also disagree with the Requesting Parties' argument that the Commission's actions in the Clarification Order violate the Commission's authority under the filed rate doctrine and the corollary rule against retroactive ratemaking. First, as described above, the Commission's actions are allowed by the statute. Second, as we explain below, our actions are not at odds with the filed rate doctrine or the rule against retroactive ratemaking.

26. The filed rate doctrine "forbids a regulated entity [from] charging rates for its services other than those properly filed with the appropriate regulatory authority."⁴⁷ This doctrine is founded on the requirements in FPA section 205 that rates for jurisdictional services must not only be just and reasonable but also must be on file with the Commission.⁴⁸ The considerations underlying the rule are "preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant."⁴⁹

27. It is well established that predictability is an underlying purpose of both the filed rate doctrine and the rule against retroactive ratemaking.⁵⁰ These doctrines are designed to allow parties to know the consequences of the purchasing decisions they make.⁵¹ The

⁴⁷ See November 2000 Order, 93 FERC ¶ 61,121 at 61,380 (citing *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981)).

⁴⁸ We note the Court of Appeals for the District of Columbia Circuit recognized that "the Commission has held that traditional utilities and power marketers who engage in market-based rate transactions are required to file quarterly reports summarizing transactions and that these reports satisfy the filing requirements of § 205(c)." See Refund Order, 96 FERC ¶ 61,120 at 61,506 (citing *Power Co. of America, L.P. v. FERC*, 245 F.3d 839, 846 (D.C. Cir. 2001)).

⁴⁹ November 2000 Order, 93 FERC ¶ 61,121 at 61,380 (citing *City of Cleveland v. FPC*, 525 F.2d 845, 854 (D.C. Cir. 1976); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251-52 (1951)); accord *Town of Norwood v. National Grid*, 126 FERC ¶ 61,039, at P 14 (2009).

⁵⁰ *Pub. Util. Comm'n of Cal. v. FERC*, 988 F.2d 154, 164 (D.C. Cir. 1993) (*CPUC v. FERC II*) (citing *Towns of Concord, Norwood and Wellesley v. FERC*, 955 F.2d 67, 75 (D.C. Cir. 1992); *Pub. Util. Comm'n of Cal. v. FERC*, 894 F.2d 1372, 1383 (D.C. Cir. 1990)).

⁵¹ *CPUC v. FERC II*, 988 F.2d at 164 (citing *Towns of Concord, Norwood and Wellesley v. FERC*, 955 F.2d 67, 75).

court in *CPUC v. FERC II* stated that, when determining whether a Commission order violates either of these two doctrines, it inquires whether parties had sufficient notice that the approved rate was subject to change.⁵² The court noted that such notice "changes what would be purely retroactive ratemaking into a functionally prospective process by placing the relevant audience on notice at the outset that the rates being promulgated are provisional only and subject to later revision."⁵³

28. On August 2, 2000, in response to significant increases in prices for energy and ancillary services in California, SDG&E filed a complaint in Docket No. EL00-95-000 against all sellers of energy and ancillary services into the CAISO and PX markets and requested that the Commission impose a price cap for sales into those markets. As we discuss further below,⁵⁴ the *CPUC v. FERC I* court held that SDG&E's complaint, in light of the August 2000 Order and subsequent rehearing requests, provided sufficient notice to the market participants to satisfy the notice requirements of FPA section 206.⁵⁵ Therefore, as a result of SDG&E's complaint and the Commission's subsequent orders establishing a refund effective date, sellers into the CAISO/PX markets were put on sufficient notice that the rates under the CAISO/PX tariffs were potentially subject to later revision by the Commission and potentially subject to 15 months of refunds beginning as of the refund effective date. As such, we reject the Requesting Parties' arguments that the Commission violated the filed rate doctrine and the corollary rule against retroactive ratemaking when it reset the market clearing prices for all spot market sales under FPA section 206.

29. We also disagree with BPA and Western's argument that the *Bonneville* court's rejection of the Commission's exercise of refund authority over non-public utilities undermines the Commission's position that the Refund Order revises the CAISO tariff with respect to the market clearing price that applied from and after the refund effective date. In *Bonneville*, the Ninth Circuit did *not* invalidate the Commission's finding that all transactions in the CAISO/PX markets during the refund period should be revised using the MMCP methodology.⁵⁶ While the Ninth Circuit held that the Commission lacks the

⁵² *CPUC v. FERC II*, 988 F.2d at 164.

⁵³ *Id.*

⁵⁴ *See infra* P 38-39.

⁵⁵ *Pub. Util. Comm'n of Calif. v. FERC*, 462 F.3d 1027, 1047 (9th Cir. 2006) (*CPUC v. FERC I*).

