

129 FERC ¶ 61,147
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

San Diego Gas & Electric Company

v.

Docket No. EL00-95-184

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

ORDER ON REMAND

(Issued November 19, 2009)

1. This case is before the Commission on remand from the United States Court of Appeals for the Ninth Circuit (Ninth Circuit).¹ The court preserved the scope of the Commission's existing refund proceedings, but expanded them to also include the following issues requiring further consideration by the Commission: (1) whether relief is warranted for possible tariff violations committed prior to October 2, 2000; and (2) whether relief is appropriate for block forward market transactions and energy exchange transactions which were previously excluded from the scope of the refund proceeding.² The Ninth Circuit did not address the merits of the issues remanded to the Commission or appropriate remedies, if any.³

¹ *Pub. Util. Com'n of the State of Cal. v. FERC*, 462 F.3d 1027 (9th Cir. 2006) (*CPUC Decision*). On April 15, 2009, the Ninth Circuit issued its mandate for Commission action on this remand. See *Pub. Util. Com'n of the State of Cal. v. FERC*, slip op. No. 01-71051 (Apr. 15, 2009).

² See *CPUC Decision*, 462 F.3d at 1035.

³ Specifically, the Ninth Circuit stated that “[it does] not prejudice how [the Commission] should address the merits or fashion a remedy if appropriate.” *Id.* at 1051.

2. In this order, we establish an evidentiary, trial-type hearing before an Administrative Law Judge (ALJ) to address the issues remanded by the Ninth Circuit. We reopen the record to allow the participants to submit the information described below on which the Commission will resolve this proceeding.

3. Specifically, the hearing will address the issue of whether any individual public utility seller engaged in a tariff violation, as defined below, prior to October 2, 2000, and whether any such violation affected the market clearing price. When the Commission receives the factual determinations of the ALJ with respect to each seller, the Commission will determine what further steps will have to be taken.

4. We also reopen the record to allow participants to supplement the existing record with additional evidence on block forward transactions entered into during the Refund Period (October 2, 2000 – June 20, 2001).⁴ If any party wishes to rely on evidence previously submitted to the Commission, it must resubmit that evidence. The ALJ will then determine which of those transactions, if any, are subject to mitigation and calculate appropriate refunds. Finally, participants will be allowed to supplement the record with additional evidence and expert testimony on energy exchange transactions entered into during the Refund Period.⁵ Subsequently, the ALJ will devise the refund methodology for these transactions and will calculate the refunds based on that methodology.

I. Background

A. Commission Proceedings

5. The instant proceeding commenced with a complaint under section 206 of the Federal Power Act (FPA)⁶ filed by San Diego Gas and Electric Company (SDG&E) in August 2000. SDG&E's complaint named as respondents all sellers of energy and ancillary services in the California Independent System Operator Corporation (CAISO) and California Power Exchange Corporation (CalPX) markets. Specifically, SDG&E's complaint requested that the Commission impose a \$250 MW/h cap on all bids of energy and ancillary services into the CAISO's markets and CalPX's day-ahead, hour-ahead and

⁴ *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 96 FERC ¶ 61,120 (2001) (July 2001 Order). The end date of the Refund Period was set in *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 95 FERC ¶ 61,418 (2001) (June 2001 Order).

⁵ If any party wishes to rely on evidence previously submitted to the Commission, it must resubmit that evidence.

⁶ 16 U.S.C. § 824e (2006).

block forward markets.⁷ The Commission denied SDG&E's complaint but established a hearing proceeding to investigate the justness and reasonableness of the rates for all sales in the CalPX and CAISO markets and held the hearing in abeyance pending the results of a separate fact-finding staff investigation.⁸ Based on the staff investigation report, in November 2000, the Commission implemented certain measures to address identified market dysfunctions and established an evidentiary, trial-type hearing to determine the appropriate refunds.⁹ The refund effective date was determined to be October 2, 2000.¹⁰ In July 2001, the ALJ issued a report and recommendations regarding the methodology for calculating refunds.¹¹

6. In response to the ALJ's report and recommendations, the Commission issued an order establishing the scope of and methodology for calculating refunds related to transactions in the spot markets operated by the CAISO and CalPX during the Refund Period. Under the Commission-established refund methodology, all sales of 24-hours or shorter in the CAISO and CalPX markets were to be mitigated to the level of a mitigated market clearing price (MMCP).¹² To calculate appropriate MMCPs for each hour of the Refund Period and the amounts of refunds owed, the July 2001 Order established an evidentiary hearing proceeding before an ALJ (Refund Proceeding).¹³ The July 2001

⁷ SDG&E Complaint, Docket No. EL00-95-000, at 14 (Aug. 2, 2000).

