

135 FERC ¶ 61,176
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Investigation of Wholesale Rates of Public Utility Docket No. EL01-68-000
Sellers of Energy and Ancillary Services in the Western
Market Systems Coordinating Council

ORDER DISMISSING AND DENYING REQUEST FOR REFUNDS

(Issued May 24, 2011)

1. In this order, the Commission dismisses in part and denies in part the California Parties' (Cal Parties)¹ request for refunds stemming from sales to the California Energy Resources Scheduling Division (CERS) of the California Department of Water Resources (CDWR) during the period from June 20, 2001 through December 19, 2001 (Post-Refund Period) at rates allegedly exceeding the price cap established by the Commission.

I. Background

2. In an order issued June 19, 2001,² the Commission established a price cap for all spot market sales in the Western Systems Coordinating Council (WSCC), including sales in the centralized California Independent System Operator (CAISO) market and sales in the bilateral WSCC spot markets. The California Power Exchange (CalPX) ceased operations on January 30, 2001, so it was no longer operative during the Post-Refund Period. 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

¹ The California Parties include the People of the State of California, *ex rel.* Edmund G. Brown, Jr., Attorney General; the Public Utilities Commission of the State of California (CPUC); Pacific Gas and Electric Company (PG&E); and Southern California Edison Company (SoCal Edison).

² *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 95 FERC ¶ 61,418 (2001) (June 19, 2001 Order).

stage 1 emergency declared by the CAISO. The June 19, 2001 Order stated the maximum market clearing price as \$108.49/MWh,³ but permitted generators and load-serving entities the opportunity to seek Commission approval to sell above the cap. Marketers were not permitted to sell above the cap under any circumstances.⁴

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.⁵ The 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.⁶

4. The June 19, 2001 Order gave sellers the opportunity to file cost justifications for prices exceeding the cap. During the summer of 2001, several sellers filed cost justifications seeking Commission approval to receive the higher prices. On multiple occasions, the Commission denied the requests as untimely and/or unsupported and ordered refunds to be paid on sales that exceeded the maximum market clearing price.⁷ In the September 7, 2001 Order, the Commission clarified explicitly that the price cap

³ 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. June 19, 2001 Order, 95 FERC ¶ 61,418 at 62,548 n.14.

⁴ *Id.* at 62,564.

⁵ CAISO June 22, 2001 Filing in Docket No. EL00-95-031, *et al.* (CAISO Market Notices).

⁶ *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)”).

⁷ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 96 FERC ¶ 61,254 (2001) (September 7, 2001 Order); *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Servs.*, 97 FERC ¶ 61,012 (2001) (October 5, 2001 Order).

stated in the June 19, 2001 Order was incorrect and that the cap calculated by the CAISO represented the applicable maximum market clearing price.⁸

5. By its terms, the cap established in the June 19, 2001 Order applied only to spot market sales of electricity.⁹ On rehearing, the Commission denied requests to expand the scope of the prospective mitigation measures to include forward transactions.¹⁰ The Commission denied rehearing of the December 19, 2001 Order.¹¹

II. Cal Parties Motion and Answers to the Motion

6. On June 9, 2009, Cal Parties filed a motion in Docket No. EL01-68-000,¹² alleging violations of the June 19, 2001 Order and requesting refunds, plus interest at the Commission applicable rate, for all sales made to CERS during the Post-Refund Period at rates exceeding \$91.87/MWh.¹³ Cal Parties state that during the Post-Refund Period, nine sellers¹⁴ sold electricity to CERS at unlawful rates, primarily in the form of

⁸ September 7, 2001 Order, 96 FERC ¶ 61,254 at 62,002 n.9.

⁹ June 19, 2001 Order, 95 FERC ¶ 61,418 at 61,545-46.

¹⁰ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 97 FERC ¶ 61,275, at 62,244 (2001) (December 19, 2001 Order). For purposes of these proceedings, forward transactions have been defined as “any transactions with a future delivery that are entered into more than 24 hours before commencement of service.” June 19, 2001 Order, 95 FERC ¶ 61,418 at 62,546, n.9.

¹¹ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 99 FERC ¶ 61,160, at 61,648 (2002) (May 15, 2002 Order).

¹² The EL01-68-000 docket was established as a result of the Commission’s April 26, 2001 Order initiating a section 206 investigation into the rates, terms, and conditions sales in WSCC markets, other than CAISO market sales. *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Servs.*, 95 FERC ¶ 61,115, at 61,365 and Ordering Paragraph (L) (2001) (April 26, 2001 Order).

¹³ 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).

¹⁴ Sellers alleged to have made sales at prices that exceeded the \$91.87/MWh cap include: Powerex Corp. (Powerex); Sempra Energy Trading (Sempra); Dynegy Power Marketing (Dynegy); Allegheny Energy Trading Services (Allegheny); Public Service Company of New Mexico (PNM); Coral Power (Coral); TransAlta Energy Marketing US

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energy exchange transactions.¹⁵ Cal Parties request 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.¹⁶

7. On June 17, 2009, PNM and Tucson filing jointly, and Allegheny, submitted motions requesting an extension of time to respond to the June 9, 2009 Filing.¹⁷ Cal Parties filed an answer to the motions for an extension of time, stating that it did not object to an extension of time until July 2, 2009, but disagreed with the parties' rationale for seeking the extension.¹⁸ On June 23, 2009, the Commission issued a notice granting an extension of time for filing answers until July 16, 2009.¹⁹

8. Answers to and/or motions to dismiss the June 9, 2009 Filing were filed by the following: (1) Allegheny; (2) PNM; (3) Powerex; (4) Sempra; (5) Shell Energy North America (US) L.P. (Shell, f/k/a Coral); (6) TransAlta; (7) TransCanada; and (8) Tucson. Cal Parties filed an answer to the answers and motions to dismiss. Allegheny filed an answer to Cal Parties' answer.

