

138 FERC ¶ 61,251
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Investigation of Wholesale Rates of Public Utility Docket No. EL01-68-040
Sellers of Energy and Ancillary Services in the Western
Systems Coordinating Council

ORDER DENYING REHEARING

(Issued March 30, 2012)

1. In this order, we deny the California Parties' (Cal Parties)¹ request for rehearing of an order issued on May 24, 2011 that dismissed in part and denied in part Cal Parties' motion for refunds on sales to the California Energy Resources Scheduling Division of the California Department of Water Resources (CERS) during the period from June 20, 2001 through December 19, 2001 (Post-Refund Period).²

I. Background

2. In an order issued June 19, 2001,³ the Commission established a price cap for all spot market sales in the Western Systems Coordinating Council (WSCC), including sales

¹ For the purposes of this rehearing request, Cal Parties are the People of the State of California *ex rel.* Kamala D. Harris, Attorney General; the Public Utilities Commission of California; Pacific Gas and Electric Company; and Southern California Edison Company.

² *Investigation of Wholesale Rates of Pub. Util. Sellers of Energy and Ancillary Servs. in the Western Sys. Coordinating Counsel*, 135 FERC ¶ 61,176 (2011) (CERS Refund Order).

³ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs. into Markets Operated by the California Indep. Sys. Operator Corp. and the California Power Exchange*, 95 FERC ¶ 61,418 (2001) (June 19, 2001 Order).

in the centralized California Independent System Operator Corporation (CAISO) market and sales in the bilateral WSCC spot markets.⁴ Spot market sales were defined as sales that are 24 hours or less.⁵ The level of the price cap during non-reserve deficiency hours was set at 85 percent of the highest market clearing price established during the hours of the last stage 1 emergency declared by the CAISO. The June 19, 2001 Order stated the maximum market clearing price as \$108.49/MWh,⁶ but permitted generators and load-serving entities the opportunity to seek Commission approval to sell above the cap.⁷

3. On June 20, 2001, the CAISO issued a market notice purporting to correct the June 19, 2001 Order. The market notice stated that the maximum market clearing price was \$91.87/MWh, and not \$108.49/MWh. The CAISO explained in a subsequent market notice, issued on June 22, 2001, that the \$108.49/MWh stated in the June 19, 2001 Order was erroneously calculated as 85 percent of a market clearing price set at an hour in which the CAISO had declared a stage 2, rather than a stage 1 emergency. The CAISO filed both market notices with the Commission.⁸ The price cap became effective on June 21, 2001 and remained in place until December 19, 2001, when the Commission adjusted the maximum price for the winter months.⁹

⁴ The California Power Exchange (CalPX) ceased operations on January 30, 2001 so it was no longer operative during the Post-Refund Period.

⁵ June 19, 2001 Order, 95 FERC at 62,545 n.3.

⁶ The Commission based this calculation on the price of \$127.64/MWh, a price set on May 31, 2001, for the clock hour ending 1400. *Id.* at 62,548 n.14.

⁷ *Id.* at 62,564.

⁸ CAISO June 22, 2001 Filing in Docket No. EL00-95-031, *et al.* (CAISO Market Notices or Market Notices).

⁹ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 97 FERC ¶ 61,294, at 62,375 (2001) (noting that “[t]he new interim mitigated price will supersede the existing mitigated price (approximately \$ 92/MWh)”).

4. During the summer of 2001, several sellers¹⁰ filed cost justifications seeking Commission approval to sell at prices higher than the cap, pursuant to the June 19, 2001 Order. In its filing, Mirant pointed to the discrepancy between the price stated in the June 19, 2001 Order and the price stated in the CAISO Market Notices, and noted that its transactions did not exceed the maximum price identified by the Commission in the June 19, 2001 Order.¹¹ On two occasions, the Commission rejected Mirant's requests as untimely and/or unsupported and ordered refunds to be paid on sales that exceeded the maximum market clearing price.¹² In the September 7, 2001 Order, the Commission clarified explicitly, for the first time, that the price cap stated in the June 19, 2001 Order was incorrect and that the cap calculated by CAISO represented the applicable maximum market clearing price.¹³ The Commission did not, however, address the question of whether Mirant could have reasonably relied on the price stated in the June 19, 2001 Order because the filings were rejected on procedural grounds.¹⁴

5. By its terms, the cap established in the June 19, 2001 Order applied only to spot market sales of electricity.¹⁵ On rehearing, the Commission denied requests to expand the scope of the prospective mitigation measures to include forward transactions.¹⁶ In

¹⁰ Reliant Energy Services, Inc.; Williams Energy Services Corporation; and Mirant Americas Energy Marketing, LP, Mirant California, LLC, Mirant Delta, LLC, and Mirant Potero, LLC (Mirant) filed cost justifications. *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs. into Markets Operated by the California Indep. Sys. Operator Corp. and the California Power Exchange*, 96 FERC ¶ 61,254, at 62,002 (2001) (September 7, 2001 Order).

