158 FERC ¶ 61,076
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

San Diego Gas & Electric Company

v. Docket Nos. EL00-95-289
EL00-95-287

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

ORDER ON REHEARING

(Issued January 27, 2017)

1. In this order, we deny in part, grant in part, and dismiss in part rehearing requests of Opinion No. 536-B,[1] which directed the Respondents remaining in the instant proceeding[2] to disgorge overcharges and excess amounts they received for all sales during all hours of the Summer Period[3] during which the market prices were inflated by tariff violations committed by any of the Respondents. We also deny Exelon Generation Company LLC's (Exelon) request for rehearing of the Commission's determination in Opinion No. 536-B rejecting Exelon's cost offset claim. In this order, we also dismiss as

[1] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, Opinion No. 536-B, 154 FERC ¶ 61,063 (2016).

[2] Hafslund Energy Trading L.L.C. (Hafslund), Illinova Energy Partners, Inc. (Illinova), MPS Merchant Services, Inc. (f/k/a Aquila Power Corporation) (MPS), Shell Energy North America (US), L.P. (f/k/a Coral Power, L.L.C.) (Shell), and APX Inc. (APX). Hafslund did not file a request for rehearing of Opinion No. 536-B.

[3] The Summer Period refers to the period from May 1-October 2, 2000.

moot in part and deny in part MPS's request for rehearing of Opinion No. 536-A[4] and also dismiss APX's request for rehearing and clarification of Opinion. No. 536-A. In addition, MPS is directed to submit a revised compliance filing in Docket No. EL00-95-288 within 15 days of the date of this order, as discussed below.

I. Background

2. In Opinion No. 536, and as further detailed in that order, 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.[5] In that order, the Commission also ordered Exelon to pay a refund for the forward market transaction entered into during the Refund Period.[6]

3. In Opinion No. 536-A, the Commission clarified that the Respondents found to have engaged in tariff violations impacting the market clearing prices 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.[7] In that order, the Commission also provided Exelon with an additional opportunity to file a cost recovery claim related to the forward market transaction entered into during the Refund Period.[8] The following parties sought rehearing of Opinion No. 536-A in Docket No. EL00-95-287: MPS, the California Parties,[9] and APX. The California Parties filed an answer to APX's request for

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

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

[6] The Refund Period is October 2, 2000 – June 20, 2001.

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

[8] *Id*. PP 170-171.

[9] 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. The California Parties' request for rehearing of Opinion No. 536-A was addressed in Opinion No. 536-B.

rehearing. The California Parties' request for rehearing of Opinion No. 536-A was addressed in Opinion No. 536-B.[10] The requests for rehearing of Opinion 536-A submitted by APX and MPS are the two remaining rehearing requests that will be addressed in this order.

4. On February 1, 2016, the Commission issued Opinion No. 536-B, which addressed the California Parties' request for clarification and rehearing, and the fuel cost allowance filing submitted by Exelon in response to Opinion No. 536-A. In that order, the Commission granted the California Parties' request for clarification and clarified that the remaining Respondents "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."[11] The Commission also rejected Exelon's fuel cost allowance claim as deficient.[12]

5. The following parties seek rehearing of Opinion No. 536-B in Docket No. EL00-95-289: MPS and Illinova,[13] the Joint Petitioners,[14] the Indicated Respondents,[15] and Exelon. In addition, this order addresses MPS's and APX's requests for rehearing of

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[10] Opinion No. 536-B, 154 FERC ¶ 61,063 at P 1.

[11] *Id*. PP 8-11.

[12] *Id*. P 27.

[13] In their joint rehearing request of Opinion No. 536-B, MPS and Illinova raise many arguments that are identical to the arguments raised in MPS's rehearing request of Opinion No. 536-A. Accordingly, these two rehearing requests will be addressed simultaneously.

[14] Morgan Stanley Capital Group Inc.; Commonwealth Energy Corp. (n.k.a. Commerce Energy) (Commerce); Merrill Lynch Capital Services, Inc. (Merrill Lynch); and BP Energy Company. We note that the Commission has since approved a settlement between the California Parties and Commerce. *See San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 157 FERC ¶ 61,062 (2016). Moreover, a settlement between the California Parties and Merrill Lynch is pending in Docket No. EL00-95-298, *et al.*

[15] Shell and Hafslund. Indicated Respondents indicate that they support and join the rehearing request of Opinion No. 536-B filed by MPS and Illinova. Indicated Respondents Request for Rehearing of Opinion No. 536-B, Docket No EL00-95-289, at 1 (Mar, 2, 2016).

Opinion No. 536-A. The California Parties filed an answer to the pending requests for rehearing. MPS and Illinova filed opposition to the California Parties' answer to the rehearing requests.

6. Exelon, MPS, Illinova, Shell, and APX filed petitions for review with the United States Court of Appeals for the Ninth Circuit (Ninth Circuit). The court denied Exelon's petition for review on August 4. 2016, affirming the Commission's determination on Exelon's refund liability for the forward market transaction.[16] The Ninth Circuit decision did not address issues pertaining to Exelon's cost offset claim. In a September 8, 2016 decision, the Ninth Circuit also upheld the Commission's findings on the issue of liability of MPS, Illinova, Shell, and APX. The court, however, declined to address the remedy because the Commission had not yet ruled on pending rehearing requests of Opinion No. 536-B.[17]

II. Procedural Matters

7. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2016) prohibits answers to a request for rehearing. Accordingly, we will reject the answers filed by the California Parties, as well as MPS and Illinova's opposition to the California Parties' answer.

III. Summer Period

A. Price Effect

1. Rehearing Requests

8. MPS argues that the Commission misstated the record on False Export transactions in Opinion No. 536-A by inaccurately representing that "MPS effectively withheld capacity from the day-ahead market to raise prices in the real-time market."[18] MPS and Illinova argue that the Commission stated in Opinion 536-B without supporting record evidence that "by committing a tariff violation that affected the market clearing

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[16] *Exelon Generation Co., LLC v. FERC*, No. 15-73836, 2016 WL 4137672 (9th Cir. Aug. 4, 2016).

[17] *MPS Merchant Services, Inc. v. FERC*, 836 F.3d 1155 (9th Cir. 2016) (*MPS*).