(TransAlta); TransCanada Energy Ltd. (TransCanada); and Tucson Electric Power (Tucson).

¹⁵ 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*).

¹⁶ June 9, 2009 Filing, Appendix A (Declaration of Dr. Carolyn A. Berry) at 1.

¹⁷ June 17, 2009 Motion of the Public Service Company of New Mexico and Tucson Electric Power Company for Extension of Time to Respond to the California Parties' Motion for Refunds in Docket No. EL01-68-000; June 17, 2009 Motion of Allegheny Energy Supply Company, LLC for Extension of Time to Respond to the California Parties' Motion for Refunds in Docket No. EL01-68-000.

¹⁸ June 18, 2009 Answer of the California Parties to Motion for Extension of Time to Respond in Docket No. EL01-68-000.

¹⁹ June 23, 2009 Notice of Extension of Time in Docket No. EL01-68-000.

9. Cal Parties subsequently withdrew its motion, as against Dynegy, Tucson PNM, and Sempra as a result of settlement agreements that have been approved by the Commission.²⁰

III. Discussion

A. Procedural Matters

10. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We will accept Cal Parties' answer to the parties' answers and motions to dismiss and Allegheny's answer to Cal Parties' answer because they have provided information that assisted us in our decision-making process.

B. Energy Exchange Transactions

11. Powerex argues that Cal Parties' claims for refunds are baseless because, according to Powerex, all of the sales identified by Cal Parties²¹ are consistent with the June 19, 2001 Order. Powerex asserts that the bulk of the sales complained of are multi-day exchanges that were not subject to the price cap. Powerex states that price cap established by the June 19, 2001 Order applied only to "spot market transactions" and

²⁰ See Cal Parties July 13, 2009 Letter Withdrawing Motion as Against Dynegy in Docket No. EL01-68-000; Cal Parties and PNM May, 13, 2010 Notice of Withdrawal in Docket Nos. EL00-95-000, *et al.*; Cal Parties and Tucson July 6, 2010 Notice of Withdrawal in Docket Nos. EL00-95-000, *et al.*; Cal Parties and Sempra January 31, 2011 Notice of Withdrawal in Docket Nos. EL00-95-000, *et al.* The Commission has approved separate settlements resolving claims against Dynegy, Tucson, PNM and Sempra arising from events and transactions during the Western energy crisis in 2000 and 2001, including claims related to the sales made to CERS during the Post-Refund Period. See *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 129 FERC ¶ 61,256 (2009), *order on reh'g*, 130 FERC ¶ 61,199 (2010); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 131 FERC ¶ 61,082 (2010);); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 131 FERC ¶ 61,259 (2010); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 133 FERC ¶ 61,249 (2010).

²¹ Although Cal Parties included no transaction detail with their June 9, 2009 Filing, Powerex requested and received the work papers used by Dr. Carolyn A. Berry to calculate the refund amounts claimed by Cal Parties. Cal Parties Answer at 15, Appendix 1.

notes that in the June 19, 2001 Order, the Commission defined spot market sales as “sales that are 24 hours or less and that are entered into the day of or the day prior to delivery.”²² Powerex contends that its exchanges with CERS were multi-day transactions and not spot market sales. Powerex asserts, therefore, that these transactions were not subject to the price cap. Thus, Powerex maintains that Cal Parties’ claims for refunds for the exchange transactions should be rejected.²³

12. Cal Parties dispute Powerex’s contention that multi-day sales are not subject to the price cap. According to Cal Parties, Powerex’s argument ignores the holding by the U.S. Court of Appeals for the Ninth Circuit in *CPUC*²⁴ that rejected the Commission’s exclusion of multi-day sales from the Refund Proceeding. Moreover, Cal Parties assert that even if multi-day transactions are not subject to the price cap, the Powerex transactions at issue are still subject to refund because they are not, in fact, multi-day sales. Cal Parties claim that in order to be considered a multi-day sale, the delivery period must be longer than 24 hours; the timing and form of payment have no bearing on the consideration of whether the transaction is multi-day in nature. To hold otherwise, according to Cal Parties, would “violate the Ninth Circuit’s ruling in *CPUC* that the form of payment (in-kind versus cash) is not a valid basis for distinguishing the relief provided”²⁵ Cal Parties submit that when the sales at issue were made, power was delivered to CERS within 24 hours, making the Powerex exchange transactions spot market transactions that were subject to the price cap.²⁶

Commission Determination

13. We dismiss with prejudice the June 9, 2009 Filing as it pertains to energy exchange transactions. We find that Cal Parties’ argument that the Powerex exchange transactions are subject to the price cap constitutes an impermissible collateral attack on prior Commission orders that defined the scope of the prospective mitigation measures.

²² Powerex July 16, 2009 Response to Cal Parties’ Motion for Refunds in Docket No. EL01-68-000 at 5 (Powerex Response) (quoting June 19, 2001 Order, 95 FERC ¶ 61,418 at n.3).

²³ *Id.* at 8-10.

²⁴ *CPUC*, 462 F.3d at 1059.

²⁵ Cal Parties July 31, 2009 Answer to Motions to Dismiss and Answers in Docket No. EL01-68-000 at 10 (Cal Parties Answer).

²⁶ *Id.* at 9-11.