¹¹ *Id.* at 62,002 n.9.

¹² The other requests were also rejected as untimely and/or unsupported. *Id.* at 62,001; *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Servs. into Markets Operated by the California Indep. Sys. Operator Corp. and the California Power Exchange*, 97 FERC ¶ 61,012 (2001) (October 5, 2001 Order).

¹³ September 7, 2001 Order, 96 FERC at 62,002 n.9.

¹⁴ *See id.* at 62,001; October 5, 2001 Order, 97 FERC ¶ 61,012.

¹⁵ June 19, 2001 Order, 95 FERC at 61,545-46.

¹⁶ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs. into Markets Operated by the California Indep. Sys. Operator Corp. and the California Power Exchange*, 97 FERC ¶ 61,275, at 62,244 (2001) (December 19, 2001 Order). For purposes of these proceedings, forward transactions have been defined as "any

(continued...)

subsequent orders, the Commission determined that, within the context of the refund proceeding, energy exchange transactions¹⁷ are not spot market sales because they are conducted over a period of greater than 24 hours.¹⁸

6. On June 9, 2009, Cal Parties filed a motion alleging violations of the June 19, 2001 Order and requesting refunds for all sales made to CERS during the Post-Refund Period at rates exceeding \$91.87/MWh.¹⁹ Cal Parties asserted that during the Post-Refund Period, certain sellers sold electricity to CERS at unlawful rates, primarily in the form of energy exchange transactions. Cal Parties requested refunds totaling approximately \$28.5 million, which breaks down as follows: (1) almost \$6 million for in-kind energy exchange transactions; (2) \$21.25 million for monetized energy exchange transactions; and (3) \$1.3 million for cash energy sales.²⁰

7. In the CERS Refund Order, as discussed in greater detail below, the Commission dismissed Cal Parties' request for refunds as it pertained to energy exchange transactions, and denied their request for refunds associated with the cash energy sales.

8. On June 23, 2011 Cal Parties filed a request for rehearing.

transactions with a future delivery that are entered into more than 24 hours before commencement of service.” June 19, 2001 Order, 95 FERC at 62,546, n.9; *see also San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs. into Markets Operated by the California Indep. Sys. Operator Corp. and the California Power Exchange*, 99 FERC ¶ 61,160, at 61,148 (2002) (May 15, 2002 Order) (affirming that June 19, 2001 Order did not extend mitigation to bilateral transactions other than spot markets).

¹⁷ In an energy exchange transaction, the selling party provides energy in a certain period and agrees to receive payment in the form of a return of energy at a later date. In order to reflect normal profit margin considerations, in virtually all cases the amount of energy returned to the seller exceeds the amount of energy that was initially supplied. *See Pub. Utils. Comm'n of Cal. v. FERC*, 462 F.3d 1027, 1059 (9th Cir. 2006) (CPUC).

¹⁸ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs. into Markets Operated by the California Indep. Sys. Operator Corp. and the California Power Exchange*, 102 FERC ¶ 61,317, at P 154 (2003) (March 26, 2003 Order).

¹⁹ California Parties' June 9, 2009 Motion for Refunds for Unauthorized Rates in Excess of the Post-June 19, 2001 Proxy Market Clearing Price at 1 (June 9, 2009 Filing).

²⁰ *Id.*, Appendix A (Declaration of Dr. Carolyn A. Berry) at 1.