⁸ *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 92 FERC ¶ 61,172, at 61,603 (2000) (August 2000 Order).

⁹ *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 93 FERC ¶ 61,121 (2000) (November 2000 Order).

¹⁰ *Id.* at 61,370.

¹¹ *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 96 FERC ¶ 63,007 (2001).

¹² July 2001 Order, 96 FERC at 61,517.

¹³ *Id.* at 61,499.

Order also limited the applicability of refunds to spot market transactions¹⁴ in the organized markets operated by the CAISO and CalPX.¹⁵

7. In addition, in the July 2001 Order, the Commission declined to order refund relief for sales that occurred prior to October 2, 2000.¹⁶ The Commission reaffirmed its determination on the October 2, 2000 refund effective date in a subsequent order, reiterating that

[a]ll sellers in the CAISO and CalPX markets reasonably were on notice that their sales were subject to refund, and that, in accordance with FPA section 206, their refund liability would begin no "earlier than the date 60 days after the filing" of a complaint. Sellers were not reasonably on notice that their refund liability would begin prior to October 2, 2000, the date we previously determined would be the refund effective date.¹⁷

8. On February 13, 2002, pursuant to its investigative authority under 18 C.F.R. § 1b.1 *et seq.*, the Commission instituted a staff fact-finding investigation into whether any entity manipulated short-term prices in electric energy or natural gas markets in the West or otherwise exercised undue influence over wholesale prices in the West, for the period January 1, 2000, forward (Enforcement Investigation).¹⁸ In a November 2002 order, the Commission allowed parties in the Refund Proceeding to conduct additional discovery into market manipulation by various sellers during the period January 1, 2000

¹⁴ Spot market transactions were defined as sales that are 24 hours or less and that are entered into the day of or day prior to delivery. *See* June 2001 Order, 95 FERC at 62,545 n.3.

¹⁵ The MMCP was a proxy for the just and reasonable price that would have been expected in a competitive energy market. Specifically, the MMCP was based upon the marginal cost of the last unit dispatched to meet the load in the CAISO's real-time market. *See* July 2001 Order, 96 FERC at 61,499.

¹⁶ *Id.* at 61,508-10.

¹⁷ *San Diego Gas & Eclectic Co. v. Sellers of Energy and Ancillary Serv.*, 97 FERC ¶ 61,275, at 62,183 (2001)

¹⁸ *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 98 FERC ¶ 61,165, at 61,614 (2002).

to June 20, 2001 and allowed the parties to submit to the Commission additional evidence and to propose new and/or modified findings of fact.¹⁹

9. In December 2002, the ALJ issued findings of facts in the Refund Proceeding,²⁰ which were modified in part and adopted in part by the Commission in a March 2003 order.²¹ In that order, the Commission upheld its prior determinations in regard to the scope of the refund proceeding and the refund effective date. Specifically, the Commission reaffirmed that only spot market transactions were subject to refund, and accepted the ALJ's finding that block forward transactions scheduled for delivery in the CalPX's day-ahead market were properly excluded from the total day-ahead volumes, as those transactions were long-term, non-spot transactions not subject to mitigation.²² The Commission also declined to mitigate energy exchange transactions except for the energy purchased by the CAISO in order to return energy in-kind.²³ Further, the Commission held that it would not reset the refund effective date because of additional evidence submitted by parties pursuant to the November 2002 Order.²⁴ In addition, the Commission stated that

[that additional evidence] would have no impact on the just and reasonable clearing prices developed for the [R]efund [P]eriod. Rather, depending on the outcome of the Commission's review, the Commission may initiate one or more additional enforcement actions against entities found to have committed market manipulation in violation of the CAISO and PX tariffs. The proposed remedy in such a proceeding would be disgorgement of profits by those entities that are found to have violated one or both of these tariffs. Any such company-specific disgorgement or other appropriate remedies ... would be in addition to the refunds associated with the mitigated market clearing prices developed pursuant to this order and could

¹⁹ *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 101 FERC ¶ 61,186, at P 26 (2002) (November 2002 Order).