[18] MPS Request for Rehearing of Opinion No. 536-A, Docket No. EL00-95-287, at 8 (Dec. 4, 2015) (citing Opinion No. 536-A, 153 FERC ¶ 61,144 at P 142) (MPS).

price, the Respondents benefitted from the sales made at the inflated prices."[19] MPS and Illinova state that the California Parties have never argued for or supported a position that False Exports were made for the purpose of raising prices in the California Independent System Operator Corporation (CAISO) real-time market or did in fact raise those prices.[20] According to MPS and Illinova, the California Parties only presented an analysis indicating that False Exports had an adverse impact on prices in the California Power Exchange Corporation (CalPX) day-ahead market, and testimony submitted by the California Parties indicated that False Export transactions may have benefitted CAISO real-time prices.[21] MPS and Illinova argue that multiple witnesses testified on behalf of the Respondents that False Exports were beneficial to real-time prices.[22] MPS and Illinova state that the Commission must correct this error by confirming that the record evidence as to adverse price effects from False Export transactions apply solely to CalPX day-ahead market prices.

9. MPS and Illinova and the Indicated Respondents also argue that the Commission erred in relying on the testimony of the California Parties' witness Dr. Fox-Penner because his analysis did not establish price effects and data contradict his theories.[23] According to MPS and Illinova, they both were price-takers, and scheduled energy at the negative bid cap. MPS and Illinova contend that to the extent there were price increases in the CalPX market caused by suppliers, they were miniscule and there is substantial evidence in the record that their actions lowered prices rather than increased them.[24] MPS and Illinova also note that the Commission previously concluded that some of the same transactions now being labeled as violations actually helped the markets by

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[19] MPS and Illinova Request for Rehearing of Opinion No. 536-B, Docket No. EL00-95-289, at 32 (Mar. 2, 2016) (citing Opinion No. 536-B, 154 FERC ¶ 61,063 at P 8) (MPS and Illinova).

[20] MPS at 8; MPS and Illinova at 32.

[21] MPS at 8-9 (citing Ex. CAX-143, Ex. CAX-310 64:4-7, Ex. CAX-315 and Ex. CAX-316); MPS and Illinova at 32-33.

[22] MPS at 9 & n.16; MPS and Illinova at 33 & n.75.

[23] MPS and Illinova at 30; Indicated Respondents at 7.

[24] MPS at 10; MPS and Illinova at 30, 34, 44.

alleviating reliability concerns.[25] MPS and Illinova further argue that according to Dr. Fox-Penner's theory of price impact, conforming transactions would have lowered resultant market clearing prices.[26]

2. Commission Determination

10. In *MPS*, the Ninth Circuit found that the Commission's determination in Opinion No. 536 and Opinion No. 536-A on the remaining respondents' liability was final[27] and upheld the Commission's findings. Specifically, the Ninth Circuit found that the Commission "reasonably concluded that the sellers engaged during the Summer Period in the practices deemed tariff violations,"[28] and that "substantial evidence supports [the Commission']s findings that the sellers' tariff violations increased market-clearing prices for electricity."[29] The Ninth Circuit also found that the sellers' attacks on the price effect methodology adopted by the Commission are not persuasive.[30] Based on these Ninth Circuit findings, we dismiss as moot MPS's request for rehearing of Opinion No. 536-A and MPS and Illinova's and Indicated Respondents' rehearing requests of Opinion No. 536-B to the extent they raise issues regarding the Commission's findings of tariff violations and their impact on market clearing prices. The Ninth Circuit, however, declined to rule on the issue of remedy because of the pending rehearing requests of Opinion No. 536-B, which we will address below.

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[25] MPS and Illinova at 44 (citing *Am. Elec. Power Serv. Corp.*, 103 FERC ¶ 61,345, at P 60 (2003), *order on reh'g*, 106 FERC ¶ 61,020, at P 76 (2004)).

[26] *Id*. at 34; MPS at 11.

[27] *MPS*, 836 F.3d at 1163-64.

[28] *Id*. at 1167.

[29] *Id*. at 1168.

[30] *Id*. at 1169.

B. Remedy

1. Commission's Authority

a. Rehearing Requests

11. MPS and Illinova and the Joint Petitioners argue that the Commission's requirement that individual Respondents disgorge profits that are not causally connected to any violation they were found to have committed is not disgorgement but rather an award of retroactive refunds.[31] MPS and Illinova and the Indicated Respondents argue that the Commission does not have authority under the Federal Power Act (FPA) to retroactively reset prices received by sellers for transactions that did not violate any law, rule, regulation or tariff. MPS and Illinova and the Indicated Respondents explain that FPA section 206[32] authorizes the Commission to order refunds only prospectively, and section 309[33] has been interpreted only to grant the Commission authority to correct tariff violations and to impose remedy of disgorgement of unjust profits. Indicated Respondents add that the Commission's discretion to order equitable relief must also be derived from authority under the FPA, but that authority is not available under section 309.[34] MPS and Illinova and the Indicated Respondents thus conclude that the Commission-imposed remedy cannot be justified by either the rate-setting authority of FPA section 206 or the authority under section 309 to remedy violations of the FPA or

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[31] MPS and Illinova at 35-37 (citing *The Washington Water Power Co.*, 83 FERC ¶ 61,097, at 61,464 (1998); *The Washington Water Power Co.*, 83 FERC ¶ 61,282, at 62,169 (1998); *Delmarva Power & Light Co.*, 24 FERC ¶ 61,199, at 61,470 (1983); *Carolina Power & Light Co.*, 17 FERC ¶ 61,118, at 61,238 (1981), *reh'g denied*, 18 FERC ¶ 61,234 (1982), *remanded on other grounds*, 716 F.2d 52 (D.C. Cir. 1983)). *See also* Joint Petitioners Rehearing Request of Opinion No. 536-B, Docket No. EL00-95-289, at 2, 8-11 (Mar. 2, 2016) (Joint Petitioners).

[32] 16 U.S.C. § 824e (2012).

[33] 16 U.S.C. § 825h (2012).

[34] Indicated Respondents at 9-10.

