149 FERC ¶ 61,116
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator Corporation and the California Power Exchange	Docket No.	EL00-95-248

OPINION No. 536

ORDER AFFIRMING FACTUAL FINDINGS, DIRECTING COMPLIANCE FILING AND ORDERING REFUNDS

(Issued November 10, 2014)

Table of Contents **Page Numbers**

I. Introduction

1. This case is before the Commission on exceptions to an Initial Decision issued February 15, 2013 by the Administrative Law Judge (Presiding Judge).[1] This case concerns the Remand Proceeding established by the Commission pursuant to the Ninth Circuit decision in *CPUC v. FERC*[2] expanding the scope of the California Refund Proceeding to include forward market transactions and energy exchanges entered into during the Refund Period (October 2, 2000 – June 21, 2001), and, pursuant to section 309 of the Federal Power Act,[3] transactions entered into during the Summer Period (May 1, 2000 – October 2, 2000) prior to the Refund Effective Date of October 2, 2000. In this order, the Commission partially affirms factual findings in the Initial Decision, vacates certain findings, dismisses settled parties and non-jurisdictional entities from the

[1] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 142 FERC ¶ 63,011 (2013) (Initial Decision).

[2] *Pub. Util. Comm'n of the State of Cal. v. FERC*, 462 F.3d 1027, 1061 (9th Cir. 2006) (*CPUC Decision*).

[3] 16 U.S.C. § 825h (2012).

proceeding, directs a compliance filing, and orders Constellation NewEnergy, Inc. (Constellation) to refund $2,845,024 plus interest, as discussed below. [4]

2. To determine whether the transactions executed by the Indicated Respondents[5] and APX Inc. (APX) constituted tariff violations, we have examined whether there was a consistent pattern of market activities indicating, due to their sheer volume and frequency, and other simultaneously undertaken activities, that a seller engaged in the behavior that rendered the transactions at issue unjustifiable as a legitimate business practice. To assess the volume and frequency of such behavior, we used the marginal cost-based proxy price screens developed by the California Parties[6] as a measure of just and reasonable rates. We find that this proxy price methodology produces a conservative

---

[4] The transactions addressed in this order occurred during the 2000-2001 energy crisis in the West, which predated the anti-manipulation provisions of the Energy Policy Act of 2005 (EPAct 2005). Pub. L. No. 109-58, § 1283, 119 Stat. 594 (2005) (adding new section 222 to the Federal Power Act). At the time of the crisis, neither the Commission's regulations nor its grants of market-based-rate authority contained market behavior rules prohibiting market manipulation or defining prohibited market manipulation. This situation, in fact, led the Commission to act after the Western energy crisis to address market behavior more directly. *See, e.g., 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)(codifying the EPAct 2005 anti-manipulation authority). The analysis and the determinations made in this proceeding are therefore fact-specific and limited to the facts and circumstances of this particular case.

[5] Hafslund Energy Trading L.L.C. (Hafslund); Illinova Energy Partners, Inc. (Illinova); MPS Merchant Services, Inc. (f/k/a Aquila Power Corporation) (MPS); Koch Energy Trading, Inc. (Koch); and Shell Energy North America (US), L.P. (f/k/a Coral Power, L.L.C.) (Shell).

[6] The People of the State of California, *ex rel.* Kamala D. Harris, Attorney General of the State of California; the Public Utilities Commission of the State of California; Pacific Gas and Electric Company (PG&E); and Southern California Edison Company (SoCal Edison).

estimate of what the market price would have been in a specific hour at issue absent a tariff violation, and we note the lack of any specific evidence showing that a market-based proxy price as an evaluative measure is unjust and unreasonable. Further, we adopt the California Parties' price effect analysis, which evaluated each tariff violation to determine whether the transaction had a price-increasing effect on the market clearing price. Accordingly, we find that the Indicated Respondents and APX engaged in the below identified tariff violations that affected the market clearing price and the overcharges and excess payments they received as a result of engaging in these tariff violations are subject to disgorgement.[7] We therefore direct the Indicated Respondents and APX to submit, within 60 days of the date of issuance of this order, a compliance filing providing calculations of their excess payment and overcharges due for disgorgement based on the California Parties' marginal cost proxy-based methodology. We will also allow the Indicated Respondents and APX to provide evidence of cost offsets that they may be entitled to, as discussed below.

3. With respect to specific transactions addressed in the Initial Decision, we find that the Indicated Respondents and APX engaged in the following types of tariff violations that affected the market clearing price: Types II and III Anomalous Bidding, False Exports, False Load Scheduling, and sale of ancillary services without market-based rate authorization. Specifically, we find that: (1) Shell engaged in Types II and III Anomalous Bidding, as well as False Exports and False Load Scheduling, and these tariff violations impacted the market clearing price; (2) MPS engaged in False Exports and False Load Scheduling, and these tariff violations impacted the market clearing price; (3) APX engaged in Type III Anomalous Bidding and False Load Scheduling, and these tariff violations impacted the market clearing price; (4) Illinova and Hafslund engaged in False Load Scheduling and their tariff violations impacted the market clearing price; (5) Koch engaged in sale of ancillary services without market-based rate authorization and this tariff violation impacted the market clearing price.

4. Finally, we dismiss from the proceeding several parties based on their settlement of the claims by the California Parties against them. We also dismiss the Bonneville

---

[7] We reiterate that the market conduct at issue in the instant proceeding took place before the enactment of the EPAct 2005 that gave the Commission authority to prohibit energy market manipulation. Under Order No. 670 which codified the EPAct 2005 anti-manipulation authority, fraud is a question of fact to be determined by all the circumstances of a case, not by a mechanical rule limiting manipulation to tariff violations. *See In Re Make-Whole Payments & Related Bidding Strategies*, 144 FERC ¶ 61,068, at P 83 (2013) *(*citing *Prohibition of Energy Market Manipulation*, Order No. 670, FERC Stats. & Regs. ¶ 31,202, at P 50 (2006)).

Power Administration (BPA) and Western Area Power Administration (WAPA) from the proceeding. We find that their dismissal is appropriate because the Commission lacks authority to order refunds from them. However, as discussed further below, we do not vacate the factual findings made by the Presiding Judge regarding BPA and WAPA's conduct.

II. Background

A. Procedural History

5. This case began in August 2000 with San Diego Gas & Electric Company's (SDG&E) complaint filed under section 206 of the Federal Power Act (FPA), 16 U.S.C. § 824e, seeking "an emergency order capping at $250 per MWh the prices at which sellers subject to [the Commission's] jurisdiction may bid energy or ancillary services" into the California Independent System Operator Corporation (CAISO) and the California Power Exchange Corporation (CalPX) markets.[8] In an August 2000 order, the Commission instituted a hearing proceeding (Refund Proceeding) "to investigate the justness and reasonableness of the rates and charges of public utilities that sell energy and ancillary services to or through" the CAISO and CalPX markets,[9] and set October 2, 2000 as the Refund Effective Date.

6. The Commission established a process for calculating refunds related to transactions in the spot markets operated by CAISO and Cal PX during the Refund Period (October 2, 2000 - June 20, 2001).[10] Under this approach, all sales of 24 hours or less were mitigated.[11] The mitigated sales included "spot transactions in the organized markets operated by the [CA]ISO and [Cal] PX during the Refund Period"[12] (spot market transactions) and out of market purchases "made by [CA]ISO from sellers outside the

---

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

[9] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs*., 92 FERC ¶ 61,172, at 61,603 (2000).

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

[11] *Id.* at 61,517.

[12] *Id*. at 61,499.

[CA]ISO single price auction market within 24 hours or less of delivery"[13] (OOM spot transactions). Both spot market transactions and OOM spot transactions were mitigated.[14]

7. To mitigate these transactions, the Commission used the Mitigated Market Clearing Price (MMCP). The MMCP serves as a proxy price based on the marginal cost of the most expensive unit dispatched to serve load in CAISO's real-time imbalance energy market.[15] To calculate the MMCPs for each hour of the Refund Period and the refunds owed, the Commission established an evidentiary hearing.[16] The Commission then reiterated that only spot market transactions and OOM spot transactions were subject to refund, not transactions in excess of 24 hours, nor energy exchange transactions.[17]

8. To examine whether any entity had 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, the Commission instituted a staff fact-finding investigation pursuant to its investigative authority under 18 C.F.R. § 1b.1 *et seq.*[18]

9. After rehearing requests to reconsider the scope of the Refund Proceeding were denied,[19] judicial review was sought before the United States Court of Appeals for the

---

[13] *Pub. Util. Comm'n of the State of Cal. v. FERC*, 462 F.3d 1027, 1051 (9th Cir. 2006) (*CPUC Decision).*

[14] *See San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 96 FERC ¶ 61,120 at 61,515-16, *affirmed in CPUC Decision*, 462 F.3d at 1051-53.

[15] *See San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 97 FERC ¶ 61,275 (2001).

[16] 96 FERC ¶ 61,120 at 61,499.

[17] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 102 FERC ¶ 61,317, at PP 153-154 (2003) (*Refund Order*).

[18] *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 98 FERC ¶ 61,165, at 61,614 (2002). [19] *San Diego Gas & Elec. Co. v. Sellers of Ancillary Servs.*, 105 FERC ¶ 61,066 (2003).

[19] *San Diego Gas & Elec. Co. v. Sellers of Ancillary Servs.*, 105 FERC ¶ 61,066 (2003).

Ninth Circuit (Ninth Circuit). The Ninth Circuit remanded the case to the Commission stating that the Commission erroneously excluded FPA section 309[20] relief for tariff violations that had occurred prior to the Refund Effective Date of October 2, 2000 (Summer Period).[21] In addition, the Ninth Circuit expanded the scope of the Commission's proceeding for the Refund Period to include forward market transactions in excess of 24 hours, and energy exchanges.[22] "Forward market transactions" in this proceeding refer to transactions of duration longer than 24 hours negotiated during the Refund Period outside CAISO's organized markets between CAISO and one of the respondents.[23]

10. On remand**,** for the Summer Period the Commission established an evidentiary, trial-type hearing covering the Summer Period and the Refund Period, instructing the Administrative Law Judge (Presiding Judge) to make factual determinations on three issues with regard to spot market transactions[24] during the Summer Period:[25] (1) which market practices and behaviors constitute a violation of the then-current CAISO, CalPX,

---

[20] Section 309 authorizes the Commission "to use means of regulation not spelled out in detail, provided the agency's action conforms with the purposes and policies of Congress and does not contravene any terms of the Act." *See Niagara Mohawk Power Corp. v. FERC*, 379 F.2d 153, 158 (D.C. Cir. 1967) (citing *Pub. Serv. Comm'n of State of New York v. FPC*, 327 F.2d 893, 896-97 (D.C. Cir. 1964)).

[21] *CPUC Decision*, 462 F.3d at 1046-48.

[22] In this proceeding, the Commission has defined an energy exchange transaction as "a non-monetary transaction where a party provides energy to CAISO and CAISO pays back the energy in kind in subsequent hours at an exchange ratio." Refund Order, 102 FERC ¶ 61,317 at P 153; *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs .*, 129 FERC ¶ 61,147, at P 29 (2009) (Remand Order). In this order, the Commission will not address the Presiding Judge's finding on the exchange transactions for the reasons explained in P 24.

[23] *CPUC Decision*, 462 F.3d at 1056-57.

[24] Defined as "sales that are 24 hours or less and that are entered into the day of or day prior to delivery." *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 95 FERC ¶ 61,418, at 62,545 n.3 (2001); *see also CPUC Decision*, 462 F.3d at 1038.

[25] The Summer Period is May 1, 2000 to October 1, 2000.

and individual sellers' tariffs and Commission orders; (2) whether any of the sellers named as respondents in this proceeding engaged in such tariff violations; and (3) whether any such tariff violations affected the market clearing price.[26] The Commission specified that participants may submit evidence with respect to violations of a provision in the then-current CAISO and CalPX tariffs, known as the Market Monitoring and Information Protocol (MMIP), that barred all participants in the CAISO and CalPX markets from engaging in gaming or anomalous behavior in those markets.[27] The Remand Order also defined which categories of the MMIP violations would be addressed in the hearing, which the Commission later expanded on rehearing.[28] In addition, the Commission stated that when it receives from the Presiding Judge factual determinations concerning which sellers committed tariff violations that impacted the market clearing prices, the Commission would decide what further steps should be taken.[29]

11. For the Refund Period, the Commission reopened the record and instructed the Presiding Judge to determine which of the forward market transactions were unjust and unreasonable and calculate refunds based on the Commission–established MMCP or any other methodology.[30] The Commission also reopened the record and directed the Presiding Judge to "to propose a refund methodology applicable to energy exchange transactions and to calculate the refunds."[31]

12. On August 27, 2012, a partial initial decision was issued in this matter granting motions for summary disposition that were filed by Avista Corporation (Avista Corp.) (d/b/a Avista Utilities, f/k/a Washington Water Power), Mieco, Inc. (Mieco), and Shell Martinez Refining Company (Shell Martinez).[32] The partial initial decision dismissed

---

[26] Remand Order, 129 FERC ¶ 61,147, at P 3; *order on reh'g*, 135 FERC ¶ 61,183, at P 31 (2011) (Rehearing Order).

[27] Remand Order, 129 FERC ¶ 61,147 at P 20.

[28] *Id*. PP 20-22; Rehearing Order., 135 FERC ¶ 61,183, at PP 26-28.

[29] Remand Order, 129 FERC ¶ 61,147 at PP 3, 24; *see also* Rehearing Order, 135 FERC ¶ 61,183 at P 3.

[30] Remand Order, 129 FERC ¶ 61,147 at P 4.

[31] *Id*. P 30.

[32] *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 140 FERC ¶ 63,015 (2012).

these parties on the ground that no issue of material fact remains against them with respect to any claims.[33] The Commission affirmed this partial initial decision.[34]

B. The Initial Decision

13. After an extensive hearing that permitted both sides to present evidence, on February 15, 2013, the Presiding Judge issued the Initial Decision covering the Summer Period and the Refund Period. For the Summer Period, the Presiding Judge found that 34,020 transactions constituted tariff violations, 20,000 of which affected the market clearing prices. At the end of the long process, the tariff violations found to have affected the market clearing price included Types II and III Anomalous Bidding, False Exports, False Load Scheduling/Overscheduling, and Sales of Ancillary Services without Market-Based Rate Authority. To reach this conclusion, the Presiding Judge adopted the California Parties' marginal cost proxy-based screens and price impact analysis.

14. With regard to the Refund Period, the Initial Decision examined which of the forward market transactions should be mitigated and calculated refunds based on the Commission-established MMCP methodology. The Initial Decision also calculated refunds owed from the energy exchange transactions, using the Commission-established MMCP methodology.

C. Briefs on Exceptions and Opposing Exceptions, and Procedural Motions

15. The Indicated Respondents, Hafslund, MPS and Illinova, WAPA, Avista Energy, Inc. (Avista Energy), Powerex Corporation (Powerex), Commission Trial Staff (Trial Staff), TransAlta Energy Marketing (TransAlta), APX, Shell, Constellation, Salt River Project Agricultural Improvement and Power District (Salt River), CAlifornians for Renewable Energy, Inc. (CARE), and BPA filed timely briefs on exception. The California Parties filed a Brief Opposing Exceptions on June 7, 2013.[35]

---

[33] *Id*. P 1.

[34] *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 141 FERC ¶ 61,088 (2012).

[35] On February 22, 2013, the Commission granted Trial Staff's Motion for Extension of Time to file briefs on exceptions and briefs opposing exceptions. *See* Notice of Extension of Time, Docket No. EL00-95-248 (Feb. 22, 2013).

16. After the Initial Decision was issued, the Indicated Respondents filed a Request for Clarification of Further Procedures (Motion for Clarification), asking the Commission to clarify that it will not address remedies in its order on the Initial Decision. Indicated Respondents requested that the Commission establish a procedural schedule to afford participants a full opportunity to address the evidence relevant to the consideration of remedies, in briefing and possibly with further evidentiary submissions.[36]

17. Subsequent to the Indicated Respondents' Motion, the California Parties filed a Motion on Overcharges and Refunds, urging the Commission to order disgorgement of excess payments received by the Respondents from the sales of energy and ancillary services during the Summer Period and the Refund Period. On June 7, 2013, the Indicated Respondents filed a Motion for Oral Argument, requesting an opportunity to have an oral argument before the Commission.[37]

III. Scope of the Order

A. Dismissal of Settled Parties

18. Prior to issuance of the Initial Decision, on February 1, 2013, the Commission approved an uncontested settlement between the California Parties and California Polar Power Brokers, LLC (Cal Polar) that resolved all claims for refunds and other remedies between Cal Polar and the California Parties relating to Cal Polar's transactions in the Western energy markets during the period January 1, 2000 through June 20, 2001.[38] The Presiding Judge noted the settlement and declined to adjudicate the impact of this settlement on the instant proceeding and deferred the issue to the Commission.[39] Since the date of the issuance of the Initial Decision, a number of parties have reached settlement. The Commission has approved settlement agreements of the California Parties with Powerex Corp, [40] Avista Energy,[41] TransAlta,[42] and the California

---

[36] Indicated Respondents Motion for Clarification at 2 and 4.

[37] Indicated Respondents Motion for Oral Argument at 2-3.

[38] *See San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 142 FERC ¶ 61,083, at P 3 (2013).

[39] Initial Decision, 142 FERC ¶ 63,011 at P 10, n.26.

[40] *See San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 145 FERC ¶ 61,015, *reh'g denied*, 145 FERC ¶ 61,193 (2013).

Department Water Resources State Water Project (SWP),[43] settling all claims pertaining to the transactions involving these parties that were at issue in the instant proceeding. The entities that settled with the California Parties are therefore dismissed as Respondents from this proceeding. This order will not address the Initial Decision's findings pertaining to transactions by the parties that have settled.

B. Dismissal of Non-Jurisdictional Entities

19. The Initial Decision concluded that among the Respondents found to have engaged in tariff violations that affected the market clearing prices during the Summer Period were two non-jurisdictional entities, BPA and WAPA.[44] In addition, the Presiding Judge concluded that BPA is liable for refunds for both forward market transactions and energy exchanges during the Refund Period, and WAPA is liable for refunds for forward market transactions.[45] The Presiding Judge made no findings on the jurisdictional status of these parties. Now BPA and WAPA request to be dismissed from the proceeding, arguing that the Commission has no authority over non-jurisdictional entities.

20. On rehearing of the Remand Order, multiple parties requested to be dismissed from the proceeding as Respondents and the Commission granted some of those requests, but BPA and WAPA did not make such requests in their rehearing requests.[46] Instead, BPA and WAPA made three requests for summary disposition to the Presiding Judge, claiming that the Commission lacked jurisdiction over them to order refunds and thus, they should be dismissed, and these requests were denied.[47] The Presiding Judge

---

[41] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 147 FERC ¶ 61,153 (2014).

[42] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 147 FERC ¶ 61,154 (2014).

[43] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 149 FERC ¶ 61,115 (2014).

[44] Initial Decision, 142 FERC ¶ 63,011 at P 10.

[45] *Id*.[46] Rehearing Order , 135 FERC ¶ 61,183 at PP 33, 39.

[46] Rehearing Order , 135 FERC ¶ 61,183 at PP 33, 39.

[47] Order Denying Motion for Summary Disposition for Lack of Jurisdiction, Docket No. EL00-95-248 (November 1, 2012); and Order Denying Motions for

(continued …)

determined that he was not ordering a refund in this proceeding, so the non-jurisdictional entities were not entitled to summary judgment. The Presiding Judge also added in his order denying motion for reconsideration that "when this case is presented to the Commission, BPA and WAPA may more appropriately raise their challenge to jurisdiction."[48] A request for interlocutory appeal of the Presiding Judge's decision on the motion was denied on procedural grounds for failure to demonstrate extraordinary circumstances, in accordance with Rule 715(c)(5) of the Commission's Rules of Practice and Procedure.[49]

21. In their briefs on exception, WAPA and BPA request to be dismissed from the proceeding on jurisdictional grounds, and they ask the Commission to vacate the Initial Decision to the extent it makes findings pertaining to their transactions.[50] In response, the California Parties argue that the Commission should keep the non-jurisdictional entities in the proceeding to establish overcharges and excess payments these entities received from the transactions at issue. The California Parties explain that they have obtained from the Court of the Federal Claims (COFC) a judgment for declaratory relief finding that BPA and WAPA are contractually obligated to pay overcharges received from the Summer Period transactions, and the forward market transactions and energy exchanges during the Refund Period, once the Commission "corrects the prices to just and reasonable prices" for these sales at issue.[51] Therefore, the California Parties argue that the Commission should proceed with the determination of the remedy for the transactions involving BPA and WAPA.[52]

22. We find that at the current stage of the proceeding, where the Commission will be ordering a remedy for the Summer Period and refunds for the Refund Period, it is

---

Summary Disposition, Docket No. EL 00-95-248 (Feb. 14, 2012); ALJ Determination on Motion for Emergency Clarification, Docket No. EL00-95-248 (Aug. 1, 2011).

[48] Order Denying Motion for Reconsideration at P 5 (December 4, 2012).

[49] Notice of Determination by the Chairman, Docket No. EL00-95-248 (Aug. 29, 2011).

[50] WAPA Brief on Exceptions at 19-30; BPA Brief on Exceptions at 17.

[51] *See* California Parties Motion on Overcharges and Refunds at 33-34 n.104 (citing *Pac. Gas and Elec. Co. v. U. S.*, Nos. 07-157C, *et al.*, slip op. at 2 (Fed. Cl. Apr. 2, 2013)). *See also Pac. Gas and Elec. Co. v. U. S.*, 105 Fed. Cl. 420 (2012).

[52] California Parties Motion on Overcharges and Refunds at 33-34 n.104.

appropriate to dismiss the non-jurisdictional entities from the proceeding. Because the Commission is precluded from ordering a remedy for the transactions involving BPA, and WAPA,[53] there is no reason for these entities' continued participation at this stage of the proceeding. BPA and WAPA are therefore dismissed from the proceeding.

23. However, we will not vacate the Initial Decision's findings regarding the transactions involving these non-jurisdictional entities, as there are no grounds to do so. The Commission precedent is clear that while the Commission is precluded from ordering these entities to pay refunds,[54] the Commission may consider the facts and circumstances of governmental entities as part of its investigation of jurisdictional rates.[55] We also reject the California Parties' argument that the Commission should keep the non-jurisdictional entities in the proceeding so that the California Parties may obtain relief pursuant to the COFC's declaratory relief order. The Commission has no authority to order relief for transactions involving the non-jurisdictional parties in this proceeding, and the contract law-based action the California Parties are currently pursuing against BPA and WAPA in the COFC has no bearing on the Commission's decision.

C. Remaining Respondents

24. As a result of the settlements and the dismissal of the non-jurisdictional entities, there remains in the Refund Period portion of the proceeding only one Respondent, Constellation. All the respondents that the Initial Decision found to be liable for refunds from the energy exchange transactions have settled or are being dismissed as non-jurisdictional entities. Accordingly, this order will not address energy exchange transactions.

---

[53] *BPA v. FERC*, 422 F.3d 908 (9th Cir. 2005).

[54] FPA section 201(f), 16 U.S.C. § 824(f) (2004), *BPA v. FERC*, 422 F.3d 908 (9th Cir. 2005); *see also Redding v. FERC*, 693 F.3d 828 (9th Cir. 2012).

[55] *FPC v. Conway Corp.*, 426 U.S. 271, 276-82 (1976) (holding FPC had the authority to consider non-jurisdictional transactions in its evaluation of jurisdictional rates); *Pac. Gas & Elec. Co. v. FERC*, 306 F.3d 1112, 1119 (D.C. Cir. 2002) (holding that FPA section 201(f) does not justify FERC's failure to review a municipality's costs in order to ensure that the ISO's rates are just and reasonable)); *Transmission Agency of N. Cal. v. FERC*, 495 F.3d 663, 671-72 (D.C. Cir. 2007) (holding Commission review of the City of Vernon's rates under the just and reasonable standard was neither arbitrary nor unreasonable, but the Commission could not order refunds).

25. In the Summer Period portion of the proceeding, the remaining Respondents are APX, Hafslund, Koch Energy, MPS (Aquila), Shell Energy (Coral), and Sunlaw Cogen.

D. APX

26. In its brief on exception, APX states that it did not engage in Anomalous Bidding and False Load Scheduling because it only submitted schedules and bids acting on behalf of its customers. In the Initial Decision, the Presiding Judge declined to dismiss APX from the proceeding, noting that APX will have an opportunity to present these liability-related arguments to the Commission.[56] APX contends that the Initial Decision did not examine whether APX did, in fact, engage in those activities.[57] APX argues that the Presiding Judge's suggestion that APX's arguments may be addressed in any future remedy phase of this proceeding is erroneous since the arguments were before the Presiding Judge, and because it presupposes that APX did engage in these violations. Additionally, APX states that the Presiding Judge erred by nominally identifying APX as one of the sellers that engaged in Anomalous Bidding and False Load Scheduling tariff violations during the Summer Period, without considering whether this was factually true.[58] APX further argues that even if it is established, that APX's customers committed tariff violations, there is no basis to hold APX responsible because it is functionally more like CAISO or CalPX in that it was not a market participant but instead a third-party service provider to buyers and sellers in the California markets pursuant to a tariff on file at the Commission.[59]

27. In response, the California Parties state that the Presiding Judge evaluated APX claims of acting solely as a "middleman" and reasoned that APX's unique situation does

---

[56] Initial Decision, 142 FERC ¶ 63,011 at P 160.

[57] APX at 9-10 (citing Initial Decision, 142 FERC ¶ 63,011 at PP 159-160 and *Rehearing Order*, 135 FERC ¶ 61,183 at P 3).

[58] *Id*. at 8-12 (citing Initial Decision, 142 FERC ¶ 63,011 at PP 32, 38-52).

[59] *Id*. at 8-12 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 105 FERC ¶ 61,066, at PP 166-172 (2003), *order on reh'g*, 107 FERC ¶ 61,165, at PP 45-47 (2004) (discussing the third-party services provided by APX and recognizing that, in light of those services, APX "has more similarities to the PX than with energy producers"); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 127 FERC ¶ 61,269, at P 272 (2009) (discussing the close similarities between APX and the PX)).

not preclude APX and its sellers from being held jointly and severally liable.[60] California Parties contend that the Initial Decision considered the evidence underlying its Anomalous Bidding and False Load Scheduling violations, and found that APX was liable for such violations,[61] and APX did not challenge specific evidence showing that APX committed these violations.[62] The California Parties further contend that they proved that APX actively assisted customers in committing tariff violations through use of an APX Primer and APX emails.[63]

28. In addition, in its Motion on Overcharges and Refunds, the California Parties state that they are not pursuing disgorgement of excess payments and overcharges from APX as long as APX agrees not to demand excess payments and overcharges allocated to its members who were net buyers during the trading hours at issue.[64] In its reply to the motion, APX states that it took this suggestion under consideration and will continue discussing it with the California Parties and its members.

29. As discussed in detail below, we affirm the Presiding Judge's findings on this matter and find that APX and its customers are jointly and severally liable for overcharges and excess payments received for the transactions at issue. The Presiding Judge found that the sales that APX engaged in on behalf of its customers constituted Anomalous Bidding and as such were tariff violations for which the California Parties have successfully established the price effect. As the Commission stated in prior orders, the unique situation of APX requires that APX and its sellers be held jointly and severally liable for refunds where the refund liability cannot be apportioned based on specific transactions to an individual seller.[65] APX may address the apportionment issues in a

---

[60] California Parties at 171-172 (citing Initial Decision, 142 FERC ¶ 63,011 at PP 159-160).

[61] *Id*. at 172 (citing Initial Decision, 142 FERC ¶ 63,011 at PP 33, 35, 57, 63, 79, 159-160).

[62] *Id*. at 173 (citing APX at 2, 8; Ex. CAX-001 at 34, 95, 120-21; Ex. CAX-110 at 27-29, 63; Ex. CAX-124; Ex. No. CAX-271; Ex. CAX-315).

[63] *Id*. (citing Ex. CAX-001 at 120-21; Tr. at 5256:7-5260:9 (Taylor May 31, 2012)).

[64] *See* California Parties Motion on Overcharges and Refunds at 23-24.

[65] *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 127 FERC ¶ 61,269, at P 272 (2009) (citing *San Diego Gas & Elec. Co. v. Sellers of Energy &*

(continued …)

compliance filing that we will require in this order, as discussed in the Remedies section below. Accordingly, we reject APX's argument that it should be dismissed from the proceeding. We, however, encourage APX and the California Parties to work together to resolve this issue outside this proceeding, as was proposed by the California Parties in their Motion on Overcharges and Refunds.

IV. Summer Period

A. Evidentiary Framework and Burden of Proof

30. The Initial Decision found that the California Parties made a *prima facie* case by a preponderance of evidence that certain respondents committed various tariff and other violations that impacted the market clearing price in the California organized electricity markets during the Summer Period.[66] The Presiding Judge found that the Respondents did not refute California Parties' case.

31. The Presiding Judge explained that the California Parties have met their burden of proof by providing marginal cost proxy-based screens that showed patterns of conduct that matched the established definitions of various violations, and providing evidence of the effect of the violations on the market clearing price.[67] The Presiding Judge found that the Commission imposed a high burden on the California Parties, requiring that they make a factual demonstration of each violation, hour-by-hour, and general allegations would not suffice.[68] According to the Presiding Judge, the California Parties have complied with this requirement by developing marginal cost proxy-based screens to show the individualized violations, hour-by-hour, and the price effects for each hour. The Presiding Judge held that these screens established a rebuttable presumption that violations occurred in the identified hours, and the Respondents were therefore under an obligation to rebut the screens, pursuant to Commission precedent.[69] In his conclusion, the Presiding Judge relied on a prior Commission order on an unrelated matter where the

---

Ancillary Servs.,105 FERC ¶ 61,066, at P 170 (2003) and *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 122 FERC ¶ 61,274, at PP 54-56 (2008)).