²⁰ *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 101 FERC ¶ 63,026 (2002) (*ALJ Fact Findings*).

²¹ *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 102 FERC ¶ 61,317 (2003) (March 2003 Order).

²² *Id.* at P 94-96.

²³ *Id.* at P 153-54.

²⁴ *Id.* at P 148-49.

apply to conduct both prior to the refund period and during the refund period.²⁵

10. The Commission reaffirmed the above determinations in a subsequent order on rehearing.²⁶

B. Ninth Circuit Decision

11. On appeal the Ninth Circuit remanded the case to the Commission stating that the Commission erred on the following matters. Specifically, the Ninth Circuit found that the Commission erroneously excluded FPA section 309²⁷ relief for tariff violations that occurred prior to October 2, 2000. The Ninth Circuit also expanded the scope of the Refund Proceeding to include transactions in the CAISO and CalPX markets that occurred outside the 24-hour period, as well as energy exchange transactions in the CAISO and CalPX markets.²⁸

1. Section 309 Relief for Violations Prior to October 2, 2002

12. Although the Ninth Circuit concluded that the Commission correctly established the October 2, 2000 refund effective date for SDG&E's FPA section 206 complaint,²⁹ the court found that the Commission erred in its decision "not to consider a section 309 remedy for tariff violations prior to October 2, 2000."³⁰ The Ninth Circuit stated that the relief sought is based on section 309, not section 206, and refunds are not limited to the Refund Period. The Ninth Circuit found that "[the Commission] has remedial authority to require that entities violating the [FPA] pay restitution for profits gained as a result of a statutory or tariff violation... [and that this] authority derives from [section] 309."³¹ The Ninth Circuit stated that it does not question the Commission's broad investigatory and

²⁵ *Id.* at P 149.

²⁶ *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 105 FERC ¶ 61,066, at P 87 and 184 (2003).

²⁷ 16 U.S.C. § 825h (2006).

²⁸ *CPUC Decision*, 462 F.3d at 1035.

²⁹ *Id.* at 1046.

³⁰ *Id.* at 1048.

³¹ *Id.*

prosecutorial authority under FPA section 307(a) but finds that the fact that the Commission may be seeking similar remedies against specific companies in the investigation commenced under 18 C.F.R. § 1b.1 *et seq.* does not justify its denial of the request for section 309 relief in a civil proceeding instituted by a third party complaint.³² Accordingly, the Ninth Circuit remanded this issue to the Commission; however, the court stated that it did not prejudge how the Commission should address the merits of the request for section 309 relief or fashion a remedy if appropriate.³³

2. Transactions Outside the 24-Hour Period

13. The Ninth Circuit found that the Commission erred in limiting the scope of the Refund Proceeding to include only spot market transactions. Specifically, the Ninth Circuit concluded that the Commission misinterpreted SDG&E's complaint and provided no explanation for excluding from the Refund Proceeding transactions outside the 24-hour period.³⁴

3. Energy Exchange Transactions

14. The Ninth Circuit held that the Commission improperly excluded energy exchange transactions from the Refund Proceeding.³⁵ The Ninth Circuit found that the fact that the Commission was not satisfied with a proposed mitigation method for exchange transactions does not justify its decision to exclude exchange transactions on a categorical basis.³⁶ According to the Ninth Circuit, the Commission failed to articulate a valid basis for its decision.³⁷

II. Commission Determination

15. To address the above identified issues remanded by the Ninth Circuit, we establish a trial type, evidentiary hearing before an ALJ. As discussed below, we find that issues of material fact exist with respect to the question of whether prior to October 2, 2000, any

³² *Id.* at 1051.

³³ *Id.* (citations omitted).

³⁴ *Id.* at 1057-58.

³⁵ *Id.* at 1060.

³⁶ *Id.* at 1061.