In an order issued April 26, 2001 Commission instituted the investigation in Docket No. EL01-68-000, limiting the scope to spot market sales throughout the WSCC, other than sales through the organized California markets.²⁷ As a result of that investigation, the Commission found it appropriate in the June 19, 2001 Order to “provide for price mitigation in the spot markets in California and throughout the West,”²⁸ and determined that parties had not “provided justification for extending the scope of our investigation or the mitigation to bilateral transactions other than spot markets.”²⁹ Pursuant to the June 19, 2001 Order, therefore, the price cap applied only to spot market transactions. On rehearing, the Commission evaluated and expressly rejected requests to include a broader set of transactions within the West-wide price mitigation scheme.³⁰

14. The June 19, 2001 Order and subsequent orders on rehearing make clear that exchange transactions are not spot market sales by defining spot market sales as sales that are 24 hours or less.³¹ Indeed, the Commission has made clear on several occasions that exchange transactions are not spot market transactions.³² The Commission’s position on this issue has not been reversed, either on rehearing or on appeal. While the Ninth Circuit interpreted the San Diego Gas & Electric complaint³³ to cover exchange transactions, it did not speak to the issue of whether exchange transactions are spot

²⁷ April 26, 2001 Order, 95 FERC ¶ 61,115 at 61,351.

²⁸ June 19, 2001 Order, 95 FERC ¶ 61,418 at 62,546.

²⁹ *Id.* at 62,556.

³⁰ December 19, 2001 Order, 97 FERC ¶ 61,275 at 62,245; May 15, 2002 Order, 99 FERC ¶ 61,160 at 61,648 (denying requests for rehearing of the December 19, 2001 Order).

³¹ June 19, 2001 Order, 95 FERC ¶ 61,418 at n.3.

³² For example, the Commission ruled, within the context of the refund proceeding, that because energy exchange transactions are conducted over a period of greater than 24 hours, they “would not come under the definition of spot market transactions.” *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 102 FERC ¶ 61,317, at P 154 (2003) (March 26, 2003 Order).

³³ San Diego Gas and Electric August 2, 2000 Complaint in Docket No. EL00-95-000 (SDG&E Complaint).

market sales.³⁴ The Ninth Circuit based its reversal of the Commission's exclusion of forward transactions from the refund proceedings on its determination that the SDG&E Complaint "explicitly referred to both short-term and forward sales in the Cal-ISO and CalPX markets."³⁵ The Ninth Circuit found that the SDG&E Complaint "clearly challenged rates for forward transactions, asserting that 'until workable competition is established, supply bids into the California *forward and real-time markets* should be capped ...,'" and concluded that the SDG&E Complaint "did not limit FERC's section 206 refund authority to only 'spot market' transactions."³⁶ Thus, the Ninth Circuit invalidated the distinction between forward and spot sales, for purposes of the refund proceedings, based on its interpretation of the SDG&E Complaint.

15. However, the Ninth Circuit made no such finding with respect to energy exchange transactions, despite its holding that "energy exchanges are considered sales, subject to FERC's jurisdiction."³⁷ First, the Ninth Circuit based its reversal of the Commission's exclusion of exchange transactions on its finding that the Commission failed to articulate a valid basis for excluding them. The Ninth Circuit explained that, "[b]y refusing relief simply because the calculation was difficult, FERC abandoned its duty under the Federal Power Act to ensure just and reasonable rates."³⁸ Second, the Ninth Circuit did not determine that energy exchange transactions are spot market transactions. The Ninth Circuit noted merely that because it had already rejected the distinction between spot and forward transactions, the Commission could not rely on the fact that exchanges are conducted over periods greater than 24 hours to justify their exclusion from the refund proceedings arising out of the SDG&E Complaint.³⁹ The fact that exchanges are

³⁴ The Ninth Circuit held merely that "energy exchange transactions are considered sales, subject to FERC's jurisdiction," and concluded that because it had already rejected the theory that the SDG&E Complaint limited the refund proceedings to spot market transactions, defining exchange transactions as non-spot sales conducted over a period of greater than 24 hours did not provide a valid basis for excluding them from the refund proceedings.³⁴ *CPUC*, 462 F.3d at 1060-61. Neither of these holdings collapse the distinction between exchange transactions and spot market sales for purposes of the applicability of the price cap at issue here.

³⁵ *CPUC*, 462 F.3d at 1057.

³⁶ *Id.* (emphasis in original).

³⁷ *CPUC*, 462 F.3d at 1060

³⁸ *Id.*

³⁹ *Id.* at 1061.

considered sales under the Federal Power Act (FPA) for purposes of establishing Commission jurisdiction has no bearing on the question of whether exchange transactions are included in the definition of spot market transactions set forth in the June 19, 2001 Order. Therefore, the Ninth Circuit's holding in *CPUC* did not disturb the Commission's determination that exchange transactions, for purposes of the prospective mitigation measures, are not spot market sales.

16. The testimony provided by Powerex establishes that each exchange transaction between CERS and Powerex spanned a period of several days, pursuant to an exchange arrangement that spanned an eight-week period.⁴⁰ Cal Parties disagree with Powerex's conclusion regarding the proper classification of the transactions at issue, but do not challenge the factual aspects of the underlying testimony.⁴¹ Accordingly, given the duration of the Powerex exchange transactions, we are persuaded that the sales at issue are not spot market sales and hence, not subject to the price cap. As a result, we find that as a matter of law, the Powerex exchange transactions did not violate the June 19, 2001 Order. In addition, because exchange transactions are outside the scope of the price cap established by the June 19, 2001 Order, we find Cal Parties' argument that the Powerex sales were not multi-day sales to be irrelevant. Multi-day sales, or block forward sales, have consistently been treated as distinct from exchange transactions throughout the refund and mitigation proceedings.⁴² However, neither can be considered spot market sales within the context of the prospective mitigation measures because both are types of sales that last longer than 24 hours. Thus, to the extent Cal Parties seek to include in the prospective mitigation measures any sales other than spot market sales, as defined in the June 19, 2001 Order and elsewhere, the June 9, 2009 Filing is an impermissible collateral attack on prior Commission orders.⁴³

⁴⁰ Powerex Response at 10, Attachment A (Yadzi Declaration).

⁴¹ We note that Cal Parties have previously raised nearly identical arguments that were considered and rejected by the Commission. *See* Cal Parties April 25, 2003 Request for Rehearing of March 26, 2003 Order in Docket Nos. EL00-95-081 and EL00-98-069 at 53-54; *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 105 FERC ¶ 61,066, at P 5 (2003).