Commission rules or orders.[35] MPS further argues that FPA section 205[36] also does not give the Commission authority to order retroactive refunds for transactions that were in compliance with the then-existing tariff, as, according to MPS, the Commission itself recognized in Opinion No. 536-A.[37]

12. MPS and Illinova further state that the Commission has previously recognized that the remedy of disgorgement is not a generic refund authority, but is limited to ordering a party in violation of its tariff to "relinquish[] profits illegally obtained."[38] MPS and Illinova thus argue that the Commission can only order the disgorgement of amounts that are "'a reasonable approximation of profits "causally connected to the violation."[39] In support, MPS and Illinova also point to a decision by the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) limiting the remedy to disgorgement of unlawfully received fees and rejecting the liability for a third party's wrongdoing because it would have been duplicative of the disgorgement liability and over ten times the amount subject to disgorgement.[40]

13. MPS and Illinova conclude that nothing in the FPA permits the Commission arbitrarily to expand its section 309 authority to require retroactive disgorgement of the amounts received for transactions that were not in violation of then-effective tariffs, where the only "offense" associated with such transactions was that they occurred in an hour in which some unknown third party committed some tariff violation in one or more of the California markets. MPS argues that the Commission has failed to establish any rational nexus between a transaction that constituted a tariff violation during a specified hour and other, completely separate transactions conforming to the tariff that took place

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[35] MPS at 12-15; MPS and Illinova at 14-15 (citing *Cal. ex rel. Brown v. Powerex Corp.*, 135 FERC ¶ 61,178, at PP 73, 76, 79, 82 (2011) (*Brown*)); Indicated Respondents at 3, 7-9 (citing *Pub. Utils. Comm'n of Cal. v. FERC*, 462 F.3d 1027, 1048 (9th Cir. 2006) (*CPUC Decision*)).

[36] 16 U.S.C. § 824d (2012).

[37] MPS at 14 (citing Opinion No. 536-A, 153 FERC ¶ 61,144 at P 193).

[38] MPS and Illinova at 15 (citing *Enforcement of Statutes, Orders, Rules, and Regulations*, 132 FERC ¶ 61,216, at P 216 (2010)).

[39] *Id*. at 15 (citing *City Power Mktg.*, 152 FERC ¶ 61,012, at P 272 (2015)).

[40] *Id*. at 15-16 (citing *Hateley v. SEC*, 8 F.3d 653, 655-57 (9th Cir. 1993)).

in the same hour but received no benefit from purported tariff violation.[41] The Joint Petitioners also allege that the Commission failed to adequately explain its rationale and legal basis for imposing vicarious liability as a remedy or to address whether the Commission satisfied its legal obligation to consider sellers' individual circumstances prior to requiring market participants to disgorge profits.[42]

14. Further, MPS and Illinova and the Indicated Respondents argue that there is no precedent for the Commission-imposed remedy in Opinion No. 536-B, as all of the cases where the Commission used its section 309 authority to correct the prices retroactively involved entirely different facts and legal principles than in the instant case.[43] Specifically, MPS and Illinova, and Indicated Respondents explain that all those cases involve situations where the market operator, in direct violation of explicit provisions in its own tariff, incorrectly calculated a charge or price that it later had to correct, often requiring a reallocation of charges among all market participants to correctly reflect filed and Commission-approved tariff provisions, of which all market participants had notice.[44]

15. MPS and Illinova also challenge the Commission's finding in Opinion No. 536-B that the Commission's discretionary equitable authority to award refunds "akin to

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[41] MPS at 14, 16.

[42] Joint Petitioners at 2, 11-12.

[43] MPS and Illinova at 16-17 (citing *NRG Power Mktg., Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 91 FERC ¶ 61,346 (2000); *Cities of Anaheim v. Cal. Indep. Sys. Operator Corp*, 94 FERC ¶ 61,268, *order on reh'g*, 95 FERC ¶ 61,197 (2001), *aff'd sub nom., IDACORP Energy L.P. v FERC*, 433 F.3d 879, 880, 883 (D.C. Cir. 2006) (*Cities of Anaheim*); *S. Ill. Power Coop. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 114 FERC ¶ 61,234, at PP 30-32, *reh'g denied*, 116 FERC ¶ 61,117 (2006); and *Consol. Edison Co. of N.Y., Inc.* v. FERC, 347 F.3d 964, 967 (D.C. Cir. 2003)). Indicated Respondents at 11-15 (citing Opinion No. 536-B, 154 FERC ¶ 61,063 at P 4; *Cities of Anaheim*, 94 FERC ¶ 61,268, *order on reh'g*, 95 FERC ¶ 61,197 (2001), *aff'd sub nom., IDACORP Energy L.P. v FERC, 433 F.3d 879 (D.C. Cir. 2006)*; *S. Ill. Power Coop. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 114 FERC ¶ 61,234; *H.Q. Energy Servs. (U.S.), Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 110 FERC ¶ 61,243, at P 9, *clarified*, 113 FERC ¶ 61,184 (2005)). *See also* MPS at 15.

[44] MPS and Illinova at 16-17; Indicated Respondents at 11-14.

restitution." MPS and Illinova argue that restitution, like refund, is designed to make other parties whole, which is completely different from imposing disgorgement.[45]

16. Further, MPS and Illinova assert that because the size of the disgorgement amount ordered bears no relationship to the profits gained by the sellers by allegedly engaging in the subject tariff violations, the disgorgement ordered is an unauthorized penalty.[46] MPS and Illinova state that under the Commission precedent, "[d]isgorgement involves relinquishing profits illegally obtained" while "[c]ivil penalties, on the other hand, serve to provide just punishment."[47] MPS and Illinova explain that the evidence demonstrates that the total adverse price effect attributed to MPS/Aquila's and Illinova's trades amounts to no more than $9,779 and $483, respectively, and the total undue gain amounts to no more than $130,697 and $105,667, respectively, while the amount that must be disgorged under the newly-revised penalty, according to the California Parties' calculations, are in excess of $38.9 million (exclusive of interest and cost offsets) for MPS and $686,000 (exclusive of interest and cost offsets) for Illinova.[48] MPS and Illinova add that historically, the Commission has always imposed civil penalty as a completely distinct sanction from any disgorgement remedy ordered,[49] and that the sanction imposed in this case is unconstitutional because it is 300 times any undue profits which may have been gained.[50] MPS and Illinova thus conclude that on rehearing the Commission must adopt some other methodology for calculating disgorgement that

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[45] *Id.* at 37 (citing Opinion No. 536-B, 154 FERC ¶ 61,063 at P 9 & n.19).

[46] *Id*. at 16 (citing *Coastal Oil & Gas Corp.*, 782 F.2d 1249, 1253 (5th Cir. 1986)). *See also id*. at 38; MPS at 21.

[47] MPS and Illinova at 38 (citing *Revised Policy Statement on Penalty Guidelines*, 132 FERC ¶ 61,216 at P 216). MPS at 22, 28-29.

[48] MPS and Illinova at 12, 38.