⁵⁶ *Bonneville*, 422 F.3d at 910-11, 919-20.

authority to order refunds from governmental entities and non-public utilities, the Ninth Circuit did not disapprove of the Commission's resetting of all prices under the CAISO/PX tariffs.⁵⁷ Indeed, the Ninth Circuit implicitly ruled on the issue before us here by suggesting that a remedy may exist for parties who wished to pursue claims against governmental entities and non-public utilities in the form of a contract claim.⁵⁸ If, as the Requesting Parties suggest, the Commission's authority to fix a just and reasonable rate does not include the ability to amend pricing formulations under the CAISO/PX tariffs, then the Ninth Circuit's suggestion that a remedy may rest on a contract claim, rather than a refund action, would be superfluous.

30. Our interpretation of *Bonneville* is also consistent with the subsequent decision of the Ninth Circuit in *CPUC v. FERC I*, which reviewed the actions of the Commission in connection with mitigation of the CAISO and PX markets.⁵⁹ In *CPUC v. FERC I*, the court ultimately rejected challenges to the Commission's decision in the Refund Order to reset prices on a market-wide basis during the refund period, adding that the Refund Order adopted the MMCP to calculate just and reasonable rates for the CAISO and PX markets.⁶⁰

31. Regardless of the limits that the then-effective FPA section 206 placed on the Commission with respect to the ordering of refunds from governmental entities and other non-public utilities, the Commission has the authority to determine the just and reasonable rates that may be charged pursuant to a Commission-jurisdictional tariff such as the CAISO/PX tariffs.⁶¹ In fact, in the *MAPP* cases, while the Commission reiterated that only jurisdictional public utilities members of the power pool were required to pay refunds, it nonetheless determined that the "tariffs and agreements on file with [the Commission] are subject to [Commission] jurisdiction."⁶²

⁵⁷ *Id.*

⁵⁸ *Id.* at 925.

⁵⁹ *See CPUC v. FERC I*, 462 F.3d at 1027.

⁶⁰ *See id.* at 1052.

⁶¹ *See Mid-Continent Area Power Pool*, 89 FERC ¶ 61,135 (1999), *reh'g denied*, 92 FERC ¶ 61,229 (2000) (*MAPP*) (collectively, *MAPP* cases).

⁶² *MAPP*, 92 FERC ¶ 61,229 at 61,755.

32. The *MAPP* cases make clear that, even in a market that includes both jurisdictional public utilities as well as governmental entities and non-public utilities selling power pursuant to a Commission-jurisdictional tariff, the Commission has the authority and duty to determine the just and reasonable rates that may be charged under that tariff. The Ninth Circuit did not rule to the contrary; instead, it drew an analogy between the facts in the *MAPP* cases and *Bonneville*.⁶³ For these reasons, we reject BPA and Western's argument that *Bonneville* undermines the Commission's position that the Refund Order revises market clearing prices applicable to all market participants.

33. With respect to BPA and Western's contention that the Commission, in its Refund Order, recognized a lack of authority to reset rates during the refund period, we note that BPA and Western take out of context the Commission's discussion in the Refund Order as it pertains to refund authority. In the Refund Order, the Commission acknowledged that, in amending FPA section 206, Congress did not grant the Commission unfettered authority to modify unjust and unreasonable rates retroactively.⁶⁴ BPA and Western view this statement in isolation and, notwithstanding section 206(b), incorrectly assert that the Commission held that Congress did not grant the Commission *any* authority to reset unjust and unreasonable rates after the fact. This is not the case. Rather, as the Refund Order went on to explain, Congress, in the Regulatory Fairness Act, added refund

⁶³ *Bonneville*, 422 F.3d at 922, 925-926. Specifically, the Ninth Circuit noted that, similar to the facts in the *MAPP* proceedings, in *Bonneville*, both public utilities along with governmental entities and non-public utilities were selling electric energy in wholesale power markets. *See Bonneville*, 422 F.3d at 922. In *Bonneville*, the Ninth Circuit also noted that, in the *MAPP* proceedings, the Commission concluded that portions of the *MAPP* tariff violated FPA section 205 and ordered refunds from the *MAPP* members. *See id.* at 925. The Ninth Circuit went on to state that, in the *MAPP* cases, the Commission held that tariffs and agreements on file with the Commission are subject to the Commission's jurisdiction. *See id.* at 922. The Ninth Circuit added that, while the Commission ultimately found that it could not order refunds from governmental entities or non-public utilities, it suggested that a contract action might provide a remedy for public utility members of *MAPP* against governmental entities or non-public utilities. *See id.* at 925. In particular, the Ninth Circuit pointed out that, in subsequent *MAPP*-related proceedings in federal court, the United States District Court for the District of Minnesota held that the governmental entities or non-public utilities were contractually liable to pay refunds as a result of the Commission's orders in the *MAPP* cases that changed *MAPP*'s FERC-jurisdictional tariff and the *MAPP* agreement. *See id.* at 925-26. The Ninth Circuit noted that the United States Court of Appeals for the Eighth Circuit affirmed this decision. *See id.* at 926.