II. Discussion

A. Energy Exchange Transactions

1. CERS Refund Order

9. The Commission found that Cal Parties' argument that the Powerex energy exchange transactions were subject to the price cap constitutes an impermissible collateral attack on prior Commission orders that defined the scope of the prospective mitigation measures, which were limited to spot market sales.²¹ Specifically, the Commission cited the June 19, 2001 Order, in which the Commission found that "parties had not provided justification for extending the scope of our investigation or the mitigation to bilateral transactions other than spot markets."²² The Commission explained that the June 19, 2001 Order and subsequent orders explicitly excluded energy exchange transactions from the definition of spot market sales.²³ As a result, these transactions were not subject to the price cap. Further, the Commission affirmed that its position on this issue has not been reversed, either on rehearing or on appeal.²⁴

10. The Commission also found that Cal Parties' reliance on the holdings by the United States Court of Appeals for the Ninth Circuit in *CPUC* was misplaced. The Commission distinguished the issues decided in *CPUC* from the issues presented in this case, explaining that unlike the case in *CPUC*, where the proceeding arose out of a complaint,²⁵ the investigation that resulted in the Post-Refund Period price cap was initiated *sua sponte* by the Commission pursuant to its authority under section 206 of the Federal Power Act (FPA).²⁶ As a result, the scope of the investigation and ensuing mitigation measures were not tied to the SDG&E Complaint. Rather, the Commission defined the scope of the investigation and ensuing remedy and, in doing so,

²¹ CERS Refund Order, 135 FERC ¶ 61,176 at P 13. Spot market sales were defined as sales that are 24 hours or less. June 19, 2001 Order, 95 FERC at 62,545 n.3.

²² CERS Refund Order, 135 FERC ¶ 61,176 at P 13 (citing June 19, 2001 Order, 95 FERC at 62,546).

²³ *Id.* P 14.

²⁴ *Id.* P 15.

²⁵ San Diego Gas & Electric Co., Complaint, Docket No. EL00-95-000 (filed August 2, 2000) (SDG&E Complaint).

²⁶ 16 U.S.C. § 824e (2006).

unambiguously limited the scope of the prospective mitigation measures to spot market sales. Thus, the Commission concluded that the scope of the SDG&E Complaint is not relevant to this proceeding and found, therefore, that the Ninth Circuit's holdings in *CPUC* do not alter the scope of the prospective mitigation measures at issue here.²⁷ In addition, the Commission observed that the Ninth Circuit's holdings in *CPUC* apply only to those transactions that took place prior to June 20, 2001, whereas the transactions at issue in this proceeding did not take place until after June 20, 2001. Thus, the Commission rejected Cal Parties' contention that *CPUC* stands for the proposition that the price cap imposed in the June 19, 2001 Order applies to the exchange transactions at issue here.²⁸

11. Finally, the Commission found that even if the Powerex exchange transactions could be considered spot market sales subject to the price cap, ordering refunds would be inequitable because Powerex reasonably relied on the \$108.49/MWh stated in the June 19, 2001 Order.²⁹

2. Cal Parties' Rehearing Request

12. Cal Parties contend that the Commission erred in finding that Cal Parties' request for refunds for energy exchange transactions is a collateral attack on prior Commission orders. Cal Parties argue that the CERS Refund Order is the first time that the Commission has interpreted the price cap as excluding energy exchange transactions. Cal Parties assert that the June 19, 2001 Order merely applied the price cap to spot market transactions, but did not make any attempt to exclude exchange transactions from the definition of spot market transactions. Cal Parties repeats its earlier arguments that exchange transactions are spot market transactions, subject to the price cap. Cal Parties continue to insist that to find otherwise creates an arbitrary distinction, pursuant to which energy exchange transactions are excluded from the relief afforded similarly situated transactions, and therefore contradicts the basic point of the Ninth Circuit's holding in *CPUC*.³⁰

13. Cal Parties also argue that the Commission erred in finding that Powerex reasonably relied on the \$108.49/MWh price cap. Cal Parties again argue that the

²⁷ CERS Refund Order, 135 FERC ¶ 61,176 at P 18.

²⁸ *Id.* P 19.

²⁹ *Id.* P 20.

³⁰ Cal Parties Rehearing Request at 11-17.