[49] *Id*. at 38-41 (citing *El Paso Natural Gas Co.*, 59 FERC ¶ 61,188, at 61,656-57 (1992); *Cleco Corp.*, 104 FERC ¶ 61,125, at 61,436 (2003); *Energy Transfer Partners, L.P.*, 120 FERC ¶ 61,086, at PP 1, 9, & 13 (2007); *Rumford Paper Co.*, 140 FERC ¶ 61,030, at 61,099 (2012); *City Power Marketing, LLC*., 152 FERC ¶ 61,012). *See also* MPS at 23-25.

[50] MPS and Illinova at 41-42 (citing *U. S. v. 3814 NW Thurman Street*, 164 F.3d 1191 (9th Cir. 1999); and *U.S. v. Bajakajian*, 524 U.S. 321, 339-40 (1998)).

reflects a real measure of either undue profits gained by each Respondent or harm caused to the markets solely attributable to each Respondent's individual activities.[51]

b. <u>Commission Determination</u>

17. We deny rehearing of Opinion No. 536-A and Opinion No. 536-B on this issue. In so doing, we note that the Commission throughout this proceeding has endeavored to carry out the Ninth Circuit's remand instructions in the *CPUC Decision*. As relevant here, the Ninth Circuit found that FPA section 309 "gives FERC authority to order refunds if it finds violations of the filed tariff and imposes no temporal limitations."[52] Specifically, the Ninth Circuit held:

> [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. This authority derives from [section] 309 of the [FPA], which authorizes FERC "to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act." Unlike refund proceedings commenced under [section] 206, no time limits apply to remedial actions filed pursuant to [section] 309.[53]

18. In considering the Ninth Circuit's remand instructions, the Commission concluded that it has the authority under section 309 of the FPA to require the Respondents to disgorge unjust profits.[54] The Ninth Circuit's subsequent decision in *MPS* upheld the Commission's finding that the remaining Respondents engaged in tariff violations increasing market clearing prices for electricity.[55] Accordingly, disgorgement of unjust

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[51] MPS and Illinova at 42-43.

[52] *CPUC Decision*, 462 F.3d at 1045.

[53] *Id.* at 1048 (internal citations omitted).

[54] *See, e.g., Towns of Concord, Norwood & Wellesley v. FERC*, 955 F.2d 67, 76 (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) (*Towns of Concord*).

[55] *MPS*, 836 F.3d at 1155.

profits received by the remaining Respondents is authorized by the Ninth Circuit's remand instructions.

19. We reiterate here that 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. The unprecedented scope and scale of the California energy crisis, the manipulation of the wholesale electricity spot markets operated by CAISO and the California Power Exchange by sophisticated suppliers through a variety of schemes, the consequential effects of this manipulation that pushed wholesale market clearing prices above a just and reasonable amount, and the resulting harm to consumers all support the Commission's exercise of its broad remedial authority under section 309 in this manner. Otherwise, the Commission would be in the position of allowing suppliers that have committed these acts, as demonstrated by ample record evidence in this proceeding, to retain monies to which they were not entitled and to unjustly benefit from their wrongdoing. Accordingly, we conclude that the remedy, as clarified in Opinion No. 536-B, is appropriate based on the specific facts and circumstances of this proceeding.

20. We disagree with the Respondents that the disgorgement ordered constitutes an unauthorized penalty because it is not a reasonable approximation of profits causally connected to tariff violations committed. Throughout the proceeding the Commission noted the record evidence showing that "there were many forms of inter-temporal and inter-seller interactions that linked the actions of many sellers within and across hours"[56] and that market participants "also organized coordinated schemes 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."[57] As the Commission found in Opinion No. 536-B, "the consequences of the Respondents' tariff violations were not limited to the hours in which they committed tariff violations"[58] and "each tariff violation contributed to an environment where more tariff violations were possible and profitable, and in fact did occur."[59] 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

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[56] Opinion No. 536-A, 153 FERC ¶ 61,144 at P 81 (citing Ex. CAX-143 at 35 (revised)).

[57] Opinion No. 536, 149 FERC ¶ 61,116 at P 173 (citing Ex. CAX-167 at 65-66, 83 (revised Mar. 28, 2012) and Ex. CAX-143 at 82-83 (revised)).

[58] Opinion No. 536-B, 154 FERC ¶ 61,063 at P 10.

[59] *Id*. P 11.

throughout the Summer Period.[60] Accordingly, we clarified in Opinion No. 536-B that the remaining Respondents 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 remaining Respondents.[61] We continue to find that equity requires that the excess revenue derived by the Respondents from these sales must be disgorged.[62]

21. We find that the cases cited by the Respondents in support of their arguments are inapposite. In *Brown*, the Commission denied the relief requested, stating, among other findings, that the complainant there did not provide sufficient support for its claims based on FPA section 309.[63] By contrast, in the instant proceeding, the Commission found those requisite showings. In Opinion Nos. 536 and 536-A, the Commission found that the California Parties established by a preponderance of the evidence that the remaining Respondents engaged in transactions during the Summer Period that violated tariffs and, as a result, increased market clearing prices.[64] As the Commission stated multiple times, the disgorgement remedy ordered in the instant proceeding only applies to profits made

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[60] *Id*.

[61] *Id*. P 8.

[62] As discussed below, MPS did not commit tariff violations after July 24, 2000 and, consistent with findings of price persistence in the record, we find that under this remedy, MPS is liable for disgorgement of overcharges and excess payments it received for all sales during all hours of the Summer Period, up to and including August 8, 2000, during which market prices were inflated by tariff violations committed by any of the remaining Respondents.

[63] *Brown*, 135 FERC ¶ 61,178 at P 2 ("We are compelled to dismiss the Complaint as … to the extent it raises an appropriate legal theory, to wit, Federal Power Act section 309, the claims are not sufficiently supported."); P 76 (finding that the relief sought under FPA section 309 (if at all) can be obtained only by pleading a specific violation by a specific seller of a substantive provision of the FPA or a tariff, compliance with which the Commission can enforce by taking actions "necessary and appropriate.").

[64] Opinion No. 536, 149 FERC ¶ 61,116 at PP 2-3; Opinion No. 536-A, 153 FERC ¶ 61,144 at P 1.

by those sellers who committed tariff violations affecting the market clearing prices and excludes parties who did not engage in such violations.[65]

22. We further disagree with MPS and Illinova that the relief ordered in this proceeding resembles refunds that are like restitution designed to make other parties whole. The disgorgement remedy in this proceeding is different from market-wide refunds, as it requires disgorgement of profits only by sellers who violated then-effective tariffs with a resultant increase in market clearing prices. The disgorgement remedy is "akin to restitution" in that it requires the violator to relinquish unjust profits it has received.

