

154 FERC ¶ 61,063
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

San Diego Gas & Electric Company

Docket Nos. EL00-95-287
EL00-95-288

v.

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

ORDER ON REHEARING AND FUEL COST ALLOWANCE CLAIM

(Issued February 1, 2016)

1. The Commission received a number of requests for rehearing and clarification of Opinion No. 536-A,¹ which, among other things, clarified the Commission's instructions concerning the remedy ordered in Opinion No. 536² and provided Exelon Generation Company LLC (Exelon) with an additional opportunity to file a cost recovery claim related to Summer Period transactions. In this order, we address the California Parties'³ request for clarification and rehearing, and the fuel cost allowance filing submitted by Exelon in Docket No. EL00-95-288. Other requests for rehearing pending in this proceeding will be addressed in a separate order.

¹ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, Opinion No. 536-A, 153 FERC ¶ 61,144 (2015).

² *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, Opinion No. 536, 149 FERC ¶ 61,116 (2014).

³ 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; and Southern California Edison Company.

I. Summer Period

A. Remedy

2. In Opinion No. 536, the Commission found that the appropriate remedy for Types II and III Anomalous Bidding, False Export, and False Load Scheduling tariff violations that affected the market clearing prices is the disgorgement of payments the Respondents received above the applicable marginal cost-based proxy price.⁴ In Opinion No. 536-A, the Commission clarified that the Respondents found to have engaged in tariff violations impacting the market clearing price are required to disgorge the amounts received above the marginal cost-based proxy price for *all* sales they made during the trading hours in which the market clearing price was affected by their tariff violations.⁵

3. On rehearing, the California Parties argue that the Commission erred to the extent that it failed to require the Respondents to pay refunds for all hours of the Summer Period⁶ in which any Respondent's tariff violations impacted the market clearing price. The California Parties state that they are not challenging the Commission's finding that sellers not found to have committed any tariff violations in the Summer Period are not liable to disgorge any amounts for the Summer Period.⁷

4. The California Parties argue that each of the Respondents clearly benefited from sales made at inflated prices that resulted from other Respondents' wrongdoing as well as their own. According to the California Parties, the filed rate doctrine precludes marketers from charging rates different from those filed with or fixed by the Commission, regardless of the cause. The California Parties argue that the filed rate doctrine and section 205 of the Federal Power Act (FPA)⁸ put the Respondents on notice that they may receive only the filed tariff rate, that any other rate is unlawful, and that the Commission may correct the rate to the filed rate.⁹ The California Parties also argue that a substantial body of Commission precedent concerning refunds in single-price auction markets

⁴ Opinion No. 536, 149 FERC ¶ 61,116 at P 2.

⁵ Opinion No. 536-A, 153 FERC ¶ 61,144 at PP 1 & 142.

⁶ May 1, 2000 through October 1, 2000.

⁷ California Parties Rehearing Request at 6-7.

⁸ 16 U.S.C. § 824d (2012).

⁹ California Parties Rehearing Request at 10.

dictates that the Commission require the Respondents to disgorge the excess payments they received for all sales in all affected hours.¹⁰

5. Additionally, the California Parties state that the evidence adduced during the hearing shows that: (1) the Respondents' violations in a given hour had inter-temporal effects that resulted in the market-clearing price being artificially increased in other hours; and (2) the Respondents' violations were interdependent (and some violations were especially advantageous to the Respondents because of other violations occurring at the same time), with the result that the real price effect of the Respondents' multiple violations was greater than the sum of the effects of each individual violation. The California Parties conclude that due to these intertemporal effects and interdependencies, adverse price effects could easily extend to all violations (not just the 20,000 violations for which the price effects were established), regardless of whether the price effect of each single violation in any single hour can be specifically quantified.¹¹

6. The Indicated Respondents¹² filed an answer to the California Parties' rehearing request.

Commission Determination

7. As an initial matter, we reject the answer filed by the Indicated Respondents to the California Parties' rehearing request. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2015), prohibits answers to a request for rehearing.

