

158 FERC ¶ 61,055  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

San Diego Gas & Electric Company

Docket No. EL00-95-295

v.

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

Investigation of Practice of the California  
Independent System Operator and the  
California Power Exchange

Docket No. EL00-98-267

ORDER ON REMAND AND INSTUTING HEARING  
AND SETTLEMENT JUDGE PROCEDURES

(Issued January 23, 2017)

1. This case is before the Commission on voluntary remand from the United States Court of Appeals for the Ninth Circuit (Ninth Circuit).<sup>1</sup> On October 12, 2016, the court granted the Commission's unopposed motion for partial voluntary remand to reconsider the cost offset claims submitted by Shell Energy North America (US) ), L.P. (f/k/a Coral Power, L.L.C.) (Shell) and Hafslund Energy Trading L.L.C. (Hafslund). The Commission here orders a trial-type, evidentiary hearing before an Administrative Law Judge (ALJ) to examine whether the cost offset claims submitted by Shell and Hafslund include the costs associated with the transactions that constitute False Exports, Phantom

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<sup>1</sup> *Pub. Util. Com'n of the State of Cal. v. FERC*, No. 01-71934 *et al.* (9<sup>th</sup> Cir. Oct. 12, 2006).

Ancillary Services and False Load Scheduling, as determined in Opinion No. 536.<sup>2</sup> We will also hold the hearing in abeyance and institute the settlement judge procedures.<sup>3</sup>

## I. Background

2. The instant proceeding commenced with a complaint under section 206 of the Federal Power Act (FPA)<sup>4</sup> filed by San Diego Gas & Electric Company (SDG&E) in August 2000. SDG&E's complaint named as respondents all sellers of energy and ancillary services in the California Independent System Operator Corporation (CAISO) and California Power Exchange Corporation (CalPX) markets. In response to SDG&E's complaint, the Commission established a hearing proceeding to investigate the justness and reasonableness of the rates for all sales in the CalPX and CAISO markets<sup>5</sup> and subsequently established another evidentiary, trial-type hearing to determine the appropriate refunds.<sup>6</sup>

3. Following the issuance of the ALJ's report and recommendations,<sup>7</sup> the Commission issued an order establishing the scope of and methodology for calculating refunds related to transactions in the spot markets operated by the CAISO and CalPX during the Refund Period.<sup>8</sup> Under the Commission-established refund methodology, all

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<sup>2</sup> *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, Opinion No. 536, 149 FERC ¶ 61,116 (2014), *order on reh'g*, Opinion No. 536-A, 153 FERC ¶ 61,144 (2015), *order on reh'g*, 154 FERC ¶ 61,063 (2016), *aff'd in part, MPS Merchant Services, Inc. v. FERC*, 836 F.3d 1155 (9<sup>th</sup> Cir. 2016).

<sup>3</sup> On March 11, 2011, Commissioner Cheryl A. LaFleur issued a memorandum to the file in sixty dockets, including Docket No. EL00-95-000, documenting her decision, based on a memorandum from the Office of General Counsel's General and Administrative Law section, dated February 18, 2011, not to recuse herself from considering matters in those dockets.

<sup>4</sup> 16 U.S.C. § 824e (2012).

<sup>5</sup> *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Servs.*, 92 FERC ¶ 61,172 (2000).

<sup>6</sup> *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Servs.*, 93 FERC ¶ 61,121 (2000).

<sup>7</sup> *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Servs.*, 96 FERC ¶ 63,007 (2001).

<sup>8</sup> October 2, 2000 - June 20, 2001.

sales of 24 hours or shorter in the CAISO and CalPX markets were to be mitigated to the level of a mitigated market clearing price (MMCP).<sup>9</sup> The Commission also ruled that generators that believe that MMCP does not cover all of their costs “can file for cost-of-service rates covering all of their generating units ... for the duration of the mitigation period and including the [R]efund [P]eriod.”<sup>10</sup> Subsequently, the Commission extended an opportunity to claim cost offsets to marketers based on “their overall revenues over the [R]efund [P]eriod”<sup>11</sup> and also clarified the requirements for calculating cost offset and established a uniform format for cost offset filings.<sup>12</sup>

4. In a series of subsequent orders,<sup>13</sup> the Commission addressed cost offset claims submitted by various sellers, including Shell and Hafslund. The Commission accepted Shell’s cost offset claim, requiring certain changes to correct data discrepancies, and also accepted Hafslund’s cost offset claim without further changes.<sup>14</sup> The California Parties<sup>15</sup> filed a petition for review before the Ninth Circuit. That petition was held in abeyance. Subsequently, the Commission issued Opinion No. 536, in which it found that False Export, Phantom Ancillary Services, and False Load Scheduling transactions violated the then-current tariffs.<sup>16</sup>

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<sup>9</sup> *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Servs.*, 96 FERC ¶ 61,120 (2001).