⁶⁴ Refund Order, 96 FERC ¶ 61,120 at 61,505.

authority to FPA section 206 (albeit limited refund authority for only fifteen months) by allowing, under the language of section 206(b) as it then existed, the Commission to establish a refund effective date no earlier than 60 days after the date that a complaint is filed or that the Commission initiates an investigation.⁶⁵ Thus, the refund effective date is an important dividing line. As the Commission stated in the Refund Order, section 206 does not permit retroactive refund relief for periods prior to the filing of a complaint or the initiation of an investigation, even if the Commission determines that such past rates were unjust and unreasonable.⁶⁶ By contrast, as explained above,⁶⁷ essential to our ability to exercise our statutory refund authority during the established fifteen-month refund period following the refund effective date is the application during that period of the new rate determined by the Commission to be just and reasonable.

34. We find that IP Entities' claim that the FPA section 206(a) notice requirement prevents the Commission's authority under section 206 from covering governmental entities and non-public utilities is unfounded. The Commission may investigate the reasonableness of a rate either in response to a third-party complaint or "upon its own motion."⁶⁸ Under the FPA, the Commission is statutorily bound to establish a refund effective date whenever it institutes an FPA section 206 investigation.⁶⁹ In cases where the Commission acts upon its own motion under FPA section 206, or institutes a proceeding on complaint under FPA section 206, section 206(b) as then written required that the Commission establish a refund effective date that was no earlier than 60 days after the filing of the complaint, but no later than five months subsequent to the expiration of the 60-day period.⁷⁰

35. In the August 2000 Order, pursuant to FPA section 206, we established a refund effective date of October 29, 2000, 60 days from the date of our order instituting an

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *See supra* P 21.

⁶⁸ *See* 16 U.S.C. § 824e(a) (2006).

⁶⁹ *See* 16 U.S.C. § 824e(b) (2006); *see also* *CPUC v. FERC I*, 462 F.3d at 1047.

⁷⁰ *See* 16 U.S.C. § 824e(b) (2006); *see also* August 2000 Order, 92 FERC ¶ 61,172 at 61,608. FPA section 206 notice timing changed in August 2005. *See* Energy Policy Act of 2005, Pub. L. No. 109-58, § 1285, 119 Stat. 594 (2005).

investigation on our own motion into the practices of the CAISO and PX.⁷¹ On September 22, 2000, SoCal Edison and PG&E filed for rehearing of this date, seeking a refund effective date beginning 60 days after the filing of SDG&E's complaint in Docket No. EL00-95-000.⁷² The Commission granted this request in its November 2000 Order, which changed the refund effective date to an earlier date, October 2, 2000, to coincide with the date that would have been established based on the date SDG&E filed its complaint.⁷³ So, certainly from as early as the date of the August 2000 Order, the IP Entities were on notice that the Commission might reset the market clearing prices for all spot market sales during the refund period.

36. The Ninth Circuit in *CPUC v. FERC I* addressed the issue of whether SDG&E's complaint afforded sufficient notice to alert market participants, even entities such as IP Entities, that transactions in the CAISO and PX markets might be subject to refund.⁷⁴ As the Ninth Circuit pointed out, a complaint challenging the reasonableness of rates can lead to a refund under FPA section 206, even if a refund remedy is not specifically designated in the initial complaint.⁷⁵ The Ninth Circuit went on to state that "market participants were quickly apprised that the original refund effective date might be subject to revision."⁷⁶ Ultimately, the Ninth Circuit decided that, "because SDG&E's [FPA section] 206 complaint could have led to a FERC refund order, because the [August 2000 Order] establishing the refund effective date was not final, and because rehearing petitions were timely filed challenging the refund effective date, SDG&E's filing of its complaint provided sufficient notice to the market to satisfy [FPA section] 206."⁷⁷ Given the statute and the Commission's actions, as well as the Ninth Circuit's conclusion in *CPUC v. FERC I* that SDG&E's complaint provided sufficient notice to participants in

⁷¹ Refund Order, 96 FERC ¶ 61,120 at 61,500.

⁷² See SDG&E August 2, 2000 Complaint, Docket No. EL00-95-000.

⁷³ Refund Order, 96 FERC ¶ 61,120 at 61,500. This new refund effective date was within the range of refund effective dates permitted by the statute. See 16 U.S.C. § 824e(b) (2006).

⁷⁴ *CPUC v. FERC I*, 462 F.3d at 1046.

⁷⁵ *Id.* at 1046-47.

⁷⁶ *Id.*

⁷⁷ *Id.*

the market to satisfy the notice requirements of FPA section 206, we reject IP Entities' argument that it was not given appropriate notice of the Commission's right to revise pricing formulations in the CAISO and PX markets.

37. Finally, we find no merit to IP Entities' claim that prior orders in these proceedings did not contain explicit language that would put governmental entities and other non-public utilities on notice that the Commission might reset the market clearing price during the refund period, which would necessarily affect all sales including sales by governmental entities and other non-public utilities. The Commission's statements in prior orders in this proceeding⁷⁸ do not suggest that the Commission never intended to, or that the Commission cannot, make the just and reasonable market clearing price it developed applicable to all participants in the CAISO and CalPX markets. Nor do these statements preclude the Commission from carrying out its obligation under section 206 to determine a just and reasonable market clearing price and thus just and reasonable rates to be applicable during the refund period. Further, section 206 imposes no requirement upon the Commission that it specifically state, upon initiation of a section 206 proceeding, that rates charged by governmental entities or non-public utilities might be impacted. As discussed above, SDG&E's filing of its section 206 complaint provided sufficient notice to participants in the market to satisfy the notice requirements of section 206. Accordingly, we deny IP Entities' rehearing request regarding this issue.