[66] Initial Decision, 142 FERC ¶ 63,011 at P 1.

[67] *Id*. P 66.

[68] *Id*. P 68.

[69] *Id*. P 69.

Commission required entities to provide rebuttal evidence in the face of screens that showed likely market power.[70] The Initial Decision also noted that this framework of a *prima facie* case and a corresponding rebuttable presumption is the accepted practice in the decisions issued by the Commission and its administrative law judges.[71]

32. The Presiding Judge found that the Respondents did not meet their burden to go forward once they were confronted with a *prima facie* case. According to the Presiding Judge, their generalized arguments to challenge the evidence, or "at best to criticize the methodology of the screens," was not sufficient to negate the *prima facie* case that the California Parties presented in the screens.[72] The Presiding Judge found unpersuasive the Respondents' argument that because the screens may contain transactions that were legitimate business practices, the methodology of the screens must fail.[73]

33. The Presiding Judge further found that the Respondents could have offered a statistical sampling defense to rebut a screen that has demonstrated a tariff violation. The

---

[70] Specifically, in that order, the Commission stated:

> Failure to pass either of the indicative screens (which, as noted above, creates a rebuttable presumption of market power) will constitute a *prima facie* showing that the rates charged by the applicant pursuant to its market-based rate authority may have become unjust and unreasonable and that continuation of the applicant's market-based rate authority may no longer be just and reasonable

Id. P 72 (citing *AEP Power Mktg, Inc.*, 107 FERC ¶ 61,018, at P 209 (2004) (emphasis added)).

[71] *Id.* (citing *Tex. Gas Serv. Co. v. El Paso Natural Gas Co.*, 136 FERC ¶ 63,010, at P 327 (2011) (J. Silverstein) (finding that "[t]he party with the burden of proof also bears the burden of production, or the need to provide sufficient evidence to establish a *prima facie* case. Once it meets that burden, however, the burden of going forward shifts to the opposing party.") (internal citations omitted); *Nantahala Power & Light Co.*, 19 FERC ¶ 61,152, at 61,276 (1982) (finding that "[T]he burden of proof in a [section] 206 complaint proceeding is on the complainant. The burden consists of coming forward with a *prima facie* case and once this initial burden is met, the burden shifts to the respondent.")).

[72] *Id.* P 37.

[73] *Id.* P 72.

Initial Decision noted that the statistical sampling defense is permitted by the Commission for investigative or rate projection purposes.[74] The Presiding Judge explained that if the Respondents had shown that a significant statistical sample of five percent or 10 percent of the individual violations in the screens were legitimate transactions for which they had facts to support, they would have been able to argue that the error rate of the screens was too high and that therefore the screens should not be considered. However, the Presiding Judge concluded, none of the specific transactions in the screens were challenged, so the validity of such rebuttal evidence could not be tested.[75] The Presiding Judge also noted that while the Respondents challenged the validity of the California Parties' marginal cost proxy-based screens, none of the Respondents' witnesses provided any recalculations of the marginal cost proxy nor applied these recalculations to show that, if their calculations were used, then a violation shown in a certain hour would not be a tariff violation. No such demonstration was performed with respect to any hours of the Summer Period.[76]

34. The Presiding Judge also addressed repeated assertions by the Respondents that generation shortages and high demand explained the high prices, even though on some days the prices were over 900 percent above normal rates. The Presiding Judge noted that the Respondents provided no discussion of whether gaming activity had anything to do with the problem,[77] despite the fact that Enron-related evidence has shown that the CAISO market was manipulated by the price raising schemes of marketers. The Presiding Judge found that the lack of discussion of these strategies and their relationship to persistently high prices raises questions about the completeness of the Respondents' expert testimony.[78]

35. Further, the Presiding Judge rejected the Respondents' challenge of the California Parties' expert's qualifications. The Presiding Judge concluded that contrary to the Respondents' contentions, analyzing CalPX and CAISO data and methods to identify

---

[74] *Id*. P 76 (citing *Iowa S. Utils. Co.*, 16 FERC ¶ 62,149, at 63,284 (1981).

[75] *Id*.

[76] *Id*. P 73.

[77] *Id*. P 156 (citing Ex. CSG-1 at 110 (revised Apr. 3, 2012); *see also* CAX-001 at 23 fig.II-1 (revised)).

[78] *Id*. P 156 (citing Ex. BPA-66 and American *Elect. Power Serv. Corp.*, *Order to Show Cause Concerning Gaming and/or Anomalous Market Behavior*, 103 FERC ¶ 61,345, at P 340 (2003) (Gaming Order).

transactions that connote anomalous market behavior, does not require engineering or managerial expertise.[79]

Briefs on Exceptions

36. The Indicated Respondents argue that the Presiding Judge erred in using a *prima facie* evidentiary framework to conclude that the California Parties have met their burden of proof to show tariff violations and manipulative intent by sellers. The Indicated Respondents argue that the Presiding Judge should have required a showing "by preponderance of evidence." The Indicated Respondents argue that a *prima facie* standard is used only to determine whether the California Parties' case can survive a motion for summary judgment and assumes that all facts are undisputed, while the "preponderance of evidence" standard requires a showing that the existence of an alleged fact is more probable than not.[80] The Indicated Respondents argue that the California Parties met neither of the standards. MPS and Illinova add that the Presiding Judge accepted the California Parties' methodology and capriciously decided to ignore fundamental flaws in the California Parties' case. The Presiding Judge also imposed on MPS and Illinova an unreasonably high burden to present an hour-by-hour rebuttal to the California Parties' allegations.[81]

37. Further, the Indicated Respondents and MPS and Illinova argue that the Presiding Judge's use of the "*prima facie*" standard inappropriately shifts the burden of proof to the Respondents.[82] The Indicated Respondents also argue that in the instant proceeding, the use of an evidentiary presumption is inappropriate under the Administrative Procedure Act.[83]

---

[79] *Id*. P 158.

[80] Indicated Respondents at 47-48 (citing *Phillips Petroleum Co. v. FERC*, 902 F.2d 795, 802 (10th Cir. 1990)).

[81] MPS and Illinova at 12-13.

[82] MPS and Illinova at 12; Indicated Respondents at 47 (citing *Greenwich Collieries*, 512 U.S. 267, 277-78 (1994)).

[83] Indicated Respondents at 49-50 (citing *Cablevision Sys. Corp*. v. FCC, 649 F.3d 695, 716 (D.C. Cir. 2001)).

38. Trial Staff echoes the Indicated Respondents' and MPS and Illinova' assertions by stating that having erroneously found that the California Parties had established a *prima facie* case with respect to many of the alleged violations, the Presiding Judge transferred the burden of going forward to the Respondents.

39. The Indicated Respondents further argue that the Presiding Judge ignored evidence demonstrating that high prices were attributable to market fundamentals and shifted to Respondents the burden of proof to demonstrate that high prices were not caused by Enron-style market manipulation.[84] According to the Indicated Respondents and Trial Staff, the Presiding Judge gave no weight to the Respondents' expert testimony and exhibits explaining the Western power crisis and the associated high power prices during the Summer Period through basic economic fundamentals, including reduced hydroelectric generation, constrained natural gas supplies and resulting increases in electricity prices, environmental constraints, other supply constraints, and soaring consumer demand for power, combined with critical flaws in the California market design.[85]

40. Trial Staff argues that there was an abuse of discretion since the Presiding Judge attached more credibility to the testimony of the California Parties' witnesses who, in Trial Staff's opinion, did not perform either the reasonable preparation or necessary due diligence to ensure its accuracy.[86] Trial Staff asserts that the Commission is not bound by the credibility determinations of the Presiding Judge and is free to perform a *de novo* review of the testimony and exhibits in order to make its own determination as to the credibility of each witness.[87]

---

[84] *Id*. at 221 (citing Initial Decision, 142 FERC ¶ 63,011 at P 156).

[85] Indicated Respondents 22-23 (citing Ex. CSG-1 at 116:16–128:15, 129:8–148:3, 142:11-13, 148:8-149:4, 156:9–176:3, 176:6–186:7, Part II; Ex. POW-233 at 9:4–8, 17:3-18:1 & fig.6, 23:5-7, 24:1-3, 27:12-31:8, 35:10–37:14, 46:3–50:5, 61:11–93:8; Ex. AVI-1 at 17:13-18:2; POW-233; 37:15–46:2; and Ex. BPA-66 at 3).

[86] Trial Staff at 38.

[87] *Id.* at 34 (citing *Pennzoil Co. v. FERC*, 789 F.2d 1128, 1135 (5th Cir. 1986); *Mattes v. U. S.*, 721 F.2d 1125, 1129 (7th Cir. 1983)).

Brief Opposing Exceptions

41. The California Parties argue that the Presiding Judge used the correct evidentiary standard by first finding that the California Parties had made a *prima facie* case, and then concluding that they had demonstrated violations that affected the market price through a preponderance of evidence when the Respondents failed to effectively rebut these claims.[88] The California Parties argue that this framework is consistent with the Supreme Court precedent on the preponderance of evidence standard.[89]

42. The California Parties also disagree with the Respondents' assertion that the Presiding Judge imposed an impermissibly high evidentiary standard on the Respondents. The California Parties state that the Presiding Judge placed a high burden on the California Parties to specifically demonstrate the tariff violations, but expressed openness to rebuttals from the Respondents by suggesting that instead of proffering an hour by hour rebuttal the Respondents could employ a "statistical sampling defense" approved by the Commission.[90] The California Parties further argue that contrary to the Respondents' assertions, the Presiding Judge did not adopt the California Parties' case uncritically and, on a number of issues, he found that the California Parties failed to make a *prima facie* case.

43. The California Parties argue that the Presiding Judge appropriately gave California Parties' witnesses more weight because he found them more believable and more relevant. The California Parties further argue that the Commission and the courts have made clear that the Presiding Judge's findings, made after holding a full hearing, are to be given great weight and that the Commission "deference to the trier of fact [] is the rule, not the exception."[91] According to the California Parties, "the ALJ is entitled to deference with regard to the credibility of witnesses and evidence, and the amount of weight to be accorded to particular testimony or evidence."[92] In addition, the California Parties cite to *Universal Camera Corp. v. NLRB*[93] where the Supreme Court held that an

---

[88] California Parties at 7-10, 12.

[89] *Id*. at 13 (citing *Steadman v. SEC*, 450 U.S. 91 (1981)).

[90] *Id*. at 15-16.

[91] *Id*. at iii and 22 (citing *Brian Hunter*, 137 FERC ¶ 61,146, at P 30 (2011), *overturned on other grounds, Hunter v. FERC*, 711 F.3d 155 (D.C. Cir. 2013)).

[92] *Id*. at iii (citing *Entergy Servs. Inc.*, 130 FERC ¶ 61,023, at P 53 n.66 (2010)).

agency should be reluctant to overturn a fact finder unless clear error is shown.[94] Accordingly, the California Parties conclude that if an agency disregards the Presiding Judge's findings, its decision is subjected to heightened scrutiny on appeal. [95]

Commission Determination

44. We find the Respondents' and Trial Staff's arguments challenging the evidentiary framework applied by the Presiding Judge to be misplaced. We note that the Respondents and Trial Staff cite numerous court cases in support of their position; however, none of the references puts into question the evidentiary framework used by the Presiding Judge. It appears that when the Respondents and Trial Staff claim that the Presiding Judge relied on the wrong evidentiary framework in its analysis, they, in essence, challenge the Presiding Judge's findings of fact and argue that the California Parties' evidence was insufficient to prove their case by preponderance of evidence. We will examine the evidence submitted in the record by both sides in detail in the sections below as they pertain to transactions in each of the tariff violations categories and make determinations as to whether the California Parties have presented sufficient evidence demonstrating that the remaining Respondents engaged in tariff violations affecting the market clearing price. However, as a preliminary matter, we find that the evidentiary framework used by the Presiding Judge is consistent with governing case law and Commission precedent, as discussed below.

45. In *Dir. OWCP v. Greenwich Collieries*,[96] the Supreme Court explained that the burden of proof under the Administrative Procedure Act[97] refers to a party's burden of persuasion, or the ultimate obligation to persuade the trier of fact as to the truth of the matter, and falls on the proponent of a rule or order.[98] The Supreme Court explained that when a party has the burden of persuasion, it will lose "if the evidence is evenly

---

[93] 340 U.S. 474, 476, *on remand*, 190 F.2d 429 (2d Cir. 1951).

[94] California Parties at 22.

[95] *Id*. at iii-iv (citing *Pennzoil Co. v. FERC*, 789 F.2d 1128, 1135-36 (5th Cir. 1986)).

[96] 512 U.S. 267 (1994).

[97] 5 U.S.C. § 556(d) (2004).

[98] 512 U.S. at 275-77.

balanced."[99] The party with the burden of proof bears the burden of production, or the need to provide sufficient evidence to establish a *prima facie* case.[100] Once it meets that burden, however, the burden of going forward shifts to the opposing party, although the ultimate burden of persuasion remains with the proponent.[101] The party bearing the burden of proof will prevail only if the preponderance of evidence supports its position.[102]

46. Consistent with Commission and court precedent, we find that the Presiding Judge has correctly placed the burden of proof in this proceeding on the California Parties. This burden consists of coming forward with a *prima facie* case and once this initial burden is met, the burden to produce evidence shifts to the Respondents.[103] As the Commission explained in an earlier case, "[t]he test for *prima facie* evidence is whether there are facts in evidence which if unanswered would justify [persons] of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain."[104] Once the Respondents offered their rebuttal, the Presiding Judge appropriately determined whether the California Parties made their case by a preponderance of the evidence.[105] Accordingly, we find that the Presiding Judge applied the correct evidentiary framework to analyze this case.[106]

47. Next, we turn to the issue of whether the Respondents in this proceeding were required to present transaction-specific evidence to rebut the California Parties' *prima facie* case. We agree with the Presiding Judge's conclusion that because the Commission

---

[99] *Id.* at 281.

[100] *Id.* at 276.

[101] *Id.* at 273, 279-80 (finding that "when the party with the burden of persuasion establishes a *prima facie* case supported by 'credible and credited evidence,' it must either be rebutted or accepted as true.").

[102] *See, e.g., S. Co. Serv., Inc.*, 23 FERC ¶ 63,018 (1983).

[103] *Greenwich Collieries*, 512 U.S. at 273.

[104] *Nantahala Power and Light Co. Town of Highlands, NC v. Nantahala Power and Light Co.*, 19 FERC ¶ 61,152, at 61,276 (1982).

[105] Initial Decision, 142 FERC ¶ 63,011 at P 1.

[106] *See id.* PP 1, 66-77.

determined that general allegations would not be enough and imposed a high burden on the California Parties, requiring that they make a factual demonstration of each violation, hour-by-hour, the Respondents were also required to produce transaction-specific evidence to refute the California Parties' *prima facie* case.

48. Throughout this proceeding, the Commission has emphasized numerous times that the California Parties would be required to present specific evidence of specific conduct violating then-existing tariffs and the tariff violation's effect on the market clearing price in a specific trading hour.[107] The Commission imposed a high burden of proof on the California Parties to demonstrate that specific conduct violated a specific provision in then-existing tariffs and impacted the market clearing price in a specific hour. By narrowing the scope of the hearing this way, the Commission ensured that each Respondent is held liable only for a specific tariff violation that affected the market clearing price in a specific trading hour. Accordingly, we agree with the Presiding Judge that an appropriate rebuttal in this case should have included specific countervailing evidence.

49. We therefore conclude that the Presiding Judge applied the evidentiary framework that is consistent with Supreme Court precedent and the Commission's prior orders, as

---

[107] *See* Remand Order, 129 FERC ¶ 61,147 at P 22. Also, in the Rehearing Order, the Commission stated that "[t]he hearing will focus only on *specific* conduct by *specific* respondents." Rehearing Order, 135 FERC ¶ 61,183 at P 37 (emphasis added). The Commission explained that "[t]o succeed on the merits, the California Parties are thus required to demonstrate that a *specific* trading practice violated a *specific* provision in the seller's own tariffs." *Id.* P 28 (emphasis added). The Commission also warned the California Parties that they "are expected to be *very specific* when presenting their arguments and evidence on this issue." *Id*. P 27 (emphasis added). The Commission also stated that "[t]he California Parties are required to *specify* which tariff provision and/or portion of the tariff provision the above identified conduct was violated and that "[g]*eneral allegations will not suffice*." *Id*. (emphasis added). The Commission also held that "[t]he California Parties will be required to demonstrate the nexus between the market clearing price in a *specific* trading hour and the unlawful conduct committed by a *specific* seller at another time." *Id*. P 38 (emphasis added). Moreover, the Commission further clarified that "each respondent is potentially liable only in the *specific* instances in which its own tariff violations are shown to have adversely affected market-clearing prices in a *specific* hour and not vicariously liable in the event that other sellers' tariff violations affected the market clearing prices in a trading hour in which the said respondent transacted." *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 141 FERC ¶ 61,087, at P 11 (2012) (emphasis added).

well as the Commission's direction in the Remand Order and subsequent orders on rehearing. In this order, we will examine the evidence submitted in the record by both sides to determine whether the California Parties established a *prima facie* case by a preponderance of evidence in regard to transactions in each of the tariff violation categories and whether the Respondents provided specific countervailing evidence to refute the California Parties' case. With regard to the credibility of witnesses, and the amount of weight to be accorded to particular testimony or evidence, we note that as the trier of fact, the Presiding Judge had the opportunity to observe the witnesses' live testimony and demeanor, and was thus in the best position to evaluate the witnesses' credibility.[108]

B. Tariff Violations and Price Effect Findings

50. The Commission instructed the Presiding Judge to make factual determinations on three issues with regard to spot market transactions during the Summer Period: (1) which market practices and behaviors constitute a violation of the then-existing CAISO, CalPX, and individual seller's tariffs and Commission orders; (2) whether any of the sellers named as respondents in this proceeding engaged in those tariff violations; and (3) whether any such tariff violations affected the market clearing price.[109] The Presiding Judge found that of the 34,020 Summer Period transactions that constituted tariff violations, more than 20,000 affected the market clearing prices.[110] To reach this conclusion, the Presiding Judge adopted the California Parties' marginal cost proxy-based screens and price impact analysis. The marginal cost proxy-based screens were

---

[108] *See* Inwood Lab. Inc. v. Ives Lab., Inc., 456 U.S. 844, 856 (1982) *(holding that "determining the weight and credibility of the evidence is the special province of the trier of fact."). See also El Paso Natural Gas Co.*, 67 FERC ¶ 61,327, at 62,156 (1994) (finding that "[in matters where a decision had to be made as to the relative weight to be accorded the testimony of a witness, we will give great deference to the decision of the ALJ"); *Williams Natural Gas Co.*, 41 FERC ¶ 61,037, at 61,095 (1987) (finding that "the rationale for affording deference to the determinations of the trier of fact on credibility is that the trier of fact is in the best position to evaluate such elusive factors as motive or intent.").

[109] Remand Order, 129 FERC ¶ 61,147 at P 3; Rehearing Order, 135 FERC ¶ 61,183 at P 31.

[110] Due to settlements and dismissal of non-jurisdictional entities, the number of transactions at issue in this proceeding has been reduced.

developed to capture tariff violations by identifying anomalous transactions with bid prices higher than the marginal cost proxy prices, and the price effect was determined by assessing whether the tariff violations had a resulting impact on the market clearing price. The types of tariff violations identified in the Initial Decision were: Anomalous Bidding, False Exports, False Load Scheduling, sale of Ancillary Services without market-based rate authorization, phantom ancillary services, intentional running of Uninstructed Generation, circular scheduling, false counterflow, shifting false load, and a host of other interrelated violations including false price reporting, attempts to arrange boycotts, and criminal acts involving manipulation. In this section, we address the Presiding Judge's findings of fact and the record evidence pertaining to each type of the market conduct at issue to make determinations on whether the California Parties have submitted sufficient evidence to demonstrate that the remaining Respondents engaged in tariff violations affecting the market clearing prices.

1. Anomalous Bidding

51. In the Initial Decision, Anomalous Bidding was defined as bidding behavior that departs from the normal competitive behavior, or as behavior leading to unusual or unexplained market outcomes in violation of the CAISO MMIP.[111] Relying on the testimony provided by the California Parties' expert witness Dr. Carolyn Berry, the Presiding Judge identified three types of Anomalous Bids.[112] The Presiding Judge defined Type I anomalous bids as bids or portions of bids with prices that "vary in output in ways that are unrelated to cost, such as bids that change in response to supply and demand conditions that are unrelated to changes in cost."[113] According to the Initial Decision, Type II anomalous bids "are bids above marginal cost which were used in conjunction with other anti-competitive tariff strategies, such as withholding anomalous bids, false export anomalous bids, and false load anomalous bids."[114] Finally, Type III anomalous bids are bids set so high above the market price that such bids will likely not

---

[111] Initial Decision, 142 FERC ¶ 63,011 at P 16 (citing Ex. CAX-100 at 1031-32 (CAISO MMIP §§ 2.1.1, 2.1.3)).

[112] *Id.* P 19 (citing Tr. at 994:6-17 & 995:3-7 (Berry)).

[113] The Initial Decision described three subcategories of Type I bids: hockey stick bids, walking cane bids, and all-in bids. *Id*. PP 18, 21-23.

[114] *Id.* P 24.

be accepted, thereby either reducing the available supply to CAISO or increasing the market clearing price.[115]

52. The Presiding Judge found Type I bids to be tariff violations. However, because the California Parties did not perform a price effects analysis for Type I bids, the Presiding Judge concluded that a *prima facie* case for Type I bidding behavior was not established.[116] In regard to Types II and III anomalous bids, the Presiding Judge found that they, too, were tariff violations and that the California Parties established a *prima facie* case demonstrating that market clearing prices were impacted as a result of these tariff violations by certain Respondents.

53. To determine if any Respondent engaged in Type I, II, or III categories of Anomalous Bidding, the Presiding Judge determined it was appropriate to employ the screens developed by Dr. Berry for the California Parties. The marginal cost proxy-based screens considered all bids that occurred during the Summer Period, and the Presiding Judge found that the screens were a standard, well-accepted method to analyze the bids and identify conduct that departs from competitive behavior.[117] However, the Presiding Judge recognized that merely bidding above marginal cost is not a tariff violation; however, certain bidding patterns in relation to marginal cost are indicative of Anomalous Bidding. The Presiding Judge, therefore, adopted the framework for classifying violations by incorporating the California Parties' expert witness Dr. Berry's definitions for each bid type, but evaluated the Respondents' bidding patterns in relation to marginal cost, to determine whether tariff violations were committed.[118]

54. The Presiding Judge found that the marginal cost proxy-based screens devised by the California Parties' expert witness Dr. Berry are appropriate in examining transactions based on the type of seller, such as importers that own generation outside the CAISO control area versus importers that are marketers and therefore do not own generation. The Presiding Judge explained that most sellers in Dr. Berry's analyses were importers; however, a limited number of sales were made by certain in-state generation units. For these in-state generation units, Dr. Berry used the marginal cost proxy price calculated based on the Commission's marginal cost proxy methodology adopted in the California Refund Proceeding, which reflected the cost of the most expensive unit dispatched in the

---

[115] *Id.* PP 28-29 (citing Ex. CAX-110 at 47 & 49).

[116] *Id.* P 33.

[117] *Id.* P 19.

[118] *Id.* P 88.

CAISO real-time market, and thus, the Presiding Judge found their cost proxy estimate to be conservative.[119] For importers, according to the Presiding Judge, Dr. Berry correctly estimated the marginal cost proxy based on their opportunity costs.

55. The Presiding Judge explained that a seller's opportunity cost was the disposal price and the proxy for the disposal price was equal to the marginal cost of the most expensive gas-fired generator that was dispatched in the CAISO real-time market for each hour during the Summer Period. The Presiding Judge reasoned that because the CAISO real-time market was the last market to operate before the actual delivery of energy in the Western Electricity Coordinating Council (WECC), the importer had limited alternatives if its bid was not chosen in the CAISO real-time market. The importer could either let the energy flow on the system where the energy was located and risk penalties for creating an energy imbalance, or it could sell the energy at a heavily discounted or "disposal" price to a generator that would benefit by backing down its physical generation.[120] The Presiding Judge found that this "disposal" price is a conservative estimate to the extent the out-of-state generator marginal costs were less than the most expensive California unit.[121] The Presiding Judge found that the Respondents' witnesses failed to refute that the real-time market was the last opportunity to sell energy, as they presented no data showing that sellers were able to find other opportunities for their non-dispatched energy.[122]

56. The Presiding Judge thus concluded that based on the record and Commission precedent, the California Parties-developed marginal cost proxy price is a credible proxy of prices in a normal competitive market and was properly applied to the Summer Period as a factor to determine which transactions are anomalous and therefore are violations of the tariffs, rules, or Commission orders.[123]

57. Finally, the Presiding Judge adopted the California Parties' price effect analysis for Type II and Type III Anomalous Bidding, finding that the California Parties' witness Dr. Fox-Penner evaluated the price effects for these violations and presented evidence for

---

[119] *Id.* (citing Ex. CAX-110 at 50 (revised Mar. 26, 2012)).

[120] *Id.* P 90 (citing Ex. CAX-110 at 51 (revised Mar. 26, 2012)).

[121] *Id.* (citing Ex. CAX-110 at 53 (revised Mar. 26, 2012)).

[122] *Id.* P 96.

[123] *Id.* P 98.

each trading hour for all of the listed Respondents except for MPS.[124] The Presiding Judge determined that Dr. Fox-Penner did not present a price effects analysis for Type I bids, and therefore failed to establish a *prima facie* case for this bid type.[125]

a. Type I Anomalous Bidding

58. As mentioned above, the Presiding Judge found that Type I bids, which are identified by the shape of their bid curve, involved bidding some portion of the megawatt hours (MWh) at extremely high prices well in excess of marginal cost. The Presiding Judge found that Type I bids were used to exploit a tight supply/demand balance and an inelastic demand to purposely raise prices. Based on the Presiding Judge's findings, Type I bids violated sections 2.1.1 and 2.1.1.4 of the CAISO MMIP[126] because they were consistently priced too high and used to exploit shortages in supply in the CAISO real-time market. The Presiding Judge found the excessively high price of the bids was demonstrated by the fact that they were priced well in excess of marginal cost and thus did not reflect normal bidding in a competitive market. The Presiding Judge ultimately concluded that the main effect of Type I bids was to raise the market clearing price in real

---

[124] *Id*. PP 34-35, (citing Ex. CAX-317 (revised); Ex. CAX-318, Ex. CAX-319 (revised); Ex. CAX-320 (revised)).

[125] *Id*. P 33.

[126] MMIP sections 2.1.1 "Anomalous Market Behavior" and 2.1.1.4 provide in pertinent part**:**

> Anomalous market behavior, which is defined as behavior 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:
>
> …
>
> pricing and bidding patterns that are inconsistent with prevailing supply and demand conditions, *e.g.*, prices and bids that appear consistently excessive for or otherwise inconsistent with such conditions…

time.[127] According to the Presiding Judge, when the high portion of the bid was accepted, it set the market clearing price to a higher level and the seller received the higher price, not just for the quantity of the high bid, but for all of its sales that were made within the same bidding hour.[128]

59. The Presiding Judge found that California Parties provided evidence that APX and Shell Energy engaged in the Type I Anomalous Bidding violations, but that the California Parties did not meet their *prima facie* burden for these violations for any of the Indicated Respondents because they failed to provide a price effects analysis for this bid type.

b. Type II Anomalous Bidding

60. Further, the Presiding Judge found that Type II anomalous bids, which were bids made above marginal cost used in combination with other tariff violations, such as economic withholding, false export, and false load constituted violations. The Presiding Judge explained that withholding anomalous bids occurred when "the supplier withheld supply from … CAISO by placing bids or portions of bids that were priced excessively above marginal cost."[129] The Presiding Judge described a false export anomalous bid as a bid (or a portion of a bid) by a seller at a price above marginal cost during the same hour that the seller engaged in a false export, which occurred "when a participant in the market made a purchase from the CalPX and ostensibly exported the energy to a sink outside the CAISO control area and then bid that same energy into the CAISO real-time market as an import."[130] The Presiding Judge found that the false load anomalous bid occurred when a seller submitted a bid at a price above marginal cost during the same hour that the seller had submitted a false load schedule. According to the Presiding Judge, this strategy was used by sellers to fraudulently move energy from the day-ahead markets into real time and to sell it as uninstructed energy to receive the CAISO real-time market clearing price.[131]

---

[127] Initial Decision, 142 FERC ¶ 63,011 at P 20, (citing Ex. CAX-110 at 16-18, 27 (revised Mar. 26, 2012)).

[128] *Id.* P 21.

[129] *Id.* P 25 (citing Ex. CAX-110 at 34, 39, 43 tbl. 4 (revised Mar. 26, 2012)).

[130] *Id.* P 26.

[131] *Id.* P 27.