⁴² *See, e.g., CPUC*, 462 F.3d at 1055-61; *San Diego Gas & Electric v. Sellers of Energy and Ancillary Servs.*, 129 FERC ¶ 61,147, at P 4 (2009) (CPUC Remand Order) (both addressing block forward and exchange transactions as separate categories of sales).

⁴³ As the Commission has previously found, “[c]ollateral attacks on final orders and relitigation of applicable precedent by parties that were active in the earlier cases

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17. In addition, we reject Cal Parties' argument that the Ninth Circuit's holdings in *CPUC* "stand clearly for the proposition that the price cap imposed in the June 19, 2001 Order applies to exchange transactions."⁴⁴ Rather, we find that Cal Parties have misinterpreted the scope of *CPUC*. While Cal Parties state correctly that *CPUC* rejected the Commission's rationale for excluding exchange and multi-day transactions from the refund proceedings, *CPUC* is distinct from the issue presented in this proceeding. In the refund proceedings, the Commission was constrained by the scope of the SDG&E Complaint. Accordingly, in addressing whether the refund proceedings should consider exchange transactions, the Ninth Circuit in *CPUC* interpreted the scope of the SDG&E Complaint to determine which transactions should be part of the refund proceedings and what time period could be included.

18. Unlike the investigation that arose out of the SDG&E Complaint, though, the investigation that resulted in the price cap at issue here was initiated *sua sponte* by the Commission pursuant to its FPA section 206⁴⁵ authority. Because this investigation and the ensuing mitigation measures were not tied to the SDG&E Complaint that triggered the refund proceeding, the Commission defined the scope of its own investigation and the ensuing remedy. In doing so, as discussed above,⁴⁶ the Commission unambiguously limited the scope of transactions covered by the prospective mitigation measures to spot market sales. In the April 26, 2001 Order, the Commission announced that it was instituting "an investigation into the rates, terms and conditions of public utility sales for resale of electric energy in interstate commerce in the WSCC other than sales through the California ISO markets, to the extent that such sales for resale involve: (1) electric energy sold in *real-time spot markets (i.e. up to 24 hours in advance)*; and (2) take place when contingency reserves (as defined by the WSCC) for any control area fall below 7 percent."⁴⁷ In the June 19, 2001 Order, as a result of the investigation instituted in the

thwart the finality and repose that are essential to administrative efficiency and are strongly discouraged." *Entergy Nuclear Operations, Inc. v. Consolidated Edison Co. of New York, Inc.*, 112 FERC ¶ 61,117, at P 12 (2005). *See also EPIC Merchant Energy NJ/PA, L.P., SESCO Enterprises, L.L.C., and Coaltrain Energy L.P. v. PJM Interconnection, L.L.C.*, 131 FERC ¶ 61,130 (2010) (dismissing as an impermissible collateral attack a complaint that merely sought to re-litigate the same issues as raised in the prior case citing no new evidence or changed circumstances).

⁴⁴ Cal Parties Answer at 9.

⁴⁵ 16 U.S.C. § 824e (2006).

⁴⁶ *See supra* P 13.

⁴⁷ April 26, 2001 Order, 95 FERC ¶ 61,115 at 61,351 (emphasis added).

April 26, 2001 Order, the Commission prescribed “price mitigation for spot markets throughout the West, including California.”⁴⁸ 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.”⁴⁹ In light of the procedural distinctions between the origins of the refund proceedings and this proceeding, the scope of the SDG&E Complaint is not relevant to this proceeding. Likewise, because the scope of the SDG&E Complaint does not define the scope of the prospective mitigation measures at issue here, the Ninth Circuit’s holdings in *CPUC* regarding exchange and multi-day transactions do not require us to subject exchange transactions to the price cap established in the June 19, 2001 Order.

19. Moreover, the discussion regarding exchange transactions in *CPUC* applies only to transactions that took place during the Refund Period, which ended on June 20, 2001.⁵⁰ Specifically, the Ninth Circuit held in *CPUC* that the Commission’s “failure to exercise its broad remedial discretion to analyze exchanges of power *during the Refund Period*,” was an abuse of discretion.⁵¹ The Refund Period ended on June 20, 2001,⁵² whereas the transactions at issue in this proceeding all occurred after June 20, 2001. *CPUC* did not address exchange transactions during the Post-Refund Period. Indeed, on remand, the Commission expressly limited reconsideration of refunds related to multi-day and exchange transactions that took place during the Refund Period.⁵³ Thus, we find that *CPUC* does not invalidate the Commission’s limitation of the Post-Refund Period mitigation measures to spot market transactions. Exchange and multi-day transactions are not spot market sales, so they are not subject to the price cap.

⁴⁸ June 19, 2001 Order, 95 FERC ¶ 61,418 at 62,546.

⁴⁹ *Id.* at 62,556.

⁵⁰ See *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 96 FERC ¶ 61,120 (2001).

⁵¹ *CPUC*, 462 F.3d at 1060 (emphasis added).

⁵² See, e.g., CPUC Remand Order, 129 FERC ¶ 61,147 at P 4.

⁵³ *Id.* P 4, 25-30. We note that the CPUC Remand Order also established a trial-type hearing to develop a record on the issue of possible relevant tariff violations prior to October 2, 2000, but did not consider the extension of the Refund Period beyond June 20, 2001.