September 7, 2001 Order, which acknowledged the Commission's prior error and clarified that the correct price cap was \$91.87/MWh, precludes any argument of reasonable reliance. Cal Parties state that the September 7, 2001 Order is now a final ruling that binds Powerex to the \$91.87/MWh cap. Cal Parties note that Powerex challenged neither the September 7, 2001 nor the October 5, 2001 Order on the issue of the correct price cap. Cal Parties likewise reject the Commission's finding that Powerex could have reasonably relied on informal Commission staff guidance regarding the applicable price cap. Cal Parties contend that the doctrine of equitable estoppel cannot apply here because statements by Commission employees who are not authorized to bind the Commission cannot be a basis for justifiable reliance.³¹ Cal Parties argue that the Commission erred further "when it presumed that it cannot require sellers to refund unlawful rates, but can require buyers to pay such rates," in contravention of the Commission's duty under the FPA to protect consumers from excessive rates and charges. Cal Parties add that there has been no showing that Powerex will suffer a confiscatory rate if it is required to refund amounts collected above the price cap.³²

3. Commission Determination

14. We deny Cal Parties' request for rehearing on the issue of refunds for energy exchange transactions. The Commission has made clear that the prospective price cap established in the June 19, 2001 Order applies only to spot market sales.³³ The Commission has also made clear that energy exchange transactions are not spot market

³¹ *Id.* at 18 (citing *UAH-Braendly Hydro Assoc.*, 47 FERC ¶ 61,448, at 62,395 (1989) (Commission will not recognize detrimental reliance when a party could have learned the truth of the matter with reasonable diligence but chose to "negligen[tly] ... remain ignorant by not using those means.")).

³² *Id.* at 17-19.

³³ *See, e.g., San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs. into Markets Operated by the California Indep. Sys. Operator Corp. and the California Power Exchange*, 95 FERC ¶ 61,115, at 61,351 (2001) (instituting the investigation in Docket No. EL01-68-000 and limiting the scope to spot market sales); June 19, 2001 Order, 95 FERC at 62,546, 62,556 (providing for price mitigation in the spot markets and denying requests for extending the scope of the investigation to bilateral transactions other than spot market sales); December 19, 2001 Order, 97 FERC at 62,245, *reh'g denied*, May 15, 2002 Order, 99 FERC at 61,648 (rejecting requests to include a broader set of transactions in the West-wide price mitigation scheme).

transactions.³⁴ Further, as the Commission explained in the CERS Refund Order, the Ninth Circuit did not reverse the Commission's determination that "exchange transactions, for purposes of the prospective mitigation measures, are not spot market sales."³⁵ In their rehearing request, Cal Parties acknowledge as much, stating that "[t]he Commission correctly observes that the *CPUC* decision did not expressly reject the reasoning embraced by the Commission here"³⁶ In light of the Commission's consistent position that exchange transactions are not spot market sales, as well as the fact that this determination has not been reversed in the courts, we find that there can be no question that the Commission did not intend to apply the price cap to exchange transactions. In its rehearing request, Cal Parties presented no arguments that the Commission has not already considered and rejected. Thus, we continue to find that Cal Parties' repeated attempts to re-litigate the issue of whether exchange transactions are spot market sales subject to the price cap constitute an impermissible collateral attack on prior Commission orders that defined the scope of the prospective mitigation measures, including the orders that addressed the issue of whether exchange transactions are spot market sales.

15. Regarding the issue of reasonable reliance, we likewise find that Cal Parties have not presented any new arguments that would persuade us to reconsider this issue. Cal Parties contention that the September 7, 2001 Order addressed the issue of reasonable reliance is simply incorrect. As the Commission explained in the CERS Refund Order, the cost filings at issue in those proceedings were dismissed on procedural grounds.³⁷ As such, the Commission never considered the question of whether Mirant could have reasonably relied on the \$108.49/MWh cap. The issue of reasonable reliance on the price cap stated in the June 19, 2001 Order was not addressed by the Commission until the CERS Refund Order, where the Commission found that the error in the June 19, 2001 Order caused confusion among market participants sufficient to justify a waiver of refunds.³⁸ On rehearing, Cal Parties presented no arguments to persuade us that a delay of almost three months before the Commission addressed the error in the June 19, 2001 Order did not create confusion regarding the correct price cap.

³⁴ March 26, 2003 Order, 102 FERC ¶ 61,317 at P 154; *see* June 19, 2001 Order, 95 FERC at 62,545 n.3.

³⁵ CERS Refund Order, 135 FERC ¶ 61,176 at P 15.

³⁶ Cal Parties Rehearing Request at 17 (citing *CPUC*, 462 F.3d at 1061).

³⁷ CERS Refund Order, 135 FERC ¶ 61,176 at P 43.

³⁸ *Id.* P 42.