61. As with Type I anomalous bids, the Presiding Judge found Type II bids violated sections 2.1.1 and 2.1.1.4 of the CAISO MMIP, reflecting bidding that "departs significantly from the normal behavior in competitive markets."[132] Specifically, the Presiding Judge concluded that Type II anomalous bids were "consistently excessive and were used to exploit supply shortages in the CAISO real-time market that often were artificially created by suppliers." [133] Additionally, the Presiding Judge found that Type II anomalous bids constituted gaming or "taking unfair advantage of the rules and procedures set forth in the CalPX and CAISO tariffs to the detriment of the efficiency of, and of consumers in, the CAISO Markets."[134] Thus, the Presiding Judge found that Type II anomalous bids constitute violations of MMIP section 2.1.3's prohibition on gaming.[135] According to the Presiding Judge's findings, these bids resulted in unusual and unexplained market outcomes, such as inexplicably high market clearing prices, which were observed during the Summer Period.[136]

62. The Presiding Judge found that MPS and Shell Energy engaged in the Type II Anomalous Bidding violations, and that the California Parties met their *prima facie* burden of proof for Shell Energy by presenting a price effects analysis. The Presiding

---

[132] *Id.* P 24 (citing Ex. CAX-100 at 1031-32).

[133] *Id.*

[134] *Id.* (citing Ex. CAX-110 at 34 (revised Mar. 26, 2012); Ex. CAX-100 at 1032 (CAISO MMIP § 2.1.3)).

[135] MMIP section 2.1.3 "Gaming" provides:

> "Gaming" or taking unfair advantage of the rules and procedures set forth in the [Cal]PX or [CA]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 [CA]ISO Markets vulnerable to price manipulation to the detriment of their efficiency.

[136] Initial Decision, 142 FERC ¶ 63,011 at P 24.

Judge found that the California Parties did not meet their *prima facie* burden of proof for MPS, because they did not present a price effects analysis for MPS' bidding behavior.[137]

c. Type III Anomalous Bidding

63. The Presiding Judge further found that Type III bids were used to effectuate economic withholding, which constituted a violation of MMIP sections 2.1.1.1 and 2.1.3. The Presiding Judge explained that economic withholding occurred when bids were set so high above the market price that it was likely that they would not be accepted, thereby either reducing the available supply to CAISO or increasing the market clearing price.[138] The Presiding Judge concluded that these bids reflected bidding that departed considerably from normal behavior in a competitive market and led to unusual and unexplained market outcomes, such as inefficient dispatch of energy to serve load and inexplicably high market clearing prices. The Presiding Judge found that Type III bids were violations of MMIP section 2.1.1.1 that prohibits the "withholding of generation capacity under circumstances in which it would normally be offered in a competitive market," and MMIP section 2.1.3 that prohibits "behaviors that may render the system and the ISO Markets vulnerable to price manipulation to the detriment of efficiency."[139] The Presiding Judge found that APX, Shell, and MPS engaged in these violations, and that the California Parties met their *prima facie* burden for these violations for APX and Shell, but not MPS.[140]

Briefs on Exceptions

64. The Respondents raise various arguments pertaining to the validity of the marginal cost proxy-based analysis performed by the California Parties. Certain Respondents argue that bidding above marginal costs alone cannot be considered a tariff violation *per se*, and the fact that bids exceeded the marginal cost proxy price in the California Parties'

---

[137] *Id.* P 34, (citing Ex. CAX-110 Tables 4, 5, and 6; Ex. CAX-272; Ex. CAX-273; Ex. CAX-274; Ex. CAX-318; CAX-319 (revised) and CAX-320 (revised)).

[138] *Id.* P 28 (citing Ex. CAX-110 at 47 (revised Mar. 26, 2012)).

[139] *Id.* P 31 (citing Ex. CAX-110 at 48 (revised Mar. 26, 2012)).

[140] *Id.* P 35 (citing Ex. CAX-110 at 63 tbls 8 and 9 (revised Mar. 26, 2012); Ex. CAX-282 & CAX-317 (revised)).

screens cannot serve as sufficient evidence to show that the bids were tariff violations.[141] The Indicated Respondents further argue that in a competitive market setting high or anomalous prices alone do not imply manipulation. The Indicated Respondents also allege that to be deemed a tariff violation, a bid did not have to be substantially higher than the California Parties' marginal cost proxy price; the screens employed captured bids that exceeded the threshold by a mere penny.[142]

65. In addition, the Respondents claim that the marginal cost proxy price used in the California Parties' screening methodology is based on unrealistically low marginal cost estimates that do not incorporate opportunity cost.[143] With regard to importers, the Indicated Respondents contend that record evidence demonstrates that there is no clear relationship between the marginal cost proxy price, which was designed as a proxy for the cost of the most expensive thermal generation within California, and the costs associated with the energy Respondent importers sold. The Indicated Respondents state that importers priced their energy based on market values at western trading locations such as Alberta, Mid-C, California-Oregon Border, Nevada-Oregon Border, Mead, Four Corner, and Palo Verde, not based on marginal costs.[144]

66. The Indicated Respondents also challenge the Presiding Judge's conclusion that the marginal cost proxy price can be appropriately applied to importers. According to the Indicated Respondents, there were numerous alternative markets available in the WECC in real time. According to Shell, a more realistic estimate for Coral's marginal cost would have been the actual market clearing prices, since its regular business practice was to wait until Coral received acceptance of its bids or a dispatch instruction from CAISO before committing to buy energy to fulfill its sale or to answer the dispatch.[145] MPS contends that the screens used in Dr. Berry's analysis were objectively too low to identify any truly anomalous behavior.[146]

---

[141] Indicated Respondents at 54, 64, 66-69, 82, 89-90, 98-105; Shell at 27.

[142] Indicated Respondents at 102 (citing Tr. at 2517:2-18 (Fox-Penner)).

[143] *Id*. at 70-82; MPS and Illinova at 27.

[144] Indicated Respondents at 70-80, *also,* at 77 n.170 (citing Ex. SNA-3 at 50:9-16).

[145] Shell at 28.

[146] MPS and Illinova at 27 (citing Ex. CSG-1at 225:10-16).

67. The Indicated Respondents and Trial Staff also raise the issue that the California Parties' screening methodology and price effects analysis are based on the flawed analytical framework of perfect competition. Specifically, they argue that the California Parties' analysis is grounded in the assumption that every rational bid must be made at marginal cost.[147] The Indicated Respondents assert that perfect competition does not exist in actual markets and is an inappropriate standard to assess the lawfulness of the Respondents' bids.[148] Trial Staff explains that section 2.1.1 of the MMIP is designed to identify anomalous behavior in workably competitive markets rather than perfectly competitive markets.

68. The Indicated Respondents also argue that the California Parties' screening methodology based on "marginal cost proxy" is identical to the Commission's MMCP formula used to reconstruct just and reasonable prices during the Refund Period for purposes of market-wide mitigation, and, therefore, would not be appropriate for the section 309 proceeding.[149] Further, in regard to the Initial Decision's findings on Type I bids, the Indicated Respondents claim that the Presiding Judge erred in adopting Dr. Berry's contention that Type I bidding activity constituted a *per se* tariff violation of the CAISO MMIP in each hour in which their bids were captured by Dr. Berry's Type I bidding screen.[150] The Indicated Respondents cite to the Respondents' expert witness testimony that submission of bid curves at a range of prices is a standard and accepted practice, and that the transactions that appear high or unusual when viewed in isolation are often competitive and legitimate when fully understood.[151] According to the Indicated Respondents, the Commission precedent is clear that high bids are not *per se* manipulative, but are *per se* legitimate in the absence of evidence showing unlawful or manipulative intent.[152] The Indicated Respondents further argue that the record evidence

---

[147] Indicated Respondents at 215-216; Trial Staff at 100-104.

[148] Indicated Respondents at 83 (citing Ex. S-6 at 5:15-20, 30:14-16; Ex. POW-257 at 18:4-5; Ex. TRA-1 at 15:5-9; Ex. MI-1 at 39:5-7; Tr. at 3890:7-13 (Hildebrandt)).

[149] *Id.* at 72.

[150] *Id.* at 89.

[151] *Id.* at 94 (citing POW-217 at 108:7–109:6; POW-257 at 15:20-16:8).

[152] *Id.* (citing *Blumenthal ex rel. Conn. v. ISO New England Inc.*, 135 FERC ¶ 61,117, at P 42 (2011), *reh'g denied*, 138 FERC ¶ 61,013, at P 12 (2012) (affirming that although Respondents submitted high capacity-backed energy offers, "ample record

(continued …)

demonstrates that the Type I definition is arbitrary and unrelated to the MMIP.[153] The Indicated Respondents contend that the California Parties offer no empirical evidence to establish what constitutes "normal behavior" in the CAISO real-time market.[154] The Indicated Respondents also claim that there is no evidentiary support for Dr. Berry's contention that the marginal cost proxy threshold is indicative of consistently excessively priced Type I bids.[155]

69. The Indicated Respondents maintain that the Presiding Judge erred in finding Type II bidding activity to be a violation of the CAISO MMIP. The Indicated Respondents claim that the Type II definition is arbitrary and unrelated to the MMIP's Anomalous Bidding standard, and is further incapable of identifying bids submitted with intent to raise prices. The Indicated Respondents argue that the screens utilized in the California Parties' analysis depend on the unsupported assertions of other specified tariff violations.[156] MPS and Illinova state that a single bid, identified by Dr. Berry as anomalous, hardly constitutes substantial evidence of a pattern of bidding by MPS with the intent to inflate the prices of the CAISO real-time market.[157]

70. The Indicated Respondents contend that the Presiding Judge erred in its finding that Type II bids proved to be profitable in the absence of evidence supporting that finding. The Indicated Respondents argue that Dr. Berry admitted that she did not conduct profitability studies within the hours in which anomalous bids were identified.[158] Citing their expert witness's testimony, the Indicated Respondents maintain that even where flaws in market rules or design create suboptimal market outcomes, it is still

---

evidence supports that doing so was a legitimate business decision, resulting from natural market forces, and not alone demonstrative of manipulative conduct")).

[153] *Id.* at 90.

[154] *Id.* at 94 (citing Tr. at 1005:20–1006:5 (Berry)).

[155] *Id.* at 91 (citing Tr. at 996:2-3 (Berry); Ex. CAX-142; Ex. CAX-001 at 23 fig II-1; EX. SNA-19 (asserting that Dr. Berry's Type I metric is still out of step with the markets in the West that saw daily on-peak prices regularly exceeding the average MMCP plus $150 threshold by $50-$350/MWh)).

[156] *Id.* at 99-100.

[157] MPS and Illinova at 26 (citing Tr. at 1678:16-18, 1688:13-1689:12 (Berry)).

[158] Indicated Respondents at 100.

legitimate for market participants to engage in aggressive profit-seeking or cost minimizing behavior deemed rational in all other contexts.[159]

71. The Indicated Respondents argue that determination of whether a bid amounts to economic withholding should be based on whether sellers profited from the alleged economic withholding. According to the Indicated Respondents, it is not well-reasoned to assert that companies were engaging in economic withholding in order to elevate the real-time power price if they did not profit from making any energy sales at this higher price.[160] MPS and Illinova note that Dr. Berry's analysis ignores the fact that the Respondents would have profited on other real-time sales if the bids that Dr. Berry alleged were economic withholding had raised real-time power prices.[161]

72. The Indicated Respondents further contend that bids that allegedly constitute economic withholding cannot possibly violate CAISO MMIP section 2.1.1.1, as that section addresses withholding of generation.[162] The Indicated Respondents and Trial Staff maintain that most Respondents were under no obligation to offer supply imports to California and had no load to serve in California, and thus cannot be held liable for withholding the energy they had no obligation to offer in the first place. [163]

73. The Indicated Respondents assert that Dr. Berry's screen as applied to Type III bidding is illogical because it concludes that a supplier withheld by bidding above the marginal cost proxy price even when CAISO chose not to accept such offers because lower cost energy was available.[164] The Indicated Respondents further argue that Dr. Berry's Type III screens are arbitrary because a bid of the same amount could be considered a tariff violation in one hour but a legitimate transaction in another hour. According to the Indicated Respondents, the typical supplier offering energy in the California markets during the Summer Period had no control over and could not have known either the price at which the market would clear for that hour or the value of the marginal cost proxy price calculated by California Parties. The Indicated Respondents

---

[159] *Id.* at 62 (citing Ex. POW-257 at 9:21-10:6 and Ex. POW- 261 at 17).

[160] *Id.* at 104 (citing Ex. CSG-1 at 225:19–226:1, 260:4-6, 261:5-8).

[161] MPS and Illinova at 27-28 (citing CSG-1 at 225:19-226:4).

[162] Indicated Respondents at 105.

[163] *Id.* at 104-105; Trial Staff at 111 (citing Ex. SNA-3 at 50).

[164] Indicated Respondents at 106 (citing CSG-1 at 231:16-232:5).

state that, despite the unknown variables at hand, a supplier's wrongdoing is still determined on this flawed premise.[165]

74. The Indicated Respondents and Trial Staff claim that California Parties ignored the behavior by the investor-owned utilities in its analysis. Trial Staff states that Dr. Berry tailored her analysis to capture the Respondents' bids while ignoring the bidding behavior of her clients.[166]

75. Trial Staff states that an investigation performed by the Commission's Office of Market Oversight and Investigations (OMOI) in 2003 found no evidence of Anomalous Bidding.[167] Trial Staff notes that the investigation was non-public and interventions were not permitted, but the California Parties' expert Dr. Berry nevertheless testified before the OMOI asserting that the bidding during the Summer Period was anomalous because "it was far above competitive levels."[168] Trial Staff argues that considering that the OMOI investigation found no evidence of Anomalous Bidding, the Commission should insist on a high measure of proof before imposing remedies for alleged anomalous behavior.[169]

76. Trial Staff further argues that CAISO authored MMIP section 2.1.1 and monitored sales and purchases in the CAISO auction markets, yet never cited any Respondent for Anomalous Bidding behavior. Trial Staff concludes that since CAISO never contemporaneously identified any Anomalous Bidding behavior, no Respondent was afforded contemporary notice that its bidding strategies were running afoul of section 2.1.1 of the MMIP.[170]

Brief Opposing Exceptions

77. The California Parties state that the Presiding Judge correctly found that Anomalous Bidding Types I, II and III were tariff violations, and that the California

---

[165] *Id.* (citing POW-277; Tr. at 1040:25-1042:21and 2107:23-2108:3 (Berry)).

[166] Trial Staff at 97-99.

[167] *Id*. at 90-91 (citing *Investigation of Anomalous Bibbing Behavior and Practices in the Western Markets*, 103 FERC ¶ 61,347, at P 12 (2003)).

[168] *Id*. at 91 fn.158 (citing Tr. 1010-11 (Berry)).

[169] *Id.* at 92.

[170] *Id.* at 91-92 (citing Tr. 3231, 3409, 3472 and 3888 (Hildebrandt)).

Parties demonstrated both violations and price effects for Type II and Type III Anomalous Bidding. The California Parties state that Dr. Berry examined evidence for each of the 3,696 hours of the Summer Period and found that Anomalous Bidding took place in most of those hours. The California Parties explain that she reached this conclusion by first using economic analysis to detect anomalous bids and then using sensitivity analyses to reach her conclusions about whether a sufficient pattern of behavior was established. The California Parties argue that the Presiding Judge properly concluded that the Respondents had produced nothing to refute this analysis.[171]

78. The California Parties also argue that, contrary to the Respondents' assertions, Dr. Berry's screens were appropriately upheld in the Initial Decision, since they demonstrated an hour-by-hour analysis of individualized violations and took the unique marginal cost characteristics of the different types of sellers into account.[172] The California Parties argue that the use of the least efficient generator as marginal cost proxy price is a conservative approach.[173] The California Parties further argue that Dr. Berry's approach is consistent with the Commission's finding in an earlier order addressing the California crisis that opportunity costs are not appropriate because energy that is available in real time cannot be sold elsewhere.[174]

79. The California Parties further state that Dr. Berry's analysis was not based on perfect competition. The California Parties explain that Dr. Berry did not find that every bid in excess of the marginal cost proxy price was a tariff violation, but, instead, identified only those bids that were submitted in conjunction with other tariff violating actions (Type II) or amounted to withholding (Type III). The California Parties argue that, based on Dr. Berry's sensitivity analysis, even if the marginal cost proxy prices increase by 10 and 25 percent, there would have only been a small reduction in the number of tariff violations found. The California Parties contend that such an analysis clearly demonstrates that there were no assumptions of perfect competition, but rather "behavior far outside the norm, far above marginal cost, and clearly associated with fraud."[175]

---

[171] California Parties at 85-86 (citing Initial Decision, 142 FERC ¶ 63,011 at P 76).

[172] *Id.* at 87.

[173] *Id.* at 88 (citing Tr. at 975:9-11 (Berry)).

[174] *Id.* at 89 (citing *San Diego Gas & Elec. Co.*, 97 FERC ¶ 61,275 at 62,212).

[175] *Id.* at 96 (citing Ex. CAX-260 at 26-28, 61-68, 87 (showing sensitivity analysis results in Tables 8-13, Table 16)).

80. With respect to Type I bids, the California Parties argue that the Presiding Judge correctly assessed the record evidence in determining that Respondents perpetrated these violations, and although related price effects were not established, the Presiding Judge's findings demonstrate the interrelated fabric of violations that Respondents committed.[176] The California Parties assert that the record evidence supported Dr. Berry's threshold for the Type I analysis and remains consistent with Commission rulings during the crisis as the analysis uses an extremely conservative measurement of marginal cost.[177] According to the California Parties, record evidence confirmed that, through an intentional strategy to artificially increase prices, the Respondents were employing Type II strategies by combining bids in excess of marginal cost to increase the profitability of the other manipulative trading strategies employed during the same hour.[178] The California Parties further argue that the Presiding Judge appropriately found that the Respondents engaged in Type II and Type III bids to keep CAISO's Balancing Energy and Ex Post (BEEP) stack high, and that the Respondents' generalized defenses were unconvincing.

81. The California Parties state that the Presiding Judge properly disregarded the Respondents' arguments that PG&E and SoCal Edison submitted bids that resemble Anomalous Bids because the argument is a generalized response to specific arguments.[179] The California Parties state that the Respondents present no evidence about PG&E's and SoCal Edison's allegedly anomalous bids, and note that the marginal cost proxy price cannot be applied to those entities without an estimation of marginal costs, which the Respondents did not develop.[180] Furthermore, the California Parties contend that the Respondents did not consider the completely different incentives of PG&E and SoCal Edison, which stood to lose, rather than to make money, if prices were inflated.[181]

---

[176] *Id.* at 105.

[177] *Id.* at 106 (citing Ex. CAX-260 at 53, 59; Tr. At 995:20-996:12 (Berry); Ex. CAX-367 at 17).

[178] *Id.* at 78-79 (citing Ex. CAX-110 at 35-37, 43, 45 & Ex. CAX-260 at 64-65; see also Ex. CAX-121).

[179] *Id.* at 99 (citing Initial Decision, 142 FERC ¶ 63,011 at PP 67, 73, 163).

[180] *Id.* at 99 (citing Tr. at 2154:20-21 and 2152:5-2155:3 (Berry); Tr. at 8571: 8-8578:6 (Hogan); Ex. No. CAX-260 at 86).

[181] *Id.* at 99-100 (citing Tr. at 2153:23-2154: 24 (Berry)).

Commission Determination

a. Marginal Cost Proxy-Based Methodology

82. We find that the marginal cost proxy-based screens and analysis adopted by the Presiding Judge properly identify the bidding behavior that violated the CAISO MMIP, identify the parties that engaged in these violations, and determine whether those violations affected market clearing prices. We affirm the Presiding Judge's finding that the marginal cost proxy-based methodology developed by the California Parties provides for a credible proxy of prices in a normal competitive market. As the Commission stated before, "in a competitive market,… sellers have the incentive to bid their marginal costs."[182] Accordingly, the marginal cost proxy price was appropriately applied to the Summer Period as a factor to determine which bids were anomalous and therefore constituted MMIP violations. That said, we agree with the Presiding Judge that bidding above marginal cost is not a tariff violation *per se*; however, certain bidding patterns in relation to marginal costs are indicative of Anomalous Bidding, as illustrated by various Type I, Type II and Type III bids. Accordingly, we reject the Respondents' argument that the marginal cost proxy-based screens employed by the California Parties to detect tariff violations implicate any bid that was made in excess of marginal cost as a *per se* tariff violation. The analysis proffered by the California Parties demonstrates the collective pattern and consistency of sellers' bids in excess of marginal costs, not just that a series of single bids found in isolation exceeded marginal cost. Our determination of whether the Respondents' bidding behavior constitutes a tariff violation is based on the California Parties' showing of a persistent reoccurrence of the same Anomalous Bidding in violation of the CAISO MMIP.

83. Further, we reject the Respondents' contention that the marginal cost proxy used in the California Parties' screening methodology is based on unrealistically low, inapplicable marginal cost estimates. To counter the Respondents' repeated assertions to this effect, the California Parties presented a thorough sensitivity analysis showing that there was not a significant decline in number of bids exceeding the marginal cost proxy price when the marginal cost proxy was increased by two sensitivity factors: a 10 percent adder and a 25 percent adder.[183] As a result, the majority of bids in question remained higher than the marginal cost proxy. Even though Respondents cite instances where

---

[182] *San Diego Gas & Elec. Co. v. Seller of Energy and Ancillary Servs.*, 97 FERC 61,275, at 61,212 (2004).

[183] *See* Ex. CAX-260 (revised Mar. 26, 2012).

bidding only slightly exceeded the marginal cost proxy threshold, the sensitivity analysis demonstrates that such occurrences were not extensive.[184] These sensitivity test results further demonstrate that there was a pattern of pervasive bidding behavior involving bids higher than marginal costs.

84. We also find that the Presiding Judge correctly adopted screens that considered elements of opportunity costs. The CAISO real-time market was the last market to operate before the actual delivery of energy in the WECC.[185] This finding by the Presiding Judge is consistent with Commission precedent. As stated in a prior order, energy that is available in real time cannot be sold elsewhere.[186] Sellers had limited choices if their bids were not chosen in the CAISO real-time markets. One option was to take delivery of the energy, sell it to no one, and let it flow on the system where the energy was located, which would create an energy imbalance to be dealt with by the system's balancing authority. Another option was to sell the energy at a heavily-discounted "disposal" price to a generator that could back down its physical resource.[187] In both cases the seller's marginal cost is its opportunity cost. Despite the Indicated Respondents' contention that there is no clear relationship between the California Parties' proxy price and the costs associated with the energy sold, we find that the disposal price accurately reflects the sellers' opportunity costs. It is reasonable to assume that a generation owner that reduces the output of generating unit to accommodate an energy purchase in the last hour before the operating/delivery hour will pay no more for energy than the cost it avoids from reducing its output. In other words, the generation owner would not pay more to serve its load from purchased energy than it would to generate the energy itself. In fact, the generation owner could hypothetically pay less if it were competing with other generating units with lower marginal costs for purchase of the disposal energy. Therefore, the maximum disposal price would be the marginal cost of the most expensive generator, but in general could be lower. As such, the California Parties' estimates of marginal cost proxy prices for importers are rather conservative and benefit the Respondent importers.

85. Additionally, we find that the Indicated Respondents' attempt to characterize their bidding as consistent with market values at various trading hubs is an unsupported

---

[184] *Id.*

[185] Ex. CAX-110 at 51 (revised Mar. 26, 2012).

[186] *San Diego Gas & Elec. Co. v. Seller of Energy and Ancillary Servs.*, 97 FERC ¶ 61,275, at 61,212 (2001).

[187] Ex. CAX-110 at 51 (revised Mar. 26, 2012).

generalization. The Indicated Respondents did not demonstrate that the disposal prices at each hour where a bidding violation was captured were inaccurate. Although the Indicated Respondents contend that alternative markets existed in the WECC in real time to get value from their energy, they did not offer their own methodology to incorporate allegedly more accurate market-related cost proxies to prove that its bidding behavior was consistent with business practices.

86. With respect to Shell's argument that the disposal price does not accurately capture its marginal costs, we find that the California Parties' marginal cost proxy price accurately reflects the disposal price Shell would have received had it been acting in accordance with CAISO procurement rules. Shell admits to committing violations of the CAISO MMIP, while attempting to disprove the California Parties' methodology. Shell claims to have engaged in business practices where it waited to receive acceptance of its bid or dispatch instructions before committing to buy energy to fulfill its sale or answer the dispatch.[188] This behavior indicates that Shell unlawfully made sales of ancillary service reserve without first procuring the underlying capacity. Such conduct violates a number of provisions in the CAISO tariff. [189] Further, although Shell claims that actual market clearing prices would have been a more realistic estimate for its marginal cost, Shell does not incorporate such proxies into its own methodology to demonstrate that, unlike the California Parties' marginal cost proxy prices, the market clearing prices more accurately represented Shell's marginal costs. We therefore conclude that Shell's contentions are meritless, since they represent generalized arguments to challenge specific evidence.

87. We further reject the Respondents' arguments that the California Parties' marginal cost proxy-based methodology is based on an inapplicable model of perfect competition. The Commission has adopted and approved the use of the marginal cost proxy-based

---

[188] Since scheduling and bidding protocols required specific information regarding the resources' supporting bids or schedules, the information supplied by Shell regarding such resources would not have been verified prior to submission of its bid, , thus subverting tariff requirements. *See* Ex. CAX-167 at 173-74 & fn. 320 (revised Mar. 28, 2012). *See also* Ex. CAX-001 at 73-74 (revised).

[189] *See* CAISO MMIP §§ 2.1.1.3, 2.1.3; the general requirement to comply with ISO protocols (CAISO § 2.2.6.9); a range of operating and bidding requirements (CAISO §§ 2.2.14.2, 2.3.1.2, 2.5.6.1, 2.5.6.2, 2.5.6.3, 2.5.14-17, 2.5.22.11; SBP §§ 2.3, 5.1.1-4); and the provisions of the Ancillary Services Protocol (ASRP §§ 5.3, 5.4, 5.6, 5.7, 6.2, 6.4).

methodology because it reflects prices that would be expected in workably competitive markets, not perfect markets.[190] The same principles that dictated adoption of the MMCP methodology for the Refund Period apply to the Summer Period. The market rules embodied in the CAISO and CalPX tariffs, and the prices that would have been obtained had those rules been followed, were the same on the last day of the Summer Period (October 1, 2000) as they were on the first day of the Refund Period (October 2, 2000). The Commission previously found that the prices produced by the MMCP methodology during the Refund Period served as a "reasonable proxy for the rates that a competitive energy market would have produced."[191] This reasoning holds equal weight for the Summer Period, since the essential market rules that established market pricing remained unchanged for that period. In addition, because the marginal cost proxy-based methodology incorporates the actual fuel costs, demand and unit availability for each hour, the fundamentals that affect pricing were built into the California Parties' methodology. Even if the fundamental conditions changed between the two periods, the marginal cost proxy price accounts for such changes, and accurately reflects the maximum level that market clearing prices would have reached had the Respondents not violated the tariffs.

88. In addition, we also reject the Indicated Respondents' assertion that the marginal cost proxy-based methodology is not appropriately applied to the Summer Period in the proceeding under FPA section 309, since this methodology was used to reconstruct just and reasonable prices under the section 206 inquiry of 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."[192] In addition, 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.[193] Section 309

---

[190] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 95 FERC ¶ 61,115 (2001); *see also San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 97 FERC ¶ 61,294, at 62,210 (2001).

[191] *San Diego Gas & Elec. Co*., 127 FERC ¶ 61,250 at P 12 (2009).

[192] *CPUC Decision*, 462 F.3d at 1048.

[193] *Id*. at 1051.

"augment[s] existing powers conferred upon the agency by Congress"[194] and authorizes the Commission "to use means of regulation not spelled out in detail, provided the agency's action conforms with the purposes and policies of Congress and does not contravene any terms of the Act."[195] Therefore, the Commission is acting within its statutory authority when relying on the marginal cost proxy-based methodology previously approved and effectively applied by the Commission in the Refund Proceeding. Similarly, we reject the contention that sellers were unaware that their bids must adhere to the marginal cost proxy price during the Summer Period and never received any notices from CAISO that their bidding practices did not comply with MMIP provisions, as sellers should have been generally aware of their marginal costs during this time. Moreover, sellers that engaged in tariff violations were on notice that their transactions may be subject to refund, restitution, and disgorgement of profits or other remedy.[196]

89. Furthermore, we reject Trial Staff's contention that the Commission should hold the California Parties to a higher evidentiary standard because Anomalous Bidding has already been investigated by the OMOI. As we stated in the Rehearing Order, the trading practices that were addressed by the Commission in its investigative proceedings may also be examined in the instant proceeding.[197] The Ninth Circuit also found that the Commission's investigation and enforcement proceeding does not preclude a civil proceeding instituted by a third party complaint.[198] By creating additional evidentiary hurdles to the reexamination of these trading practices on the ground that the same trading practices have been addressed in the investigative proceeding, the Commission would, in effect, violate the directive given to the Commission by the Ninth Circuit.

---

[194] *Albany Engineering Corp. v. Hudson River-Black River Regulating Dist.*, 127 FERC ¶ 61,174, at P 33 (2009) (citing *New England Power Co. v. FERC*, 467 F.2d 425, 430-31 (D.C. Cir. 1972)).

[195] *See Niagara Mohawk Power Corp. v. FERC*, 379 F.2d 153, 158 (D.C. Cir. 1967) (citing *Pub. Serv. Comm'n of State of New York v. FPC*, 327 F.2d 893, 896-97 (D.C. Cir. 1964)).