¹⁰ *Id.* at 11 (citing *Cities of Anaheim*, 94 FERC ¶ 61,268, at 61,391 (2001), *aff'd*, 95 FERC ¶ 61,197 (2001), *aff'd sub nom.*, *IDACORP Energy L.P. v FERC*, 433 F.3d 879, 882 (D.C. Cir. 2006); *S. Ill. Power Coop.*, 114 FERC ¶ 61,234, at PP 30-32 (2006), *reh'g denied*, 116 FERC ¶ 61,117 (2006); *H.Q. Energy Servs. (U.S.), Inc.*, 110 FERC ¶ 61,243, at P 1, ordering para. (B), *clarified*, 113 FERC ¶ 61,184 (2005), *clarified*, 114 FERC ¶ 61,059 (2006); *Cf. Louisville & Nashville R.R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915)).

¹¹ *Id.* at 8-9 (citing Ex. No. CAX-143 at 19:1-20:5, 93:3-12, 95:1-98:3 (Fox-Penner Direct Testimony); Tr. 3041:25-3048:8 (Fox-Penner May 4, 2012); Tr. 2408:15-22 (Fox-Penner Apr. 30, 2012)).

¹² The Indicated Respondents are Shell Energy North America (US), L.P., (f/k/a Coral Power, L.L.C.), Hafslund Energy Trading LLC, and MPS Merchant Services, Inc. (f/k/a Aquila Power Corporation).

8. We grant the California Parties' request for clarification and clarify that the remaining Respondents (i.e., Hafslund Energy Trading L.L.C., Illinova Energy Partners, Inc. MPS Merchant Services, Inc. (f/k/a Aquila Power Corporation), Shell Energy North America (US), L.P. (f/k/a Coral Power, L.L.C.), and APX Inc.) are liable to disgorge overcharges and excess payments they received for *all* sales during *all* hours of the Summer Period during which the market prices were inflated by tariff violations committed by *any* of the Respondents.¹³ As the Commission stated in Opinion No. 536-A, by committing a tariff violation that affected the market clearing price, the Respondents benefited from the sales made at the inflated prices, and the amounts they received above the marginal cost-based proxy prices must be disgorged.¹⁴

9. In the order on remand setting this matter for a trial type hearing, the Commission stated that when it receives the factual determinations of the Administrative Law Judge with respect to each seller, the Commission will determine what remedy, if any, to impose on sellers.¹⁵ The United States Court of Appeals for the Ninth Circuit, which remanded this case to the Commission, stated that it did not prejudge how the Commission should fashion a remedy if appropriate.¹⁶ It is, therefore, up to the Commission to fashion an appropriate remedy after it has received the complete factual record.¹⁷ Having demonstrated by a preponderance of evidence that the remaining Respondents committed tariff violations resulting in inflated prices during most trading hours of the Summer Period,¹⁸ the California Parties are now entitled to relief. As stated in Opinion No. 536-A, the Commission's authority to order refunds under the FPA is

¹³ We reiterate that this ruling does not apply to non-parties and entities that settled with the California Parties.

¹⁴ Opinion No. 536-A, 153 FERC ¶ 61,144 at P 142.

¹⁵ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 129 FERC ¶ 61,147, at PP 3, 24 (2009).

¹⁶ *Pub. Util. Comm'n of the State of Cal. v. FERC*, 462 F.3d 1027, 1051 (9th Cir. 2006).

¹⁷ We note that the Commission's discretion is at its zenith when fashioning a remedy. *See, e.g., Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967).

¹⁸ Opinion No. 536, 149 FERC ¶ 61,116 at P 2.

discretionary and the use of this discretion is guided by equitable principles.¹⁹ Equity in this case requires disgorgement of excess payments and overcharges received by the Respondents that committed tariff violations inflating the prices for *all* sales during *all* affected trading hours.

10. Additionally, the record evidence demonstrates that the consequences of the Respondents' tariff violations were not limited to the hours in which they committed tariff violations. As the California Parties' expert witness Dr. Fox-Penner noted, price shocks in markets can be perpetuated by changing seller behavior.²⁰ Dr. Fox-Penner found significant inter-temporal effects to the Respondents' tariff violations due to price persistence following tariff violations.²¹ Moreover, Dr. Fox-Penner presented evidence of explicit coordination between sellers.²² He also noted that numerous analyses of California's market concluded that sellers were behaving as tacit colluders and adjusting their behavior in response to changes in supply offers.²³

11. The foregoing evidence is persuasive, as it shows that the Respondents' tariff violations were not isolated incidents. Each tariff violation contributed to an environment where more tariff violations were possible and profitable, and in fact did occur. As a result of their collective tariff violations, the Respondents were able to sell power at levels that exceeded the just and reasonable price levels throughout the Summer Period.²⁴ We find that the excess revenue derived by the Respondents from these sales must be disgorged.