B. Bonneville Precedent

38. The Requesting Parties argue that the Clarification Order is inconsistent with *Bonneville* and is barred by the law of case doctrine. Specifically, the Requesting Parties disagree with the position taken by the Commission that the language in *Bonneville* indicates that the Commission reset market prices and then ordered non-public utilities to pay refunds based on those prices. The Requesting Parties contend that, when the Ninth Circuit stated that "FERC's [Refund Order] does more than simply reset the market-clearing price for power in the FERC jurisdictional [CA]ISO and CalPX markets," the Ninth Circuit meant that the Commission did something altogether different from resetting the market clearing price when it ordered refunds under FPA section 206. The Requesting Parties argue that the *Bonneville* court's use of "more than" does not equate to "in addition to." The Requesting Parties point to the following language in *Bonneville* in support of their position:

⁷⁸ See August 2000 Order, 92 FERC ¶ 61,172 at 61,603, 61,606, 61,608-09; see also November 2000 Order, 93 FERC ¶ 61,121 at 61,350, 61,367, 61,370; see also March 2001 Order, 94 FERC ¶ 61,245 at 61,864.

FERC attempts to deflect our attention away from the fact that it is ordering refunds from the Public Entities by arguing that the FERC is simply using its §§ 205 and 206 authority to reset the prices of the single-price auction to a just and reasonable level . . . [The CA]ISO similarly tries to cast FERC's orders as resetting the market clearing price under FERC-jurisdictional tariffs and *characterizes the refunds by the Public Entities as just a 'byproduct' of the resettlement of the [CA]ISO and [PX] markets.*

*The rationale advanced by FERC and [the CA]ISO is flawed. Perceiving FERC's orders as effecting a reset market clearing price for all spot market sales under the [CA]ISO and [PX] tariffs, rather than as an order for refunds under § 206(b), ignores the explicit language of FERC's July 25, 2001 Order. . . . We cannot conclude that FERC said 'refund' but meant resettlement of the market-clearing price.*⁷⁹

39. BPA and Western argue that, in holding that the Commission's ordering of refunds was not a byproduct of the resettlement of the market price, the *Bonneville* court recognized the ordering of refunds as an independent exercise of legal authority. BPA and Western add that the Ninth Circuit's use of the phrase "rather than" indicates that it viewed the Commission's activities in the Refund Order as ordering refunds rather than resetting the market clearing price.

40. According to IP Entities, in the following passage, the Ninth Circuit rejected the Commission's argument that it was simply "effecting a reset market clearing price for all spot market sales under the [CA]ISO and [PX] tariffs:"⁸⁰

Indeed, it would be one thing for FERC to order [PX] and [the CA]ISO to operate the market in a different fashion or to set a market-clearing price for power on a going-forward basis, but the retroactive imposition of a market price that effects a refund responsibility is a regulatory action that falls outside of FERC's jurisdiction with respect to non-public utilities and governmental entities.

FERC's attempt to order refunds based on its *general* jurisdiction over wholesale sales of electric energy in interstate commerce contained in §201(b)(1) contravenes the more *specific* provisions of the FPA that limit

⁷⁹ IP Entities Rehearing Request at 12-13 (quoting *Bonneville*, 422 F.3d at 919 (emphasis added)); BPA/Western Rehearing Request at 14 (quoting *Bonneville*, 422 F.3d at 919 (emphasis added)).

⁸⁰ IP Entities Rehearing Request at 15 (quoting *Bonneville*, 422 F.3d at 919).

FERC's authority over governmental entities, *see* § 201(f), and limit FERC's authority to ensure just and reasonable rates and to order refunds to 'public utilities,' *see* §§ 205, 206(b). In sum, the text and structure of the FPA are unambiguous: *Chevron* deference is not due where FERC's authority to order refunds under § 206(b) is specifically limited to 'public utilities' and no explicit reference to governmental entities is made in § 206(b), as required by § 201(f).⁸¹

41. According to IP Entities, this discussion indicates that the Commission had no authority to reset the market clearing price for all spot market sales.⁸² IP Entities add that the Commission cannot reassert this argument because it was argued before the Ninth Circuit and rejected.⁸³

42. BPA and Western further argue that the Commission's methodology for calculating refunds suggests that this proceeding did not involve resetting the market clearing price. BPA and Western state that rather than creating a single, just and reasonable rate, the Commission set up a process for calculating rates for each jurisdictional seller, beginning with either the MMCP or the actual clearing price, and adjusted for offsets each seller is entitled to take under the established methodology.