[196] *San Diego Gas & Elec. Co. v. Seller of Energy and Ancillary Servs.*, 141 FERC ¶ 61,088, at P 25 (2012).

[197] Rehearing Order, 135 FERC ¶ 61,183 at PP 16-17.

[198] *CPUC Decision*, 462 F.3d at 1049-51.

90. As discussed below, we affirm most of the Presiding Judge's findings and reject the Indicated Respondents and Trial Staff's argument that since the California Parties' screens would hypothetically capture Anomalous Bidding patterns of California investor-owned utilities, the Respondents should be excused from liability for the tariff violations they committed. We reiterate here that general allegations challenging the validity of the California Parties' marginal cost proxy-based screens will not suffice.

b. Type I Anomalous Bidding

91. We affirm the Presiding Judge's findings that Type I bids are a violation of MMIP sections 2.1.1 and 2.1.1.4 that prohibit "bidding that departs significantly from normal behavior in a competitive market." We find that the California Parties have demonstrated the Respondents consistently engaged in excessive Type I bidding patterns in relation to the marginal cost proxy price.[199] We find the California Parties' marginal cost proxy-based methodology agreeable with the purpose of identifying Type I bidding violations, since it detects bid prices that deviate significantly from what would be expected in a workably competitive market. By incorporating additional, more stringent assumptions into the Commission-approved methodology, the California Parties are taking a rather conservative approach, ensuring that their screens capture the bids that significantly deviate from normal bidding behavior.

92. The California Parties have demonstrated that even when the marginal cost proxy threshold for the various Type I bids increases by 10 percent and 25 percent, respectively, a majority of the Respondent's bids remain above marginal cost.[200] In addition, Dr. Berry's analysis shows that it was not necessary to submit Anomalous Bids to profitably participate in the CAISO real-time market during the Summer Period. Dr. Berry demonstrates that certain companies submitted only nominal amounts of what were classified as Anomalous Bids, while other generators and marketers had a majority of their bids meet the threshold for Type I anomalous behavior as determined by the screens.[201] For example, of the 34,850 total bids Shell submitted during the Summer Period, 27,513 (79 percent) were determined to be Type I Anomalous Bids.[202] As noted

---

[199] Ex. CAX-271; Ex. CAX-142; Ex. CAX 260 at 30 tbl 2, 61 tbl 8, 62 tbl 9 & 63 tbl 10 (revised Mar. 26, 2012).

[200] Ex. CAX-260 at 61 tbl 8, 62 tbl 9, 63 tbl 10 (revised Mar. 26, 2012).

[201] CAX-260 at 30 tbl 2 (revised Mar. 26, 2012).

[202] *Id.*

above, it is the pattern and consistency of the bidding at above the marginal cost that indicate that this bidding behavior was a tariff violation, not that all bids in isolation were deemed *per se* tariff violations.

93. However, as the Indicated Respondents point out, the California Parties' evaluation of Type I bidding does not include an analysis of the actual market clearing price in any hour. As the record evidence shows, the California Parties' expert witness, Dr. Fox-Penner did not present evidence of price effects with respect to Type I bids, and therefore, we find that assumptions about the effect of such bidding on prices are unsupported. We therefore affirm the Presiding Judge's finding that the California Parties have failed to establish a price effect for Type I bids, and subsequently fail to establish a *prima facie* case for Type I bidding.

c. Type II Anomalous Bidding

94. We affirm the Presiding Judge's finding that Type II bids are tariff violations. Respondents engaged in above marginal cost bidding in conjunction with anti-competitive tariff strategies, which violated CAISO MMIP sections 2.1.1 and 2.1.3, prohibiting bidding that "departs significantly from normal behavior in competitive markets", and that "[takes] unfair advantage of the rules and procedures set forth in the CalPX and CAISO tariffs to the detriment of the efficiency of, and of consumers in, the CAISO Markets."[203] Furthermore, we agree with the Presiding Judge's conclusion that Respondents engaging in Type II bids also violated CAISO MMIP section 2.1.1.4 by using the excessive bidding strategy to "exploit supply shortages in the CAISO real-time market that often were artificially created by suppliers."[204]

95. The Presiding Judge adopted screens demonstrating that Type II bids involved above marginal cost bidding in conjunction with false exports, false load, and economic withholding strategies, which led to inexplicably high market clearing prices during the Summer Period.[205] As discussed above we accept these screens. We agree with the Presiding Judge's conclusion that above marginal cost bidding alone is not necessarily a tariff violation, but that it does violate the tariff when it is used in combination with anti-competitive bidding strategies.[206] However, our affirmation of the Presiding Judge's

---

[203] Ex. CAX-100 at 1031-1032.

[204] *Id*. at 1031.

[205] Ex. CAX-110 at 35-37, 43, 45, 47 (revised Mar. 26, 2012); Ex. CAX-260 at 64-66 (revised Mar. 26, 2012); *see also* Ex. CAX-121.

[206] Ex. CAX-110 at 43 tbl 4, 45 tbl 5, 47 tbl 6 (revised Mar. 26, 2012); Ex. CAX-

(continued …)

ruling on this issue is not based solely on the notion that the various anti-competitive tariff strategies occurred during the same hour as above marginal cost bidding. As stated before, the pattern of bidding and the consistency of such bidding in excess of marginal cost has been a guiding determinant in finding whether any Respondents violated the tariff.

96. We find that the Presiding Judge properly found that Shell Energy engaged in Type II Anomalous Bidding that violated the provisions of the CAISO MMIP, as noted above. As with Type I Anomalous Bids, the California Parties' sensitivity analysis has shown that even when the marginal cost proxy threshold for the various Type II bids was increased by 10 percent and 25 percent, a majority of Shell's bids exceeded the adjusted thresholds, and thus demonstrate a consistent pattern of bidding in excess of marginal cost.[207] For instance, of the 25,669 MWh of Total Type II False Load Anomalous Bids made by Shell (Coral Power), over 99 percent of the total MWh still exceeded the marginal cost proxy when the threshold was increased by 10 percent and 25 percent. Similarly, of the 2,118 MWh of total Type II False Export Anomalous Bids made by Shell, approximately 95 percent and 90 percent of the total MWh still exceeded the marginal cost proxy, respectively. Also, regarding Shell's Type II Withholding Anomalous Bids, 100 percent of the total MWh cited for violations exceeded the marginal cost proxy plus 10 percent threshold, while approximately 97 percent exceeded the marginal cost proxy plus 25 percent threshold. With respect to MPS, we find that the identification of a single anomalous bid does not constitute a pattern of market behavior that would amount to Anomalous Bidding.[208] We therefore vacate the Presiding Judge's finding that MPS engaged in Type II Anomalous Bidding.

97. We also find that the Presiding Judge correctly determined that Type II Anomalous Bidding affected market clearing prices. Relying on the analysis of Dr. Fox-Penner, witness for the California Parties, the Presiding Judge adopted the price effects analysis, which demonstrated certain Type II violations increased the market clearing price in at least one market that was affected by the transaction.[209] Dr. Fox-Penner's

---

143 at 52 tbl 1 (revised).

[207] Ex. CAX-260 at 67-68 tbls 11, 12 &13 (revised Mar. 26, 2012).

[208] Ex. CAX-260 at 67-68 tbls 11, 12 (revised Mar. 26, 2012). We also note that the Presiding Judge ruled that the California Parties have failed to establish a price effect for this single Type II bid. *See* Initial Decision, 142 FERC ¶ 63,011 at P 34.

[209] Ex. CAX-143 at 35-36 (revised); Ex. CAX-318; Ex. CAX-319 (revised); Ex. CAX-320 (revised).

analysis shows that the calculations for price effects for Type II bids remains relatively unchanged when he incorporates more conservative assumptions into the price effects analysis.[210]

98. Accordingly, we affirm the Presiding Judge's conclusion that the California Parties have met their burden of proof in establishing that Shell engaged in Type II Anomalous Bidding, violating the provisions of the CAISO MMIP and increasing market clearing prices during the trading hours the Type II violations took place.

d. Type III Anomalous Bidding

99. Next, we affirm the Presiding Judge's determination that Type III Anomalous Bidding constituted a tariff violation. We find that economic withholding violates MMIP sections 2.1.1, 2.1.1.1, 2.1.1.4, and 2.1.3. Because these bids associated with economic withholding are often substantially above the marginal cost proxy price, economic withholding reflects bidding that "departs significantly from normal behavior in a competitive market." We find that economic withholding violates MMIP section 2.1.1.1 that prohibits the withholding of generation capacity under circumstances in which it would normally be offered in a competitive market. We also affirm the Presiding Judge's conclusion that Type III anomalous bids were "consistently excessive" and were used to create and exploit supply shortages in the CAISO real-time market. As such, Type III bids violated MMIP section 2.1.3 that prohibits "behaviors that may render the system and the ISO Markets vulnerable to price manipulation to the detriment of efficiency."[211]

100. Similar to our findings on Type II anomalous bids, we accept the Presiding Judge's adoption of the California Parties' screens as applied to Type III bids, and we rely on the sensitivity analysis offered by the California Parties to determine the extent to which the Type III bids exceeded the marginal cost proxies, to assess the overall constancy and pattern of bidding.

101. We find the Presiding Judge properly determined that Shell and APX engaged in Type III Anomalous Bidding that violated the provisions of the CAISO MMIP, as noted above. The California Parties demonstrate through the sensitivity analysis that even when the marginal cost proxy threshold for various Type III bids is increased by 10 percent and 25 percent, the majority of the Respondent's bids remain above the marginal cost proxy. Of Shell's 19,643 MWh of total economic withholding, approximately 98 percent of bids remained anomalous with application of the 10 percent

---

[210] Ex. CAX-310 at 73 tbl 5 (2nd revised version).

[211] Ex. CAX-100 at 1032.

sensitivity factor, while approximately 92 percent of the bids remained anomalous with application of the 25 percent sensitivity factor. For APX, of the 83,396 MWh of total economic withholding, 88 and 69 percent of the bids remained anomalous when applying the 10 and 25 percent adjustment, respectively.[212]

102. We also find that the Presiding Judge correctly determined that Type III Anomalous Bidding affected market clearing prices. The Presiding Judge adopted the price effects analysis provided by Dr. Fox-Penner, which demonstrated certain Type III violations increased the market clearing price in at least one market that was affected by the transaction.[213] Dr. Fox-Penner's analysis shows that the calculations for price effects for Type III bids remains relatively unchanged when he incorporates more conservative assumptions into the price effects analysis.[214]

103. Similar to our finding regarding MPS's alleged Type II tariff violations, we find that a consistent pattern of bidding cannot be demonstrated with regard to MPS' alleged Type III Anomalous Bidding tariff violation identified by California Parties. There is not sufficient record evidence to establish that MPS engaged in economic withholding, since MPS placed only one bid associated with 100 MWh of total economic withholding. Although that bid remained anomalous 100 percent of the time with application of both 10 percent and 25 percent sensitivity factors,[215] one bid is not sufficient to establish a pattern of Anomalous Bidding behavior. We also note that the Presiding Judge ruled that the California Parties failed to show the price effect of MPS' bid on the market clearing price. Therefore, we find that the California Parties have failed to meet their burden of proof to show that MPS committed Type III Anomalous Bidding tariff violations that affected the market clearing price. We affirm the Presiding Judge's conclusion that the California Parties have met their burden of proof in establishing that Shell and APX engaged in Type III Anomalous Bidding, violating the provisions of the CAISO MMIP and increasing market clearing prices during the trading hours the Type III violations took place. We address the select arguments raised in briefs on exceptions regarding these findings below.

104. We reject the Respondents' assertion that the profitability of individual bids should be a determining factor as to whether a market participant engaged in economic

---

[212] Ex. CAX-260 at 87 tbl 16 (revised Mar. 26, 2012).

[213] Ex. CAX-143 at 35-36 (revised); Ex. CAX-317 (revised).

[214] Ex. CAX-310 at 73 tbl 5 (2nd revised version).

[215] Ex. CAX-260 at 87 tbl 16 (revised Mar. 26, 2012).

withholding. The Commission has previously held that "economic withholding occurs when a supplier offers output to the market at a price that is above both its full incremental costs and the market price (and thus, the output is not sold)."[216] Just because a single offer is not accepted and does not raise real-time prices in isolation, does not mean that the impact on the market is not felt. Due to withholding, energy is removed from the market when it could have been economically viable to sell into the market at prevailing prices. Sellers did not withhold in isolation, however, because there is no profit to be made if nothing is sold. The record evidence shows that sellers had a portfolio of transactions in the market at any given hour, and economic withholding was used to raise the price received by the rest of their portfolio in a given hour. [217]

105. Furthermore, we reject the Indicated Respondents' assertion that withholding of generation is irrelevant to importers who did not have generation assets. Although an importer who was a marketer was not required to identify the generation unit associated with its bids into the market, such bidding was a confirmation that some capacity/energy was available. The fact that certain importers were not actually providing the generation, but were instead purchasing it from a generating unit does not excuse them under the rules delineated in CAISO MMIP section 2.1.1.1. The high prices in the CAISO real-time market presented lucrative opportunities for suppliers. The withholding analysis provided by Dr. Berry identifies MWhs that were not sold when it would have been economically rational to sell them.[218]

106. We reject the Indicated Respondents' and Trial Staff's argument that suppliers who were not obligated to offer supply and serve load in California should be excused from withholding violations. The analysis does not assume an obligation of suppliers to provide energy to CAISO, but certain sellers did offer to provide such energy. Sellers that chose to participate in the CAISO market are not exempt from the rules because they have the option not to participate. Bidding in such offers played a vital role in determining market clearing prices. Although the Respondents were not required to bid, such bidding did obligate them to follow the rules established in the CAISO MMIP. Furthermore, the Respondents' assertion that the screens used to identify Type III withholding bids are invalid because CAISO never accepted the energy is meritless. As

---

[216] *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 97 FERC ¶ 61,220, at P 4 (2001).

[217] Ex. CAX-143 at 31, 61-65 (revised).

[218] Ex. CAX-100 at 1031 (CAISO MMIP § 2.1.1.1).

discussed above, the Commission has previously explained that economic withholding, by definition, results in the output not being sold.[219]

107. We also reject as baseless the Indicated Respondents' claim that Type III screens are arbitrary because application of the marginal cost proxy price allowed for a bid to be considered legitimate in one hour and constitute a tariff violation in another hour. By applying a marginal cost proxy price unique for each trading hour, such a finding could be made with regard to any multi-hour, flat-priced energy sale. For example, in the *CPUC Decision*, the Ninth Circuit affirmed the use of the MMCP to determine the just and reasonableness of OOM spot transactions which were flat-priced, multi-hour transactions.[220]

2. False Export

108. The Presiding Judge explained that False Export violations occurred when a generator or marketer made a purchase of CalPX energy and then exported the energy outside the CAISO control area, ostensibly as a sale to a grid located outside of CAISO or by parking the energy with another generator or marketer outside CAISO. According to the Presiding Judge, the entity would subsequently return the same energy to CAISO in real time, but disguised as energy sourced from outside CAISO, when it was in fact CAISO energy all along.[221] By allowing the fictitious energy sources to be bid back into the ancillary services market or as supplemental energy, the Presiding Judge found, this process enabled the supplier to evade the CAISO price cap on real-time prices or to attain a higher real-time price for the sale. The Presiding Judge concluded that the success of this process required the submission of false information to CAISO, which in and of itself, is a violation of the tariffs.[222]

109. Relying on the testimonies of Mr. Taylor and Dr. Fox-Penner, experts for the California Parties, the Presiding Judge concluded that MPS, Shell, and Koch engaged in

---

[219] *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 97 FERC ¶ 61,220, at P 4 (2001) (*Order Establishing Refund Effective Date & Proposing to Revise Market-Based Rate Tariffs & Authorizations).*

[220] *CPUC Decision*, 462 F.3d at 1052.

[221] Initial Decision, 142 FERC ¶ 63,011 at P 36.

[222] *Id.* P 36 (citing Ex. CAX-001 at 40-45 (revised)).

False Export violations and that California Parties made a *prima facie* case for all of these Respondents.[223]

Briefs on Exceptions

110. The Indicated Respondents argue that the Presiding Judge did not specifically state what tariff provision, rule or Commission order prohibited the practices associated with alleged False Export violations.[224] The Indicated Respondents further contend that there is no correlation between the alleged False Export transactions and the real-time price cap established in the California markets. The Indicated Respondents argue that the California Parties failed to present evidence of the Indicated Respondents' intent to evade the CAISO price cap on real-time prices or to attain a higher real-time price for the sale of this energy.[225] MPS asserts that it cannot be shown that alleged False Export transactions enabled MPS to evade the CAISO price cap or attain a higher real-time price because Mr. Taylor's marginal cost proxy-based screens did not require that any of the imported power be priced above the price cap.[226] MPS and Illinova explained that it is unlikely for screen-identified pairs to be linked in any manner because almost half of the identified pairs included import segments which were not sold at higher prices in the real-time markets.[227]

111. The Indicated Respondents and Trial Staff further assert that the California Parties failed to demonstrate a nexus between the transactions at issue and clearing prices in the relevant market.[228] The Indicated Respondents explain that the California Parties' expert

---

[223] *Id.* P 37 (citing Ex. CAX-167 at 111 (revised Mar. 28, 2012); Ex. CAX-218, Ex. CAX-316 (revised); and California Parties October 15, 2012 Errata to Initial Brief at 2).

[224] Indicated Respondents at 109 (citing Initial Decision, 142 FERC ¶ 63,011 at P 36).

[225] *Id.* at 113 (citing Tr. at 4133:15-21 and 4220:17–4221:11 (Taylor) and Ex. CAX-167 at 134:17–135:7).

[226] MPS and Illinova at 22 (citing Initial Decision, 142 FERC ¶ 63,011 at P 36; MPS-Illinova Post-Hearing Brief at 10-11; Ex. MI-1 at 32:11; MI-10; Tr.at 5169:7-15 (Taylor)).

[227] *Id.* at 25 (citing MPS-Illinova Post-Hearing Brief at 16-17; Ex. CAX-383).

[228] Indicated Respondents at 207-208; Trial Staff at 80.

established a price effect for the CalPX day-ahead market, while claiming that False Exports violated CAISO's tariff governing CAISO's real-time market.[229] According to the Indicated Respondents, for the transactions that California Parties claim to have established the price effect, they provided no information on the magnitude of such impact.[230] The Indicated Respondents also state that they offered sufficient evidence overlooked by the Presiding Judge, demonstrating that alleged False Export transactions had a beneficial effect on the CAISO real-time market by reducing differentials between real-time and day-ahead prices.[231] Trial Staff alleges that Dr. Fox-Penner failed to follow the Commission's directive since his analysis only required an examination of positive price changes. Trial Staff contends that Dr. Fox-Penner's analyses with respect to False Exports with CalPX-sourced energy and False Export with in-state, non-CalPX-sourced energy were flawed and rested upon erroneous assumptions.[232]

112. The Indicated Respondents and Trial Staff contend that the California Parties failed to demonstrate that the real-time imported energy was the same energy identified in the day-ahead export schedule and that the California Parties' evidence simply identifies, in a given delivery hour, that an import and an export both occurred.[233] The Indicated Respondents conclude that without matching, each such transaction constitutes an independent legitimate transaction consistent with normal behavior in efficient, competitive markets.[234] The Indicated Respondents contend that the California Parties failed to prove that the export was a fictitious schedule that never occurred and the import unlawfully identified a "false" source outside the CAISO control area.[235] According to the Indicated Respondents, the California Parties failed to demonstrate, in any hour, that the sink control areas specified in the Respondents' day-ahead False Export schedules

---

[229] Indicated Respondents at 207-208 (citing Tr. at 2433:8-25 and 2660:24–2661:6 (Fox-Penner) and Ex. CAX-001 at 88 tbl.V-2).

[230] *Id.* at 208 (citing Ex. CAX-316 at col.3).

[231] *Id.* at 211 (citing Ex. CSG-1 at 205:4–17 and 209:13-17 (Hogan)).

[232] Trial Staff at 82-86.

[233] Indicated Respondents at 112-113; MPS and Illinova at 21-22, 24-25; Shell at 22; Trial Staff at 79-81.

[234] Indicated Respondents at 112-113,123 (citing Tr. at 3168:22–3169:14 (Taylor); CAX-167 at 137:5–6).

[235] *Id.* at 111-112.

failed to receive the energy identified on that schedule. The Indicated Respondents state that the California Parties' expert witness Mr. Taylor admitted that load in the sink control area would have relied on that schedule and consumed that volume of energy.[236] The Indicated Respondents also contend that the California Parties failed to examine whether generation was available, or under control of or under contract to any of the Respondents, in the locations each Respondent identified as source control areas for their imported energy.[237]

113. MPS and Illinova claim that Mr. Taylor's screens were incapable of distinguishing between purportedly illicit imports and exports and those that were entered into legitimately.[238] Specifically, MPS and Illinova asserts that the California Parties could not actually prove that MPS's transactions were False Exports because they never linked intent to any of the paired transactions identified by Mr. Taylor.[239] In addition, MPS and Illinova contend that MPS provided evidence that certain forms of parking are legitimate, but the Presiding Judge expressly failed to prove why MPS's specific arrangements were illegitimate or harmful to system reliability.[240] Shell claims that the Presiding Judge did not take into account the "transaction-by-transaction" evidence Shell presented on each of its imports and exports, or he would not have concluded that any information was false or any energy fictitious.[241] Shell argues that the California Parties failed to produce evidence against any of the alleged 110 False Export violations, and that the two documents which were produced do not prove its intent to engage in any tariff violation.[242] According to Shell, the California Parties did not present evidence that its alleged False Exports were sourced from the CalPX, and Mr. Taylor's marginal cost

---

[236] *Id.* at 118 (citing Tr. at 4346:18–4347:1 (Taylor)).

[237] *Id.* (citing Tr. at 4801:17–20 (Taylor); Tr. at 7723:21–7724:5 (Tranen); POW-254 at 90:15-92:4).

[238] MPS and Illinova Brief on Exceptions at 21-22 (citing Ex. S-11 at 40:1-4).

[239] *Id.* at 24-25 (citing MPS-Illinova Post-Hearing Br. at 15; Tr. at 5174:8-21, 5175:1-5 (Taylor)).

[240] *Id*. at 22-23 (citing Initial Decision, 142 FERC ¶ 63,011 at P 36 n.72; Ex. MI-1 at 31:10-12; MPS-Illinova Post-Hearing Br. at 12; CAX-041 at 10; Ex. CAX-200; Ex. CAX-167 at 51:3-4; Tr. at 8965:8-16 and 9070:14-15 (Kalt).

[241] Shell at 22 (citing Ex. SNA-7).

[242] *Id.* at 25 (citing Ex. CAX-385 and CAX-026).

proxy-based screens did not demonstrate other common denominators such as quantity, counterparty or location.[243]

114. Trial Staff gives two examples of evidence that may demonstrate legitimate transactions in which the Presiding Judge undertook no analysis: (1) the transaction was a long-term bilateral contractual export obligation followed by a real-time import from the same party in an unrelated transaction; or (2) the market participant was importing power on behalf of CAISO or SWP because suppliers were unwilling to assume the credit risk of dealing directly with such entities.[244]

115. The Indicated Respondents and Trial Staff also raise issues regarding the proper definition and scope of False Exports and the applicability of rulings on similar transactions from prior Commission orders. The Indicated Respondents argue that the definition of "False Export" used by the California Parties and ultimately adopted by the Presiding Judge is inconsistent with the definition of "False Import" developed in the Gaming Show Cause Proceeding[245] and provided as an example of an MMIP violation in the Remand Order.[246] The Indicated Respondents contend that to capture False Export transactions, the California Parties used the same marginal cost proxy-based screens that were previously rejected by the Commission in the Gaming Show Cause Proceeding.[247] Trial Staff asserts that the California Parties defined False Export too broadly and that the Presiding Judge failed to make a complete review of substantial record evidence, as well as prior Commission rulings, on the essence of falsity with respect to false import.[248] Trial Staff contends that False Export is merely a rehash of the California Parties' screens that were rejected in the Gaming Order.[249] Trial Staff contends that, while Mr. Taylor

---

[243] *Id.* at 21- 22 (citing CAX-001 at 88 tbl V-2; Tr. at 4204:21–4205:3, 5167:23–5168:1, and 5168:2–6 (Taylor)).

[244] Trial Staff at 79-80.

[245] Indicated Respondents at 120 (citing Gaming Order, 103 FERC ¶ 61,345 at PP 37-40, 67-68).

[246] *Id.* at 119 (citing Remand Order, 129 FERC ¶ 61,147 at PP 21-22 & n.61).

[247] *Id.* at 120 (citing *Am. Elec. Power Serv. Corp*., 106 FERC ¶ 61,020, at PP 37-38, 88 (2004)).

[248] Trial Staff at 68.

[249] *Id.* at 74-79.

attempted to analogize False Export transactions of this proceeding with Ricochet transactions from the Gaming Order, he ignored the fact that the objective of using Ricochet transactions was to evade the price cap in the California real-time market.[250]

Brief Opposing Exceptions

116. The California Parties state that the Presiding Judge correctly described False Export as a practice that involved the "submission of fraudulent information to [] CAISO in order to evade the price cap on real-time prices or attain a higher real-time price for energy" and the Respondents' claim that the Presiding Judge did not define a False Export is unfounded.[251] The California Parties further claim that the Presiding Judge's description of False Export is consistent with the California Parties' description.[252] Contrary to the Respondents and Trial Staff's assertions, the California Parties maintain that the Initial Decision is clear that the California Parties' evidence with respect to False Export was closely analyzed and cited by the Presiding Judge. In addition, the California Parties state that the Presiding Judge correctly found that a False Export is a tariff violation because it involved submitting fraudulent information.[253] The California Parties state that the Respondents and Trial Staff only challenge the evidence presented by the California Parties but do not dispute the fact that, if the evidence presented by the California Parties is true, the Respondents violated the CAISO tariff.[254]

117. The California Parties reference the Presiding Judge's conclusion that their detailed, hour-by-hour transactional analysis overcame the Respondents' general arguments for "extolling the virtue of arbitrage" and repeated conjuring of "perfect storm" economics conditions that they claimed prevailed during the period.[255] The

---

[250] *Id.* at 73-74.

[251] California Parties at 64 (citing Initial Decision, 142 FERC ¶ 63,011 at P 36).

[252] *Id.* at 65 (citing Ex. CAX-001 at 44-48; Ex. CAX-167 at 104-09; Tr. at 3155:15-3168:3 (Taylor)).

[253] *Id.* (citing Initial Decision, 142 FERC ¶ 63,011 at P 36; Ex. CAX-001 at 40-45 (revised)).

[254] *Id.* at 66 (citing Ex. CAX-001 at 44-48; Tr. at 3164:22-3266:19 (Taylor); Tr. at 5934:2-25 (Peterson); Ex.POW-172 at 2; Tr. at 10024:13-17 (Savitski)).

[255] *Id.* (citing Initial Decision, 142 FERC ¶ 63,011 at PP 67-68, 73-75, 153,157-158); *see also* Indicated Respondents at 223.

California Parties argue that they successfully rebutted criticisms of their marginal cost proxy-based screens used to analyze False Export violations[256] and noted that the Presiding Judge found the screens to be an appropriate method for setting forth evidence of violations, consistent with Commission precedent.[257] The California Parties also note that the Presiding Judge dismissed the Respondents' contention that False Exports were legitimate arbitrage, since he determined that the issue in the case was discrete acts of tariff violations, not arbitrage.[258]

118. The California Parties explain that an exact match between forward transactions and offsetting real-time transactions is not a necessary or a typical component of a False Export because the quantities that will be taken in a real-time auction are not known until the auction comes in or dispatch calls are made.[259] The California Parties state that record evidence concerning contracts support this contention and the fact that the Respondents engaged in this scheme.[260] The California Parties argue that the Respondents attempt to show that power actually flowed through False Exports is contradicted by record evidence that shows that the same Respondents denied they contained actual power. The California parties claim that parking cannot be shown to legitimize False Export transactions, since the evidence established that parking was used in conjunction with False Export violations and did not excuse it.[261]

119. The California Parties argue that the Respondents' focus on the Gaming Order's False Import conclusions as dispositive of False Export allegations is an attempt to

---

[256] *Id.* at 70 (citing Ex. CAX-167 at 104-05, 134, 137-40, 153-54; Tr. at 5216:22-5218:23, 3168:22-3169:14 (Taylor); Tr. at 6019:19-6020:21 (Peterson)) .

[257] *Id.* at 70 (citing Initial Decision, 142 FERC ¶ 63,011 at PP 71, 73).

[258] *Id.* at 71-72 (citing Initial Decision, 142 FERC ¶ 63,011 at P 157).

[259] *Id.* at 71 (citing Ex. CAX-167 at 137-40, 153-54; Tr. at 5216:22-5218:23 and 3168:22-3169:14 (Taylor)).

[260] *Id.* (citing Ex. CAX-034; Tr. at 8490:1-8533:23 (Hogan); Ex. CAX-001 at 175 n.263; Ex. CAX-014; Ex. CAX-080; Tr. at 3167:23-3168:3, 3179:2-3185:7 (Taylor); Ex. CAX-001 at 76-77; Ex. CAX-030 at 1-3; Ex. CAX-167 at 120-22; Ex. CAX-184)).