¹⁹ Opinion No. 536-A, 153 FERC ¶ 61,144 at PP 196-97 (citing *Towns of Concord, Norwood, & Wellesley, Mass. v. FERC*, 955 F.3d 67, 72 (D.C. Cir. 1992) (holding that customer refunds are a form of equitable relief, akin to restitution, and the general rule is that agencies should order restitution only when money was obtained in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it.)).

²⁰ Ex. No CAX-143 at 95.

²¹ *Id.*

²² *Id.* at 70-87.

²³ *Id.* at 69-70.

²⁴ See, e.g., Opinion No. 536, 149 FERC ¶ 61,116 at P 173; Opinion No. 536-A, 153 FERC ¶ 61,144 at P 81.

12. To the extent the compliance filings submitted or to be submitted by the Respondents in Docket No. EL00-95-288 are not in compliance with the clarification provided in this order, these compliance filings must be revised within 60 days of the date of issuance of this order, to reflect the amounts to be disgorged for all sales in all affected trading hours. Because we are granting the California Parties' request for clarification, we dismiss its alternative request for rehearing on this issue as moot.

B. Cost Offsets

13. In Opinion No. 536, the Commission permitted the Respondents to provide specific evidence on revenue derived from and costs related to specific transactions subject to mitigation, including emission costs and fuel costs, and directed the Respondents to follow the template for cost offset filings previously established by the Commission in the Refund Proceeding.²⁵ In Opinion No. 536-A, the Commission clarified that the cost recovery will be limited to the costs incurred to make sales into the California Independent System Operator Corporation (CAISO) and the California Power Exchange Corporation (CalPX) markets during the relevant trading hours and that the cost offset filings must follow the requirements previously established by the Commission for cost offset filings.²⁶

14. On rehearing, the California Parties request the Commission to clarify that the cost offsets should be based on period-wide costs and revenues. The California Parties argue that the sales during the periods that are not subject to mitigation should be included in any cost offset calculations to determine if rates have become confiscatory because sellers cannot claim that they have lost money, period-wide, by ignoring non-mitigated transactions.²⁷ Accordingly, the California Parties urge the Commission to clarify that the Respondents must show an overall revenue shortfall, based on its overall portfolio, for all hours during the Refund and Summer Periods for which refunds are ordered. The California Parties also ask the Commission to clarify that "relevant trading hours" means all hours of the Refund and Summer Periods.²⁸

²⁵ Opinion No. 536, 149 FERC ¶ 61,116 at P 212.

²⁶ Opinion No. 536-A, 153 FERC ¶ 61,144 at P 151-153 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 112 FERC ¶ 61,176 (2005)).

²⁷ California Parties Request for Rehearing at 14-15.

²⁸ *Id.* at 15.

Commission Determination

15. We grant in part the California Parties' request for clarification. We agree with the California Parties that the Respondents' cost offset calculations must include sales during the trading hours not subject to mitigation. As the Commission has previously stated:

[S]ellers may have made substantial profits on nonmitigated sales that balance out losses from mitigated sales. Netting [CA]ISO market revenues from associated costs of all transactions, mitigated and non-mitigated, will ensure that there is no cherry-picking among transactions. In determining whether a particular rate or rate methodology is confiscatory, the Commission is not bound myopically to consider only certain costs and revenues, but ignore all others. Rather, the Commission may properly consider whether the 'end result' of its rate methodology is reasonable, and here the end result is reasonable if sellers are adequately compensated for their total sales into the California markets during the relevant period.²⁹

While we grant the California Parties' request for clarification that cost offsets are to be based on period-wide costs and revenues, we deny the California Parties request to require the Respondents to provide cost offset calculations for both the Summer Period and the Refund Period. In Opinion No. 536-A, the Commission did not intend that the phrase "relevant trading hours" was to apply to all hours in the both the Refund Period and the Summer Period. There is no reason to revisit the Refund Period cost offsets. The Refund Period cost offset filings have already been submitted to the Commission, and the California Parties have not persuaded us that it is necessary or appropriate to reopen those issues.

16. Consistent with the direction above, we also note that if the cost offset filings submitted by the Respondents along with the compliance filings pending in Docket No. EL00-95-288 are not in compliance with the clarification provided in this order, the Respondents have 60 days of the date of issuance of this order to revise their cost offset calculations.