³⁷ *Id.*

individual seller engaged in a market activity that violated tariff(s) effective at the time of the alleged violation and whether by means of such violation a seller effectuated a transaction that set the clearing price for the relevant period. We also reopen the record to allow participants to supplement the record by submitting to the ALJ additional evidence on block forward market transactions and energy exchange transactions entered into during the Refund Period. The ALJ is also instructed to make certain findings of fact in regard to the appropriate refunds for those transactions, as discussed in detail below.

16. While we are setting these matters for a trial-type evidentiary hearing, we encourage the participants to make every effort to settle their dispute before hearing procedures are commenced. We note that there have been numerous settlements already filed and accepted by the Commission in the Refund Proceeding and related proceedings. We encourage the remaining participants to take advantage of this settlement opportunity to further explore mutually acceptable resolution of the Refund Proceeding and related proceedings.

17. To aid the participants in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.³⁸ If the participants desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.³⁹ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the participants with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

A. Section 309 Relief for Transactions Prior to October 2, 2000

18. Under section 309, the Commission has broad authority to carry out the provisions of the FPA. Specifically, section 309 affords the Commission "power to perform any and all acts"⁴⁰ as it may find "necessary or appropriate to carry out the provisions of this

³⁸ 18 C.F.R. § 385.603 (2009).

³⁹ If the participants decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within ten days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

⁴⁰ 16 U.S.C. § 825h (2006).

Act.”⁴¹ Courts have long recognized that section 309 invests the Commission with significant discretion regarding the determination of what actions are “necessary and appropriate.”⁴² While the Ninth Circuit specifically did not prejudge how the Commission should address the merits of this case under section 309 or how to fashion a remedy, if any, it did note that the Commission has remedial authority derived from section 309 “to require that entities violating the [FPA] pay restitution for profits gained as a result of a statutory or tariff violation.”⁴³

19. Given this guidance from the Ninth Circuit and the specific circumstances of the instant case, we find that additional procedures are needed to address possible tariff violations committed prior to October 2, 2000. The Ninth Circuit did not make any determinations on how the Commission should address the merits of this issue and which remedy, if any, is appropriate.⁴⁴ We thus find that a trial-type, evidentiary hearing before an ALJ is needed to develop a record on possible tariff violations during the period prior to October 2, 2000. Specifically, we instruct the ALJ to gather evidence on: (1) whether any of the sellers named as respondents in this proceeding engaged in violations of the relevant tariff, rules or regulations governing the markets, in effect at the time in organized markets operated by the CAISO and CalPX; and (2) whether any such violation(s) affected the market clearing price for a trading hour during which the violation occurred.

20. Whether any of the sellers in this case engaged in a violation of a relevant tariff, rule or regulation in the CAISO and CalPX markets during the period prior to October 2, 2000 must be determined based on the relevant laws, regulations, orders, and tariffs in effect during the relevant period.⁴⁵ The 2000-2001 energy crisis in the West predated the anti-manipulation provisions of the Energy Policy Act of 2005 (EPA).⁴⁶ Further, at the time of the crisis, neither the Commission’s regulations nor its grants of market-based-

⁴¹ *Id.*

⁴² *See, e.g., Towns of Concord, Norwood & Wellesley v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992)

⁴³ *CPUC Decision*, 462 F.3d at 1048.

⁴⁴ *Id.* at 1051.

⁴⁵ *See Nevada Power Co. v. Enron Power Mktg., Inc.*, 125 FERC ¶ 61,312, at P 25 *et seq.* (2008).

⁴⁶ Pub. L. No. 109-58, § 1283, 119 Stat. 594 (2005) (adding new section 222 to the FPA).

rate authority contained market behavior rules prohibiting market manipulation or defining prohibited market manipulation.⁴⁷ However, there was a provision in the then-current CAISO and CalPX tariffs, known as the Market Monitoring and Information Protocol (MMIP), that addressed “gaming” and “anomalous market behavior.” The MMIP barred all participants in the CAISO and CalPX markets from engaging in gaming or anomalous behavior in those markets.⁴⁸ Moreover, the Commission later provided

⁴⁷ This situation, in fact, led the Commission to act after the Western energy crisis to address market behavior more directly. *Investigation of Terms and Conditions of Pub. Util. Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003), *reh’g denied* 107 FERC ¶ 61,175 (2004) (adding market behavior rules to all market based rates tariffs); *see also Investigation of Terms and Conditions of Pub. Util. Market-Based Rate Authorizations*, 114 FERC ¶ 61,165, *reh’g denied* 115 FERC ¶ 61,053 (2006) (rescinding some of the market behavior rules and removing other rules from the tariffs as they were included in *Prohibition of Energy Market Manipulation*, Order No. 670, FERC Stats. & Regs. ¶ 31,202, *reh’g denied*, 114 FERC ¶ 61,300 (2006), which codified the EPAct anti-manipulation authority).