Commission Determination

43. We disagree with the Requesting Parties' assertion that the Clarification Order is inconsistent with the Ninth Circuit's ruling in *Bonneville*. In *Bonneville*, the Ninth Circuit found that the Commission lacked authority to order governmental entities or other non-public utilities to pay refunds. On remand, we are not ordering those entities to pay refunds, rather we are establishing just and reasonable prices in markets operated by jurisdictional public entities (the CAISO and PX), so that we may properly order refunds from public utilities.

44. To interpret *Bonneville* as meaning that the Commission was ordering refunds *as opposed to* resetting the market clearing price in the CAISO and PX markets is a mischaracterization of the Ninth Circuit's decision. The *Bonneville* court ultimately held that the Commission does not have authority to order refunds for wholesale electric

⁸¹ *Id.* at 13-15 (quoting *Bonneville*, 422 F.3d at 919-20 (emphasis added)) (citations omitted).

⁸² *Id.* at 15 (citing *Bonneville*, 422 F.3d at 920).

⁸³ *Id.* at 15-17 (citing *City of Cleveland v. FPC*, 561 F.2d 344, 346-48 (D.C. Cir. 1977); *Atl. City Elec., Co. v. FERC*, 329 F.3d 856, 858-59 (D.C. Cir. 2003)).

energy sales made by governmental entities and other non-public utilities.⁸⁴ It did not find that the Commission did not or should not have revised pricing formulations under the CAISO/PX tariffs on a market-wide basis. In fact, the Ninth Circuit explicitly acknowledged that the CAISO and PX are public utilities that are subject to the Commission's jurisdiction and authority under FPA sections 205 and 206, including the Commission's statutory authority to regulate price-setting provisions in the CAISO/PX tariffs.⁸⁵ The Ninth Circuit only held that the Commission lacked the authority to *also* order governmental entities and non-public utilities to pay the refunds *resulting* from those reset prices.

45. In *Bonneville*, the Ninth Circuit explicitly states that the Commission did “*more than* simply reset the market-clearing price for power in the FERC-jurisdictional [CA]ISO and CalPX markets.”⁸⁶ This language indicates that the Ninth Circuit recognized that, in the Refund Order, the Commission first reset tariff prices and then ordered non-jurisdictional entities to pay refunds based on those reset prices. The Ninth Circuit, then, disagreed with the Commission's position that it had only reset the market prices, holding instead that the Refund Order had in fact both reset the clearing price and ordered refunds.⁸⁷ The Ninth Circuit went on to state that the Commission “specifically ordered governmental entities/non-public utilities to pay refunds, an action that lies outside Congress' clearly expressed intent that FERC's § 206 refund authority should apply only to public utilities.”⁸⁸ Therefore, it was the Commission's action of ordering refunds from governmental entities and other non-public utilities, after having reset tariff prices, that *Bonneville* found exceeded the Commission's FPA section 206 authority.⁸⁹

46. For these reasons, we reject IP Entities' argument that the language in *Bonneville* indicates that the Commission had no authority to reset the market clearing price for all spot market sales in the CAISO/PX markets. As discussed above,⁹⁰ this argument is

⁸⁴ *Bonneville*, 422 F.3d at 910.

⁸⁵ *Bonneville*, 422 F.3d at 911, 919.

⁸⁶ *Id.* at 919-920 (emphasis added).

⁸⁷ *Id.*

⁸⁸ *Id.* at 920.

⁸⁹ *Id.*

⁹⁰ *See supra* P 31, 33-34.

inconsistent with FPA section 206 and misconstrues the Ninth Circuit's decision in *Bonneville*.⁹¹

47. We also note that, in *Bonneville*, the Ninth Circuit held that the Commission lacks authority to enforce refund liabilities against governmental entities and non-public utilities.⁹² It did not disapprove of, or even call into question, the Commission's action of resetting prices under the CAISO/PX tariffs.⁹³ Therefore, we reject the Requesting Parties' argument that the Clarification Order is inconsistent with the Ninth Circuit's ruling in *Bonneville*.

48. Finally, we reject BPA and Western's argument that the Commission's action of setting up a process for calculating rates for jurisdictional sellers, rather than establishing a single just and reasonable price, suggests that this proceeding did not involve resetting the market clearing price. BPA and Western create an artificial distinction between the Commission's authority to establish a single just and reasonable rate and its authority to implement a methodology for calculating a just and reasonable rate.

49. FPA section 206(a) states that whenever the Commission "shall find that any rate, charge, or classification . . . collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission . . . is unjust, unreasonable, unduly discriminatory or preferential, *the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed.*"⁹⁴ Further, FPA section 206(b) states that the Commission may order refunds of "any amounts paid . . . in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the

⁹¹ *Bonneville*, 422 F.3d at 919-920.

⁹² *Id.* at 910-911, 919-920.