²⁹ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 114 FERC ¶ 61,070, at P 81 (2006).

II. Refund Period

17. In Opinion No. 536-A, the Commission provided Exelon with an additional opportunity to submit evidence of the cost offsets applicable to the transaction at issue. The Commission clarified that because the portfolio-based cost offsets would not apply to the forward market transaction that is traceable to a specific resource, Exelon has an option of presenting evidence of marginal costs that are directly attributable to the incremental sale in question. The Commission noted that these costs are the fuel cost allowance and the NOx emission costs offset, as well as the transmission costs and losses paid to make the sale in question. The Commission emphasized that because Exelon can match the transaction at issue to the specific resource, these types of costs must be clearly linked with the resource and the sale, and easily verifiable by supporting evidence, and be presented in a format prescribed by the Commission.³⁰

A. Request for Rehearing

18. On rehearing, the California Parties argue that the Commission should not have permitted Exelon to make a second cost offset filing. First, the California Parties assert that Exelon should have submitted evidence of costs during the hearing in this proceeding.³¹ The California Parties explain that, because Exelon failed to submit a cost offset template based on the Commission methodology, the Presiding Judge properly did not determine a cost offset. Second, the California Parties contend that Exelon is not eligible for a fuel cost allowance because the Commission had previously clarified that power marketers, such as Exelon, do not generate electricity and therefore do not purchase fuel.³² Similarly, the California Parties argue that Exelon is not eligible for an emissions offset, because allowing it to do so would be an impermissible shifting of costs, allowing Exelon to claim a reduction to its refunds for emissions costs that it never incurred.³³ Finally, the California Parties assert that Exelon failed to file a period-wide analysis as it was required to do.³⁴

³⁰ Opinion No. 536-A, 153 FERC ¶ 61,144 at PP 170-71.

³¹ California Parties Request for Rehearing at 17-19.

³² *Id.* at 20-23.

³³ *Id.* at 23-24.

³⁴ *Id.* at 25-27.

19. Exelon submitted an answer to the California Parties' request for rehearing.

B. Exelon's Fuel Cost Allowance Filing

20. On December 4, 2015, Exelon submitted a fuel cost allowance filing, seeking fuel cost recovery for the forward market transaction at issue in the amount of \$2,718,235, plus interest. According to Exelon, this amount should be offset against the Commission ordered refund of \$2,845,024, plus interest. Thus, Exelon contends that if its cost fuel allowance is accepted by the Commission, its remaining refund liability will be \$126,789, plus interest.³⁵

21. In its filing, Exelon explains that because it has never owned the Placerita plant, and that it has no access to the invoices associated with the purchase of gas for the forward market transaction at issue, its fuel cost allowance claim is based on information requested and obtained from CAISO, as well as the Generation Report and Logs for the days that the sales occurred, transcripts of conversations between CAISO and the Placerita plant's president, and to other evidence showing that CAISO agreed to the costs that Exelon claims.³⁶ In support of its claim, Exelon has also submitted the affidavit of A. Joseph Cavicchi and an auditor's report of fuel costs prepared by Ernst & Young LLP. The auditor's report also notes the unavailability of invoices related to the cost of fuel purchased to generate electricity and lists the documents provided by Exelon to reconstruct fuel costs from other sources.³⁷

C. Notice of Filing and Responsive Pleading

22. Notice of Exelon's fuel cost allowance claim in Docket No. EL00-95-288 was published in *Federal Register*, 80 Fed. Reg. 76,967-02 (2015), with interventions and protests due on or before December 28, 2015. On December 28, 2015, the California Parties filed a protest to Exelon's fuel cost allowance claim. On January 12, 2016, Exelon filed an answer to the California Parties' protest.

23. In their protest, the California Parties allege that Exelon should not be able to reduce its refund liability because the fuel costs at issue were incurred by its affiliate-

³⁵ Exelon Fuel Cost Allowance Filing at 2.

³⁶ *Id.* at 4 (citing Ex. No. AES-3 at 1, 4-5; Ex. No. CEI-8, CEI-11, CEI-18; and Ex. No. CAX-110, CAX-134)).