⁴⁸ *Order to Show Cause Concerning Gaming and/or Anomalous Market Behavior*, 103 FERC ¶ 61,345, at P 19 (2003), *order on reh’g*, 106 FERC ¶ 61,020 (2004) (*Gaming Order*). Section 2.1.3 of the MMIP defined “gaming” as:

Taking unfair advantage of the rules and procedures set forth in the PX or ISO Tariffs, Protocols or Activity Rules, or of transmission constraints in periods in which exist substantial Congestion, to the detriment of the efficiency of, and of consumers in, the ISO Markets. “Gaming” may also include taking undue advantage of other conditions that may affect the availability of transmission and generation capacity, such as loop flow, facility outages, level of hydropower output or seasonal limits on energy imports from out-of-state, or actions or behaviors that may otherwise render the system and the ISO Markets vulnerable to price manipulation to the detriment of their efficiency. *See id.* P 17

Section 2.1.1 of the MMIP defined “anomalous market behavior” as:

[B]ehavior that departs significantly from the normal behavior in competitive markets that do not require continuing regulation or as behavior leading to unusual or unexplained market outcomes. Evidence of such behavior may be derived from a number of circumstances, including: withholding of Generation capacity under circumstances in which it would normally be offered in a competitive market; unexplained or unusual redeclarations of availability by Generators; unusual trades or transactions; pricing and bidding patterns that are inconsistent with prevailing supply and demand conditions, e.g., prices and bids that appear consistently

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guidance on the categories of activities occurring at the time of the crisis that constituted gaming and anomalous behavior in violation of the MMIP.⁴⁹ These categories are: withholding of generation, both economic and physical;⁵⁰ false import;⁵¹ cutting non-firm power;⁵² circular scheduling;⁵³ scheduling counterflows on out-of-service lines;⁵⁴ load

excessive for or otherwise inconsistent with such conditions; and unusual activity or circumstances relating to imports from or exports to other markets or exchanges. *See id.* P 18.

⁴⁹ *See id.* P 37-55; *Investigation of Anomalous Bidding Behavior and Practices in the Western Markets*, 103 FERC ¶ 61,347, at P 2 (2003) (*Withholding Order*).

⁵⁰ With regard to economic withholding the Commission determined that sellers' bids into the CAISO and CalPX markets exceeding \$250/ MWh warranted investigation under the MMIP. *Withholding Order*, 103 FERC ¶ 61,347 at P 3.

⁵¹ This practice took advantage of the price differentials that existed between the day-ahead or day-of markets and out-of-market sales in the real-time market. A market participant made arrangements to export power purchased in the California day-ahead or day-of markets to an entity outside the state and to repurchase the power from the out-of-state entity, for which the out-of-state-entity received a fee. The "imported" power was then sold in the California real-time market at a price above the cap. *Gaming Order*, 103 FERC ¶ 61,345 at P 37.

⁵² This practice involved the scheduling of non-firm power by a market participant that did not intend to deliver or could not deliver the power. Upon receipt of the congestion payment for cutting the schedule, the market participant then canceled the non-firm power sale after the hour-ahead market closed but kept the congestion payment. *Id.* at P 42.

⁵³ This practice involved the market participant scheduling a counterflow in order to receive a congestion relief payment. In conjunction with the counterflow, the market participant scheduled a series of transactions that included both energy imports and exports into and out of the CAISO control area and a transaction outside the CAISO control area in the opposite direction of the counterflow back to the original place of origin. With the same amount of power scheduled back to the point of origin, however, power did not actually flow and congestion was not relieved. Circular scheduling was profitable as long as the congestion relief payments were greater than the cost of scheduled transmission. *Id.* at P 43.