23. As to other cases cited by MPS and Illinova and the Indicated Respondents, all of them involved facts different from the ones in the instant proceeding. The California energy crisis of 2000-2001 was unprecedented. That said, all of the cited cases support the Commission's conclusion that the Commission has the authority to redress rates that deviated from the filed tariff.[66] For the reasons described above, we affirm the Commission's conclusion in Opinion No. 536-B that the remedy, as clarified in that order, is an appropriate exercise of the Commission's remedial authority.

2. Notice

a. Request for Rehearing

24. The Indicated Respondents assert that Opinion No. 536-B imposes retroactive refund liability on the basis of other sellers' tariff violations and denied them rate certainty. As such, the Indicated Respondents contend that they lacked notice of being

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[65] *See, e.g.*, Opinion No. 536, 149 FERC ¶ 61,116 at P 193.

[66] *NRG Power Mktg., Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 91 FERC ¶ 61,346 (rejecting the argument that recalculations of erroneous energy prices resulting from computational errors are in violation of the FPA and Commission orders); *Consol. Edison Co. of N.Y., Inc., v. FERC*, 347 F.3d at 967 (stating that "FPA section 309 gives FERC authority to order refunds if it finds violations of the filed tariff"); *IDACORP Energy L.P. v FERC*, 433 F.3d at 883 (holding that "the prohibition on retroactive ratemaking may well require an amended invoice if the original invoice deviated from the tariff"); *S. Ill. Power Coop. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 114 FERC ¶ 61,234 (directing refunds of charges assessed in violation of the tariff); *H.Q. Energy Servs. (U.S.), Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 110 FERC ¶ 61,243 (ordering to pay refunds and collect surcharges designed to reinstate the original market clearing prices for energy for the real-time market).

potentially liable on the basis of other seller's tariff violations.[67] The Joint Petitioners argue that because they did not have adequate notice that market participants could be required to disgorge profits as a result of third-party tariff violations, they lacked a meaningful opportunity to challenge claims related to vicarious liability.[68] The Joint Petitioners further argue that the filed rate doctrine and FPA section 205 do not provide adequate notice that market participants could be required to disgorge profits as a result of third-party tariff violations.[69] The Joint Petitioners state that while "the filed rate doctrine prohibits the Respondents from profiting from rates impacted by their own wrongdoing," it does not provide notice of vicarious liability.[70] The Joint Petitioners state that, in this proceeding, the Commission has recognized that its notice requirements under FPA section 206 preclude the imposition of vicarious liability.[71] The Joint Petitioners also argue that, because the Commission made its decision to expand the remedy by imposing vicarious liability on the remaining Respondents after the hearing closed on the Summer Period transactions and without adequate notice, market participants were unable to exercise their due process rights.[72]

25. MPS and Illinova also argue that the suppliers had no notice, as required under the FPA and principles of due process, that prices of conforming transactions could be retroactively reduced. According to MPS, the Commission has repeatedly made the importance of adequate notice clear in other cases involving the Western energy crisis.[73] MPS and Illinova state that the Commission refused to impose refund liability on sellers that were in compliance with the then-existing tariffs because they had no notice that the price at which they transacted could later be changed. According to MPS and Illinova,

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[67] Indicated Respondents at 15-16.

[68] Joint Petitioners at 2, 9 & n. 26.

[69] *Id*. at 9-10.

[70] *Id*. at 10 (citing Opinion No. 536-A, 153 FERC ¶ 61,144 at P 142).

[71] *Id.* at 10-11 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs*., 141 FERC ¶ 61,088, at PP 25-27 (2012)).

[72] *Id.* at 3, 8-9.

[73] MPS at 16 (citing *Cal. ex rel. Lockyer v. British Columbia Power Exch. Corp.*, 125 FERC ¶ 61,016, at P 38 (2008) (*Lockyer*)).

the same logic that the Commission used to dismiss other Respondents from this case must hold for the transactions that were not in violation of then-existing tariffs.[74]

26. MPS and Illinova further assert that for the period after July 24, 2000, MPS/Aquila was in the same position as other sellers who were dismissed from this case. According to MPS and Illinova, there are over two months of transactions for which imposing refund liability on MPS/Aquila who was in compliance with the then-existing tariffs would be inequitable because MPS/Aquila would have had no notice that the price at which it transacted could later be changed. MPS and Illinova argue that the Commission cannot discriminate in its treatment as to those sellers who it dismissed from this case (rightfully, with no liability) and MPS/Aquila, who is on equal footing for periods after July 24, 2000.[75] MPS and Illinova add that in ordering a remedy that extends a disgorgement requirement to all the transactions throughout the majority of the Summer Period, the Commission has taken the unprecedented and unsupported steps of: (i) attributing knowledge of their own tariff violations to the suppliers as of the date of the transaction (which they clearly did not have); (ii) assuming that knowledge of their individual tariff violation in one transaction would make all other perfectly legitimate transactions occurring in the same hour subject to refund; and (iii) attributing knowledge about violations by third parties during most hours of the Summer Period.[76]

27. Next, MPS argues that MPS/Aquila had no notice, as required by due process and under section 205 of the FPA, that transactions that are now deemed to be False Export or False Load Scheduling could retroactively be subject to disgorgement. MPS contends that the fact that the Commission has belatedly decided that certain types of transactions violated CAISO tariff provisions, does not show that MPS/Aquila had notice in 2000 that the tariff would later be interpreted in ways that were so contrary to the common industry understanding at that time. According to MPS, even this Commission, as late as 2003 and 2004 in its Gaming orders, did not view these types of transactions as problematic or harmful to the market, nor does it explain why it has reached a different substantive conclusion in this proceeding.[77] MPS argues that the Commission cannot presume that

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[74] MPS and Illinova at 24-25 (citing Opinion 536-A, 153 FERC ¶ 61,144 at P 194); *see also* MPS at 15-16.

[75] MPS and Illinova at 25.

[76] *Id.* at 26.

[77] MPS at 17-18 (citing Ex. CSG-1 at 34:7-12; Tr. at 7189:11-7190:7; *Am. Elec. Power Serv. Corp.*, 103 FERC ¶ 61,345, *reh'g denied*, 106 FERC ¶ 61,020).