<sup>10</sup> *Id.* at 61,518.

<sup>11</sup> *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Servs.*, 97 FERC ¶ 61,275, at 62,193 (2001).

<sup>12</sup> *San Diego Gas and Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 112 FERC ¶ 61,176 (2005), *on reh’g*, 121 FERC ¶ 61,184 (2007).

<sup>13</sup> *San Diego Gas and Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 114 FERC ¶ 61,070 (2006), *on reh’g*, 127 FERC ¶ 61,269 (2009), *on reh’g*, 131 FERC ¶ 61,144 (2010).

<sup>14</sup> *Id.*

<sup>15</sup> 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.

<sup>16</sup> Opinion No. 536, 149 FERC ¶ 61,116 at PP 120, 170-171, *order on reh’g*, Opinion No. 536-A, 153 FERC ¶ 61,144 at PP 59, 70, 96-99, 114-120.

5. Briefing on the petitions of the Commission orders described above resumed. The California Parties argued, among other things, that the Commission erroneously allowed Shell's and Hafslund's cost offset claims to account for the costs of transactions that constituted False Exports, Phantom Ancillary Services and False Load Scheduling, the practices that the Commission found in Opinion No. 536 to be in violation of the then-current tariffs.<sup>17</sup> In response to the California Parties' brief, the Commission filed a motion for voluntary remand to reconsider the cost offset claims submitted by Shell and Hafslund.<sup>18</sup> The Ninth Circuit granted the Commission's motion on October 12, 2016 without addressing the merits of the issue.

## II. Commission Determination

6. The California Parties allege that Shell's and Hafslund's cost offset claims include costs of illegal activities, namely False Exports, False Load Scheduling, and Phantom Ancillary Service. In Opinion No. 536 and Opinion No. 536-A, as affirmed by the Ninth Circuit,<sup>19</sup> the Commission found that False Exports, False Load Scheduling, and Phantom Ancillary Services constitute tariff violations.<sup>20</sup> We find that sellers should not be permitted to offset their refund liability by the costs incurred while engaged in activities in violation of the then-effective tariffs.

7. In light of these findings, we establish a trial type, evidentiary hearing before an ALJ. We find that issues of material fact exist with respect to the question of which transactions included in Shell's and Hafslund's cost offset claims constitute False Exports, Phantom Ancillary Services, and False Load Scheduling. We therefore instruct

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<sup>17</sup> The California Parties App. Br. 26- 37. In their brief, the California Parties also alleged that the Commission made a finding of False Exports in an Initial Decision in the Docket No. EL01-10 proceeding. *See id.* at 30-31 (citing *Puget Sound Energy, Inc.*, 154 FERC ¶ 63,004, at PP 30-33 (2016)). We note that the Commission subsequently held that Initial Decision's finding of False Exports is outside the narrow scope of inquiry required by Supreme Court precedent in that proceeding. *See Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity at Wholesale into Elec. Energy and/or Capacity Mkts. in the Pac. Nw.*, 157 FERC ¶ 61,026, at P 43 (2016).

<sup>18</sup> Unrelated issues that were the subject of the same petition for review filed by the California Parties continue to be litigated before the Ninth Circuit and are not the subject of this order.

<sup>19</sup> *MPS Merchant Services, Inc. v. FERC*, 836 F.3d 1155.

<sup>20</sup> Opinion No. 536, 149 FERC ¶ 61,116 at PP 120, 170-171, *order on reh'g*, Opinion No. 536-A, 153 FERC ¶ 61,144 at PP 59, 70, 96-99, 114-120.

the parties to present evidence on and the Presiding Judge to determine which of the transactions constitute False Exports, Phantom Ancillary Services, and False Load Scheduling and thus should be excluded from the cost offset calculations. Shell and Hafslund are allowed to present evidence showing that the alleged illegal transactions had a legitimate business purpose. We also reopen the record to allow parties to supplement the existing record. Parties must resubmit the relevant record evidence if they wish to use it.

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

9. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.<sup>21</sup> If the participants desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding. The Chief Judge, however, may not be able to designate the requested settlement judge based on workload requirements which determine judges' availability.<sup>22</sup> The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the participants with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing

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<sup>21</sup> 18 C.F.R. § 385.603 (2016).

<sup>22</sup> If the participants decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within ten days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience ([www.ferc.gov](http://www.ferc.gov) – click on Office of Administrative Law Judges).

shall be held concerning the issues identified in the body of this order. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (B) and (C) below.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2016), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the participants decide to request a specific judge, they must make their request to the Chief Judge within ten (10) days of the date of this order.

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

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

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.