⁵⁴ This practice involved a market participant submitting a schedule across an intertie line at the CAISO border that was known to be out of service and had been derated to zero capacity, thus creating artificial congestion. The market participant would
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shift;⁵⁵ paper trading;⁵⁶ double selling;⁵⁷ and selling non-firm energy as firm.⁵⁸ For purposes of this remand, these are the categories of behavior that could constitute “unlawful activity.” Complainants in this proceeding who allege unlawful market activity by a particular seller therefore may submit any evidence with respect to these categories of MMIP violations.⁵⁹ Any party that wishes to rely on evidence previously submitted to the Commission must resubmit the evidence.

then schedule a counterflow export, a “wheel out,” and be paid for congestion relief in the day-ahead or hour-ahead market. However, because the line was completely constrained, the initial schedule was certain to be cut by the CAISO in real time and the market participant would receive a congestion payment for energy it did not actually supply. *Id.* at P 44.

⁵⁵ This practice involved a market participant underscheduling load in one zone in California and overscheduling load in another, thereby increasing congestion in the direction of the overscheduled zone. Congestion “relief” occurred when the market participant later adjusted the two schedules to reflect actual expected loads. This adjustment created a counterflow toward the underscheduled zone, earning the market participant a congestion relief payment from the CAISO. The market participant had to own Firm Transmission Rights (FTRs) in the direction of the overscheduled zone to cover its exposure to CAISO congestion charges, but any of the FTRs that it did not use may have earned artificially high FTR payments from the CAISO. *Id.* at P 45.

⁵⁶ This practice involved selling ancillary services in the day-ahead market even though the market participant did not have the required resources available to provide the ancillary services. The market participant then bought back these ancillary services in the hour-ahead market at a lower price. *Id.* at P 49.

⁵⁷ This practice involved selling ancillary services in the day-ahead market from resources that were initially available, but later selling those same resources as energy in the hour-ahead or real-time markets. *Id.* at P 50.

⁵⁸ This practice involved buying non-firm energy from outside California and then selling it to the CAISO as firm energy. *Id.* at P 54.

⁵⁹ The Gaming Order noted that although underscheduling load and overscheduling load both technically violate the MMIP, underscheduling load had the effect of reducing power prices rather than increasing the profits of the entities that engaged in the strategy, and overscheduling load actually helped reduce reliability problems in the real-time market. Therefore, the Commission decided it was inappropriate to seek disgorgement of profits for these two practices. Similarly, the

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21. The Commission has also recognized that behavior that on its face appears to fall into one of the categories listed above is not a violation of the MMIP if there was a legitimate explanation for the behavior. The Commission explained that

[i]n this context, the Commission considers legitimate business behavior to be actions consistent with appropriate behavior in a competitive market, *i.e.*, actions taken to further a firm's business objectives but not involving manipulative, illegal, or otherwise anticompetitive acts. Engaging in manipulation, for example, in order to maximize profits, is not legitimate business behavior.⁶⁰

22. The Commission has also provided examples of evidence that could establish a legitimate business explanation for transactions that appear to constitute false imports,⁶¹ cutting non-firm,⁶² and paper trading or double selling.⁶³ Sellers accused of unlawful

Commission concludes that such practices do not, by themselves, constitute unlawful manipulation for purposes of this case. *Id.* at P 56-60.

⁶⁰ *Withholding Order*, 103 FERC ¶ 61,347 at P 13 at n.15.

⁶¹ Relevant evidence includes demonstrations that: (a) the "imported" power was actually imported from outside the State of California and not a fictitious import, *i.e.*, not an export and import that constitutes a false import, as described in n.52; (b) the transaction was designed to work around a transmission constraint (such as on Path 15) which limited the movement of power between two points within the CAISO control area by using an uncongested transmission path (such as the Pacific DC intertie) to move the power to a point outside the CAISO control area and back to its intended destination; (c) the export and import were actually two independent and unrelated obligations such as a pre-existing long-term bilateral contractual export obligation followed by a real-time import from the same party in an unrelated transaction; or (d) the market participant was importing power on behalf of the CAISO or California Department of Water Resources (CDWR), because suppliers were unwilling to assume the credit risk of dealing directly with the CAISO or CDWR. *Gaming Order*, 103 FERC ¶ 61,345 at P 67.

⁶² Relevant evidence includes a demonstration that any energy that was scheduled, but did not flow was due to circumstances beyond the control of the market participant and without prior knowledge by the market participant that the energy would not flow. *Id.* P 68.