20. Even if the Powerex exchange transactions are spot market sales subject to the price cap, the Commission has discretion in shaping an appropriate remedy⁵⁴ and will not impose any refund liability because we find that it was reasonable for Powerex to have relied on the price cap of \$108.49/MWh stated in the June 19, 2001 Order. When the price stated in that order was informally questioned via the CAISO Market Notices, Powerex sought clarity as to how it should proceed by seeking further guidance from Commission staff. Powerex has presented evidence in the current proceeding to indicate that its reliance on the \$108.49 cap was based explicitly on informal Commission staff guidance. Even though informal staff guidance is not binding,⁵⁵ we find that Powerex exercised diligence in its attempt to ascertain the correct price cap. Under the circumstances, therefore, we find Powerex's reliance on the June 19, 2001 Order to be reasonable and find that ordering refunds for sales made in accordance with that reliance would be inequitable. As discussed further below, we similarly reject Cal Parties' argument that no seller can credibly claim to have acted in good faith and reasonable reliance on the price stated in the June 19, 2001 Order.⁵⁶

C. Cash Spot Market Sales

1. Procedural and Factual Sufficiency of the June 9, 2009 Filing

21. Allegheny and Shell argue that the June 9, 2009 Filing should be dismissed as an impermissible attempt to present a complaint in the form of a motion. According to Allegheny, Commission rules and precedent require a party seeking refunds to file a formal complaint.⁵⁷ Allegheny contends that the complaint process is necessary to allow

⁵⁴ See, e.g., *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, at 159 (D.C. Cir. 1967) (“Finally, we observe that the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies and sanctions, including enforcement and voluntary compliance programs in order to arrive at maximum effectuation of Congressional objectives.”) (*Niagara Mohawk*).

⁵⁵ 18 C.F.R. § 388.104 (2010).

⁵⁶ See *infra* P 48.

⁵⁷ Allegheny July 16, 2009 Answer to Cal Parties Motion for Refunds in Docket No. EL01-68-000 at 4 (Allegheny Response) (citing Rule 206 of the Commission's Rules of Practice and Procedure (“Any person may file a complaint seeking Commission action against any other person alleged to be in contravention or violation of any ... order ...”), and *Consolidated Edison Company of New York, Inc. v. Public Service Electric and Gas*

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a respondent to file a formal response, including the assertion of any applicable affirmative defenses. Allegheny notes that if it were filing such a response, it would assert the affirmative defense of release, arguing that Cal Parties' claims against Allegheny are precluded by a 2003 settlement agreement.⁵⁸

22. TransAlta argues that the June 9, 2009 Filing should be treated as a complaint, and asserts that Cal Parties have failed to fulfill the Commission's requirements for filing a complaint, including the obligations to submit a prima facie case in support of the allegations made in the filing and to provide respondents with adequate notice of the factual basis for the allegations. Thus, TransAlta requests that the Commission dismiss the complaint for failure to satisfy either the requirements of Rule 206 or Rule 212. Likewise, Allegheny, TransCanada, and Shell complain that the June 9, 2009 Filing is factually insufficient, whether evaluated as a complaint or as a motion. Allegheny and Shell claim that due to the absence of details on specific spot market transactions that allegedly violated the price cap, they have been unable to discern how Cal Parties arrived at the numbers set forth in the motion. Regardless of the level of specificity in the June 9, 2009 Filing, Allegheny, denies having made any spot market sales to CERS above the \$91.87/MWh cap,⁵⁹ and Shell denies that Coral made sales to CERS in violation of its contemporaneous understanding of the price cap.⁶⁰

23. Powerex refutes the validity of Cal Parties' allegations regarding the Powerex cash transactions. In addition to refuting Cal Parties' claim that the applicable cap was \$91.87/MWh, and not \$108.49, as stated in the June 19, 2001 Order, Powerex also insists that the only two cash transactions identified by Cal Parties that exceed the \$108.49 cap are actually part of the monetized return of exchange energy for transactions lasting more than 24 hours. Thus, Powerex concludes that these transactions must be excluded from Cal Parties' request for refunds as non-spot market sales. Moreover, Powerex submits that an independent review of its own transaction data reveals only one sale exceeding the

Company, 120 FERC ¶ 61,161, at 61,704 (2007) (rejecting request for refunds incorporated in informational report and directing ConEd to file a new complaint if it wished to claim refunds for violations of a protocol)).

⁵⁸ *Id.* at 4.

⁵⁹ Allegheny Response at 6-7.

⁶⁰ *Id.* at 3-5. However, Shell acknowledges that Coral Power made sales at prices up to \$105/MWh prior to the hour ending at 10:00 a.m. on June 21, 2001. The alleged confusion surrounding the actual amount of the applicable price cap is discussed in section C.3. below.

price cap that could have been a spot market sale. According to Powerex, the refund liability for this lone transaction amounts to \$260.40. Powerex states that it is willing to pay this amount, plus interest, in order to resolve the matter.⁶¹

24. Cal Parties reject the argument that a complaint is the only permissible means to seek the requested relief. Cal Parties contend that when an issue arises in an established proceeding, a motion is an appropriate procedural vehicle for seeking relief. Cal Parties characterize the sellers' arguments for dismissal on procedural grounds as "little more than procedural gamesmanship designed to delay and unduly complicate" Cal Parties' request.⁶² Cal Parties argue that the June 9, 2009 Filing is tied directly to the June 19, 2001 Order and that the docket in that case remains open. Thus, Cal Parties maintain that there is no need to initiate a new proceeding in order to fairly and efficiently resolve the issue presented.

25. Moreover, Cal Parties assert that the cases cited by the sellers as authority for the necessity of a complaint are misplaced because they are based on the Commission's policy of discouraging requests for affirmative relief in pleadings that are traditionally dedicated to other purposes, such as protests, comments, and motions to intervene. Cal Parties contend that its June 9, 2009 Filing is a straightforward request for affirmative relief and thus presents none of the potential for mischief that may exist when a complaint is buried in another type of pleading. In addition, Cal Parties dismiss the sellers' claims that they were prejudiced by the form of the June 9, 2009 Filing, observing that the sellers have raised the same issues and defenses in opposition to the June 9, 2009 Filing, such as raising the affirmative defenses of laches and release, as they could have raised in response to a complaint.⁶³

26. Finally, Cal Parties assert that their June 9, 2009 Filing is sufficiently detailed and supported to satisfy the Commission's requirements for motions. Cal Parties states that the refunds requested represent the "precise monetary difference, based on a detailed review of CERS' purchase prices,"⁶⁴ between the price cap established by the Commission and the price actually charged to CERS during the Post-Refund Period. Cal Parties argue that the Commission's rules contain no specificity requirement that the backup documents and data be filed with a motion. Rather, Cal Parties assert that the

⁶¹ Powerex Response at 10-15.