[261] *Id.* at 74 (citing Initial Decision, 142 FERC ¶ 63,011 at n.72); and Ex. CAX-200; Ex CAX-225 at 5; Tr. at 9070:16-24 (Kalt); Ex. CAX-001 at 45-46, 75-76, 149-52; Ex. CAX-167 at 119-34; Tr. at 3167:20-3168:3, 3179:15-3180:7 (Taylor); Ex. CAX-030; Ex. CAX-184.

circumvent their failure to rebut the California Parties' evidence regarding False Export violations.[262] The California Parties note that the Ninth Circuit and the Commission have already addressed and rejected the argument that the Commission's prosecutorial decisions in its 2002 and 2003 investigations govern this proceeding.[263] Further, the California Parties state that the Presiding Judge appropriately recognized that the California parties are not pursuing the False Import violations discussed in the Gaming Order, but a new violation: False Exports.[264]

Commission Determination

120. We affirm the Presiding Judge's finding that False Export transactions are tariff violations. Specifically, False Exports violated a number of applicable sections of the CAISO MMIP. First, because False Export involved the submission of false information to CAISO, and therefore, subversion of export scheduling requirements, such transactions violated MMIP section 2.2.11.1,which provides that "[e]ach Preferred Schedule submitted by a Scheduling Coordinator…must include the name and identification number of each Eligible Customer for whom a Demand Bid or an Adjustment Bid is submitted." Sections 2.2.11.1.1-2 further specify that "For Load: the Location Code of the Take-Out Point," and "the aggregate quantity (in MWh) of Demand being served at each Take-Out Point" must also be included. The information submitted by the Respondents did not correspond to actual load. Second, we find that False Export violated CAISO MMIP section 2.1.1.5 prohibiting "unusual activity or circumstances relating to imports from or exports to other markets or exchanges." Third, we find that False Export violates the provisions within MMIP section 2.1.1.1, since the Respondents effectively withheld capacity from day-ahead markets to raise prices in the real-time markets.[265] Mr. Taylor, witness for the California Parties, presented evidence of the transactions with False Export patterns by supplier and month.[266] Dr. Fox-Penner

---

[262] *Id.* at 69.

[263] *Id.* (citing Initial Decision, 142 FERC ¶ 63,011 at P 44.)

[264] *Id.* at 70 (citing Initial Decision, 142 FERC ¶ 63,011 at P 36).

[265] Ex. CAX-100; Ex. CAX-167 at 104-105 (revised Mar. 28, 2012).

[266] Ex. CAX-218; Ex. CAX-167 at 111 tbl III-1 (revised Mar. 28, 2012).

examined bids identified by Mr. Taylor through analyzing whether there was a corresponding price increase as a result of the False Export transactions.[267]

121. As a preliminary matter, we address Trial Staff's argument regarding analogizing False Export transactions and the Ricochet transactions in the Gaming Order. The California Parties' expert witness Mr. Taylor has distinguished between the two types of transactions in his testimony. Although the characteristics of the transactions are similar, the framework for analysis is distinct. Mr. Taylor admits that, like Ricochet transactions identified in the Gaming Order, False Export transactions involved the ostensive simultaneous export and import of CAISO energy. However, whereas Ricochet analysis required the import prices to exceed the CAISO price cap, the False Export analysis required imports to only have been sold within the real-time or ancillary service markets, without the cap requirement.[268] We agree with the California Parties that falsely exported and then reimported energy still had reliability and price effects for CAISO regardless of whether the import was sold above or below the established price cap. As discussed below, the inherent falsification of information shaped the bid as a violation, not its relation to the price cap. Therefore, we find that just because there are transactional similarities between Ricochet transactions and False Exports, the analysis of False Exports is not bound by the same parameters as the analysis of Ricochet transactions in the Gaming Order. We reiterate that on remand the Commission made it clear that California Parties have the latitude to offer evidence concerning all behaviors that violated tariffs, whether or not those violations were addressed in the Commission's enforcement proceeding.[269] Limiting the scope of the hearing to the previously established MMIP violation categories would be equivalent to denying the California Parties this opportunity.[270]

122. We agree with the fundamental premise of the California Parties' analysis that False Exports enabled suppliers to purchase power day-ahead and hour-ahead in the CalPX market or in California's bilateral markets and subsequently sell that power directly into CAISO's real-time market without any actual flow on the system occurring outside CAISO's control area.[271] We find that in order to facilitate this strategy certain

---

[267] Ex. CAX-316 (revised).

[268] Ex. CAX-167 at 10 (revised Mar. 28, 2012).

[269] Rehearing Order, 135 FERC ¶ 61,183 at PP 23-25 (citing *CPUC Decision*, 462 F.3d at 1051).

[270] *Id.*

[271] Ex. CAX-001 at 45 fig A (revised).

Respondents relied on parking providers outside the CAISO footprint to improperly gain access to real-time markets. Respondent suppliers were able to file an export schedule by framing the export as an ostensible sale to the parking provider outside the CAISO control area, who would resell the energy back to the supplier in real time for a nominal fee. The repurchased energy was subsequently bid into the CAISO real-time market as Supplemental Energy or into the ancillary service markets as Replacement Reserves by using the parking provider's interchange ID in order to meet the tariff's requirements.[272] Thus, if the delivery leg associated with the sale were scheduled from CAISO's control area and the return leg associated with the repurchase were scheduled back into the CAISO control area, they effectively canceled each other out so that no power actually flowed at the intertie.[273] In simple terms, we find that parking providers were utilized by suppliers as a scheduling convenience to facilitate the deception that energy was sourced outside the CAISO footprint, when all along, the energy originated from the CalPX or in bilateral markets within CAISO's boundaries.[274] Power scheduled from A (the supplier) to B (the parking provider) in the delivery leg and from B to C (the ultimate purchaser) in the return leg actually just went from A to C. The two elements were falsely documented as if they were unrelated, when, in fact, they were part of the same, self-canceling transaction, which is ultimately a violation of the CAISO MMIP, as discussed above.

123. We reject the assertion by the Indicated Respondents that the California Parties' analysis merely identifies that, in a given delivery hour, an import and export both occurred. As discussed above, the California Parties analysis demonstrates how parking arrangements were used to circumvent the CAISO tariff by falsifying schedules to allow Respondent suppliers to gain access to the real-time markets because the CAISO tariff prohibited marketers, who normally just purchased and resold energy, from participating in such markets. Through documentary evidence, discussed further for each remaining Respondent, the California Parties demonstrate that parking transactions were used as a means to access the real-time markets illegitimately, not through legitimate arbitrage. The documents and dealings of parking providers show that they did nothing more than

---

[272] Ex. CAX-001 at 107-108 (revised). Energy purchased in the CalPX or the California bilateral markets did not qualify for sale in the real-time energy and ancillary service markets, since the CAISO tariff contained many provisions that required suppliers to have control over the resources bid into its markets. *See* Ex.CAX-001 at 40-43 (revised).

[273] Ex. CAX-001 at 75 (revised).

[274] Ex. CAX-001 at 76 fn.111, 107-108 (revised); Ex. CAX-030 at 2.

allow their customers to make use of their name for purposes of day-ahead scheduling and real-time bidding.[275]

124. Furthermore, the nominal fees charged by parking providers, typically $2-$10 per MWh, corroborates the California Parties' analysis given that the difference in prices between the day-ahead energy received and the real-time energy returned was often 10 to 100 times the nominal fee.[276] We agree with the California Parties that it is illogical to contend that parking providers backed down their generation and provided energy dispatched hourly at the customer's request, since such a service would have cost providers more than the nominal fee they charged.[277] We are also not persuaded by arguments that a parking provider would use day-ahead energy to serve its own load outside of California and provide a comparable amount of its own generation to be imported into the CAISO real-time market.[278] This hypothetical scenario ignores the discrepancy in market value and assumes parking providers were willing to benefit significantly less than suppliers who gained the full price differential between day-ahead and real-time markets.

125. The Indicated Respondents further claim that Mr. Taylor admitted that load in the sink control area would have relied on the alleged False Export schedule and consumed that volume of energy. We reject the Indicated Respondents' contention given that it refers to testimony addressing a specific entity no longer involved in this proceeding, not as a representation of Mr. Taylor's general analysis of False Export. Also, we find that it is not the California Parties' obligation to examine whether generation was available under control of or contract to any of the Respondents in order to prove the case for False Exports. The Respondents could have presented such evidence to potentially refute Mr. Taylor's claims, but none of the remaining Respondents has provided such evidence. The notion that the California Parties failed to evaluate potential scenarios does not alone discount the analysis proffered by the California Parties to demonstrate the False Export violations.

126. We also reject Trial Staff's assertion that the Presiding Judge undertook no analysis regarding hypothetical scenarios that could have demonstrated legitimate

---

[275] Ex. CAX-030; Ex. CAX-184, *see also* Ex. CAX-200 in Docket No. EL-03-200 (Nov. 6, 2003).

[276] Ex.CAX-001 at 126 (revised).

[277] *Id*.

[278] *See* Ex. SNA-3 at 13.

transactions. The Presiding Judge was not required to specifically address the merits of every hypothetical argument or conjectural scenarios, although the Initial Decision notes that all facts and arguments were given due consideration.[279] Furthermore, the situations to which Trial Staff refers do not apply to any of the remaining Respondents. Therefore, an analysis of such hypothetical contentions would be irrelevant, especially given the weight of the documentary evidence attributed to individual parking arrangements.

127. Next, we examine which Respondents engaged in False Exports. To make this determination, we rely on the California Parties' marginal cost proxy-based screens and also consistent with our analysis of Anomalous Bidding, we have examined whether there is a consistent pattern of behavior that would amount to False Export tariff violations. We find that the California Parties have failed to demonstrate a consistent pattern of False Export activities by Koch Energy. The record evidence indicates that Koch Energy only engaged in False Export behavior within seven bidding hours for a total of 175 MWh of total energy. The California Parties admit that Koch Energy's False Export activities "don't appear to reflect a consistent pattern."[280] In comparison, other Respondents such as Shell and MPS engaged in False Export activities over hundreds of bidding hours and for a total of thousands of MWhs of energy during the Summer Period. Specifically, MPS engaged in False Export activities over 403 hours during the Summer Period and for a total of 15,972 MWh.[281] Similarly, Shell engaged in such behavior during 110 hours of the Summer Period, and produced 1,657 MWh of falsely exported energy.[282]

128. Therefore, we affirm the Presiding Judge's findings of False Export tariff violations for MPS and Shell. However, we vacate the Presiding Judge's finding for Koch Energy, since there was not a sufficient demonstration to prove a consistent pattern of behavior that would amount to False Export tariff violations.

129. We reject MPS and Illinova's argument that Mr. Taylor's screens are flawed because they do not link intent to the identified False Export transactions. As outlined above, Mr. Taylor designed his screens to capture violations through identification of a signature of False Export through CAISO, CalPX, and individual trader transaction data, which enabled him to link forward sales and real-time sales. Furthermore, documentary

---

[279] Initial Decision, 142 FERC ¶ 63,011 at P 136.

[280] Ex. CAX-001 at 81-82 (revised); Ex. CAX-167 at 111 (revised Mar. 28, 2012).

[281] Ex. CAX-001 at 83 tbl V-1 (revised).

[282] *Id.*

evidence links the MPS transactions with intent given the apparent parking arrangements MPS had with various parking providers. According to the record evidence, MPS had an arrangement with a Pacific Northwest parking provider that allowed it to send power out of California and then back into CAISO for a $5-$10 charge.[283] MPS also had parking arrangements with a Southwest parking provider, a Pacific Northwest public utility, and two California municipalities.[284] We are not persuaded by MPS and Illinova's contention that MPS's parking arrangements were legitimate since the energy was backed by a control area outside of CAISO's footprint. The California Parties cite to documentary evidence demonstrating that one of the parking providers with which MPS engaged states that "parking and lending do not constitute control area services."[285] Despite MPS and Illinova's attempt to demonstrate the legitimate business nature of MPS's behavior, such evidence is insufficient compared to the evidence offered by the California Parties, which corroborates the premise of their analysis that False Export transactions involved falsification of scheduling, not actual power flow.

130. In response to Shell's arguments, we find that the "transaction-by-transaction" evidence presented by Shell was not sufficient to rebut the evidence presented by the California Parties. Shell presents trader book data to demonstrate that it exported power from California in response to locational price signals and as legitimate transactions to arbitrage price differentials within and outside California.[286] However, the California Parties use similar trader book data from Shell to verify the CAISO and CalPX data used in the identification of Shell's False Export violations.[287] Therefore, we are not convinced by Shell's argument that its transactions were legitimate and independent. First, Shell does not effectively demonstrate that actual power flowed through its simultaneous imports and exports. Second, the California Parties present evidence linking the pattern of Shell's False Exports with parking arrangements it had with California municipalities. [288]

---

[283] Ex. CAX-001 at 89 (revised); Ex. CAX-037.

[284] Ex. CAX-032; Ex. CAX-038; Ex. CAX-039; Ex. CAX-040; City of Pasadena's Data Responses to the FERC Staff in Docket No. PA02-2; and Ex. CAX-041.

[285] Ex. CAX-200; *see also* Ex. CAX-167 at 51(revised Mar. 28, 2012).

[286] *See* Ex. SNA-7.

[287] Ex. CAX-108 at 9-11; Ex. CAX-001 at 86-87 (revised).

[288] Ex. CAX-001 at 89 (revised); Ex. CAX-026; Ex. CAX-035; Ex. CAX-036.

131. We agree with the California Parties that demonstration of an exact match between forward transactions and offsetting real-time transactions is not necessary because the quantities that were taken in a real-time auction were not known until the real-time dispatch. Therefore, it was possible for CAISO to accept only a portion of a false export bid consistent with the single-price auction market structure, which would not always result in one-to-one matching of the forward and real-time transaction. In any case, the California Parties' witness, Mr. Taylor, conducted an assessment of False Export activity by searching for a signature of False Export transactions in CAISO and CalPX transaction data, which included matching day-ahead and hour-ahead exports with real-time imports or OOM spot transactions.[289] We find that Mr. Taylor appropriately applied the marginal cost proxy-based screens for potential False Export MWh quantities, by seller and hour, comparing exports in the day-ahead and hour-ahead markets to imports in the real-time market.[290] We also find that Mr. Taylor bolsters the California Parties' arguments by corroborating the CAISO and CalPX transactional data with trader books available for some Respondents, which allowed him to verify the export and import transactions associated with False Export in his screening analysis.[291] Using settlement data and supplier trader book information, Mr. Taylor was able to validate 100 percent of the CalPX-sourced export and import pairs identified in his screening analysis for MPS and Shell.[292]

132. Regarding the price effect analysis for False Exports, we find that the California Parties' witness Dr. Fox-Penner accurately constructed a price effects model that compared the actual market clearing price in the hour of a violation to the marginal cost proxy price that would result if the tariff violation is removed in that hour and replaced with an alternative transaction that comports with the requirements of the tariff.[293] Despite the Indicated Respondents and Trial Staff's arguments to the contrary, we find that the framework for the price effects analysis accurately incorporates the assumption that, absent the False Export violations, the seller would have sold its day-ahead power

---

[289] Ex. CAX-001 at 79-80 (revised); Ex. CAX-108 ; *see also* Ex. CA-1 at 108 *et seq*. in Docket No. EL00-95-075.

[290] EX. CAX-108 at 2-8.

[291] CAX-108 at 9-11; Ex. CAX-001 at 86-87 (revised).

[292] Ex. CAX-001 at 86-87 (revised).

[293] Ex. CAX-143 at 38-39 (revised); Ex. CAX-310(2nd revised version); *see also*, Ex. CAX-316 (revised).

into the CalPX, as the market design intended. Dr. Fox-Penner bases his model on actual historical data that demonstrates that the real-time market typically provided about one percent of power delivered to load within CAISO.[294] Therefore, the closest alternative for the sale involving a tariff violation into the California markets is generally a sale into the same markets but with no violation.

133. Further, we reject the Respondents' and Trial Staff's arguments that Dr. Fox-Penner's price effects model is flawed because it does not incorporate variables such as the magnitude of the price effect or account for potential decreases in real-time prices. First, Dr. Fox-Penner admits that his price effect model does not intend to incorporate the precise magnitude of a violation's price effect because the violations are examined in isolation and do not reflect seller interactions and other combined effects.[295] In the Remand Order, the Commission instructed the Presiding Judge to examine and the California Parties to demonstrate whether specific market behavior constituting a specific tariff violation affected the market clearing price.[296] We find that the Presiding Judge's inquiry and the California Parties' showing are consistent with this directive. If the Respondents believe that their False Export transactions had a beneficial effect on market clearing prices, they should have provided specific evidence to this effect; they failed to do so. Without specific evidence to the contrary, we are not convinced by the Respondents' and Trial Staff's arguments that there was a price reducing effect of False Exports on the real-time market.

134. We also reject MPS's argument that since False Exports did not result in greater profitability every time, it is unlikely that transactions pairs identified by the California Parties' marginal cost proxy-based screens are linked. The California Parties' expert witness Mr. Taylor has demonstrated that, for a majority of bids, the False Export strategy resulted in higher revenues, and subsequently higher profits, than selling the energy in the day-ahead market would have throughout the Summer Period.[297] For Shell, it was more profitable in 86 percent of the hours to sell in the real-time markets through a False Export strategy than it would have been to sell the same energy in the day-ahead market. MPS experienced greater profitability in 67 percent of the hours in which False

---

[294] Ex. CAX-310 at 4 (2nd revised version).

[295] Ex. CAX-310 at 3, 76 fn.64, 78 (2nd revised version); CAX-143 at 36, 39, 97 (revised).

[296] Remand Order, 129 FERC ¶ 61,147 at P 3; Rehearing Order, 135 FERC ¶ 61,183 at P 31.

[297] Ex. CAX-167 at 116-117, table III-2 (revised Mar. 28, 2012).

Exports occurred during the Summer Period. We find this analysis is sufficient to demonstrate the inherent benefits that were realized most of the time regardless of whether False Export was employed 100 percent effectively by the Respondents.

3. False Load Scheduling

135. The Presiding Judge defined False Load Scheduling as a violation by which "the supplier fraudulently created a positive imbalance that was effectively 'sold' at the real-time *ex post* price in the CAISO real-time imbalance market."[298] The Presiding Judge explained that False Load Scheduling includes overscheduling load, load deviation, and scheduling to hypothetical load. The Presiding Judge found that False Load Scheduling violated CAISO tariff section 2.2.7.2.[299] The Presiding Judge interpreted that tariff section as imposing an obligation on Scheduling Coordinators to submit schedules that are based on the actual forecasted demand for the entities they are obligated to serve.[300] The Presiding Judge concluded that the submitted schedules, which reflected an inflated demand, constitute a violation of this tariff provision.[301]

136. The Presiding Judge also found that because False Load Scheduling involved the submission of false information regarding aggregate quantity of demand, it violated

---

[298] Initial Decision, 142 FERC ¶ 63,011 at P 38 (citing Ex. CAX-001 at 48 (revised)).

[299] Section 2.2.7.2 "Submitting Balanced Schedules" provides that**:**

> A Scheduling Coordinator shall submit to the [CA]ISO only Balanced Schedules in the Day-Ahead Market and the Hour-Ahead Market. A Schedule shall be treated as a Balanced Schedule when aggregate Generation, Inter-Scheduling Coordinator Energy Trades (whether purchases or sales), and imports or exports to or from external Control Areas adjusted for Transmission Losses as appropriate, *equals aggregate forecast Demand with respect to all entities for which the Scheduling Coordinator schedules* in each Zone.

Id. P 41 (citing Ex. CAX-100 at 28) (emphasis added).

[300] *Id*. P 42 (citing Ex. CAX-167 at 30-31 (revised Mar. 28, 2012)).

[301] *Id*.

CAISO tariff section 2.2.11.1, which required each submitted schedule to include an identified "take-out point" and the quantity of energy set for delivery at this location.[302] Further, the Presiding Judge found that False Load Scheduling violated MMIP section 2.1.1.3 that covered "unusual trades or transactions" and MMIP section 2.1.1.5 that covered "unusual activity or circumstances relating to imports from or exports to other markets or exchanges."[303]

137. The Presiding Judge also accepted all the screens, evidence and methodology presented by the California Parties and found that they appropriately captured False Load Scheduling violations. According to the Initial Decision, the methodology used by the California Parties entailed: (1) establishing all hours in which the Respondents received payments for positive uninstructed deviations;[304] and (2) segregating occurrences of true false load infractions from any instances of normal fluctuations in generation and demand through the imposition of a conservatively established screen[305] that excused any imbalances that were ten percent or less.[306] This methodology was carried out by reviewing extensive transactional data, business records, tariff provisions, trader tapes, and associated studies.[307]

138. Based on the California Parties' methodology, the Presiding Judge found that the Respondents committed a total of 15,286 False Load Scheduling violations.[308] Adopting the California Parties' methodology, the Presiding Judge also determined that 10,890 of the identified False Load Scheduling violations committed by APX, MPS, California

---

[302] *Id.* P 43 (citing Ex. CAX-100 at 36 (CAISO Tariff § 2.2.11.1)).

[303] *Id.* (citing CAISO MMIP §§ 2.1.1.3, 2.1.1.5).

[304] Initial Decision, 142 FERC ¶ 63,011 at P 53 (citing Ex. CAX-167 at 24 (revised Mar. 28, 2012)).

[305] *Id.* (citing Ex. CAX-001 at 93 (revised); Tr. at 4445:23-4446:2).

[306] *Id.* (citing Ex. CAX-167 at 24 (revised Mar. 28, 2012); Tr. at 3117:18-3121:17).

[307] *Id.* (citing Ex. CAX-001 at 92-99 (revised); Ex. CAX-167 at 24 (revised Mar. 28, 2012); Ex. CAX-216; Ex. CAX-385; Tr. at 3062:4-16, 3078:17-3079:17, 3115:1-17, and 3134:15-3135:4).

[308] *Id.* PP 54-61.

Polar, Shell Energy, Hafslund, Illinova, and Powerex[309] raised the price in one of the markets in which they had occurred, specifically the CalPX day ahead energy market.[310] Accordingly, the Presiding Judge concluded that the California Parties have met their *prima facie* burden on this claim.[311]

139. The Presiding Judge rejected the Respondents' argument that False Load Scheduling violations constitute legitimate arbitrage.[312] The Presiding Judge reasoned that Respondents are not precluded from pursuing legitimate arbitrage to attain the maximum price for their energy supplies; however, these objectives cannot be pursued by violating tariff provisions.[313]

140. The Presiding Judge rejected the Respondents' and Trial Staff's argument that False Load Scheduling claims had already been resolved by the Commission in the Gaming Order and the Commission determined not to impose refunds because of the California Parties' under-scheduling. The Presiding Judge explained that in the Gaming Order, the Commission affirmatively found that False Load Scheduling violated the applicable tariffs; however, despite this finding of a violation, the Commission did not order disgorgement of the profits by market participants that had engaged in this conduct.[314] According to the Presiding Judge, the Commission made a discretionary enforcement determination not to penalize the violation due to the "countervailing circumstances" present, primarily the "utilities' practice of Under-scheduling load."[315] The Presiding Judge reasoned that this Commission determination is not binding in this complaint proceeding, as it was part in the enforcement proceeding.[316] According to the

---

[309] As discussed above, California Polar and Powerex have settled with the California Parties and are dismissed from this proceeding.

[310] *Id*. PP 62-63 (citing Ex. CAX-315; Tr. at 2433:1-7).

[311] *Id*. P 63.

[312] *Id*. P 40.

[313] *Id*. (citing Ex. CAX-001 at 42 (revised); Tr. at 5715:8-5716:7; Tr. at 7052:8-7053:2; Tr. at 8439:11-20).

[314] *Id*. PP 46-47 (citing Gaming Order, 103 FERC ¶ 61,345 at PP 59-60).

[315] *Id*.

[316] *Id*. P 44 (citing *CPUC Decision*, 462 F.3d at 1050-51).

Initial Decision, the Commission's mandate in this proceeding is to determine whether or not violations were committed by the Respondents during the Summer Period.[317] The Presiding Judge concluded that the evidence presented in this proceeding comports with the Commission's earlier finding that overscheduling is a tariff violation.[318]

141. The Presiding Judge rejected arguments that suppliers should be excused for overscheduling practices because CAISO knew of and encouraged their violations.[319] The Presiding Judge concluded that the Respondents' reliance on the guidance of a quasi-governmental entity overseen by the Commission cannot insulate them from the determination that they committed violations. [320] However, the Presiding Judge suggested that the Commission may consider this argument with respect to the amount of refunds that should be imposed. The Presiding Judge also noted that Respondents failed to present sufficient evidence demonstrating that each overschedule in this proceeding was related to and "a direct response to" a corresponding underschedule, as suggested in the Gaming Order.[321]

142. Further, citing the testimony in the Gaming Proceeding by Terry Winter, who formerly served as CAISO's CEO,[322] the Presiding Judge concluded that the false information that was provided to CAISO impeded the management of generation and load on its system and compromised its ability to ensure reliability.[323] Additionally, based on the testimony of Dr. Hildebrandt, the Director of CAISO's Department of Market Monitoring, who stated that the submission of false load schedules was "specifically designed to be hidden from the scrutiny of system operators and market monitors,"[324] the Presiding Judge concluded that False Load Scheduling compromised CAISO's ability to ensure reliability. The Presiding Judge also found that energy that

---

[317] *Id*. P 47 (citing Rehearing Order, 135 FERC ¶ 61,183 at P 31).

[318] *Id*.

[319] *Id.* P 48 (citing Indicated Respondents at 157; and Ex. POW-249).

[320] *Id*. (citing *Sec'y of Labor, Mine Safety and Health Admin. v. U.S. Steel Mining Co., Inc.*, 6 FMSHRC 2305, 2310 (1984)).

[321] *Id.* PP 51-52 (citing Gaming Order, 103 FERC ¶ 61,345 at P 60).

[322] *Id*. P 49 (citing Ex. CAX-192 at 62).

[323] *Id*.

[324] *Id*. (citing Tr. at 3428:3-4, 15-16 (Hildebrandt)).

was purchased from the CalPX, so that it could be falsely scheduled, served to remove supply from the CalPX and drive those prices upward.[325]

Briefs on Exceptions

143. The Indicated Respondents, MPS and Illinova, and Hafslund challenge the Initial Decision's finding that False Load Scheduling was a tariff violation.[326] They argue that overscheduling did not violate CAISO tariff section 2.2.7.2 that requires submission of balanced schedules.[327] The Indicated Respondents interpret section 2.2.7.2 as requiring that the sum of all demand in a Scheduling Coordinator's schedule must equal the sum of the volumes of its scheduled generation supply. The Indicated Respondents argue that the CAISO tariff's balanced schedule requirement places no volume or other restrictions on the demand a Scheduling Coordinator may commit to supply.[328] Hafslund states that the evidence failed to demonstrate that its behavior in overscheduling energy was fraudulent. Hafslund argues that the Presiding Judge did not elaborate on exactly how overscheduling involved the submission of false information, and alleges that the Initial Decision was not clear on why the false information violated any tariff, rule, or order to justify relief under section 309 of FPA.[329]

144. The Indicated Respondents and MPS and Illinova also challenge the Initial Decision's conclusion that overschedules contained false and fraudulent information and that the generation and demand volumes submitted in the Respondents' day-ahead schedules exceeded the "actual forecasted demand for the entities that [the seller was] obligated to serve."[330] They explain that based on CAISO's daily postings of forecast demand, and the CalPX posting of day-ahead cleared quantities, Scheduling Coordinators could readily project the quantities of energy that would be needed in each load zone to correct the imbalance created by the under-scheduling of utilities' load in the CalPX

---

[325] *Id.* P 50.

[326] Indicated Respondents at 131; MPS and Illinova at 16; Hafslund at 28-29.

[327] Indicated Respondents at 139.

[328] *Id.* at 140 (citing *Boston Edison Co. v. FERC*, 856 F.2d 361, 365 (1st Cir. 1988); *PSEG Energy Res. & Trade, LLC v. FERC*, 665 F.3d 203, 208 (D.C. Cir. 2011); *Mid-Continent Area Power Pool*, 92 FERC ¶ 61,229, at 61,755 (2000)).

[329] *Id.* at 29.

[330] *Id.* at 151 (citing Initial Decision, 142 FERC ¶ 63,011 at P 42).

market.[331] MPS and Illinova argue the schedules at issue identified actual served demand, and the submission of a schedule overstating load was not deceptive because CAISO and the CalPX had access to the schedules and did not rely on load schedules to forecast demand.[332]

145. The Indicated Respondents argue that overscheduling and under-scheduling were forms of permissible and legitimate arbitrage of price differences in the CalPX forward market and CAISO's real-time markets.[333] They contend that the design of the California markets recognized and anticipated that real-time conditions would to some degree differ from conditions expected day ahead. According to the Indicated Respondents, it is efficient in the long run for the markets, and profitable at times in the short run for participants, to be able to change their schedules or reconfigure their financial commitments in real time, or at least closer to the operating hour.[334]

146. Trial Staff argues that the Presiding Judge failed to perform the necessary analysis required by the Commission with respect to what constituted legitimate business behavior, but rather accepted the arguments presented by the California Parties without regard to substantial evidence presented by the Respondents and Trial Staff.[335] Specifically, Trial Staff asserts that the Initial Decision, although it recognizes the Commission's prior determination that overscheduled load violated the applicable tariffs,[336] fails to properly consider the Commission's determinations with respect to the countervailing circumstances that existed at the time and the connection between overscheduled and underscheduled load as it relates to reliability.[337]

147. MPS and Illinova assert that the California Parties also failed to prove that MPS specifically engaged in False Load Scheduling because they did not demonstrate that MPS submitted any schedules to CAISO that exceeded its forecasted load. MPS and

---

[331] *Id.* at 152 (citing Ex. POW-203 at 96:12-23; Ex. POW-001 at 58:13-17; Ex. POW-233 at 5:20-6:2 and 96:14-99:11; Gaming Order, 103 FERC ¶ 61,345 at PP 58, 60.