MPS/Aquila was "on notice" in 2000 when MPS/Aquila could not possibly have known in the summer of 2000 that in 2014 and 2015, the Commission would find that certain patterns of trading constituted tariff violations.[78]

28. MPS further argues that with respect to False Load Scheduling, the record clearly shows that MPS/Aquila did not submit any false schedules and was not the party that flowed the subject power into the CAISO real-time market. Instead, MPS explains, MPS/Aquila sold power to a third party (the City of Azusa) under a bilateral contract (which is not subject to this proceeding), which power was used by Azusa for what is now known as False Load Scheduling. MPS argues that MPS/Aquila could not have been expected to know in which hours Azusa would have available power in excess of its requirements and would flow such excess power into the CAISO real-time market under a False Load Scheduling transaction. MPS further contends that regardless of its actual knowledge of the tariff violations, this knowledge cannot taint other conforming transactions.[79]

29. MPS and Illinova and Indicated Respondents further argue that in Opinion 536-B, the Commission ordered to reprice transactions for one Respondent based on violations by one of the other remaining Respondents—all depending on the random fact of which Respondents settled, and which did not. MPS and Illinova argue that any one Respondent could not have known whether or when another market participant was engaged in a tariff violation and which market participants would settle, and which would not. MPS and Illinova conclude that there can be no prior notice that prices were subject to retroactive adjustment based on the unknown variables of whether other market participants violated tariffs, and whether or not they settled allegations against them.[80]

b. <u>Commission Determination</u>

30. With one exception, discussed below, we deny rehearing of Opinion No. 536-B on this issue and dismiss as moot MPS's arguments challenging the Commission's findings in Opinion No. 536-A. We reiterate here that in the instant proceeding, pursuant to the Ninth Circuit's mandate in the *CPUC Decision*, the Commission is using its FPA section 309 authority to provide relief for tariff violations affecting the market clearing

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[78] *Id.* at 18-19 (citing MPS Request for Rehearing and Clarification, Docket No. EL00-95-280, at 87-91 (Dec. 10, 2014); Ex. CAX-001 at 44:12-45:1 and 80:2-3; Tr. at 3157:8-12, 3168:22-25, and 3169:1-14).

[79] *Id*. at 19-20.

[80] MPS and Illinova at 26; Indicated Respondents at 14-15.

prices during the Summer Period. As held by the Ninth Circuit, no time limits apply to the Commission's remedial actions taken here pursuant to section 309.[81]

31. Throughout this proceeding, the Commission has held that 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.[82] The Ninth Circuit in *MPS* agreed with the Commission, finding that the Commission "reasonably interpreted [the then-effective CAISO tariff] to provide notice that [the Commission] could sanction practices" violating the tariff.[83]

32. The Respondents now claim that they had no notice that they would have to disgorge profits for the sales impacted by tariff violations of other sellers. The Commission addressed this issue in Opinion No. 536-B, finding that "the consequences of the Respondents' tariff violations were not limited to the hours in which they committed tariff violations"[84] and "each tariff violation contributed to an environment where more tariff violations were possible and profitable, and in fact did occur."[85] This conclusion was supported by the record evidence cited in Opinion No. 536-B.[86] Moreover, it is consistent with the Commission's findings based on the record evidence in Opinion Nos. 536 and 536-A in which the Commission found, based on that evidence, that "[t]here were many forms of inter-temporal and inter-seller interactions that linked the actions of many sellers within and across hours, which would provide a more complete and accurate measure of the price impact."[87]

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

[82] *See, e.g.*, Opinion No. 536, 149 FERC ¶ 61,116 at P 88 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 141 FERC ¶ 61,088 at P 25; Opinion No. 536-A, 153 FERC ¶ 61,144 at P 146).

[83] *MPS*, 836 F.3d at 1165.

[84] Opinion No. 536-B, 154 FERC ¶ 61,063 at P 10.

[85] *Id*. P 11.

[86] *See* Ex. CAX-143.

[87] Opinion No. 536-A, 153 FERC ¶ 61,144 at P 81 (citing Ex. CAX-143 at 35 (revised)). *See also* Opinion No. 536, 149 FERC ¶ 61,116 at P 173 (citing Ex. CAX-167 at 65-66, 83 (revised Mar. 28, 2012) and Ex. CAX-143 at 82-83 (revised)). S*ee also* Tr. 3039-41.

33. However, we grant in part MPS and Illinova's request that MPS's transactions be separated from other Summer Period transactions, given that MPS was not found to violate the tariffs after July 24, 2000. In this proceeding, the Commission examined whether each individual market activity constitutes a tariff violation impacting the market clearing prices[88] and whether the volume and frequency, as well as other simultaneously undertaken activities, indicate a consistent pattern of market behavior that cannot be justified as a legitimate business practice.[89] By utilizing this approach, the Commission concluded that MPS engaged in a consistent pattern of market activities that violated the then-effective tariffs and impacted the market clearing prices,[90] as affirmed by the Ninth Circuit in *MPS*.[91] The Commission also found that these tariff violations were not isolated incidents and contributed to artificially raising market prices during the Summer Period.[92] The Commission also cited to evidence in the record showing that tariff violations that affected prices did so persistently for approximately 15 days after the tariff violation.[93] For these reasons, we grant the rehearing request insofar as it argues that MPS should not be liable for tariff violations that occurred during the entire Summer Period. However, given the discussion above, we find that, in accordance with the remedy in this proceeding, MPS is still liable for tariff violations occurring up to and including August 8, 2000, i.e., 15 days after July 24, 2000. Accordingly, we direct MPS

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[88] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 135 FERC ¶ 61,183, at P 31 (2011).

[89] Opinion No. 536, 149 FERC ¶ 61,116 at P 2.

[90] *Id*. PP 2, 127, 174

[91] *MPS*, 836 F.3d at 1167-68.

[92] *See*. *e.g*., Opinion No. 536-A, 153 FERC ¶ 61,144 at P 81 (citing Ex. CAX-143 at 35 (revised)); Opinion No. 536-B, 154 FERC ¶ 61,063 at P 10.