⁶² Cal Parties Answer at 11.

⁶³ *Id.* at 12-13.

⁶⁴ *Id.* at 14-15.

sellers have the data, or were free to request the data, to verify the calculations. In addition, Cal Parties submit that even when judged as a complaint, the June 9, 2009 Filing satisfies the Commission's complaint requirements.⁶⁵

27. In its answer to the Cal Parties Answer, Allegheny disputes the validity of the cash transaction data provided by Cal Parties and avers that all of Allegheny's sales were compliant with the applicable price caps during the Post-Refund Period. First, Allegheny asserts that some of the transactions identified by Cal Parties were not spot market sales subject to the price cap. Second, Allegheny claims that the remaining transactions on Cal Parties' list were negotiated before the price cap went into effect and before the refund effective date. Allegheny contends that because it had no notice of the price cap while it was negotiating the sales at issue, the price cap was inapplicable to those transactions.⁶⁶

2. Timeliness of Request for Refunds

28. Allegheny argues that the request for refunds in the June 9, 2009 Filing is time-barred by the Western Systems Power Pool master agreement (WSPP Agreement).⁶⁷ Allegheny asserts that section 9.4 of the WSPP Agreement requires a party to dispute the accuracy of any bill or payment within two years of the date on which the bill for the transaction was first delivered. Allegheny adds that section 34 of the WSPP Agreement requires any dispute of a transaction under the agreement to be first referred to nonbinding arbitration. Allegheny contends that CERS did not follow these procedures. Rather, Allegheny claims that the only action taken with regard to the alleged overcharges during the Post-Refund Period was a letter sent to Allegheny in 2002 requesting additional transaction details pursuant to section 9.4 of the WSPP Agreement. According to Allegheny, CERS neither timely disputed the amounts charged by Allegheny nor followed the proper procedure for doing so. Thus, Allegheny argues that Cal Parties' waived their contractual rights to dispute the charges for the transactions at issue.⁶⁸

⁶⁵ *Id.*

⁶⁶ Allegheny August 17, 2009 Answer to Cal Parties Answer in Docket No. EL01-68-000 at 2-4 (Allegheny Answer).

⁶⁷ The WSPP Agreement governed the sellers' short-term bilateral sales to CERS. Allegheny Response at 3; PNM Response at 18; Tucson Response at 15.

⁶⁸ Allegheny Response at 2-3.

29. Cal Parties insist that their request for refunds is not time barred under the terms of the WSPP Agreement.

30. Cal Parties argue that Allegheny's claim that the action is time barred under the WSPP Agreement is in error for two reasons. First, Cal Parties assert that because the request for refunds is not a billing dispute, section 9.4 of the WSPP Agreement does not apply. Cal Parties argue that the WSPP Agreement's use of the phrase "accuracy of any bill or payment" limits the applicability the two-year limit to ordinary billing errors. Cal Parties submit that the Commission has recognized a clear difference between disputes involving ordinary billing errors and those involving violations of Commission orders.⁶⁹ Second, Cal Parties assert that even if the two-year time limit applies, CERS complied with the requirements of the WSPP Agreement by sending a letter to Allegheny requesting additional transaction details within the two-year time limit.⁷⁰

31. Allegheny refutes the distinction drawn by Cal Parties between billing errors and violations of Commission orders, claiming that the Commission precedent cited by Cal Parties makes no such distinction. More relevant, according to Allegheny, is a recent Commission order in which the Commission enforced the tariff-specified deadline for challenging invoices, noting that the customer should have protested sooner. Allegheny analogizes that situation to the CERS transactions, arguing that any alleged overcharge would have been clearly visible on the invoices and that CERS should have acted sooner. Allegheny further reject Cal Parties claim that the 2002 letter from CERS was sufficient to toll the two-year dispute limitation. Thus, Allegheny maintains that the June 9, 2009 Filing is time barred.⁷¹

3. Reasonable Reliance on Price Stated in June 19, 2001 Order

32. Powerex contends that it transacted in good faith and reliance on the price cap of \$108.49/MWh stated in the June 19, 2001 Order.

⁶⁹ *Id.* at 17-18 (citing *Carnegie Natural Gas Co.*, 63 FERC ¶ 61,103 (1993) (directing the filing party to change proposed tariff language regarding the time limit on billing disputes from "propriety of said bill" to "amount of said bill" because propriety can be interpreted as applying to more than billing errors)).

⁷⁰ *Id.* at 20. Cal Parties included a copy of the 2002 letter from CERS to Allegheny as Appendix 3 to its Answer to Answers and Motion to Dismiss.

⁷¹ Allegheny Answer at 4-7 (citing *New York Indep. Sys. Operator, Inc.*, 128 FERC ¶ 61,086 (2009) (*NYISO*)).