[332] MPS and Illinova at 15-16.

[333] Indicated Respondents at 154.

[334] *Id.* at 155 (citing Ex. CSG-1 at 208:16-21).

[335] Trial Staff at 44 (citing Initial Decision, 142 FERC ¶ 63,011 at PP 38-52).

[336] Initial Decision, 142 FERC ¶ 63,011 at P 45.

[337] Trial Staff at 46.

Illinova state that contrary to the finding in the Initial Decision, CAISO tariff section 2.2.7.2 was not violated by MPS because the City of Azusa purchased energy from MPS, which it then used to overschedule its own loads, paying MPS for the energy it brought. MPS and Illinova state that evidence concerning this issue was brought forth at trial, but the Presiding Judge failed to acknowledge it.[338]

148. MPS and Illinova note four reasons MPS should not be held liable for Azusa's overscheduling practices: (1) MPS never entered the very schedules that the California Parties' witness Mr. Taylor alleges were false; (2) Azusa took responsibility for the schedules it filed, and it had ultimate control and authority over the amount that it scheduled; (3) Mr. Taylor fails to indicate any principled reason why MPS entered false schedules solely on the basis of a contract with Azusa; and (4) allegations against MPS ignore the fact that MPS ultimately helped by providing energy to the California markets during times of supply constraint.[339]

149. MPS and Illinova claim that the Presiding Judge wrongly identified that Illinova committed 3,243 False Load Scheduling violations. MPS and Illinova argue that the Presiding Judge never responded to their argument that a ten percent threshold to gauge the level of imbalances was chosen arbitrarily and that Mr. Taylor ignored plain text of section 22.1 of the CAISO tariff, which excused imbalances less than 20 MW.[340] MPS and Illinova also claim that Mr. Taylor failed to prove by a preponderance of evidence that Illinova's schedules were fraudulent because he did not offer sufficient evidence to demonstrate that Illinova intentionally sought to deceive anyone.

150. Hafslund contends that the Presiding Judge did not find that its overscheduling violated the CalPX tariff. According to Hafslund, this is a critical fact because the California Parties evaluated the price effect of False Load Scheduling in the day-ahead CalPX market. Hafslund argues that without a finding that False Load Scheduling violated the CalPX tariff, the Presiding Judge's finding is baseless.[341]

151. The Indicated Respondents state that they do not dispute that overscheduling did occur but they argue that their overschedules were directly connected to investor-owned

---

[338] MPS and Illinova at 17, citing *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) (quoting *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001)).

[339] MPS and Illinova at 17-18.

[340] *Id*. at 19.

[341] Hafslund at 13.

utilities' practice of underscheduling.[342] According to the Indicated Respondents, underscheduling was practiced by utilities to suppress prices in the day-ahead market and thus reduce their overall energy costs.[343] As a result of investor-owned utilities' underscheduling in the day-ahead market, the Indicated Respondents argue, CAISO was left with an imbalance that it was forced to make up in its real-time market, thereby driving the Imbalance Energy market prices upward.[344] The Indicated Respondents contend that based on this observed price differential, it was only rational and legitimate for the Indicated Respondents to increase the volume of energy that would be paid at the real-time price by providing positive uninstructed energy to CAISO through overschedules submitted on a day-ahead and hour-ahead basis.[345] The Indicated Respondents thus conclude that their overschedules were balanced schedules that met applicable CAISO tariff requirements.[346] The Indicated Respondents further state that overscheduled megawatts captured in the California Parties' screens were energy actually delivered to underscheduled load in the CAISO service area, where it was consumed.[347] The Indicated Respondents further argue that the Presiding Judge erred in requiring the Respondents to show that each overschedule was related to and in a direct response to a corresponding underschedule.[348]

152. MPS and Illinova and Trial Staff echo the Indicated Respondents' and Hafslund's arguments. MPS and Illinova claim that the Presiding Judge ignores evidence that the practice of overscheduling was in fact helpful to the California markets because it "brought supplies to the highest-priced, most supply-constrained market, ameliorating

---

[342] Indicated Respondents at 131.

[343] *Id*. at 156-57 (citing Ex. POW-238 at 9-10, Ex. POW-233 at 98:1-8; 100:8-101:5; Ex. CSG-1 at 202:8-11).

[344] Indicated Respondents at 157 (citing Ex. POW-233 at 101:14-103:6, & fig. 41; 103:12-104:8 & fig. 42).

[345] *Id.* at 157 (citing Ex. POW-203 at 82:3-9; Ex. POW-270 at 14:15-16; Ex. POW-233 at 135:5-14 and 145:21-146:2; POW-257 at 79:5-13; and Tr. at 7442:22-7443:12 (Pirrong)).

[346] *Id.* at 128.

[347] *Id.* at 131-32.

[348] *Id.* at 137.

whatever forcers were causing those high prices."[349] Trial Staff asserts that the Commission determined that overscheduling load helped reduce reliability problems in the real-time market and that it was often "actively encouraged by CAISO because it reduced the need for real-time energy due to the utilities' underscheduling."[350] Moreover, Trial Staff claims that although the Commission recognized that overscheduling load was technically a violation of the MMIP, it excluded it from the categories of behavior that could constitute unlawful activity.[351] The Indicated Respondents contend that the Presiding Judge should have adopted the Commission's determination in the Gaming Order where the Commission declined to order refunds for overscheduling because of a blanket finding that "market participants who engaged in overscheduling load did so as a response to the utilities' practice of underscheduling load.[352] The California Parties, according to Trial Staff, have failed to meet their burden of proof to show that the Commission should alter its prior rulings on underscheduling and overscheduling.

153. Several parties claim that the California Parties failed to demonstrate that any of the alleged False Load Scheduling tariff violations affected the market clearing prices. Hafslund contends that the Presiding Judge erred by accepting the California Parties' price effect methodology, which, it claims, was overly simplistic and ignored the importance of the FPA section 309 nexus requirement. According to Hafslund, the nexus requirement implicitly required the Presiding Judge to make three findings that: (1) there was a nexus between an alleged violation and the demonstrated effect on the market-clearing price; (2) such a price effect resulted from the tariff-violating behavior of an individual entity, i.e., a nexus between an entity's conduct and the price effect; and (3) that the individual entity's violation has to cause the price effect, and not be a mere technical violation that the California Parties' "but-for" analysis claims to link to an effect on some other market-clearing price.[353]

---

[349] MPS and Illinova at 16 (citing Ex. MI-1 at 27:18-28:2).

[350] Trial Staff at 65 (citing Gaming Order, 103 FERC ¶ 61,345 at n.65).

[351] Trial Staff at 66 (citing Remand Order, 129 FERC ¶ 61,147 at P 20; and Gaming Order, 103 FERC ¶ 61,345 at PP 56-60).

[352] Indicated Respondents at 137 (citing Gaming Order, 103 FERC ¶ 61,345 at P 60).

[353] *Id.* at 36.

154. Trial Staff argues that the California Parties' witness, Dr. Fox-Penner failed to analyze those False Load Scheduling violations that reduced real-time prices. Further, according to Trial Staff, Dr. Fox-Penner only examined the price effect on the CalPX day-ahead market, but did not examine the price effects on the CAISO real-time market, or on the prices to which Mr. Taylor claims the Respondents sought to increase. As such, Trial Staff contends that the California Parties have not adequately demonstrated that False Load Scheduling violations "affected" the market clearing price of the real-time market.[354] Moreover, Trial Staff argues that Dr. Fox-Penner's price effect analyses with respect to overscheduled load sourced by the CalPX, with other California energy, and with imported energy are based on flawed assumptions.[355]

155. The Indicated Respondents contend that they were price takers and their bids only rarely set the market-clearing price in the CAISO real-time market. They further argue that the California Parties' own analyses indirectly reveal that overscheduling actually reduced prices in the CAISO real-time market.[356] They contend that the California Parties' price-effect analysis incorrectly treats bids into one market at specified prices and quantities as fungible with bids in other California markets.[357] According to the Indicated Respondents, there is no basis for assuming that power sold in real time could have been sold economically in the day-ahead market.[358] The Indicated Respondents also point to experts' analyses suggesting that overscheduling moved supply from a lower-value market to a higher-value market and therefore had a beneficial price effect.[359]

156. CARE argues the Gaming Order meant to relieve the Respondents of a refund obligation because it found they overscheduled in response to the California Parties' underscheduling. CARE then says that at the hearing the California Parties failed to prove they overscheduled in response to underscheduling.[360]

---

[354] Trial Staff at 54.

[355] *Id.* at 54-64.

[356] Indicated Respondents at 162 (citing Ex. CAX-310 (revised Apr. 10, 2012); Ex. HAF-9; Ex CAX-310 at fig. 6; Tr. at 2850:14-2853:16 (Fox-Penner)).

[357] *Id.* at 199 (citing Ex. S-6 at 72:19–73:19).

[358] *Id.* (citing Ex. CSG-1 at 205:6-12).

[359] *Id.* at 214-15 (citing Ex. CSG-1 at 202:6-11; 203:16–204:5; Ex. S-11 at 34:18 and 37:17–38:11).

[360] CARE at 11-14 (citing Initial Decision, 142 FERC ¶ 63,011 at PP 19, 21, 28;

(continued …)

Brief Opposing Exceptions

157. The California Parties argue that the Presiding Judge correctly found that the Respondents engaged in False Load Scheduling, a scheme in which the Respondents intentionally scheduled more load than they served in order to shift resources to the real-time market to take advantage of higher prices. The California Parties further argue that the Presiding Judge correctly found that this practice violated several tariff provisions, that several companies committed these violations, and that none of the Respondents provided a legitimate business justification for their violations. [361]

158. The California Parties state that the Presiding Judge correctly interpreted CAISO tariff section 2.2.7.2 to impose an obligation for a Scheduling Coordinator to submit schedules based on actual forecast demand. In response to the Indicated Respondents' argument that this section only means that scheduled demand must equal scheduled supply, the California Parties argue that the Indicated Respondents' interpretation ignores the provision in the tariff that the balanced schedule submitted by the Scheduling Coordinator must be for the entities it actually schedules, and thus be based on those entities' forecast demand.[362] The California Parties note that the Presiding Judge's interpretation of the CAISO tariff section is consistent with the testimony by Dr. Hildebrandt, the Director of CAISO's Department of Market Monitoring, concerning CAISO's understanding of that tariff section.[363] The California Parties also note that the understanding is consistent with Trial Staff's understanding of the provision.[364]

159. The California Parties also argue that the Presiding Judge appropriately found that False Load Scheduling violated other tariff provisions: CAISO tariff section 2.2.11.1, which prohibits submitting false information, and MMIP sections 2.1.1.3 and 2.1.1.5, which prohibit anomalous market activity.[365] In response to the Indicated Respondents' assertion that the Initial Decision contains no evaluation of the Indicated Respondents' evidence contesting false or fraudulent intent, the California Parties state that ample

---

Gaming Order, 103 FERC ¶ 61,345 at PP 47, 49).

[361] California Parties at 38.

[362] *Id*. at 29-30.

[363] *Id*. at 32 (citing Tr. at 3280:15-22 (Hildebrandt)).

[364] *Id.* at 33 (citing Ex. S-9 at 19).

[365] *Id.* at 34-35.

evidence was presented indicating a concerted plan to engage in such behavior.[366] The California Parties also note that the Presiding Judge correctly determined that MMIPs provided independent bases for finding False Load Scheduling to be a tariff violation because they separately prohibit participants from taking unfair advantage of the rules and procedures set forth in the CalPX and CAISO tariffs, protocols and rules. [367]

160. The California Parties further argue that the Presiding Judge properly determined that False Load Scheduling was not legitimate arbitrage. The California Parties argue that the Respondents have offered no credible reason to overturn the Initial Decision's finding that the Respondents' False Load Scheduling transactions cannot be considered legitimate arbitrage because they were conducted through tariff violations.[368]

161. Next, the California Parties challenge Illinova's assertion that the Presiding Judge erred in finding its False Load Schedules were tariff violations because there was no intent to deceive. The California Parties argue that a finding of intent to deceive is not required, consistent with the Presiding Judge's reading of the tariff. The California Parties argue that Illinova presented its argument regarding CAISO tariff section 22.1 at hearing and it was refuted.[369]

162. The California Parties argue that the Presiding Judge properly rejected Respondents' arguments that False Load Scheduling was justified because CAISO knew of and encouraged such practices. The California Parties state that the Respondents did not produce a single piece of documentary evidence to corroborate this claim.[370] The California Parties argue that the Presiding Judge properly credited the testimony of Dr. Hildebrandt, a CAISO market monitoring manager during the crisis, over the excerpted statements of Terry Winter, CAISO's CEO during the crisis. The California Parties argue that the Presiding Judge's findings should be given deference.[371]

---

[366] *Id.* at 36 (citing Ex. CAX-023 at 28-29; Tr. at 3417:3-3421:10 (Hildebrandt)).

[367] *Id.* at 36-37.

[368] *Id.* at 51.

[369] *Id.* at 62-63 (citing Tr. at 5155:15-5160:23, 5175:18-5178:5, 5253:8-5255:20, and 5384:16-5387:3 (Taylor)).

[370] *Id.* at 39-40.

[371] *Id.* at 41 (citing Initial Decision, 142 FERC ¶ 63,011 at PP 49-50).

163. The California Parties also dispute the notion that utilities underbid in the CalPX market. The California Parties point to their witness Dr. Stern's rebuttal testimony demonstrating that utilities' under-procurement was a result of sellers' under-offering of supply in the CalPX market.[372] The California Parties also cite to Dr. Hildebrant's testimony that an attempt by utilities to purchase more power in the CalPX would have resulted in utilities' obtaining only marginally more supply but at an enormous price of $2,500/MWh.[373]

164. The California Parties also argue that False Load Scheduling did not benefit CAISO. The California Parties state that the evidence considered in the Initial Decision showed that the Respondents were not providing additional energy to the market but, instead, were shifting power from the CalPX to CAISO in violation of their tariffs making it harder for investor-owned utilities to purchase in the day-ahead market.[374] The California Parties note the testimony of Dr. Hildebrandt, who stated that "[f]rom a reliability perspective CAISO would clearly have preferred that … sellers simply participate and schedule through the PX's forward markets."[375] The California Parties also note an email by Mr. Bechard, a Powerex trader, who admits that suppliers putting in high priced bids in the CalPX market resulted in underscheduling.[376]

165. The California Parties also state that the Presiding Judge properly rejected the Respondents' arguments that the Commission's statements in the Gaming Order absolve their False Load Scheduling behavior. The California Parties note that the conclusions in the Gaming Order were made without the benefit of an on the record hearing.[377]

166. The California Parties further argue that the Presiding Judge correctly found that Trial Staff and the Respondents' price reduction argument was not relevant in evaluating whether Dr. Fox-Penner's analysis met the Commission's requirements.[378] The

---

[372] *Id.* at 56 (citing Ex. CAX-350 at 12-15).

[373] *Id.* at 55-56 (citing Tr. at 3326:24-3327:8 (Hildebrandt)).

[374] *Id.* at 46 (citing Ex. HAF-2 at 16; Tr. at 8214:21-8215:11 (Mueller); Ex. CAX-001 at 105, tbl. V-4).

[375] *Id.* at 46-47.

[376] *Id.* at 57 (citing Tr. at 3326:24-3327:8 (Hildebrandt); Ex. CAX-350 at 37-41, 48-50; Tr. at 5005:17-5006:5 (Stern)).

[377] *Id.* at 44.

[378] *Id.* at 112.

California Parties assert that this argument is irrelevant in determining whether the Respondents engaged in tariff violations that affected the market clearing price.[379] The California Parties argue that the Commission specified in its mandate that it only wanted to know which violations had a price effect on the market clearing price and did not specify that the price effects achieve a certain amount or be positive or negative.[380] Moreover, the California Parties state that the Respondents and Trial Staff offered no record evidence that any specific tariff violation in any specific hour decreased the real-time market clearing price.[381] The California Parties reiterate their position that the Respondents' argument is a generalized point that is insufficient to rebut Dr. Fox-Penner's hour-by-hour, transaction-by-transaction analysis.[382] The California Parties also point to Dr. Fox-Penner's testimony, which indicates his opinion that any price-reducing effects were outweighed by bidding violations.[383]

167. The California Parties further state that contrary to the argument of several Respondents and Trial Staff, Dr. Fox-Penner analyzed the possibility of price decreases,[384] which he also discussed in his rebuttal testimony, and did not exclude the possibility that price was decreased by particular tariff violations.[385] The California Parties claim that the possibility of price reductions in the real-time market when the violation is considered in isolation without considering other simultaneous behaviors is not evidence that is relevant to Dr. Fox-Penner's analysis of the day-ahead market.[386] The California Parties assert that it is, at worst, an open question whether specific False Load Scheduling violations, looked at in isolation, reduced prices in the CAISO real-time market in some hours, but that this still would not change the fact that thousands of the Respondents' False Load Scheduling violations increased prices in the CalPX day-ahead

---

[379] *Id.* at 112 (citing Initial Decision, 142 FERC ¶ 63,011 at P 155; Ex. CAX-310, at 22:18-19 and 38:22-39:2; Ex. S-11, at 43:13-17).

[380] *Id.* at 113 (citing Initial Decision, 142 FERC ¶ 63,011 at P 155).

[381] *Id.* at 114.

[382] *Id.* (citing Initial Decision, 142 FERC ¶ 63,011 at PP 66-77).

[383] *Id.* at 115 (citing Tr. at 2408:2-14 (Fox-Penner)).

[384] *Id.* at 118 (citing Tr. at 2514:16-2515:16 (Fox-Penner)).

[385] *Id.* (citing Tr. 2514:23-24 (Fox-Penner)).

[386] *Id.*

market.[387] The California Parties further state that record evidence shows that the practice caused prices to increase. In addition, the California Parties point to Dr. Hildebrant's testimony stating that the activities were designed to inflate prices.[388]

168. The California Parties also argue that they established the appropriate nexus between violations of the CAISO tariff and corresponding price increases in the CalPX market.[389] The California Parties claim that the Respondents' understanding of nexus is contrary to Commission policy, "which takes a severe view of committing manipulative violations in one market in order to profit from an effect on prices in a related market."[390] Additionally, the California Parties claim that the Respondents failed to offer evidence refuting Dr. Fox-Penner's analysis, as they made only "categorical" responses that they claim rendered hour-by-hour analyses moot, [391] which was appropriately rejected in the Initial Decision.[392]

169. The California Parties state that the Presiding Judge correctly concluded that the Respondents' generalized arguments related to market fundamentals did not sufficiently negate the *prima facie* case made by the California Parties. The California Parties contend that Respondents provided no evidence quantifying the relationship between the "fundamentals" and the actual prices that they charged during the Summer Period.[393] Thus, the California Parties assert that the Respondents' discussion of market fundamentals does nothing to establish or refute whether or not tariff violations occurred and whether these violations had an effect on market prices.[394]

---

[387] *Id.* (citing Ex. CAX-310 at 10:3-7 tbl. 1).

[388] *Id.* at 48.

[389] *Id.* at 122.

[390] *Id.* (citing *Constellation Energy Commodities Group, Inc.*, 138 FERC ¶ 61,168 (2012)).

[391] *Id.* at 122-23 (citing MPS & Illinova at 2).

[392] *Id.* at 123 (citing Initial Decision, 142 FERC ¶ 63,011 at P 73).

[393] *Id.* at 128 (citing Indicated Respondents at nn.724-728).

[394] *Id.* at 128 (citing Ex CAX-310 at 112).

Commission Determination

170. False Load Scheduling is the creation of fictitious load to match some quantity of supplied electricity in the CalPX day-ahead market. Entities performed False Load Scheduling with the aim of making the supplied electricity available for sale in the higher-priced real-time imbalance market rather than in the day-ahead market. The Commission finds that False Load Scheduling was a tariff violation under several sections of CAISO's tariff and MMIP. The Commission affirms the Presiding Judge's finding that False Load Scheduling was a violation of CAISO's MMIP section 2.2.7.2 requiring that Scheduling Coordinators submit balanced schedules. We reject the Respondents' argument that this requirement only requires them to submit a schedule that has equal amounts of forecast demand and generation. We do not find this a credible interpretation of the tariff provision. This tariff provision provided that a Scheduling Coordinator must submit balanced schedules for the load it was contractually obligated to serve. Interpreting this tariff provision as allowing Scheduling Coordinators to schedule fictitious load in anticipation of actual load would be inconsistent with the meaning and intent of the tariff provision. Allowing a Scheduling Coordinator to bypass any requirement to have contracted supply and demand in balance with the imaginary demand that they anticipate to be present in real time would create an absurd result given the requirements of the tariff provision. Under this interpretation, a Scheduling Coordinator would not be obliged to submit balanced schedules, but would be allowed to resolve any imbalance by simply inventing supply or demand. As the California Parties' witness Gerald Taylor states "[t]he suggestion that one could schedule to fictional demand would rewrite the tariff. If intentional imbalances were allowed, the balanced scheduling provision of the [CA]ISO [tariff], intended to allow efficient management of the power grid, would be meaningless."[395] Accordingly, the Commission also affirms the Presiding Judge's finding that False Load Scheduling violates CAISO tariff section 2.2.11.1, requiring each submitted schedule to include an identified "take-out point" and the quantity of energy set for delivery at this location. The information submitted in fictitious load schedules did not correspond to actual load.

171. Further, we affirm the finding of the Presiding Judge that this practice was an anomalous marker behavior as defined in MMIP sections 2.1.1.3 and 2.1.1.5, involving "unusual trades and transactions" and "unusual activity or circumstances relating to imports from or exports to other markets or exchanges."[396] The Respondents scheduled

---

[395] Ex. CAX-167 at 33 (revised Mar. 28, 2012).

[396] Initial Decision, 142 FERC ¶ 63,011, at PP 17, 43.

fictitious load in an attempt to contravene CAISO's market rules contrary to what would be expected in a competitive market not requiring regulation.

172. We reject claims by the Respondents that False Load Scheduling constituted legitimate arbitrage by market participants. Trial Staff and the Respondents appear to argue that the opportunity for arbitrage alone justifies the Respondents' tariff violations. However, even if the Respondents' practices constituted an attempt at arbitrage, there are policy considerations other than facilitation of the convergence of prices in the day-ahead and real-time markets, the ostensible policy benefit of profit-seeking arbitrage. One of the purposes of the CAISO market structure at the time was precisely to avoid the crisis situation of 2000-2001 in California, where energy was being procured at the last second at extremely high prices. The California Parties' witness Gerald Taylor showed that prior to the crisis this market structure performed as designed, and that the investor-owned utilities were able to procure the energy they needed from the CalPX day-ahead market at reasonable prices.[397] However, during the Summer Period, as real-time prices became extremely high, the Respondents contrived ways, such as False Load Scheduling, to remove their energy from the day-ahead CalPX market, where the demand was more elastic and subject to differences in offer price, and moved the energy into the real-time market, where the demand was inelastic and investor-owned utilities had no ability to avoid a high real-time price. Trial Staff and the Respondents characterize False Load Scheduling as helpful arbitrage since they were removing energy from a low price market and into a high price market where it was presumably in more demand and could do more good. However, this ignores the plain fact that the CalPX market and the real-time market were not two separate markets serving different consumers. The CalPX and the real-time market were two parts of the same market structure serving the same consumers.[398] Moving a megawatt between the two markets is not a transaction to legitimately serve higher demand, but to exploit the essentially inelastic demand for electricity that is common to all real-time energy markets, and that all market structures seek to mitigate by rules and regulations. In the CalPX market, the risk of not being able to sell energy is supposed to discipline market participants to bid their marginal cost.[399] By contrast the real-time market was not designed to handle large amounts of power sales and was more susceptible to manipulation.[400] Circumventing CAISO tariff provisions to

---

[397] Ex. CAX-167 at 33 (revised Mar. 28, 2012).

[398] Ex. CAX-001 at 9 (revised).

[399] Ex. CAX-001 at 17 (revised).

[400] Ex. CAX-001 at 46 (revised).

eliminate the incentive to bid at marginal cost does not serve this market structure, but instead helps to destroy it.

173. The Commission also finds that the Presiding Judge correctly dismissed arguments that the Respondents should be excused from False Load Scheduling violations because CAISO approved of the practice. The evidence presented on whether CAISO approved of this practice or found it desirable is at best ambiguous. But more important, the tacit approval of some CAISO officials of the practice does not excuse the tariff violations of market participants. The Presiding Judge correctly noted that this approval is meaningless from a legal perspective.[401] Moreover, we should not weigh too heavily the opinions of CAISO officials besieged by a crisis. In that atmosphere one may well be willing to take energy where one can find it. As Mr. Taylor's testimony shows, market participants deprived CAISO of the reasonably priced power that had been available to it prior to the crisis.[402] They also organized coordinated schemes[403] to manipulate and bully California consumers into accepting prices for power that were so high that they caused major investor-owned utilities to go bankrupt.[404]

174. We also find that the California Parties demonstrated that the following Respondents committed the enumerated False Load Scheduling violations: MPS, Illinova, Shell, APX, and Hafslund. We affirm the Presiding Judge's acceptance of the California Parties' marginal cost proxy-based screens developed to capture False Load Scheduling violations. The California Parties' witness Mr. Taylor used a conservative screen designed to separate False Load Scheduling violations from legitimate forecast errors.[405] Mr. Taylor matched these screens with patterns that indicated fraudulent behavior, and matched his findings with documentary evidence to show that they captured real False Load Scheduling violations.[406]

175. We disagree with MPS and Illinova that Mr. Taylor's screens are faulty because they did not demonstrate intent to deceive. Mr. Taylor specifically designed his screens

---

[401] Initial Decision, 142 FERC ¶ 63,011 at P 27 (citing *Sec'y of Labor, Mine Safety and Health Admin. v. U.S. Steel Mining Co., Inc.*, 6 FMSHRC 2305, 2310 (1984)).

[402] Ex. CAX-167 at 65-66 (revised Mar. 28, 2012).

[403] *See, e.g.*, Ex. CAX-143 at 82-83 (revised).

[404] Ex. CAX-167 at 83 (revised Mar. 28, 2012).

[405] Ex. CAX-001 at 92 (revised).

[406] Ex. CAX-001 at 110-121 (revised).

to capture violations and to not capture legitimate demand forecast errors. We also disagree with MPS and Illinova that the CAISO section 22.1 tolerance band for accepting balanced schedules of 20 MW should be controlling on Mr. Taylor's analysis. The 20 MW tolerance band was merely the administrative threshold that CAISO set to accept a schedule from the CalPX market, not a statement on what they believed should constitute the threshold for a legitimate forecast error.

176. We also find that a great part of the enumerated tariff violations affected the market price. We affirm the Presiding Judge's acceptance of the California Parties' price-effect analysis. The California Parties' witness Dr. Fox-Penner's analysis represents a reasonable and conservative methodology to ascertain which False Load Scheduling violations impacted the market price in the CalPX market. Dr. Fox-Penner performed a violation by violation analysis and created a meticulously constructed "but-for" scenario to show the price effects of False Load Scheduling on the CalPX market.[407] Crucially, Dr. Fox-Penner assumed that the power that was laundered through False Load Scheduling would have been bid into the market that was the closest legal alternative. This assumption does not consistently contribute to Dr. Fox-Penner's ultimate finding that the practice of False Load Scheduling increased prices in the CalPX market, as some of the energy laundered through False Load Scheduling is assumed to have been not bid at all or bid into the real-time market.[408]

177. The Respondents and Trial Staff attack Dr. Fox-Penner's analysis because they claim that he makes unrealistic assumptions about where the electric power could have gone. However, as with many of Trial Staff and the Respondents' arguments, they rely on theoretical conjectures and anecdotal evidence rather than on broad-based, transparent, and data driven analysis that the California Parties present. Obviously, any attempt to re-construct a scenario where the Respondents did not commit their violations will not perfectly capture their alternative behavior, but Dr. Fox-Penner's assumptions are reasonable alternative scenarios given the different types of energy laundered through False Load Scheduling, and do not appear to be biased to achieve desired results. As Dr. Fox-Penner notes, the theoretical alternatives proffered by the Respondents and Trial Staff have not been established as realistic, let alone more likely, alternative scenarios during the 2000-2001 crisis.[409]

---

[407] Ex. CAX-143 at 38-39 (revised).

[408] Ex. CAX-143 at 43 tbl 2 (revised).

[409] Ex. CAX-310 at 28-29 (2nd revised version).

178. The Respondents and Trial Staff also charge that Dr. Fox-Penner did not take into account the price reducing effects of False Load Scheduling on the real-time markets. However, the Commission has been and remains unconvinced by arguments that there was a price reducing effect of False Load Scheduling on the real-time market, as such arguments seem to rely on the fact that False Load Scheduling increased supply into the real-time market.[410] These arguments again rely on the fallacy that the CalPX market and the real-time market are equivalent separate markets, where supply taken from one market would increase the supply in the other market without affecting demand. If the vast majority of the bids by the Respondents had been made in the day-ahead market, the legal alternative to False Load Scheduling for selling power into CAISO, as Dr. Fox-Penner's alternative scenario suggests, the demand that needed to be met in the real-time market would have been far less, as supply would have been secured at lower prices in the CalPX market.