⁹³ As stated above, the Ninth Circuit already implicitly ruled on the Commission's resetting of prices under these tariffs, by suggesting that a remedy may exist for parties in the form of a contract claim. If, as the Requesting Parties suggest, the Commission's authority to fix a just and reasonable rate does not include the ability to amend pricing formulations under the CAISO/PX tariffs, then the Ninth Circuit's suggestion that a remedy for parties pursuing claims against governmental entities and non-public utilities may rest in a contract claim, rather than a refund action, would be superfluous. *See supra* P 29-31.

⁹⁴ 16 U.S.C. § 824e(a) (2006) (emphasis added).

Commission orders to be thereafter observed.”⁹⁵ As such, FPA section 206 does not distinguish between the authority of the Commission to establish a single just and reasonable rate and its authority to implement a methodology for calculating a just and reasonable rate. Instead, Congress wrote the statute with sufficient breadth to encompass both.

50. For these reasons, we deny IP Entities’ and/or BPA and Western’s rehearing requests regarding these issues.

C. Deviation from Prior Commission Orders

51. The Requesting Parties argue that the Commission’s conclusion in the Clarification Order that it reset prices in the CAISO/PX tariffs departs, without explanation, from prior Commission orders. The Requesting Parties argue that the Commission, in its Clarification Order, incorrectly adopted the position that it could not have legally ordered refunds from jurisdictional sellers unless it modified the CAISO/PX tariffs. According to the Requesting Parties, the Commission has made clear that (1) for refund purposes, it was setting an hourly cap on sellers’ prices in which refunds for each hour would be computed using the lower of the MMCP or the actual clearing price as the just and reasonable rate, and (2) the prices each seller would be permitted to charge would be different, as sellers would be allowed offsets to their individual refund obligations based on proof of actual fuel costs or proof that their individual costs exceeded the revenues that would be produced by the MMCPs.⁹⁶ As such, the Requesting Parties state that the Commission’s previous orders established a just and reasonable rate for each hour for individual sellers, rather than establishing a single price.

52. The Requesting Parties contend that the Commission cannot assert in the Clarification Order that it inadvertently disagreed with the California Parties when it, in fact, meant to agree. The Requesting Parties state that, while the Commission may change its position, it must nonetheless acknowledge its change and provide a reasoned explanation for doing so.⁹⁷ The Requesting Parties argue that the Commission cannot

⁹⁵ 16 U.S.C. § 824e(b) (2006).

⁹⁶ IP Entities Rehearing Request at 19 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 115 FERC ¶ 61,171, at P 33 (2006)); BPA/Western Request for Rehearing at 20.

⁹⁷ IP Entities Rehearing Request at 4, 17 (citing *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (*Greater Boston*)); BPA/Western Rehearing Request at 19.

call the Clarification Order a “clarification” of the October 2007 Order because it is a reversal of the Commission’s position.⁹⁸ The Requesting Parties state that the Commission cannot escape the obligation to explain its change of position by claiming that such a change was an inadvertent mistake.⁹⁹ The Requesting Parties contend that the language in the October 2007 Order constituted an express and intentional rejection of the California Parties’ position that the Commission revised the pricing formulations contained in the CAISO/PX tariffs for the period to which the MMCP applies.

53. The Requesting Parties further argue that, in the Clarification Order, the Commission failed to consider or address arguments demonstrating that the Commission could not and did not retroactively revise the CAISO/PX tariffs. Specifically, the Requesting Parties claim that the Commission did not address arguments that the Commission never reset the pricing formulations under the CAISO/PX tariffs because the over-collection of wholesale electric energy rates in *Bonneville* was accomplished by the individual sellers of wholesale electric energy themselves through their own rates.¹⁰⁰

54. According to the Requesting Parties, it was not necessary for the Commission to change the pricing formulations under the CAISO/PX tariffs as a precondition to ordering refunds. The Requesting Parties contend that, as to jurisdictional sellers, FPA section 206(b) provides the Commission with the authority to implement a refund remedy, subject to the availability of offsets, to prevent imposition of confiscatory rates for individual sellers. According to the Requesting Parties, the Commission determined that, as a result of market dysfunction, the prices that sellers could charge under their market-based rates had become unreasonable.¹⁰¹ The Requesting Parties argue, however, that the Commission lacks the authority to impose a refund obligation or to effect any change in the individual rates for non-jurisdictional sellers.

⁹⁸ IP Entities Rehearing Request at 17; BPA/Western Rehearing Request at 19.

⁹⁹ IP Entities Rehearing Request at 18; BPA/Western Rehearing Request at 19.

¹⁰⁰ IP Entities Rehearing Request at 18 (citing *City of Vernon*, 115 FERC ¶ 61,297, at P 41 (2006)); BPA/Western Request for Rehearing at 19.

¹⁰¹ IP Entities Rehearing Request at 19-20; BPA/Western Request for Rehearing at 21.