33. Powerex alleges that the June 9, 2009 Filing misstates the applicable price cap, characterizing Cal Parties' assertion of the \$91.87/MWh cap as an "attempt to rewrite the June 19, 2001 Order in order to benefit from what at the time was significant confusion in the industry about the price cap."⁷² Powerex argues that it should be permitted to rely on the Commission-published price cap for the following reasons: (1) reliance on an expressly statement in a Commission order is justified and should not be subject to retroactive challenge; (2) the Commission issued no order revising or correcting the price cap stated in the June 19, 2001 Order; (3) Cal Parties never sought rehearing or otherwise attempted to challenge the price cap stated in the June 19, 2001 Order; and (4) to the extent the CAISO Market Notices created confusion about the applicable price cap, neither Powerex nor any other seller should be subjected to refunds due to the confusion created by the CAISO.⁷³

34. In addition, Powerex contends that it sought guidance from Commission staff on whether Powerex should continue to rely on the price stated in the June 19, 2001 Order or the price stated in the CAISO Market Notices. Powerex claims that it continued to rely on the \$108.49/MWh cap based on the guidance it received.⁷⁴

35. In response, Cal Parties argue that every seller in this proceeding knew upon issuance of the CAISO Market Notices that the price cap stated in the June 19, 2001 Order was incorrect, and that failure to observe the CAISO's stated price cap placed the seller at risk of refunding any amount over \$91.87/MWh. In particular, Cal Parties assert that Powerex was not entitled to rely on informal guidance provided by Commission staff and has not satisfied the elements of the defense of equitable estoppel.⁷⁵ In addition, according to Cal Parties, the Commission's September 7, 2001 Order put sellers on notice that the June 19, 2001 Order was incorrect and that any amount collected over the \$91.87 price was subject to retroactive refund. Cal Parties contend that the refund requirements

⁷² Powerex Response at 11.

⁷³ *Id.* at 13.

⁷⁴ *Id.* at Appendix B (Bechard Declaration); Appendix B-2 (July 2, 2001 email from Thomas Bechard to Powerex traders).

⁷⁵ Cal Parties Answer at 8, n.25 (citing *UAH-Braendly Hydro Assoc.*, 47 FERC ¶ 61,448, at 62,394 (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."); *Keating v. FERC*, 569 F.3d 427, 434 (D.C. Cir. 2009) (reciting the elements of the equitable estoppel defense, including the requirement that "the government engaged in affirmative misconduct.")).

established in the September 7, 2001 Order also apply to the sellers specified in the June 9, 2009 Filing. Thus, Cal Parties assert that the sellers can make no credible argument that the sellers justifiably relied on the price cap of \$108.49 stated in the June 19, 2001 Order.⁷⁶

4. Lack of Standing

36. Allegheny complains that neither PG&E nor SoCal Edison have standing to seek refunds for Allegheny's sales to CERS, given that neither was a party to any of the sales at issue. Thus, Allegheny contends that PG&E and SoCal Edison have no right to join in the June 9, 2009 Filing.⁷⁷

37. Cal Parties refute the claims regarding Cal Parties' standing to seek refunds for the sales to CERS. First, Cal Parties provide that the California Attorney General has state constitutional and statutory authority to bring actions on behalf of the people of California and the duty to safeguard the public interest.⁷⁸ Cal Parties also assert that the CPUC, as a constitutionally-established California state agency, has a statutory mandate to represent the interests of electric consumers in proceedings before the Commission.⁷⁹ Regarding PG&E and SoCal Edison, Cal Parties offer that both parties have the right to seek refunds for their customers. Therefore, according to Cal Parties, all members of Cal Parties possess the requisite standing to seek refunds for sales made to CERS in violation of the Commission-established price cap.⁸⁰

5. Allegheny Settlement Agreement

38. Allegheny denies that any of its sales to CERS during the Post-Refund Period exceeded the applicable price cap. Further, Allegheny claims that by styling the June 9, 2009 Filing as a motion, rather than filing a new complaint, Cal Parties deprive Allegheny of the right to assert affirmative defenses in its answer. Allegheny asserts that if it were filing a formal response to a complaint it would assert, among other things, that

⁷⁶ Cal Parties Answer at 4-8.

⁷⁷ Allegheny Response at 5.

⁷⁸ Cal Parties Answer at 22 (citing Cal. Const. art. V, § 13; Cal. Gov't. Code § 12511 (2008); Cal. Bus. & Prof. Code § 16700, *et seq.* (2008); Cal. Bus. & Prof. Code § 17200, *et seq.* (2008)).

⁷⁹ *Id.* at 22-23 (citing Cal. Pub. Util. Code § 307 (2008)).

⁸⁰ *Id.* at 23-24.

Cal Parties' claims are precluded by a 2003 settlement agreement between Allegheny and the California State Releasing Parties in Docket No. EL02-60 (Settlement Agreement).⁸¹

39. Cal Parties contend that the Settlement Agreement releases Allegheny only from disputes related to Allegheny's long-term contract with CERS, and not from claims arising out of the short-term bilateral sales that are the subject of the June 9, 2009 Filing. As a result, Cal Parties assert that the releases in the Settlement Agreement have no applicability in the instant proceeding. In addition, Cal Parties argue that the transaction data provided in its answer belie Allegheny's claim that none of Allegheny's sales to CERS exceeded the cap.⁸²

40. Allegheny asserts that Cal Parties have misstated the terms of the Settlement Agreement. Allegheny contends that Cal Parties create an erroneous interpretation of the settlement agreement by quoting from only one of the release provisions. Allegheny points out that Cal Parties neglect to quote the provision that provides for Allegheny and CDWR to release each other from all claims or causes of action "which were alleged, or which could have been alleged."⁸³ Allegheny argues that Cal Parties fail to provide any explanation of why the "could have been alleged" language does not cover the instant claims. Further, Allegheny submits that another provision of the release provides that Cal Parties "waive any right they might otherwise have under California law to argue that their release does not extend to claims they did not know they had at the time of the settlement."⁸⁴ Allegheny asserts that the release language should be construed in a way that precludes Cal Parties' current allegations against Allegheny.⁸⁵

Commission Determination

41. It is well established that the Commission's discretion is at its zenith when fashioning remedies.⁸⁶ In this case, Cal Parties are asking the Commission to fashion a

⁸¹ Allegheny Response at 4.