³⁷ Ernst & Young Accountant Report at 4.

generator, and not Exelon itself.³⁸ The California Parties maintain that in the alternative, the Commission should reject Exelon's fuel cost recovery claim because Exelon's filing is not compliant with the Commission's methodology required for fuel cost allowances. In support, the California Parties cite to Exelon's failure to provide the full portfolio of gas sales and purchases for the days in question, and point also to the failure by Exelon to provide verifiable data of gas purchases, invoices, a corporate attestation concerning the accuracy of the gas costs, and the failure to link the gas portfolio with the entity making the claim for a fuel cost allowance.³⁹

24. In its answer, Exelon reasserts that denying it the fuel cost allowance would result in a confiscatory rate. Exelon argues that "the entity that is held liable for refunds based upon the MMCP [is entitled] to recover a fuel cost allowance to offset its refund liability."⁴⁰ Exelon further maintains that it was not required to submit the Placerita plant's entire portfolio of gas purchases, because it was not the marketer for the transactions at issue. Rather, Exelon argues that its fuel cost allowance adheres to the Commission's documentary requirements because the daily gas prices it relies on are otherwise verifiable.⁴¹

D. Commission Determination

1. Procedural Matters

25. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2015), prohibits answers to a request for rehearing. Accordingly, we will reject Exelon's answer to the California Parties' request for rehearing.

26. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2015), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We accept Exelon's answer to the California Parties' protest because it has provided information that assisted us in our decision-making process.

³⁸ California Parties Protest at 3 (citing *San Diego Gas & Elec. Co.*, 116 FERC ¶ 61,167, at PP 35-45 (2006)); *see also id.* at 10 (citing *San Diego Gas & Elec. Co.*, 107 FERC ¶ 61,166, at P 14 (2004)).

³⁹ California Parties Protest at 7-16.

⁴⁰ Exelon Answer at 3 (citing *San Diego Gas & Elec. Co.*, 102 FERC ¶ 61,317, *order on reh'g*, 105 FERC ¶ 61,066 (2003)).

⁴¹ Exelon Answer at 3-4.

2. Substantive Matters

27. We find Exelon's fuel cost allowance filing deficient, and hereby reject it, with prejudice, as discussed further below. In Opinion No. 536-A, the Commission provided Exelon with a second opportunity to submit evidence of the cost offsets applicable to the forward market transaction. The Commission stated that, because Exelon can match the transaction at issue to the specific resource, it expects costs to be clearly linked with the resource and sale, and easily verifiable by supporting evidence.⁴² In a prior Commission order in Docket No. EL00-95, the Commission found that a marketer would be eligible to make a fuel cost claim in instances where a marketer takes on key characteristics of a generator by directly procuring and paying for fuel that is directly tied to its sales in CAISO/CalPX markets.⁴³ This finding was consistent with previous Commission findings in this proceeding that "generators must base their claims for additional fuel cost allowances on their *actual* daily cost of gas incurred to make spot power sales."⁴⁴ We find that Exelon has not demonstrated that it is eligible to receive a fuel cost allowance because it has not clearly linked any evidence of its actual incurred costs to the resource and sale at hand. Both Exelon and the independent auditor, Ernst & Young, acknowledge that Exelon does not have invoices related to the cost of fuel purchased to generate electricity for the transaction at hand.⁴⁵ While Exelon attempts to substantiate its fuel cost claim by providing CAISO records related to the transaction, there is no direct evidence demonstrating that Exelon, as a successor-in-interest to AES NewEnergy, directly procured or paid for fuel related to the transaction.⁴⁶ Therefore, we reject Exelon's request for the fuel cost allowance as deficient.

⁴² Opinion No. 536-A, 153 FERC ¶ 61,144 P 171 (citing *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)).

⁴³ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 107 FERC ¶ 61,166 at P 16.

⁴⁴ *San Diego Gas & Elec. Co.*, 103 FERC ¶ 61,078, at P 11 (2003) (emphasis in original); *see also San Diego Gas & Elec. Co.*, 102 FERC ¶ 61,317, at P 61 (2003).

⁴⁵ Exelon Filing at 3.

⁴⁶ Opinion No. 536-A, 153 FERC ¶ 61,144 at P 179.

28. Because we are rejecting Exelon's fuel cost allowance filing, the California Parties' request for rehearing on this issue is dismissed as moot.

The Commission orders:

(A) The California Parties' request for rehearing and clarification is hereby granted in part, denied in part, and dismissed in part, and clarification is hereby provided, 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, revised compliance filings and cost offset claims to comply with the clarification provided, as discussed in the body of this order.

(C) Exelon's fuel cost allowance claim is hereby rejected as deficient, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.