⁶³ Relevant evidence includes demonstrations that: (a) the resources to provide the ancillary services sold in the day-ahead market were actually available to the bidder; (b) ancillary services payments were not received for capacity that was not available to
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manipulation in this case may submit evidence that the activity in question was, in fact, legitimate business behavior.

23. After the ALJ establishes which parties engaged in unlawful market activity without a legitimate business reason during the relevant period, the ALJ is to gather evidence and determine whether the identified unlawful market activity resulted in a transaction that set a market clearing price for a trading period in which the MMIP violation occurred. This information is to be submitted to the Commission for consideration of further steps to be taken.

24. As discussed above, the Commission has considerable discretion in shaping an appropriate remedy for possible tariff violations committed prior to October 2, 2000. Once the Commission is presented with the ALJ's findings of facts at issue in these proceedings, the Commission will issue a further order regarding what remedies, if any, we will impose on individual sellers.

B. CAISO and CalPX Transactions Outside 24-Hour Limit

25. The block forward market was established in 1999;⁶⁴ it was a pay-as-bid forward market where buyers and sellers agreed on specific forward energy prices. Energy deliveries were usually done through the CalPX's day-ahead market⁶⁵ and settled as a contract for differences of the monthly weighted-average of the day-ahead zonal prices.⁶⁶ Initially, block forward market transactions were up to one month in length. Subsequently, pursuant to the Commission directive, the CalPX revised the block

provide ancillary services; or (c) the CAISO requested that the market participant provide energy in the real-time market even though it knew that such energy was being held for ancillary services previously sold to the CAISO. *Id.*

⁶⁴ *Cal. Power Exch. Corp*, 87 FERC ¶ 61,203 (1999).

⁶⁵ The Commission directed the CalPX to revise the block forward market rate schedule to allow participants to use the bilateral market rather than the CalPX's day-ahead market to effectuate their transactions, to the extent that they were not otherwise obligated to use the CalPX. *Id.* at 61,783. 91 percent of block forward market transactions addressed in the Refund Proceeding were scheduled and delivered through the CalPX's day-ahead market. *ALJ Fact-Findings*, 101 FERC ¶ 63,026 at P 680.

⁶⁶ *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 116 FERC ¶ 61,167, at P 22 (2006).

forward market rate schedule to delete reference to "monthly" block-forward transactions to allow for transactions of different lengths.⁶⁷

26. In its complaint, SDG&E requested that the Commission impose a \$250/MWh cap on bids of energy and ancillary services into California's two large bulk-power markets operated by the CalPX and the CAISO.⁶⁸ SDG&E argued that the \$250/MWh cap was needed because "the [CAISO's] price caps [did] not extend to transactions in the day-ahead, hour-ahead, and block forward markets conducted by the [CalPX]."⁶⁹ In SDG&E's opinion, "supply bids into the California forward and real-time markets should be capped at \$250/MWh" until workable competition was established.⁷⁰ The Commission denied SDG&E's complaint and established the Refund Proceeding to address the dysfunctions in the CAISO and CalPX markets.⁷¹ The scope of the Refund Proceeding was limited to spot market transactions,⁷² and the Commission has denied requests to mitigate CalPX day-ahead market transactions associated with block forward market transactions.⁷³

27. On appeal, the Ninth Circuit held that the record did not support the Commission's decision to exclude block forward transactions from the scope of the Refund Proceeding. The Ninth Circuit found that the Commission misinterpreted SDG&E's complaint as limiting the scope of the proceeding to spot market transactions.⁷⁴ According to the Ninth Circuit, SDG&E's complaint explicitly referred to both short-term and forward sales in the CAISO and CalPX markets. The court, however, concluded that SDG&E's complaint "did not reference sales outside the [CAISO's] and [CalPX's] formal markets

⁶⁷ *Cal. Power Exch. Corp.*, 90 FERC ¶ 61,173, at 61,571 (2000); and Director Letter Order, Docket No. ER00-951-001 (May 26, 2000).

⁶⁸ SDG&E Complaint, Docket No. EL00-95-000, at 1 (Aug. 2, 2000).

⁶⁹ *Id.* at 16.

⁷⁰ *Id.* at 14.