[93] *See* Opinion No. 536-B, 154 FERC ¶ 61,063 at P 10 (citing Ex. CAX-143 at 95 (revised)). Exhibit CAX-143, which is testimony from the California Parties' witness Dr. Fox-Penner, explains that "[t]he magnitude of the 15 day moving average price coefficient is slightly higher than that of the 7 day and that of the 2-day moving average prices" and that "the coefficients of these moving average prices are all statistically significant."). Ex. CAX-143 at 95 (revised); *see also id.* at 19 ("I find that price increases in the California markets during any one period had effects on prices beyond those justified by the market fundamentals for a period of weeks following the initial price increase."); *id.* at 96 (table of estimated persistence of previous prices on current prices).

to submit a revised compliance filing in Docket No. EL00-95-288 reflecting our determination here within 15 days of the date of this order.[94]

34. In regard to MPS's assertions about its sale to the City of Azusa, MPS effectively reiterates its prior argument, an argument with which we disagree and which has been rendered moot by the Ninth Circuit's decision in *MPS* where the Ninth Circuit upheld the Commission's determination on this issue in Opinion No. 536-A.[95]

35. Finally, we dismiss as moot MPS's assertion that it could not have possibly had notice that the tariff would be interpreted to deem its transactions to be False Exports or False Load Scheduling. As the Ninth Circuit found in *MPS*, the Commission "reasonably interpreted the [CAISO] tariff… to prohibit the practices of False Export, False Load Scheduling and Anomalous Bidding," and "reasonably concluded that the tariff and [Market Monitoring and Information Protocol] sufficed to put sellers on notice that such practices were not permitted."[96]

3. Vicarious Liability

a. Rehearing Requests

36. The Joint Petitioners and the Indicated Respondents assert that Opinion No. 536-B erred by imposing vicarious liability on market participants for the tariff violations of

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[94] We note that on November 4, 2016, the California Parties and MPS filed a motion to stay the Opinion No. 536 compliance process as to MPS, because the California Parties and MPS had reached a settlement. The settlement was subsequently filed on December 8, 2016. As discussed in a concurrently-issued order in Docket Nos. EL00-95-300 and EL00-98-272, the settlement remains pending before the Commission, and the California Parties were directed in that order to inform the Commission of whether the parties would withdraw the settlement from the Commission's review or re-file it absent a provision that would preserve the hours in which MPS was found to have committed a tariff violation in this proceeding with respect to the remedy applicable to the remaining Respondents. *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 158 FERC ¶ 61,074 (2017). Therefore, given the current uncertain status of the settlement, we find that, at this time, it is appropriate for MPS to submit the revised compliance filing.

[95] *MPS*, 836 F.3d at 1167 (citing Opinion No. 536-A, 153 FERC ¶ 61,144 at P 148).

[96] *Id*. at 1166.

other participants.[97] The Joint Petitioners and the Indicated Respondents argue that the Commission's finding that all Respondents are subject to refund liability for any hour in which any remaining Respondent committed a tariff violation,[98] violates section 309 of the FPA and Opinion Nos. 536 and 536-A, which they contend require that each Respondent be held liable only for specific tariff violation that affected the market clearing price in a specific trading hour.[99] The Joint Petitioners maintain that, to support the contention that disgorgement may apply to all sales in all hours, the Commission mistakenly relied on precedent cited by California Parties that addressed instances where RTOs/ISOs misapplied their tariffs, which do not support the vicarious liability imposed in Opinion No. 536-B.[100] MPS and Illinova, Joint Petitioners, and Indicated Respondents also contend that the Commission has failed to explain its departure from its holdings in the earlier orders in this proceeding.[101] MPS and Illinova argue that the Commission's attempted clarification in Opinion No. 536-B is wholly insufficient to constitute reasoned decision-making that reverses years of consistent denial of vicarious liability as the vehicle for requiring retroactive refunds under FPA section 309.[102]

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[97] Joint Petitioners at 2, 3-6; Indicated Respondents at 4.

[98] Joint Petitioners at 2 (citing Opinion No. 536-B, 154 FERC ¶ 61,063 at P 8).

[99] *Id*. at 6-7 (citing Opinion No. 536, 149 FERC ¶ 61,116 at P 48; Opinion No. 536-A, 153 FERC ¶ 61,144 at P 32 n.74; *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 141 FERC ¶ 61,087, at P 11 (2012)); Indicated Respondents at 4 (citing Opinion No. 536-A, 153 FERC ¶ 61,144 at P 32 n.74; and *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 141 FERC ¶ 61,087 at P 11).

[100] Joint Petitioners Request for Rehearing, Docket No. EL00-95-289, at 6 (citing Opinion No. 536-B, 154 FERC ¶ 61,063 at P 3, n.10).

[101] MPS and Illinova at 22-24; Joint Petitioners at 7; Indicated Respondents at 5-6.

[102] MPS and Illinova at 22-24 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 141 FERC ¶ 61,088 at PP 24-25; Opinion 536-A, 153 FERC ¶ 61,144 at P 32 n.74, P 142; *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 135 FERC ¶ 61,183 at P 38; Opinion No. 536, 149 FERC ¶ 61,116 at P 48 n.107).

37. MPS argues that the Commission has held numerous times that it cannot hold a market participant vicariously liable for the actions of others.[103] MPS and Illinova argue that the Commission has ignored its prior decisions declining to impose remedies that retroactively change electricity auction market prices.[104] MPS and Illinova and the Joint Petitioners state that in a related decision involving the Western energy crisis, the Commission specifically rejected the notion that a vicarious liability theory can overcome the fundamental notice provisions of the FPA and its prohibition against retroactive ratemaking.[105] According to MPS and Illinova, the Commission has also rejected the California Parties' theory that a single-clearing price auction market creates a "pricing umbrella" under which all sellers are vicariously liable for each other.[106]

38. MPS argues that the use of the marginal cost-based proxy price as the basis for a disgorgement calculation for MPS/Aquila's transactions conforming to the then-effective tariffs results in imposition of vicarious liability on MPS. MPS explains that the Commission has never found, nor is there any evidence or argument in the record, that the marginal cost-based proxy price represents the level of prices that would have prevailed, absent MPS/Aquila's purported tariff violations. To the contrary, the record specifically shows that MPS/Aquila's actions had at most a negligible, nearly non-existent effect on market prices.[107] MPS concludes that by requiring disgorgement of

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[103] MPS at 27 (citing Opinion No. 536-A, 153 FERC ¶ 61,144 at P 32 n.74; *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 141 FERC ¶ 61,087 at P 11; *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 141 FERC ¶ 61,088 at P 25; *Brown*, 135 FERC ¶ 61,178 at P 80).