179. We also reject the Respondents' argument that their false load schedules had no impact on the price because their bids set the market price infrequently. As Dr. Fox-Penner rightly notes, in single price auctions each bidder below the clearing price has an effect on the market clearing price.[411]

180. We also affirm the Presiding Judge's finding that False Load Scheduling should not be excused as a response to under-scheduling by load serving entities. False Load Scheduling has been shown by the record evidence to be a frequently used manipulative scheme that involved the submission of false information to CAISO, which constitutes a tariff violation. While we directed the Presiding Judge to consider the prevailing market conditions in the Remand Order, this direction concerned the evaluation of an "unusual" activity under the MMIP. The MMIP contains broad prohibitions against unusual market activity that must be weighed against the prevailing conditions present at the time.

181. Such prevailing conditions might excuse an action that was simply unusual to the extent an entity did not engage in prohibited actions. However, the record here shows that the Respondents' scheduling practices did violate the CAISO tariff. There is no principle that allows market participants to violate CAISO's tariff because of prevailing market conditions. Such a doctrine would provide a convenient justification for any violation of tariff rules.

182. We also reject arguments that the California Parties have "unclean hands" because of their under-scheduling practices, and are therefore not entitled to relief. First, as the Presiding Judge notes, the Respondents did not make a compelling case based on record

---

[410] *See, e.g.*, Ex. S-11 at 31.

[411] Ex. CAX-143 at 61-62 (revised).

evidence that the identified False Load Scheduling violations were strictly a response to under-scheduling by load serving entities, nor did they present a compelling case demonstrating that the California Parties engaged in underscheduling and that underscheduling was a tariff violation.

183. We also note that there is much evidence that prevailing market conditions justified the scheduling practices of the investor-owned utilities. California Parties' witness Gerald Taylor's analysis shows that in many instances investor-owned utilities offered to purchase at prices that would be reasonable in a functioning competitive market, but that their attempts at acquiring sufficient amounts of energy were thwarted by extremely high energy supply bids and the very False Load Scheduling that the Respondents' claim was merely a response to under-scheduling.[412] Taylor shows that even had investor owned utilities raised their bids to at least the level of the real-time bid cap, this would not have ensured that they would acquire sufficient supply in the CalPX market.[413]

184. Hafslund contends that the Respondents cannot be held responsible for an increase in prices in the CalPX day-ahead market because they have not been shown to violate any CalPX tariff provision. However, the Commission does not find this argument convincing. The CAISO tariff had many provisions that interacted with the operation of the CalPX market, as it was crucial to the operation of CAISO's overall market structure. The balanced schedule provision of section 2.2.7.2 was one of those provisions. To the extent the Respondents violated these tariff provisions to effect unjust profits in one or both California markets, they should be held responsible for those violations, not excused from them on the technical grounds that they did not violate every applicable tariff.

185. We also will not excuse MPS and Illinova on the grounds that they were merely the intermediary between their customers and CAISO. As the Scheduling Coordinator for these transactions, MPS and Illinova are responsible for the tariff violations that occurred. Scheduling coordinators are the entities that have a contractual relationship with CAISO through the tariff. Moreover, as the California Parties note, MPS and Illinova promoted False Load Scheduling schemes to market participants for whom they were a Scheduling Coordinator.

---

[412] Ex. CAX-167 at 63-64 (revised Mar. 28, 2012).

[413] Ex. CAX-167 at 65-66 (revised Mar. 28, 2012).

4. Tariff Violations without Proven Effect on Market Clearing Price

186. The Initial Decision identified a number of transactions for which the California Parties have failed to meet the *prima facie* case requirements as mandated by the Commission. Among these transactions are Type I anomalous bids, phantom ancillary services,[414] intentional running of Uninstructed Generation,[415] circular scheduling,[416] false counterflow,[417] shifting false load,[418] and a host of other interrelated violations including false price reporting, attempts to arrange boycotts, and criminal acts involving manipulation.[419]

---

[414] Under this violation, market participants bid ancillary services (spinning reserves, non-spinning reserves, or replacement reserves), for which they did not have the resources to supply. *See* Initial Decision, 142 FERC ¶ 63,011 at P 80 (citing Ex. CAX-001 at 70, 71, 73-74 (revised)).

[415] This violation involved a market participant that controlled generation resources and refused to adhere to the rules by generating more energy than the amount for which it was scheduled to produce or that the CAISO had dispatched. *See id*. (citing Ex. CAX-001 at 41-42 (revised)).

[416] This violation "took advantage of power flow characteristics and the fact that the [CA]ISO could only 'see' the portions of a transmission path that were within its boundaries." *See id.* P 84 (citing Ex. CAX-001 at 62 (revised)). The Commission has previously recognized this transaction as a violation and labeled this gaming strategy "Death Star." *See id.* (citing Gaming Order, 103 FERC ¶ 61,345 at PP 43, 62-63).

[417] This strategy was accomplished by reducing the amount of false load scheduled in a congested region, while increasing the amount of false load scheduled in an uncongested region in order to derive congestion revenues. *See id.* P 85 (citing Ex. CAX-001 at 66-67 (revised); Ex. CAX-167 at 155-56 (revised Mar. 28, 2012)).

[418] This violation is a form of false counterflow, in which a market participant scheduled generation from a constrained zone to an unconstrained zone, with the scheduled generation traveling over the transmission line against the congestion. *See id.* P 86 (citing Tr. at 4089-4091; Ex. CAX-001 at 66-68 (revised); Ex. CAX-167 at 156-57 (revised Mar. 28, 2012)).

[419] *Id.* P 87 (citing California Parties Initial Br. Part III.G).

187. The Presiding Judge found that while the California Parties presented evidence that these violations occurred, they did not complete their proof for a *prima facie* case by demonstrating the price effects that these violations had on the market clearing price.[420]

Briefs on Exceptions

188. The Indicated Respondents contend that counterflows were a legitimate business practice, not false or fraudulent as the California Parties' allege.[421] The Indicated Respondents further argue that counterflow schedules were both rational and beneficial responses to the price incentives built into California's congestion markets.[422]

189. Shell takes exception to the phantom ancillary services allegation because the CAISO Tariff neither explicitly nor implicitly prohibits short sales of ancillary services, nor is there evidence against Shell in this regard.[423] Shell contends that the Presiding Judge erred to the extent that it found that Shell sold ancillary services which it was not in a position to provide. Shell argues the unrebutted evidence shows that Shell had the resources to provide what it sold,[424] and, that Shell fully delivered dispatched ancillary services 96.5% of the time.[425]

190. With regard to circular scheduling, Shell argues there is no evidence it engaged in this, and that California Parties erroneously joined Shell's legitimate wheel-through

---

[420] *Id.* PP 79-81, 83.

[421] Indicated Respondents at 167-68 (citing Tr. at 3209:3-6, 4093:1–4094:11, and 4879:21–4880:1 (Taylor)).

[422] Indicated Respondents at 170 (citing Tr. at 6316:21-6317:11; 6320:1-19 (Bechard); and Ex. POW-249).

[423] Shell at 2, 9-15 (citing Initial Decision, 142 FERC ¶ 63,011 at P 80; *Am. Elec. Power Servs. Corp.*, 106 FERC ¶ 61,020 at P 92 (2004); CAX-001 at 71:21–72:5; Ex. SNA-16; Tr. at 782:1–18 (Stern); Tr. at 4662:5–24, 4652:23–4653:1 (Taylor); Ex. SNA-3 at 39:10–15, 38:12–39:5; Ex. SNA-16; Ex. SNA-5 at 34:10–20; Ex. SNA-1 at 3:13–21, 12:13-22, & 8:26–9:4; Tr. at 782:1–18 (Stern)).

[424] *Id.* at 12-13.

[425] *Id.* at 13-14 (citing Tr. at 4652:23–4653:1 (Taylor)).

schedules within CAISO to unrelated schedules outside.[426] Shell complains that the Presiding Judge should not have validated California Parties' concocting Circular Schedules by joining legitimate Shell wheel-through schedules inside CAISO with independent and unrelated schedules outside CAISO.[427] Shell also contends the Presiding Judge ignored Shell's inability to control the City of Glendale's out-of-ISO schedules and that the Presiding Judge ignored Shell's evidence showing its wheel-through schedules had actual flowing power.[428]

191. CARE complains that CAISO does not have clean hands and that CARE's evidence regarding circular scheduling was not included in the Initial Decision. CARE asserts CAISO ran an hour-ahead ancillary services auction, allowing the suppliers to simply "cover" their short position by purchasing identical ancillary services in the hour-ahead market. [429] Additionally, CARE demands a reason why its evidence regarding circular scheduling was not included in the Initial Decision.[430]

Brief Opposing Exceptions

192. The California Parties argue that the Presiding Judge properly concluded that the Indicated Respondents committed congestion manipulation violations, namely, false counterflows/shifting false load and circular scheduling.[431] The California Parties also assert that the Presiding Judge properly concluded that Shell engaged in phantom ancillary services violations, that the tariff required that ancillary services be backed by

---

[426] *Id.* at 15-20 (citing *Initial Decision*, 142 FERC ¶ 63,011 at PP 83-84; Ex. CAX-167 at 169:7–170:2; Ex. CAX-369; Tr. at 4941:9-17 (Taylor); Ex. SNA-3 at 26:2-9; Ex. SNA-1 at 7:21-25, 7:25–8:1 & 7:13–15, 7:25–8:2; Ex. CAX-001 at 125:17–18).

[427] *Id.* at 8, 18-19 (citing Initial Decision, 142 FERC ¶ 63,011 at P 83; Ex. CAX-219; Ex. SNA-3 at 26:2–9).

[428] *Id.* at 20-21 (citing Tr. at 4948:15 (Taylor); Ex. SNA-1 at 7:13-8:2).

[429] Ex. CAX-001 at 62, 70-74.

[430] Ex. CRE-4; Gaming Order, 103 FERC ¶ 61,345 at PP 62-63.

[431] California Parties at 107.

actual capacity, and that bidding portfolio power as ancillary services was not permitted.[432]

Commission Determination

193. We affirm the Presiding Judge's factual findings that, although these violations occurred, the California Parties did not complete their proof by demonstrating the price effects that these violations had on the market clearing price as the Commission had required for a *prima facie* case. In addition, we defer to the Presiding Judge's judgment as to which evidence was relevant for his Initial Decision. As a result, the exceptions taken, including those of CARE, are moot.

5. Sale of Ancillary Services without Market-Based Rate Authorization

194. The Presiding Judge concluded that, while the Commission granted market-based rate authority generally to all sellers of ancillary services in the CAISO market, it required jurisdictional suppliers that had not applied for market-based rate authority for ancillary services transactions to file amendments to their rate schedules under which they sold energy at market-based rates. Thus, those jurisdictional suppliers were required to specifically add ancillary services to their rate schedules.[433] The Presiding Judge said that a fair reading of the Commission's decision in *AES Redondo Beach, L.L.C.*[434] shows that the Commission mandated that all selling entities of ancillary services must amend their tariffs to include these services. Although the Respondents had argued that market-based rate authority was automatically active and valid without any further action on their part, such as amending tariffs, the Presiding Judge found that the Respondents involved did not amend their tariffs to comply with the Commission's directive.[435] In addition, the

---

[432] *Id.* at 109 (citing Initial Decision, 142 FERC ¶ 63,011 at PP 80, 82; CAISO MMIP §§ 2.2.14.2, 2.3.1.2, 2.5.6.1-3, 2.5.14-17, and 2.5.22.11, Ex. CAX-100 at 50, 53-54, 97-99, 106-24, 147-49; Ex. CAX-001 at 70-74, 138-49; Ex. CAX-167 at 173-86; Tr. at 3155:15-3174:2, 3194:4-3205:16 (Taylor); Tr. at 8053:4-8056:17, 8087:8-13 (Harris); Tr. at 3296:17-19, 3438:4-24 (Hildebrandt); Tr. at 10024:13-17 (Savitski)).

[433] Initial Decision, 142 FERC ¶ 63,011 at PP 64-65 (citing *AES Redondo Beach, L.L.C.*, 85 FERC ¶ 61,123, at 61,461 and 61,464 (1998) (*AES Redondo Beach*), *order on reh'g*, 87 FERC ¶ 61,208 (1999), *order on reh'g*, 88 FERC ¶ 61,096 (1999)).

[434] *Id.*

[435] *Id.* (citing Ex. CAX-110 at 70 tbl.10 (revised Mar. 26, 2012)).

Presiding Judge noted that Dr. Berry had provided evidence of the violations during each hour of Summer Period for capacity and energy bids into ancillary services markets,[436] and that Dr. Fox-Penner had also presented evidence of the price effects for each hour of these violations.[437] Thus, the Presiding Judge found that Complainants had presented a *prima facie* case on these claims and that Koch[438] had not amended its tariffs to comply with the Commission's directive.[439]

195. The Presiding Judge further found that the California Parties provided sufficient evidence of such violations during each hour of the Summer Period for capacity and energy bids into ancillary services markets,[440] and the price effect of these violations.[441] The Presiding Judge thus concluded that the California Parties have presented a *prima facie* case on their claims.

Briefs on Exceptions

196. The Indicated Respondents argue that the Initial Decision's finding that Respondents lacked the market-based rate authority to sell ancillary services runs counter to the Commission's decision in *AES Redondo Beach* that granted blanket authorization for all suppliers of ancillary services products to CAISO at market-based rates.[442] The Indicated Respondents further contend that although the Commission in *AES Redondo*

---

[436] *See* Ex. CAX-285; Ex. CAX-286; Ex. CAX-287.

[437] *See* Ex. CAX-321.

[438] Initial Decision, 142 FERC ¶ 63,011 at PP 64 (finding that Avista Energy, Koch, Powerex, and TransAlta made market-based sales during the Summer Period into three CAISO single price auction markets for ancillary services (spinning reserves, non-spinning reserves, and replacement reserves) without market-based rate authority). Avista, Powerex and TransAlta have since settled with the California Parties, leaving Koch as the only relevant Respondent regarding sales of ancillary services without market-based rate authority.

[439] *Id.* P 65 (citing Ex. CAX-110 at 70 tbl.10 (revised Mar. 26, 2012)).

[440] *Id.* (citing Ex. CAX-285; Ex. CAX-286; Ex. CAX-287).

[441] *Id.* P 66 (citing Ex. CAX-321).

[442] Indicated Respondents at 162 (citing *AES Redondo Beach*, 85 FERC ¶ 61,123 at 61,461 and 61,464).

Beach directed sellers to amend their tariffs, the actual grant of authority was not contingent on whether sellers in fact made such amendments.[443]

197. The Indicated Respondents challenge the Presiding Judge's finding that certain sellers did not have the authority to sell replacement reserves to CAISO at market-based rates. They argue that replacement reserves were not considered ancillary services under CAISO's tariff and the Commission ruled that replacement reserves did not require separate authorization to bid at market based rates.[444] The Indicated Respondents add that, even if *AES Redondo Beach* required the filing of conforming language for its blanket authorization to take effect, the Commission has broad discretion to excuse untimely submissions of conforming tariff language. They also add that ancillary services sales at market based rates benefited CAISO by reducing prices, satisfying reliability requirements, and helping avert shortages.[445]

198. The Indicated Respondents contend that when analyzing the price effect of allegedly unauthorized sales of ancillary services at market-based rates, the California Parties' analysis erroneously assumed that sellers would engage in cost-based transactions for which they lacked the authority.[446] In the Indicated Respondents' opinion, this assumption in the California Parties' price effect analysis also contradicts the Commission's finding that cost-based capacity sales would not be sufficiently profitable for market participants and would result in those sellers foregoing capacity sales and engaging in more profitable energy sales elsewhere, since the Respondents were under no obligation to sell anything to California.[447] In addition, the Indicated Respondents argue that the California Parties' price effect analysis overlooks that if the Respondents had not sold ancillary services to CAISO at market-based rates, they would

---

[443] *Id.* at 163 (citing *AES Redondo Beach,* 85 FERC ¶ 61,123 at 61,461).

[444] *Id.* at 164 (citing *AES Redondo Beach*, 85 FERC ¶ 61,123 at 61,464, *order accepting for filing*, 83 FERC ¶ 61,358 at 62,446; *Long Beach Generation, LLC*, 84 FERC ¶ 61,011, at 61,056 (1998); and *Ocean Vista Power Generation, L.L.C.*, 84 FERC ¶ 61,013, at 61,066 (1998)).

[445] *Id.* at 166 (citing *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967); *Laclede Gas Co. v. FERC*, 997 F.2d 936 (D.C. Cir. 1993); *California Pub. Util. Comm'n v. FERC*, 462 F.3d 1027, 1053 (9th Cir. 2006)).

[446] *Id.* at 200 (citing Ex. CAX-143 at 43 tbl.2; and Tr. at 2377:20-21 (Berry)). *See also*, Indicated Respondents at 217.

[447] *Id.* at 217 (citing *AES Redondo Beach*, 85 FERC ¶ 61,123 at 61,460).

not have sold them to CAISO at cost, which would have resulted in reduction of available supply on CAISO markets and thus higher prices.[448]

Brief Opposing Exceptions

199. The California Parties argue that the Presiding Judge correctly found that the Respondents sold ancillary services at market based rates without the required authorization. The California Parties state that in *AES Redondo Beach* the Commission required all suppliers to the California markets with market based rates for energy to add ancillary services as a market based product, and the Respondents were not excused from this mandate.[449] The California Parties also note that contrary to the Respondents arguments, the record shows that the sales were made without authorization, and therefore, illegal. [450]

Commission Determination

200. We accept the Presiding Judge's finding that Koch did not amend its tariff to comply with the Commission's directive, and we affirm the Initial Decision that it was required to do so per *AES Redondo Beach*.[451] In *AES Redondo Beach*, the Commission directed "jurisdictional suppliers that have not applied for market-based rates for Ancillary Services to file amendments to the rate schedules under which they sell energy at market-based rates, adding these additional market-based products."[452] Thus, since Koch was required to add ancillary services to its rate schedules, but did not, it violated both the Commission's directive and the CAISO tariff.

---

[448] *Id.* at 218 (citing Tr. at 8706:13–8707:2 and 8820:5-25 (Reed)).

[449] California Parties at 101.

[450] *Id.* at 102.

[451] *AES Redondo Beach, L.L.C.*, 85 FERC ¶ 61,123, at 61,461 and 61,464.

[452] *Id.*

C. Remedy

201. In the Remand Order and the subsequent rehearing orders, the Commission had explicitly stated that it would determine what further steps should be taken after it receives factual determinations from the Presiding Judge.[453] In the Remand Order, the Commission also stated that "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, … will [be] impose[d] on individual sellers." [454]

Procedural Motions

202. After the Initial Decision was issued, parties disagreed over whether to address remedies separately from this order, and the details of a proposed procedural schedule. First, the Indicated Respondents asked the Commission to clarify that it will not address remedies in this order, and that, instead, the Commission will establish a procedural schedule to afford participants a full opportunity to address remedies, in briefing and possibly with further evidentiary submissions.[455] The Indicated Respondents reasserted that, in its Rehearing Order, the Commission reiterated that it will determine what further steps should be taken only after receiving the Presiding Judge's factual determinations.[456] Trial Staff and Salt River filed answers in support of the Respondents' request.[457] Neither Respondents nor Trial Staff provided any specifics on what additional evidence the Commission should examine before determining the appropriate remedy. The California Parties filed an answer to the Indicated Respondents, arguing that the parties

---

[453] Remand Order, 129 FERC ¶ 61,147 at P 3; Rehearing Order, 135 FERC ¶ 61,183 at P 3; *see also, San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 141 FERC ¶ 61,087, at P 3 (2012).

[454] Remand Order, 129 FERC ¶ 61,147 at P 24.

[455] Indicated Respondents Request for Clarification on Further Proceedings About Remedies at 2, 4 (March 22, 2013 Motion).

[456] *Id.* at 3 (citing Rehearing Order, 135 FERC ¶ 61,183 at P 3).

[457] *See* Answer of Commission Trial Staff to Indicated Respondents Request for Clarification on Further Proceedings About Remedies; and Salt River Answer to Indicated Respondents' Request for Clarification on Further Proceedings About Remedies at 3.

should brief the Commission on which remedies are appropriate prior to a ruling on remedies.

203. The California Parties also filed a Motion on Overcharges and Refunds on May 3, 2013, complete with their methodology and analysis. That motion stated the projected Summer Period sales refund to be $949,660,460.00, and the projected Ancillary Services Excess Payments refund to be $108,437,126, both before interest.[458] California Parties want the Commission to correct the Summer Period prices in the CAISO and CalPX to the rate that would have existed absent tariff violations by applying the MMCP to determine prices that under normal competition for each hour of that period.[459] They note that no party effectively controverted the California Parties' MMCP assertions, thus the Commission should adopt the calculations of its expert, Dr. Yan.[460] The California Parties also ask the Commission to order each public utility Respondent to refund all the amounts it collected above the MMCP for the Summer Period and allocate those refunds to net buyers without a new market-wide rerun.[461]

204. The Indicated Respondents and Trial Staff responded that the motion was premature and factually inaccurate.[462] Salt River agreed that the motion was premature and factually inaccurate. The Indicated Respondents and Trial Staff argue that the motion was premature, since the Commission had not ruled on the Initial Decision as yet, and, that the issue of which remedy is applicable is outside the scope of the current proceeding.[463] The Indicated Respondents, Trial Staff and the Southern Cities also argue

---

[458] California Parties' Motion on Overcharges and Refunds at 13-23.

[459] *Id.* at 14.

[460] California Parties' Motion on Overcharges and Refunds at 15-17. *See also* Ex. CAX-110 at 83:1-84:2.

[461] California Parties' Motion on Overcharges and Refunds at 18-21; Ex. CAX-141 at 4:9-12 (California Parties assert no Respondent successfully challenged the correctness of Dr. Yan's calculations or presented an alternative measure).

[462] Parties who opposed the California Parties' Motion as premature and unsupported were the Indicated Respondents, Trial Staff, APX, Mieco, Inc., and the Cities of Anaheim, Azusa, Banning, Colton, and Riverside (Southern Cities).

[463] Indicated Respondents Answer to California Parties' Motion on Overcharges and Refunds at 2-3 (citing Remand Order, 129 FERC ¶ 61,147 at PP 3, 19, 24); Trial Staff Answer to California Parties' Motion at 5.

that, since the Commission has yet to find any wrongdoing by individual sellers in its orders regarding refunds for transactions conducted within the statutory Refund Period, and since California Parties' Summer Period allegations require a finding of seller-specific wrongdoing, the Commission cannot consider ordering remedies at this stage.[464] The Indicated Respondents also complain that California Parties' attempt to fast-forward the adjudicative process is an impermissible collateral attack on multiple Commission orders. The Commission has twice determined that potential remedies were beyond the scope of what was set for evidentiary hearing.[465]

205. In addition, the Indicated Respondents assert that the heart of the California Parties' case is their misrepresentation of the MMCP.[466] The Indicated Respondents argue that California Parties falsely insist on the MMCP being a remedial methodology, and that some Respondents did also offer evidence of alternative metrics of their marginal costs.[467] The Southern Cities also protest the usage of MMCP to calculate refunds as unjust, unreasonable and discriminatory in its refund allocation.[468]

206. The California Parties reply that their motion will expedite and conclude this long proceeding, assuming that the Commission will affirm the Presiding Judge's decision.[469] The California Parties also argue that the Commission has repeatedly held, including in its Order on Remand, that "[t]he MMCP was a proxy for the just and reasonable price that would have been expected in a competitive energy market."[470]

---

[464] *Id.* at 9 (citing *e.g.*, *San Diego Gas & Elec. Co v. Sellers of Energy & Ancillary Servs.*, 93 FERC ¶ 61,121, at 61,349-50 (2001) and *CPUC Decision*, 462 F.3d at 1048); Trial Staff Answer to California Parties' Motion on Overcharges at 6-8; Southern Cities' Answer to California Parties' Motion on Overcharges at 2-3.

[465] *Id.* at 7-8 (citing the Remand Order, 129 FERC ¶ 61,147 at PP 23, 24; and Rehearing Order, 135 FERC ¶ 61,183 at P 31).

[466] *Id.* at 10-11.

[467] *Id.* at 11 (citing, *e.g.*, Indicated Respondents at 81, arguing that actual market-clearing prices would have been a more realistic proxy for marginal costs).

[468] Southern Cities' Answer to California Parties' Motion at 4-7.

[469] California Parties' Reply to Indicated Respondents' Answer at 5.

[470] *Id.* at 8 (citing *San Diego Gas & Elec. Co.*, 129 FERC ¶ 61,147, at P 6 n.15 (2009); and *San Diego Gas & Elec. Co.*, 127 FERC ¶ 61,250, at P 12 (2009)).

207. Also, on June 7, 2013, the Indicated Respondents filed a Motion for Oral Argument, saying the record evidence submitted by the parties in this proceeding is extensive and oral argument will provide a necessary and efficient forum for addressing the evidence that the Presiding Judge failed to consider and that renders his conclusions untenable.[471] The California Parties, Constellation, Trial Staff and APX filed Answers. California Parties argue that an oral argument is not necessary after a three-month hearing with a voluminous record,[472] Constellation wanted a separate allocation of time for section 206 issues in oral argument,[473] Trial Staff suggest that oral argument might help further clarification of the issues,[474] and APX wants permission to participate if the Commission accepts the Indicated Respondents' Motion.[475]

Commission Determination

208. The Remand Order stated that "once the Commission is presented with the ALJ's findings of facts at issue [for the Summer Period], the Commission will issue a further order regarding what remedies, if any, … will [be] impose[d] on individual sellers." [476] After the Initial Decision was issued, the Commission has received two conflicting requests – one from the Indicated Respondents, asking to establish a separate proceeding to determine the appropriate remedy, and the other from the California Parties urging the Commission to order disgorgement of excess payments and overcharges based on the California Parties' calculations of those payments.

209. We find that the appropriate remedy for the Anomalous Bidding Type II and III, False Exports, and False Load Scheduling tariff violations that affected the market clearing prices is the disgorgement of payments the Respondents received above the

[471] Motion for Oral Argument at 2-3.

[472] Request for Leave to Answer and Answer with Regard to Indicated Respondents' Motion for Oral Argument at 2-3.

[473] Constellation Motion for Leave to Answer and Answer with Regard to Indicated Respondents' Motion for Oral Argument at 3-4.

[474] Trial Staff Motion for Leave to Answer and Answer with Regard to Indicated Respondents' Motion for Oral Argument at 2.

[475] APX Answer to Indicated Respondents' Motion for Oral Argument at 1.

[476] Remand Order, 129 FERC ¶ 61,147 at P 24.

applicable marginal cost proxy price. We also find that that the overcharges and excess payments received by Koch above the cost of providing the ancillary services it sold at market-based rates without the required market-based rate tariff authorization are subject to disgorgement. However, we deny the California Parties' motion. California Parties' estimates were outside the scope of the hearing, as the hearing did not include fashioning of the remedy. As a result, the Respondents did not have an opportunity to challenge these estimates. Accordingly, we find that there is not sufficient evidence for the Commission to accept the California Parties' estimates as just and reasonable and to order disgorgement of excess payments and overcharges based on those estimates.

210. In this order, the Commission has accepted the California Parties' marginal cost proxies and price effect analysis applied to the relevant trading hours to determine the tariff violations committed by the Respondents. We therefore direct the Respondents to submit, within 60 days of the issuance of this order, a compliance filing providing calculations of their excess payments and overcharges due for disgorgements based on the California Parties' marginal cost proxy-based methodology and price effect analysis. In the compliance filing, the Respondents should also account for various cost offsets, as discussed below in this Opinion.

211. In the Refund Proceeding that reset the spot market clearing prices for all hours of the Refund Period, the Commission allowed the sellers of energy and ancillary services to present evidence on costs not reflected in the MMCP, to offset their refund liability.[477] These costs are NOx emission costs,[478] fuel cost allowances,[479] and other cost offsets.[480] In the Refund Proceeding, the cost offset process was established to provide sellers the opportunity to demonstrate that "the MMCP does not allow them to recover their costs

---

[477] *See San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 102 FERC ¶ 61,317, *order on reh'g*, 105 FERC ¶ 61,066 (2003).

[478] *See San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 96 FERC ¶ 61,120, at 61,519 (2001).

[479] *See San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 107 FERC ¶ 61,166 (2004).

[480] *San Diego Gas & Elec. v. Sellers of Energy and Ancillary Servs.*, 97 FERC ¶ 61,275 (2001).

of selling power into ISO/PX markets."[481] As the Commission explained in the Refund Proceeding,

> …the MMCP could become confiscatory towards sellers without cost offsets because the allocation of additional costs to these sellers may cause their costs to become greater than their revenues from serving ISO/PX markets during the Refund Period.[482]

212. In the instant proceeding, the Respondents are permitted to provide specific evidence on revenue derived from and costs related to specific transactions subject to mitigation, including emission cost and fuel costs. The Respondents, however, must follow the template for cost offset filings previously established by the Commission in the Refund Proceeding.[483] General allegations and submissions not compliant with the previously established template will not be considered.

213. We find that because the compliance filing directed in this order requires introduction of new evidence, the Indicated Respondents' request in their Motion for Clarification to allow additional evidence to determine appropriate remedies is hereby granted. We, however, deny the Indicated Respondents' request to establish a separate proceeding to address the issue of remedy, as the Indicated Respondents did not explain why a separate proceeding is needed. Accordingly, we also deny the Indicated Respondents' motion for oral argument.