⁷¹ See August 2000 Order, 92 FERC ¶ 61,172.

⁷² See July 2001 Order, 96 FERC ¶ 61,120 at 61,499

⁷³ March 2003 Order, 102 FERC ¶ 61,317 at P 94-96; *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 105 FERC ¶ 61,066, at P 85 and 87 (2003);

⁷⁴ *CPUC Decision*, 462 F.3d at 1057.

because SDG&E was, at that time, required to purchase energy through the formal spot markets.”⁷⁵ Accordingly, the Ninth Circuit remanded this matter to the Commission.

28. Pursuant to the Ninth Circuit’s decision, we reverse our earlier decision to exclude block forward market transactions from the scope of the Refund Proceeding. We therefore establish a trial-type, evidentiary hearing before the ALJ and reopen the record to allow participants to supplement the record with additional evidence on block forward transactions entered into during the Refund Period. If any party wishes to rely on evidence previously submitted to the Commission, it must resubmit that evidence. We instruct the ALJ to determine which block forward market transactions are subject to mitigation and to calculate the refunds. The ALJ may utilize the MMCP-based refund methodology previously established by the Commission in this proceeding,⁷⁶ or another methodology the ALJ deems more appropriate. We also note that sellers would be eligible for cost offsets, and participants are allowed to submit evidence on their costs associated with the transactions in question.

C. Energy Exchange Transactions

29. An energy exchange transaction is a non-monetary transaction where a party provides energy to the CAISO in exchange for returning a specified amount of energy in kind in subsequent hours at an exchange rate.⁷⁷ Energy exchange transactions were considered during the evidentiary hearing before the ALJ and the ALJ concluded that to the extent the CAISO paid excessive prices in the spot market to obtain energy needed for the in-kind returns, those prices were subject to mitigation.⁷⁸ The Commission affirmed the ALJ’s finding that declined to mitigate the return ratios used in exchange transactions, finding that exchange transactions were nonmonetary transactions, and the return ratio did not imply a definite price.⁷⁹ The Commission also stated that “power purchased by the CAISO in order to return energy in-kind [would] be repriced according

⁷⁵ *Id.* Also, we note that the block forward market was a division of the CalPX and offered electric service on a block forward basis as an exchange which matched bids to buy power with offers to sell power. *See Cal. Power Exch. Corp.*, 87 FERC ¶ 61,023, at 61,778 (1999).

⁷⁶ *See, e.g.*, June 2001 Order, 95 FERC ¶ 61,418; July 2001 Order, 96 FERC ¶ 61,120.

⁷⁷ *See* March 2003 Order, 102 FERC ¶ 61,317 at 153.

⁷⁸ *See ALJ Fact-Findings*, 101 FERC ¶ 63,026, at P 530-536 (2002).

⁷⁹ March 2003 Order, 102 FERC ¶ 61,317 at 154.

to the MMCP methodology.”⁸⁰ The Ninth Circuit overturned the Commission’s decision to mitigate energy exchange transactions only to the extent they were the CAISO’s spot market purchases to return energy in-kind, and held that the Commission “did not articulate a valid basis for excluding the energy transaction from the Refund Proceeding....”⁸¹

30. In light of the Ninth Circuit’s holding, we reopen the record to allow participants to supplement the record with additional evidence on exchange transactions entered into during the Refund Period. If any party wishes to rely on evidence previously submitted to the Commission, it must resubmit that evidence. We instruct the ALJ to propose a refund methodology applicable to energy exchange transactions and to calculate the refunds. We also note that certain energy exchange transactions have already been mitigated to the extent they were purchases by the CAISO to return energy in-kind. We will not allow reconsideration of the already mitigated transactions. Energy exchange transactions entered into during the Refund Period will be subject to refund only to the extent they have not been mitigated.

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205, 206, and 309 thereof, and pursuant to the Commission’s Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held concerning the issues identified in the body of this order. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (B) and (C) below.

(B) Pursuant to Rule 603 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2009), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the participants decide to request a specific judge, they must make their request to the Chief Judge within ten (10) days of the date of this order.

⁸⁰ *Id.*

⁸¹ *CPUC Decision*, 462 F.3d at 1061.

(C) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the participants with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the participants' progress toward settlement.

(D) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, N.E., Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.