Commission Determination

55. We disagree with the Requesting Parties' argument that the Commission's conclusion that it reset prices in the CAISO/PX tariffs departs from prior Commission orders. In the Refund Order, the Commission concluded that:

[o]ur action here establishes a revised method for calculating the just and reasonable clearing prices to be applied in [the CAISO/PX] markets for the period beginning October 2, 2000. This is pursuant to the Commission's authority under FPA section 206 to fix the just and reasonable rate. *Our action thus revises the market clearing prices that all market participants previously agreed to accept for their sales.*¹⁰²

As discussed above, the Ninth Circuit in *Bonneville* found that the Commission was resetting the MMCP in the Commission-jurisdictional CAISO/PX markets.¹⁰³ Based on these prior statements, we find that the Requesting Parties' argument that the Commission's conclusion in the Clarification Order departs, without explanation, from prior Commission orders is unfounded.

56. We also disagree that the language in the October 2007 Order constitutes an express and intentional rejection of the California Parties' position. In the Clarification Order, the Commission stated that the language originally included in paragraph 36 of the October 2007 Order "inadvertently fail[ed] to acknowledge" the Commission's previous determination in the Refund Order that it was resetting the market clearing prices.¹⁰⁴ The Commission's prior determination that it had, in fact, revised the pricing formulations contained in the CAISO/PX tariffs is consistent with the Ninth Circuit's ruling in *Bonneville* and in line with the California Parties' assertions.¹⁰⁵ We note that the Requesting Parties cite to *Greater Boston*,¹⁰⁶ arguing that, while the Commission may change its position, it must nevertheless acknowledge its change and provide a reasoned explanation for doing so. While reasoned decision-making is a requirement of all

¹⁰² Refund Order, 96 FERC ¶ 61,120 at 61,512 (emphasis added).

¹⁰³ *Bonneville*, 422 F.3d at 919-920.

¹⁰⁴ See Refund Order, 96 FERC ¶ 61,120 at 61,512.

¹⁰⁵ See California Parties April 2, 2007 Motion for Remand Procedures, Docket Nos. EL00-95-200 and EL00-98-185, at 13, 16.

¹⁰⁶ *Greater Boston*, 444 F.2d at 852.

administrative determinations, we point out that the court in *Greater Boston* specifically noted that “an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed.”¹⁰⁷ The *Greater Boston* court went on to say that “if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.”¹⁰⁸ Here, however, the Commission is not changing prior policies or precedents, rather it is clarifying an inadvertent error that conflicts with established precedent. Specifically, the Clarification Order clarified that paragraph 36 of the Refund Order did not contradict the recognized position of the Commission, as set forth in both the October 2007 Order and the Commission’s brief in *Bonneville*. Therefore, we reject the Requesting Parties’ argument that the Commission’s conclusion that it reset prices in the CAISO/PX tariffs departs from prior Commission orders.

57. We further reject the Requesting Parties’ argument that the Commission’s previous orders established a just and reasonable rate for each hour for individual sellers, rather than establishing a single price. As we explain above,¹⁰⁹ this argument creates an artificial distinction between the Commission’s authority to establish a single just and reasonable rate and its authority to implement a methodology for calculating a just and reasonable rate. In addition, beginning with the Refund Order, the Commission ruled that the MMCP formula for calculating rates sets the *maximum prices* that may be charged to customers under the CAISO/PX tariffs during the relevant period.¹¹⁰ Further, the *CPUC v. FERC I* court held that the Commission “adopted the MMCP to calculate just and reasonable rates” for the CAISO and PX, adding that “the MMCP was the benchmark for determining the amount of refunds that sellers had to pay.”¹¹¹

58. We also find the Requesting Parties’ arguments that it was not necessary for the Commission to change prices under the CAISO/PX tariffs as a precondition to ordering refunds is without basis. As we discuss above, FPA section 206 requires the Commission to establish a just and reasonable rate prior to ordering refunds.¹¹² As such, the

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *See supra* P 50-51.

¹¹⁰ *See* Refund Order, 96 FERC ¶ 61,120 at 61,512.

¹¹¹ *CPUC v. FERC I*, 462 F.3d at 1052.

¹¹² 16 U.S.C. § 824e(b) (2006); *see supra* P 16-17.

Commission is precluded from ordering refunds from jurisdictional sellers in these proceedings unless it first modifies rates under the CAISO/PX tariffs. The Commission made clear in the Refund Order that it was resetting the market clearing prices in the CAISO and PX markets.¹¹³ Had the original language in paragraph 36 of the October 2007 Order been correct in stating that the Commission did not modify the clearing prices in the CAISO and PX markets, then the Commission would have had no legal basis for ordering refunds from any party, including jurisdictional sellers. We note that IP Entities have acknowledged that the establishment of a just and reasonable rate is a prerequisite for ordering refunds.¹¹⁴ Therefore, we reject the Requesting Parties' argument that the Commission need not change prices under the CAISO/PX tariffs prior to ordering refunds. For these reasons, we deny these requests for rehearing.

D. Authority to Review BPA and Western Rates

59. BPA and Western argue that the Commission exceeded its authority to review BPA and Western's rates. BPA and Western state that, under the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act),¹¹⁵ the Commission's review of their rates is limited to ensuring that those rates are sufficient to ensure repayment of federal investment and are based on total system costs.¹¹⁶ BPA and Western state that, upon Commission approval, their rates take effect and are controlling, subject to review by the Ninth Circuit. According to BPA and Western, in the absence of a remand of their Commission-approved rates by the Ninth Circuit, there is no jurisdictional basis for the Commission to reconsider those rates at a later time under either the Northwest Power Act or the FPA.