16. We also find that Cal Parties continue to conflate the Commission's equitable discretion in fashioning remedies³⁹ with the doctrine of equitable estoppel.⁴⁰ As the Commission explained in the CERS Refund Order, the defense of equitable estoppel is not relevant in this case.⁴¹ The Commission explained that because "there is no Commission action to estop ... the sellers need not have satisfied the elements of equitable estoppel to demonstrate their reasonable reliance on the June 19, 2001 Order."⁴² The Commission found that Powerex's reliance on the \$108.49/MWh cap was reasonable, based on the fact that Powerex made a good faith attempt to determine the correct cap by seeking guidance from Commission staff. The Commission explained that "[e]ven though informal staff guidance is not binding, we find that Powerex exercised diligence in its attempt to ascertain the correct price cap."⁴³ Thus, we continue to reject Cal Parties' argument that the informal staff guidance cited by Powerex cannot be a basis for exercising our discretion to waive refunds.

17. Finally, we reject Cal Parties' assertion that in declining to impose refund liability on Powerex, the Commission "presumed that it cannot require sellers to refund unlawful rates, but can require buyers to pay such rates." Cal Parties correctly observe that the Commission has a duty under the FPA to protect consumers from excessive rates, but Cal Parties fail to recognize that our decision not to order Powerex to pay refunds is

³⁹ See, e.g., *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, at 159 (D.C. Cir. 1967) ("the breadth of agency discretion is, if anything, at its zenith when the action assailed related primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies and sanctions ..."); see also *Towns of Concord v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992) (*Towns of Concord*) (citing *Moss v. Civil Aeronautics Board*, 521 F.2d 298, 308-09 (D.C. Cir. 1975) ("Because the 'equitable aspects of refunding past rates are ... inextricably entwined with the [agency's] normal regulatory responsibility,' ... absent some conflict with the explicit requirements or core purposes of a statute, we have refused to constrain agency discretion by imposing a presumption in favor of refunds.")); *Consol. Edison Co. of N.Y., Inc. v. FERC*, 510 F.3d 333 (D.C. Cir. 2007); *CPUC*, 462 F.3d at 1053; *Connecticut Valley Elec. Co. v. FERC*, 208 F.3d 1037, 1043 (D.C. Cir. 2000); *La. Pub. Serv. Comm'n. v. FERC*, 174 F.3d 218, 225 (D.C. Cir. 1999).

⁴⁰ Cal Parties Rehearing Request at 18.

⁴¹ CERS Refund Order, 135 FERC ¶ 61,176 at P 43.

⁴² *Id.*

⁴³ *Id.* P 20.

squarely within the scope of our discretion in fashioning remedies. The question of whether Powerex will suffer a confiscatory rate if refunds are ordered is not dispositive as to our determination that ordering refunds for sales made in accordance with Powerex's reasonable reliance on the \$108.49/MWh cap would be inequitable.

B. Cash Spot Market Sales

1. CERS Refund Order

18. The Commission denied Cal Parties' request for refunds for the cash spot market sales to CERS, finding that confusion regarding the applicable price cap justifies a waiver of refunds. The Commission acknowledged that the price cap of \$108.49/MWh stated in June 19, 2001 Order had been erroneously calculated, but observed that, despite the CAISO Market Notices stating the cap as \$91.87/MWh, the Commission did not resolve the discrepancy until issuing the September 7, 2001 Order. The Commission noted that, according to the evidence in the record of this proceeding, all of the cash spot market sales at issue took place between June 20, 2001 and September 7, 2001, when market participants may have reasonably relied on the higher price cap. Further, the Commission found that the statement of the correct price cap in the September 7, 2001 Order did not foreclose credible arguments that sellers reasonably relied on the higher price cap prior to issuance of that order.⁴⁴

2. Cal Parties Rehearing Request

19. Cal Parties assert that the Commission erred in dismissing Cal Parties' motion for refunds for the cash transaction on the basis that sellers reasonably relied on the \$108.49/MWh cap. Cal Parties first reiterate their prior argument that the September 7, 2001 Order eliminated the possibility that there was confusion about the correct cap. Cal Parties argue that "the Commission's finding in its September 7 Order confirming that \$91.87 was the correct price cap *applied to every seller in the market*, and was not prospective."⁴⁵ Thus, Cal Parties contend that the September 7, 2001 Order stands for the proposition that all sellers during June and July 2001 that had not filed cost justifications were required to pay back amounts in excess of \$91.87/MWh. Further, Cal Parties reject the Commission's finding in the CERS Refund Order that the Commission never considered the issue of reasonable reliance in the September 7, 2001 Order. Cal

⁴⁴ *Id.* P 41-43.