⁸² Cal Parties Answer at 25-27.

⁸³ Allegheny Answer at 9 (quoting paragraph 4.3 of the settlement agreement).

⁸⁴ *Id.* at 10.

⁸⁵ *Id.* Allegheny adds that in the event the Commission does not reject Cal Parties' claims against Allegheny for any of the other reasons offered, Allegheny reserves the right to further develop this affirmative defense.

⁸⁶ *Niagara Mohawk*, 379 F.2d at 159 ("Finally, we observe that the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily not

remedy for alleged violations of a Commission-established price cap. The Commission is not required to order refunds where there are appropriate equitable reasons not to do so.⁸⁷ The Commission has previously exercised its broad discretion to waive refunds where there was confusion about the rates at issue, due in part to the Commission's own orders.⁸⁸ In *Midwest ISO*, the Commission acknowledged an error in a previous rehearing order in the proceeding, related to a certain rate mismatch, and explained that “[i]n light of the confusion the [s]econd [r]ehearing [o]rder created,” the Commission would not require refunds for a portion of the applicable refund period.⁸⁹ The Commission justified its decision to waive refunds for that period by virtue of the fact that it did not address the rate mismatch comprehensively until after the refund period had already begun. Thus, the Commission determined that no refunds should be due on amounts charged prior to the issuance of the order that addressed the rate mismatch.⁹⁰

42. This case is similar to the situation in *Midwest ISO* in that the Commission erroneously calculated the price cap at \$108.49/MWh in the June 19, 2001 Order. Sellers claim to have relied on the stated cap. Indeed, Powerex states that it received guidance from Commission Staff that Powerex could “assume that \$108.49 was the applicable cap.”⁹¹ Based on that guidance, an email was issued to Powerex traders on July 2, 2001,

to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies and sanctions, including enforcement and voluntary compliance programs in order to arrive at maximum effectuation of Congressional objectives.”); *see also Towns of Concord v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992) (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).

⁸⁷ *Trunkline Gas*, 69 FERC ¶ 61,047 at 61,183.

⁸⁸ *Midwest Indep. Transmission Sys. Operator, Inc.*, 127 FERC ¶ 61,241 (2009) (*Midwest ISO*).

⁸⁹ *Id.* P 41.

⁹⁰ *Id.* P 41-42.

⁹¹ Powerex Response at Appendix B at 2.

notifying the traders that they could continue to use \$108.49 as the cap for its bilateral transactions.⁹² Furthermore, although the CAISO Market Notices stated the cap as \$91.87, the Commission did not acknowledge the discrepancy until the September 7, 2001 Order where it addressed the confusion regarding the applicable cap by stating that \$91.87 was the correct price. Based on the sellers' comments and protests in this proceeding, the price cap stated in the June 19, 2001 Order, like the error in the second rehearing order in the *Midwest ISO* proceeding, appears to have caused confusion among market participants. We find that this confusion justifies a waiver of refunds for at least those transactions that took place between June 20, 2001 and September 7, 2001, the period when the sellers could have been reasonably relying on the higher price cap.⁹³ Because, however, the record contains no evidence of overcharges occurring after September 7, 2001, we will deny Cal Parties' request for refunds for any of the cash sales that took place during the Post-Refund Period.

43. We reject Cal Parties argument that the September 7, 2001 Order forecloses any credible argument that sellers reasonably relied on the \$108.49 cap. In a footnote in the September 7, 2001 Order, which rejected several cost justification filings, the Commission noted that, "[t]he maximum clearing price identified in the June 19 Order is incorrect. The maximum clearing price identified on the ISO's website reflects the methodology of the June 19 Order and is the correct price (without the adder for credit risk)." ⁹⁴ The Commission further declared that to the extent other sellers had transactions in excess of the cap, and had not filed cost justifications, they were not entitled to receive more than the mitigated price (\$91.87/MWh) for such transactions.⁹⁵ However, the issue of reasonable reliance was not considered because the filings at issue were dismissed as untimely and/or unsupported.⁹⁶ Under the circumstances, therefore,

⁹² *Id.* at Appendix B-2.

⁹³ Based on the information provided in the Cal Parties Answer, it appears that none of the cash sales at issue took place after September 7, 2001. Cal Parties have provided no details regarding the exchange transactions at issue, but transaction records provided by Powerex indicate that the monetized exchange transactions that allegedly violated the price cap, which comprise the bulk of the refund dollars requested, occurred prior to September 7, 2001. The record contains no evidence regarding the dates of the pure exchange transactions.

⁹⁴ September 7, 2001 Order, 96 FERC ¶ 61,254 at 62,002 n.9.

⁹⁵ *Id.* at 62,002.

⁹⁶ *Id.* at 62,001, 62,002.

we find that the September 7, 2001 Order does not preclude consideration of the sellers' reasonable reliance in the overall balance of equities. We also find that Cal Parties have misapplied the precedent regarding equitable estoppel. The defense of equitable estoppel is not relevant in this case because the Commission has not found any violations of the June 19, 2001 Order and, therefore, is not trying to enforce any type of penalty or other action against the sellers. Accordingly, there is no Commission action to estop. Therefore, the sellers need not have satisfied the elements of equitable estoppel to demonstrate their reasonable reliance on the June 19, 2001 Order.

44. Finally, because we are dismissing and/or denying the June 9, 2009 Filing for the reasons discussed above, we will not further address the alleged procedural defects of the June 9, 2009 Filing, the question of Cal Parties standing to bring this claim, the sellers' claims that the action is time-barred by the statute of limitations in the WSPP Agreement, or Allegheny's claims regarding the preclusive effect of their settlement agreement.

The Commission orders:

(A) Cal Parties' request for refunds related to exchange transactions is hereby dismissed with prejudice, as discussed in the body of this order.

(B) Cal Parties' request for refunds for all other sales to CERS during the Post-Refund Period is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.