V. Refund Period – Forward Market Transaction

214. The Presiding Judge found the forward market transaction at issue was not just and reasonable and calculated the refund liability for this forward sale is $2,845,024,[484]

---

[481] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 127 FERC ¶ 61,250, at P 31 (2009).

[482] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 115 FERC ¶ 61,171, at P 30 n.24 (2006).

[483] *See., e.g., San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 112 FERC ¶ 61,176 (2005); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 107 FERC ¶ 61,166, at PP 74-77 (2004); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 102 FERC ¶ 61,317, at PP 98-122 (2003).

[484] Initial Decision, 142 FERC ¶ 63,011 at P 127 (citing Ex. CAX-110 at 91 tbl 13 (revised Mar. 26, 2012)).

not including interest. The Presiding Judge did not allow for any cost offsets, as no evidence was presented.[485]

215. The forward market transaction at issue was a continuous sale by Constellation to CAISO from December 6, 2000 through December 12, 2000. First, in determining whether the transaction was just and reasonable, the Presiding Judge addressed the issue of whether the *Mobile-Sierra* doctrine applies to forward market transactions, which it defines as transactions in the CAISO and CalPX markets "of greater than 24 hours."[486] The Presiding Judge explained that the *Mobile-Sierra* doctrine creates a presumption that negotiated contract rates meet the FPA's "just and reasonable" requirement.[487] This presumption "may be overcome only if FERC concludes that the contract seriously harms the public interest.[488]

216. The Presiding Judge found that the *Mobile-Sierra* standard does not apply, as the forward market transactions were created pursuant to the CAISO tariff and thus are governed by a *Memphis Clause* in section 19 of the CAISO tariff[489] that prevents

---

[485] *Id.*

[486] *Id.* P 99 (citing *CPUC Decision*, 462 F.3d at 1055). We note that the Remand Order inadvertently referred to "block forward market transactions" instead of "forward market transactions;" however the Rehearing Order corrected the terminology. *See* Rehearing Order, 135 FERC ¶ 61,183 at P 40.

[487] Initial Decision, 142 FERC ¶ 63,011 at P 105 (citing *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) and *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956)).

[488] *Id.* (citing *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1 of Snohomish County, Wash.*, 554 U.S. 527, 530 (2008) (*Morgan Stanley)).*

[489] CAISO Tariff section 19 provides that

> Any amendment or other modification of any provision of this [CA]ISO Tariff must be in writing and approved by the [CA]ISO Governing Board in accordance with the bylaws of the [CA]ISO. Any such amendment or modification shall be effective upon the date it is permitted to become effective by FERC. Nothing contained herein shall be construed as affecting, in any way, the right of the [CA]ISO to furnish its services in accordance with this [CA]ISO Tariff, or any tariff, rate schedule or SC Agreement which results from or incorporates this [CA]ISO Tariff, unilaterally to

(continued …)

application of the standard.[490] On this basis, the Presiding Judge found that the forward market transactions must be evaluated pursuant to the ordinary just and reasonable standard rather than the heightened *Mobile-Sierra* presumption and its required public interest analysis.[491]

217. The Presiding Judge added that CAISO tariff section 2.3.5.1.5 also prevents applying the *Mobile-Sierra* presumption to the review of the forward market transactions in question. Section 2.3.5.1.5 provides that if CAISO, after receiving all bids, is still unable to comply with applicable reliability criteria, it should take such steps as it considers necessary to ensure compliance, including the negotiation of contracts through competitive solicitation.[492] The Presiding Judge explained that CAISO exercised its authority under this provision to engage in bilaterally negotiated forward market transactions outside of CAISO's organized markets. The Presiding Judge compared the forward market transactions at issue in this proceeding to the out-of-market spot transactions addressed in a prior proceeding[493] where the Commission found that OOM

> make an application to FERC for a change in rates, terms, conditions, charges, classifications of service, SC [schedule coordinator] Agreement, rule or regulation under FPA Section 205 and pursuant to the FERC's rules and regulations promulgated thereunder. Nothing contained in this [CA]ISO Tariff or any SC Agreement shall be construed as affecting the ability of any Market Participant receiving service under this [CA]ISO Tariff to exercise its rights under Section 206 of the FPA and FERC's rules and regulations thereunder.

See id. P 110 (citing Ex. CAX-100 at 497).

[490] *Id.* P 104 (citing *See United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103, 110-13 (1958) (*Memphis)*; *California ex rel. Brown*, 140 FERC ¶ 61,115, at P 9 n.26 (2012); *Morgan Stanley*, 554 U.S. at 534; David G. Tewksbury et al., New Chapters in the Mobile-Sierra Story: Application of the Doctrine after *NRG Power Marketing, LLC v. Maine Public Utilities Commission*, 32 Energy L.J. 433, 443-44 (2011)).

[491] *Id*. P 111.

[492] CAISO Tariff Section 2.3.5.1.5.

[493] Initial Decision, 142 FERC ¶ 63,011 at P 104 (citing *San Diego Gas & Elec. Co.*, 96 FERC ¶ 61,120 at 61,515-19; *CPUC Decision*, 462 F.3d at 1051-53).

spot transactions were carried out under section 2.3.5.1.5 and that "to the extent [the seller] was compensated for these transactions, that compensation was made pursuant to section 2.3.5.1.5 of the CAISO tariff."[494]

218. The Presiding Judge found that when measured against the Commission-established MMCP, the rate in the Constellation-CAISO forward market transaction is unjust and unreasonable.[495] The Presiding Judge found that the refund methodology and associated calculations by the California Parties' expert witness Dr. Berry provide record evidence of all the instances in which the forward market transactions exceeded the MMCP,[496] while none of the Respondents presented any credible evidence to challenge these MMCP calculations.[497] The Presiding Judge found that pursuant to the Ninth Circuit's finding in *CPUC Decision* regarding OOM spot transactions, "the record allows the MMCP to be applied to a set of transactions, and the extent to which those transactions exceed the MMCP provides record evidence that those transactions are unjust and unreasonable." [498] The Presiding Judge added that pursuant to Commission precedent, the MMCP is "a just and reasonable proxy for the rates that a competitive energy market would have produced in the CAISO and CalPX markets during the Refund Period."[499]

219. Further, the Presiding Judge compared forward market transactions with the OOM spot transactions that the Commission mitigated, using the MMCP, in the Refund Proceeding.[500] The Presiding Judge found that the California Parties demonstrated by record evidence that forward market transactions are essentially the same as the OOM

---

[494] *Id.* P 109 (citing *San Diego Gas & Elec. Co.*, 109 FERC ¶ 61,218, at PP 66-67 (2004), *order on reh'g*, 110 FERC ¶ 61,336, at PP 66-67 (2005)).

[495] *Id.* P 113.

[496] *Id.* (citing Ex. CAX-110 at 90 (revised Mar. 26, 2012); Ex. CAX-136; Tr. at 2184:6-13).

[497] *Id.*

[498] *Id.* (citing *CPUC Decision*, 462 F.3d at 1052).

[499] *Id.* (citing *San Diego Gas & Elec. Co.*, 127 FERC ¶ 61,250 at P 12 (2009)).

[500] *Id.* P 15 (citing *San Diego Gas & Elec. Co.*, 96 FERC ¶ 61,120, at P 5 (2001); and *CPUC Decision*, 462 F.3d at 1051-53).

spot transactions, except for their durations.[501] The Presiding Judge explained that both transactions were "arranged outside of the normal auction processes" and were bilaterally negotiated between CAISO and an energy seller.[502] Therefore, the Presiding Judge also reasoned that because the Ninth Circuit found the application of the MMCP to be sufficient evidence to determine that OOM market transactions were unjust and unreasonable, [503] the MMCP can be appropriately applied to determine the justness and reasonableness of forward market transactions. The Presiding Judge also noted that this reasoning is in accord with the Commission's observation of the interconnected nature of the unjust and unreasonable prices that transpired during the crisis period.[504]

Briefs on Exceptions

220. Constellation and the Indicated Respondents argue that forward market transactions are entitled to the *Mobile-Sierra* presumption. The Indicated Respondents argue that even if the forward market transactions were found to be unjust and unreasonable by the Commission in prior orders, the *Mobile-Sierra* doctrine would prevent their modification, as the California Parties have failed to demonstrate that such modification would be in the public interest. Constellation asserts that the Presiding Judge erred in modifying the rates for the forward market transactions without the requisite public necessity finding under *Mobile-Sierra.* Constellation explains that in order for the Commission to alter or rewrite the contractually agreed upon price terms of a multi-day transaction, the *Mobile-Sierra* doctrine requires the finding of public necessity.[505] Constellation concludes that the Commission's prior decision regarding OOM spot transactions does not support a finding that the Commission should mitigate

---

[501] *Id.* (citing CAX-110 at 86-87 (revised Mar. 26, 2012)).

[502] *Id.* (citing CAX-110 at 86 (revised Mar. 26, 2012)).

[503] *Id.* P 15 n.205 (citing *CPUC Decision*, 462 F.3d at 1052).

[504] *Id.* P 15 (citing *San Diego Gas & Elec. Co.*, 95 FERC ¶ 61,418, at 62,547 (2001) (stating that "[t]here is a critical interdependence among the prices in the [CA]ISO's organized spot markets, the prices in the bilateral spot markets in California and the rest of the West, and the prices in forward markets")).

[505] Constellation at 2-3, 21-23, 32-34 (citing *NRG Power Mktg. v. Me. PUC*, 558 U.S. 165 (2010); *Morgan Stanley*, 554 U.S. at 547 (2008); *Mobile Gas Serv. Corp.*, 350 U.S. 32, 344 (1956); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 355 (1956)).

forward market transactions in this case. Constellation argues that there is substantial evidence that shows that the functions of the forward market transactions are different from the functions of the OOM spot transactions. Constellation states that the Commission directed CAISO to purchase additional supplies in the forward market to ensure adequate supplies and avoid uneconomic daily purchases. The Indicated Respondents contend that forward market transactions are the product of bilateral negotiations between sellers and CAISO and thus are entitled to the *Mobile-Sierra* protection.[506]

221. The Indicated Respondents also challenge the Presiding Judge's finding that two separate provisions in CAISO's tariff, sections 2.3.5.1.5 and 19, prevent application of the *Mobile-Sierra* protection.[507] The Indicated Respondents explain that CAISO tariff section 2.3.5.1.5 is a limited authorization permitting CAISO to engage in day-ahead or day-of out-of-market OOM transactions when "after receiving all bids" in a given daily or hourly market, CAISO identified a deficiency that compromised reliability.[508] According to the Indicated Respondents, the Commission has never considered forward market transactions to be equivalent to CAISO's OOM spot transactions, nor did CAISO describe forward market transactions as OOM transactions.[509] The Indicated Respondents thus contend that because forward market transactions are different from previously mitigated OOM spot transactions, the Presiding Judge erred in concluding that the *Mobile-Sierra* presumption did not apply.[510]

222. Further, the Indicated Respondents and Constellation challenge the Initial Decision's finding that CAISO tariff section 19 contains a *Memphis* clause. The Indicated Respondents explain that a *Memphis* clause is a type of express contract provision that the Supreme Court recognizes as allowing counterparties to contract out of the *Mobile-Sierra* presumption.[511] They argue that because CAISO tariff section 19 by

---

[506] Indicated Respondents at 233.

[507] *Id*. (citing Initial Decision, 142 FERC ¶ 63,011 at P 108).

[508] *Id*. (citing Ex. CAX-100 at 70).

[509] *Id*. at 233-34 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 109 FERC ¶ 61,218, at PP 64, 66–67 (2004), *order on reh'g*, 110 FERC ¶ 61,336 (2005)).

[510] *Id.* at 235.

[511] *Id.* at 235-36 (citing *Memphis*, 358 U.S. at 110–13 ; and *Morgan Stanley*, 554 U.S. at 534).

its express terms applies solely to contracts under which CAISO provides tariff services to a market participant, section 19 has no application to contracts under which CAISO receives services from third parties.[512] Constellation argues that the Presiding Judge's finding is contrary to Supreme Court precedent because rates for forward market transactions were established by individually negotiated contractual agreements rather than by the CAISO tariff and thus are not subject to unilateral change.[513] The Indicated Respondents add that CAISO tariff section 19 does not contain the kind of *Memphis* clause language "specifying . . . that a new rate filed with the Commission would supersede the contract rate."[514]

223. Constellation asserts that the Presiding Judge erred in finding that since the Commission previously mitigated OOM spot transactions without making an express finding under *Mobile-Sierra* that forward market transactions are also not entitled to *Mobile-Sierra* protections. Constellation explains that the Commission previously ordered mitigation of the OOM spot transaction as a result of evidence linking prices of OOM spot transactions to dysfunction in the spot market based on the evidence that sellers exercised market power as a result of flaws in the spot market that forced CAISO into a "must buy" position and led to uneconomic daily out-of-market spot purchases. Constellation states that abrogating forward market transactions directly conflicts with the purpose of the *Mobile-Sierra* doctrine: preserving the sanctity of contracts to ensure adequate supplies.

224. The Indicated Respondents and Constellation contend that the MMCP is inappropriate to use in measuring the just and reasonableness of forward market transactions.[515] Constellation asserts that the Presiding Judge erred in applying the MMCP and ignored the difference between spot and forward market transactions demonstrated in the record.[516] The Indicated Respondents argue that the MMCP was established by the Commission for hourly spot markets and thus has no relevance as a benchmark for evaluation of the justness and reasonableness of fixed-price short-term

---

[512] *Id*. at 236 (citing Ex. CAX-100 at 497).

[513] Constellation at 23-27.

[514] Indicated Respondents at 236 (citing *Morgan Stanley*, 554 U.S. at 534).

[515] Constellation at 34-38, 46-48 (citing *San Diego Gas & Elec. Co.*, 101 FERC ¶ 63,026, at 65,199 (2002)).

[516] *Id*. at 34-46

forward transactions.[517] The Indicated Respondents argue that even if the Commission-established MMCP benchmark could be considered relevant to an inquiry into the appropriateness of the fixed forward prices negotiated by CAISO out-of-market, the MMCP benchmark alone cannot be used to determine the justness and reasonableness of the transactions at issue. According to the Indicated Respondents, this approach may produce absurd results where the fixed price mutually agreed upon by CAISO and counterparties may exceed the MMCP benchmark in one hour but not in other hours. [518]

225. The Indicated Respondents argue that the forward market transactions were just and reasonable. The Indicated Respondents state that the Respondents produced audio transcripts of their negotiations with CAISO, correspondence and executed transaction confirmation sheets, published forward prices at nearby trading hubs, and other material demonstrating the appropriateness of their negotiated prices.[519] Constellation states that since Constellation and its predecessor played no role in negotiating or scheduling the AESP multi-day sales that it should not be held liable for refunds. Constellation states that there is clear evidence that CAISO contacted AESP directly and negotiated these sales without any involvement from Constellation.[520] Constellation states that the only activity it had with regard to multi-day sales was after-the-fact verification of the CAISO settlement statements which was after CAISO and the plant had negotiated and agreed upon the rate for the sales and the energy flowed.[521] Therefore, Constellation asserts that there is no support to hold it liable for refunds of the forward market transaction.

226. Constellation states that the Presiding Judge erred in not permitting Constellation to offset AESP's costs and that mitigating AESP's multi-day transaction below AESP's cost would be confiscatory. Constellation states that the Presiding Judge ignored the Commission's policy that it will not mitigate a seller below its cost as doing so would result in confiscatory rates.[522] Constellation therefore argues that the Initial Decision

---

[517] Indicated Respondents at 228 and 238.

[518] *Id*. at 242.

[519] *Id.* at 244 (citing Ex. S-16 at 27:2-6).

[520] Constellation at 49 (citing Ex. CEI-1 at 7:15-20; Ex. CEI-14 at 1-5).

[521] *Id.* at 49-50 (citing Ex. CEI-1 at 11:20-12:12).

[522] *Id.* at 50-51 (citing Ex. S-13 at 18:12-19:11; *San Diego Gas & Elec. Co.*, 121 FERC ¶ 61,184, at P 99 (2007); *Braintree Elec. Light Dep't*, 120 FERC ¶ 61,097, at P 99 (2007); *San Diego Gas & Elec. Co.*, 112 FERC ¶ 61,176, at P 2 (2005); *Carolina Power & Light Co.*, 87 FERC ¶ 61,083, at 61,355-56 (1999)).

violates the Due Process and Takings Clause of the Constitution.[523] Constellation also notes that the Remand Order specifically allows entities subject to mitigation for forward market transactions to pursue cost offset to any refund liability. Constellation asserts that, contrary to the Initial Decision's finding, it provided substantial and unrebutted evidence of the cost of running the AESP plant for the multi-day transactions through witness testimony[524] and briefs.[525]

Brief Opposing Exceptions

227. Overall, the California Parties argue that the Presiding Judge appropriately followed the directive in the Remand Order to determine which forward market transactions are subject to mitigation and to calculate the refunds.[526] The California Parties assert that the Presiding Judge correctly found that rates, to the extent they exceed the MMCP, charged in forward market transactions are unjust and unreasonable, and therefore subject to mitigation under FPA section 206.[527] The California Parties state that, when the Remand Order was issued, the Commission and the Ninth Circuit had already found that due to the systemic market dysfunction and seller manipulation prevalent in the California markets during the Refund Period, prices paid in excess of the MMCP were unjust and unreasonable.[528] Further, the California Parties claim that the Commission found that OOM spot transactions are similar to forward market

---

[523] *Id.* at 51-52 (citing U.S. Const. amend V and XIV; *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124-125 (1978); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944); *Bluefield Waterworks & Imp. Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679, 690 (1923)).

[524] *See* Ex. CEI-1 at 10:13-11:9; Ex. CEI-1 at 7-11;CEI-10; Ex. ISO-37 at 67; Ex. CEI-18; Ex. CEI-15.

[525] Constellation NewEnergy, Inc.'s Initial Brief, Docket No. EL00-95-248 (September 28, 2012); Reply Brief of Constellation NewEnergy, Inc., Docket No. EL00-95-248 (December 4, 2012).

[526] California Parties at 143 (citing Remand Order, 129 FERC ¶ 61,147 at PP 28, 30).

[527] *Id.* at 150 (citing Initial Decision, 142 FERC ¶ 63,011 at P 114).

[528] *Id.* at 151 (citing *CPUC*, 462 F.3d at 1052).

transactions. The California Parties assert that, contrary to the Respondents' contentions, the Presiding Judge's analysis of the justness and reasonableness of forward market transactions is appropriate, and is identical to the approach that the Commission used to evaluate OOM spot transactions, which the Ninth Circuit affirmed.[529] Further, the California Parties claim that the Presiding Judge's use of the MMCP as a just and reasonable benchmark was also appropriate.

228. Additionally, the California Parties argue that several sellers and Trial Staff are incorrect in asserting that the California Parties failed to establish a *prima facie* case that the forward market transactions were unjust and unreasonable, as the California Parties' direct case established that the rates in forward market transactions exceeded the corresponding MMCPs.[530] The California Parties claim that the Presiding Judge correctly found that it was appropriate to apply the MMCP benchmark because those transactions are functionally indistinguishable from the previously-mitigated OOM spot transactions.[531] Moreover, the California Parties state that some of the Respondents misconstrue Commission precedent when they assert that the Presiding Judge's finding that the forward market transactions were fundamentally indistinguishable from the previously-mitigated OOM spot transactions is in error.[532]

229. Further, the California Parties assert that the Presiding Judge correctly found that none of the sellers that sold energy to the CAISO pursuant to forward market transactions presented evidence that sufficiently satisfied the Commission's cost offset standard that could support cost offsets in this proceeding.[533]

Commission Determination

230. We affirm the Presiding Judge's finding that the appropriate standard of review is the just and reasonable standard. We find that the forward market transaction between CAISO and Constellation is not entitled to the *Mobile-Sierra* protection because it was very similar to OOM spot transactions that were previously mitigated by the

---

[529] *Id.* at 152 (citing *N.E. Power Co. v. FERC*, 533 F.3d 55, 59 (1st Cir. 2008)).

[530] *Id.* at 154.

[531] *Id.* at 155 (citing Initial Decision, 142 FERC ¶ 63,011 at P 115).

[532] *Id.* at 156-61 (citing Indicated Respondents at 239; BPA at 69; Constellation at 41; Trial Staff at 134-35).

[533] *Id.* at 164 (citing Initial Decision, 142 FERC ¶ 63,011 at PP 127, 152).

> Commission in the Refund Proceeding, using MMCP. We agree with the Presiding Judge's finding that the forward market transaction at issue was made pursuant to the terms of the CAISO tariff and therefore the "Memphis Clause" in CAISO tariff section 19 applies. Under the then-effective tariff section 2.3.5.1.5, CAISO had the authority to "take such steps as it considers to be necessary to ensure compliance" with applicable reliability criteria "after receiving all bids." The record evidence shows that both OOM spot transactions and the forward market transaction at issue were conducted pursuant to this tariff authority, and that the only difference between the transaction at issue here and the OOM spot transactions mitigated in the original Refund Proceeding is the duration. In the *CPUC Decision*, the Ninth Circuit rejected the Commission's argument that forward market transactions cannot be subject to mitigation because they were conducted over periods greater than 24 hours as an insufficient basis for denying relief.[534]

231. The Ninth Circuit defined OOM spot transactions as "purchases [of power] … made by CAISO from sellers outside the CAISO single price auction market within 24 hours or less of delivery, and served to stabilize the grid when supply was insufficient to meet demand".[535] OOM spot transactions were mitigated using the MMCP by the Commission in the Refund Proceeding, which was upheld by the Ninth Circuit.[536] As explained in the *CPUC Decision*, "[b]ecause Cal-ISO had no choice but to buy energy to ensure grid reliability, potential sellers were in a position to exercise improper market leverage by exploiting the structural flaws in the market" and the Commission correctly "concluded that the OOM [spot] transactions provided the best opportunity for extracting unjust and unreasonable rates and therefore, made them subject to potential refunds."[537]

232. Similar to the OOM spot transactions, the forward market transaction at issue served to maintain reliability. In anticipation of power shortages, CAISO was planning ahead by entering into an oral agreement with Constellation for future delivery of power. Specifically, CAISO and Constellation negotiated a forward market transaction involving sales of electricity beginning on December 6 Hour Ending (HE) 16 through December 12, 2000 HE 24.[538] It was an oral contract and the only record pertaining to

---

[534] *CPUC Decision*, 462 F.3 at 1055-59 & 1061.

[535] *Id.* at 1051.

[536] *Id.* at 1051-1053.

[537] *Id.* at 1051.

[538] *See* Ex. CEI-1 at 6.

this transaction is CAISO's Generation, General Log Entry, and Please Wait reports.[539] On these reports the sales at issue are labeled as "OOM" sales.[540] The record contains no other evidence on the intent of the parties or contractual terms other than price and schedule noted in CAISO's reports.

233. The CAISO-Constellation forward market transaction was a continuous sale consisting of three segments: (1) December 6-7, 2000; (2) December 8, 2000, and (3) December 9-12. The December 8 segment of the CAISO-Constellation forward market transaction was previously mitigated, as it was found in the Refund Proceeding to be a spot market transaction subject to mitigation. The two remaining segments of the sale occurring on December 6-7, 2000 and December 9-12 were left unmitigated, as they were considered forward market transactions not subject to mitigation in the original Refund Proceeding.[541] In the *CPUC Decision*, the Ninth Circuit rejected the Commission's argument that forward market transactions cannot be subject to mitigation because they were conducted over periods greater than 24 hours as an insufficient basis for denying relief.[542] Thus, treating the two remaining segments of the forward market transaction at issue differently from the mitigated segment of the same sale is not justifiable.

234. Furthermore, both the OOM spot transactions and the forward market transaction at issue were conducted for the purpose of maintaining grid reliability; therefore, Constellation's argument that the OOM spot transactions are properly characterized as a service provided by CAISO, whereas the forward market transaction at issue should be deemed a service received by CAISO, is inconsistent with the common purpose of both types of transactions. CAISO is a non-profit entity created to independently manage its transmission system. By entering into the forward market transaction at issue in anticipation of future power shortage, CAISO was performing its primary function of providing service to its customers by ensuring uninterrupted power supply and thus was acting pursuant to its tariff authority in section 2.3.5.1.5. Moreover, in a Commission order on August 23, 2000, the Commission directed CAISO to "adopt a more forward approach" in acquiring resources to reliably operate the grid.[543] So, the forward market transaction appears to be a Commission-directed extension of CAISO's authority to make

---

[539] Initial Decision, 142 FERC ¶ 63,011 at P 122.

[540] *See* Ex. CEI-3.

[541] *San Diego Gas & Elec. Co.*, 142 FERC ¶ 63,011, at PP 486-490 (2002).

[542] *CPUC Decision*, 462 F.3 at 1055-59 & 1061.

[543] *San Diego Gas and Elec. Co. et al.*, 92 FERC ¶ 61,172, at 61,608 (2000).

OOM spot transactions. Therefore, CAISO's tariff governs the terms and conditions of the forward market transaction at issue, including the so-called "Memphis Clause" in CAISO tariff section 19, and, therefore, the *Mobile-Sierra* presumption does not apply.

235. We also affirm the Presiding Judge's finding that forward transactions should be mitigated using the MMCP. In the Remand Order, the Commission directed the Presiding Judge to determine "which […] forward market transactions are subject to mitigation and to calculate the refunds" and to "utilize the MMCP-based refund methodology previously established by the Commission in this proceeding, or another methodology the ALJ deems more appropriate." [544] The Presiding Judge followed these instructions by applying the Commission-established MMCP to determine in which of the forward transactions at issue here the rates exceed the Commission-established benchmark. The Respondents presented no evidence to demonstrate why the forward market transaction at issue should be treated differently from the similar OOM spot transactions that were previously mitigated based on the MMCP, except for the difference in duration. In *CPUC Decision*, the Ninth Circuit reversed the Commission's decision to exclude forward market transactions, reasoning that the Commission did not offer sufficient "justification for excluding the transactions [at issue]" based on their duration of greater than 24 hours and that "later evidence suggested that forward prices had not been reigned in by FERC's mitigation of the spot markets, and that sellers had successfully manipulated forward markets to raise prices."[545]

236. We also note that the Commission's discretion is at its zenith when fashioning a remedy.[546] Affirming the Presiding Judge's decision to use the Commission-established MMCP to mitigate the forward transaction remaining in the proceeding is justified by the Commission's instruction in the Remand Order and the history of this proceeding.

237. Next, we address Constellation's claim that the Presiding Judge ignored the evidence presented to demonstrate that Constellation is entitled to cost offsets. We find that Constellation's claim for cost offsets did not meet the Commission's requirements for presenting cost offsets. Constellation's evidence did identify the plant from which the transaction was made, and simply represents an assertion that the transaction is made at cost. This evidence is not sufficient to establish that the entire cost of the transaction was made up by costs, and it departs from the form for the submission of costs that the

---

[544] Remand Order, 129 FERC ¶ 61,147 at P 28.

[545] *CPUC Decision*, 462 F.3d at 1057-58.

[546] *See Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967).

Commission established in the Refund Proceeding. The Commission cannot simply accept assertions that a transaction was done "at cost" as evidence that the plant costs met or exceeded the price of the transaction. For this reason, we affirm the Presiding Judge's decision to reject Constellation's claim of cost offsets. We also reject Constellation's claim that it is not liable for refunds because it acted on behalf of its client and did not negotiate the forward market transaction with CAISO. As we discussed in regard to APX, pursuant to Commission precedent, Constellation, as a Scheduling Coordinator, is jointly and severable liable for the refund.[547]

238. We therefore direct Constellation to pay refunds in the amount of $2,845,024 plus interest pursuant to Rule 35.19a of the Commission's regulations.[548] In their Motion for Overcharges and Refunds, the California Parties propose that CAISO and CalPX should allocate this refund *pro-rata* to the net buyers in this proceeding, based upon the results of the Refund Period reruns that were already conducted. The California Parties argue that because the costs were incurred in the CAISO real-time market, it is appropriate that refunds flow back to the buyers in that market. The California Parties further state that each market participant's aggregate share of the aggregate net real-time refunds, based on that market participants' CAISO and CalPX real-time net refund calculations, is an appropriate basis to allocate the refunds for each month.[549] We agree with the California Parties that there is no need for a cumbersome refund rerun process. We therefore direct CAISO and CalPX to determine, using the existing refund reruns on a monthly basis, the aggregate net real-time refunds and allocate them to net buyers in the real-time market.

The Commission orders:

(A) The Initial Decision's findings of fact are hereby partially affirmed and partially vacated, as discussed in the body of this order.

(B) The Respondents are hereby directed to submit, within 60 days of the date of issuance of this order, a compliance filing, as discussed in the body of this order.

---

[547] *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 127 FERC ¶ 61,269, at P 272 (2009) (citing *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*,105 FERC ¶ 61,066, at P 170 (2003) and *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 122 FERC ¶ 61,274, at PP 54-56 (2008)).

[548] 18 C.F.R. § 35.19a (2014).

[549] California Parties Motion for Overcharges and Refunds at 31-32.

(C) Constellation is hereby directed to pay the refund in the amount determined in this order, including interest pursuant to Rule 35.19a of the Commission's regulations.

(D) CAISO and CalPX are hereby directed to allocate the refund from Constellation ` to net buyers in the real-time market, as discussed in the body of this order.

(E) The California Parties Motion for Overcharges and Refunds is hereby granted in part and denied in part, as discussed in the body of this order.

(F) The Indicated Respondents' Motion for Clarification of Further Procedures is hereby granted in part and denied in part, as discussed in the body of this order.

(G) The Indicated Respondents' Motion for Oral Arguments is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.