⁴⁵ Cal Parties Rehearing Request at 23 (emphasis in the original).

Parties also argue that the CAISO Market Notices, which stated that the correct cap was \$91.87/MWh, demonstrate that sellers were clear as to the correct price cap figure.⁴⁶

20. Cal Parties also argue that the Commission's reliance on *Midwest ISO*⁴⁷ as the basis for declining to order refunds is misplaced. Cal Parties claim that *Midwest ISO* has no application because the circumstances in that case were entirely different. Cal Parties assert that *Midwest ISO* involved an error in a complex formula rate resulting in an incorrect rate being collected for a period of years, with confusion in the market during the entire period, whereas here, the error involved simple mathematical application of a formula and the error was immediately obvious to all market participants. In addition, Cal Parties point out that the affected parties sought rehearing in *Midwest ISO*, but sellers did not seek rehearing of the Commission's clarification of the price cap in the September 7, 2001 Order. Thus, Cal Parties contend that the Commission's departure from its holding in the September 7, 2001 Order and its denial of refunds for cash transactions are unsupported.⁴⁸

3. Commission Determination

21. We deny rehearing on the issue of refunds for the cash transactions. We are not persuaded that sellers could not have reasonably relied on the price cap stated in the June 19, 2001 Order. We continue to find that the sequence of events surrounding the error in the June 19, 2001 Order could have resulted in confusion about the correct price cap and reliance on the incorrect, Commission-stated cap. First, before attempting to address the error with the Commission, CAISO issued the Market Notices based on its interpretation of the Commission's June 19, 2001 Order. Next, after CAISO filed the Market Notices with the Commission on June 22, 2001, the Commission did not issue a correction or otherwise act until September 7, 2011 to confirm the accuracy of the price stated in the CAISO Market Notices, which could have reinforced uncertainty among market participants. Indeed, even after issuance of the CAISO Market Notices, confusion remained as to the correct price cap, as evidenced by the fact that Powerex sought informal Commission guidance to ascertain the correct cap. Further, we do not agree with Cal Parties' logic that the Commission's clarification of the correct price cap in the September 7, 2001 Order compels the conclusion that sellers could not have reasonably relied on the incorrect cap *prior to* September. Thus, we continue to find that neither the CAISO Market Notices nor the September 7, 2001 Order foreclose the possibility that

⁴⁶ *Id.* at 20-25.

⁴⁷ *Midwest Indep. Sys. Operator, Inc.*, 127 FERC ¶ 61,241 (2009) (*Midwest ISO*).

⁴⁸ Cal Parties Rehearing Request at 25-26.

sellers reasonably relied on the \$108.49/MWh price cap between June 20, 2001 and September 7, 2001.

22. We also reject Cal Parties attempt to distinguish *Midwest ISO* from this proceeding. *Midwest ISO* sets no threshold for the complexity of the error or the level of confusion among market participants. Rather, *Midwest ISO* illustrates the principle that when the Commission makes a mistake that creates confusion among market participants as to the correct rate for certain transactions, the Commission is justified in exercising its discretion to waive refunds for transactions that occurred prior to resolution of the discrepancy. That is precisely the situation presented here. Thus, we find that reference to *Midwest ISO* as support for the Commission's denial of refunds for cash energy sales is appropriate. Moreover, the Commission's authority to deny refunds does not rest solely on the precedent created in *Midwest ISO*. It is well-established that the Commission is not required to order refunds where there are appropriate equitable reasons not to do so.⁴⁹

23. We disagree with Cal Parties' claim that the error in the June 19, 2001 Order was "immediately obvious to all market participants," and continue to find that there was confusion among market participants about which price cap was correct. For example, even though the Commission rejected Mirant's cost justification filing as untimely,⁵⁰ the fact that Mirant raised the issue in its filing indicates confusion as to the correct cap. In addition, as discussed above, Powerex was uncertain enough to seek informal Commission guidance. Therefore, based on the facts and circumstances presented in this case, we continue to find that it would be inequitable to order refunds for the cash transactions due to the confusion created by the error in the June 19, 2001 Order and the fact that the Commission did not correct the mistake until over three months later, in the September 7, 2001 Order.

⁴⁹ *E.g., Towns of Concord v. FERC*, 955 F.2d at 76.

⁵⁰ September 7, 2001 Order, 96 FERC at 62,001.

The Commission orders:

Cal Parties' request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.