60. BPA and Western argue that the Commission exceeded the statutory limits on its authority to review BPA and Western rates when it claimed that the Refund Order reset the market prices in the CAISO and PX markets with respect to all participants. BPA and Western claim that, given the Commission's limited role to review their rates, the Commission lacks the authority to establish new prices in the CAISO and PX markets for their respective sales during the refund period.

¹¹³ See Refund Order, 96 FERC ¶ 61,120 at 61,512.

¹¹⁴ See IP Entities November 5, 2007 Answer to California Parties October 25, 2007 Request for Clarification of October 2007 Order, Docket Nos. EL00-95-200 and EL00-98-185, at 6.

¹¹⁵ 16 U.S.C. § 839 (2006).

¹¹⁶ BPA/Western Rehearing Request at 16.

Commission Determination

61. We reject BPA and Western's argument that the Commission exceeded its authority to review BPA and Western's rates when it reset the market clearing price in the CAISO/PX markets for all participants. The Commission rejected this same argument in the October 2007 Order.¹¹⁷ In that order, the Commission explained that, because it was not ordering governmental entities and non-public utilities to pay refunds, it was unnecessary to address on the merits BPA and Western's claims regarding the Commission's ability to review their rates.¹¹⁸

62. Because we are not ordering BPA or Western to pay refunds, BPA and Western's rates are not impacted; therefore, the Commission's ability to review BPA and Western's rates is not at issue here. We further note that, while the Commission may have a limited ability under the Northwest Power Act to review BPA and Western's previously-approved rates,¹¹⁹ this limitation is not relevant to the issue of whether the Commission may under FPA section 206 reset rates in tariffs of jurisdictional entities, the CAISO and PX. For these reasons, we deny this rehearing request.

E. Additional Arguments

63. IP Entities argue that, in the Clarification Order, the Commission did not acknowledge an argument made by the California Parties in their motion for clarification that there was no need to modify the CAISO/PX tariffs because there is no requirement that the tariff sheets be modified, when refunds are ordered for a locked-in period.¹²⁰ IP Entities argue that this statement constitutes an implicit admission by the California Parties that the CAISO/PX tariffs were not revised.

64. The Requesting Parties contend that, in the Clarification Order, the Commission did not address arguments that resetting rates under the CAISO/PX tariffs is a process that no participant in the proceedings sought to invoke. The Requesting Parties state that

¹¹⁷ See BPA and Western April 17, 2007 Answer to California Parties' April 2, 2007 Motion for Remand Procedures, Docket No. EL00-95-000, at 18; *see also* October 2007 Order, 121 FERC ¶ 61,067 at P 44.

¹¹⁸ October 2007 Order, 121 FERC ¶ 61,067 at P 44.

¹¹⁹ See 16 U.S.C. § 839 (2006).

¹²⁰ See California Parties' October 25, 2007 Motion for Clarification, Docket No. EL00-95-000, at 17 (citing *Cities Serv. Gas Co.*, 5 FERC ¶ 61,092 (1978)).

detailed tariff dispute mechanisms of the CAISO/PX tariffs provide timetables for notification and mechanisms for dispute resolution and filing of formal complaints. The Requesting Parties argue that all the mechanisms outlined in the tariffs must be invoked prior to a dispute reaching the Commission.

Commission Determination

65. We find that IP Entities' contention that the California Parties' previous argument against the need to modify the CAISO/PX tariffs constitutes an implicit admission by the California Parties that the CAISO/PX tariffs were not revised is irrelevant. The Commission is bound by the statutory obligations of the FPA, irrespective of a party's admissions on an issue. FPA section 206 requires the Commission to establish a just and reasonable rate prior to ordering refunds.¹²¹ The Commission's adherence to this statutory directive, and not the alleged admissions of a party to this proceeding, determines the validity of its actions. For this reason, we deny this rehearing request.

66. We also reject the Requesting Parties' arguments that the Commission's action of resetting rates under the CAISO/PX tariffs is questionable because no participant sought to invoke this process and all other mechanisms outlined in the tariffs must first be invoked prior to a dispute reaching the Commission. As stated above,¹²² the Commission has the power and obligation under the FPA to review prices charged to wholesale customers in markets operated by jurisdictional public entities such as the CAISO and PX and to reset prices to just and reasonable levels. It would be counterintuitive to presume that the Commission's legitimate authority to review and enforce rates was limited by the dispute resolution mechanisms or other provisions included in tariffs that are subject to the Commission's jurisdiction. Accordingly, we deny this rehearing request.

The Commission orders:

(A) IP Entities request for rehearing is hereby denied, as discussed in the body of this order.

¹²¹ 16 U.S.C. § 824e(b) (2006).

¹²² See *supra* P 17-20.

(B) BPA and Western's joint request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.