[104] MPS and Illinova at 19-21 (citing *Ameren Servs. Co.*, 127 FERC ¶ 61,121 at P 157 (2009); *Md. Pub. Serv. Comm'n v. PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,169, at P 49 (2008); *Cal. Indep. Sys. Operator Corp.*, 120 FERC ¶ 61,271, at PP 24-25 (2007); *N.Y. Indep. Sys. Operator, Inc.*, 118 FERC ¶ 61,015 (2007); *accord, e.g.*, *GenOn Energy Mgmt., LLC v. ISO New England Inc.*, 152 FERC ¶ 61,044, at P 49 (2015); *Astoria Generating Co. v. N.Y. Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,189, at P 141 (2012); *GenOn Energy Mgmt., LLC v. ISO New England Inc.*, 152 FERC ¶ 61,044 at P 49; *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,275, at P 88 (2009); *Bangor Hydro-Elec. Co. v. ISO New England Inc.*, 97 FERC ¶ 61,339, at 62,590 (2001)).

[105] MPS and Illinova at 21-22; Joint Petitioners at 10 (citing *Lockyer*, 125 FERC ¶ 61,016 at P 38).

[106] MPS and Illinova at 22 (citing *Brown*, 135 FERC ¶ 61,178 at P 80).

[107] MPS at 12; 27 (citing Pope Aff., tbl 1).

revenues associated with the conforming transactions, the Commission unlawfully imposes a vicarious liability on MPS for all actions by all other sellers in the market during the relevant hours, as well as for all of the structural deficiencies that the Commission has found existed in the California market.[108]

39. MPS further elaborates that the marginal cost-based proxy price does not represent the price that would have prevailed absent the purported tariff violations and should not be used as the basis for calculating disgorgement from transactions conforming to the then-effective tariffs. MPS argues that the marginal cost-based proxy price reflects the calculation of system marginal costs (i.e., the cost of fuel and variable O&M costs of the marginal unit), rather than long-run marginal costs, which more accurately reflect scarcity at levels sufficient to support new entry when entry is needed. According to MPS, prices during the Summer Period were too low to move California to long-run marginal cost levels. Therefore, MPS claims that the marginal cost-based proxy price understates competitive price outcomes because it does not reflect the reality that suppliers bid into the CalPX and CAISO spot markets at prices reflecting scarcity conditions.[109]

40. MPS and Illinova further state that there is no provision in the CAISO or CalPX tariff that directs the market operator to recalculate prices to "some theoretically competitive level."[110] MPS and Illinova also argue that the marginal cost-based proxy price is not the "filed rate" because the marginal cost-based proxy price represented an artificially-contrived, after-the-fact price cap that the Commission adopted for prospective only use in the FPA 206 refund phase of this case and was only used for a limited period of time until the Commission could effectuate other market reforms that corrected structural deficiencies in the market.[111] According to MPS and Illinova, the California Parties have not proven that, but for the activities of the handful of small marketers that are the Respondents in the case, that the CAISO and CalPX tariffs would

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[108] *Id*. at 27-28, 34-35.

[109] *Id.* at 32-34.

[110] MPS and Illinova at 18.

[111] *Id.* at 18-19 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 93 FERC ¶ 61,294 (2000); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 95 FERC ¶ 61,418 (2001); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 96 FERC ¶ 61,120 (2001)).

have produced the California Parties-developed marginal cost-based proxy price outcomes.[112]

41. The Indicated Respondents state that they refute any evidence that shows the remaining Respondents colluded or coordinated unlawfully to affect prices, and assert that, despite the testimony of the California Parties' witness Dr. Peter Fox-Penner, there was no evidence that Coral's sales were in any way coordinated with the actions of other sellers.[113] The Indicated Respondents allege that Dr. Fox-Penner's testimony does not provide any evidence of coordination or collusion by Coral or Hafslund or any remaining Respondent to institute a boycott.[114] The Indicated Respondents specifically argue that Coral increased the amount of power it sold into the CalPX market when, as Dr. Fox-Penner alleged, it was involved in a boycott.[115]

42. MPS and Illinova echo the Indicated Respondents' argument by stating that the Commission's finding that suppliers were tacit colluders in tariff violation rests on general statements by Dr. Fox-Penner. MPS and Illinova argue that those statements do not relate to actual Respondents or specific tariff violations and were speculative.[116] MPS and Illinova maintain that no evidence of collusion exists and Dr. Fox-Penner admitted that "market participants could not have known the nature and extent of the tariff violations that occurred in any one hour."[117] MPS and Illinova further state that Dr. Fox-Penner did not take into account market fundamentals at the time and that the Commission erred by failing to consider contrary evidence.[118]

43. The Indicated Respondents and MPS and Illinova also contend that the Commission erred in failing to consider the policy ramifications of its decision on organized electricity markets. The argue that ordering retroactive refund liability for

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[112] *Id.* at 19.

[113] Indicated Respondents at 3, 6-7.

[114] *Id.* at 3, 6-7 (citing Ex. CAX-143 at 73-74, 82:23-24, 85:8-87:9).

[115] *Id.* at 7.

[116] MPS and Illinova at 27, 30-31.

[117] *Id.* at 27-28.

[118] *Id.* at 28-29.

legitimate transactions on the basis of another seller's tariff violation will create a strong disincentive to sell into organized single clearing price auction.[119]

b. Commission Determination

44. We deny rehearing of Opinion No.536-B and dismiss challenges to Opinion No. 536-A. As an initial matter, we reject the arguments challenging the validity of the marginal cost-based proxy price screens used in this proceeding. The same arguments have been raised by the Respondents in their briefs on exceptions in response to the Initial Decision[120] and on rehearing of Opinion No. 536. These arguments have been addressed by the Commission more than once.[121] The Commission has affirmed the Presiding Judge's finding that the marginal cost-based proxy methodology developed by the California Parties provides for a credible proxy of prices in a normal competitive environment.[122] The Commission has noted that because the marginal cost-based proxy price 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.[123] MPS's renewed collateral attack on this established methodology continues to fall short. The Commission has already addressed MPS's arguments regarding the effect of scarcity on market prices. In affirming the Presiding Judge's findings, the Commission noted the concerns on the completeness of the Respondents' expert testimony and found that an appropriate rebuttal of the California Parties' transaction-specific analysis with the use of the marginal cost-based proxy screens would be specific countervailing evidence, not general statements.[124] Here, MPS continues to raise general issues about the validity of the marginal cost-based proxy prices without offering an alternative, measurable analysis to support its contention that competitive

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[119] Indicated Respondents at 15-16; MPS and Illinova at 43-44.

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

[121] *See, e.g., id.* P 19; Opinion No. 536, 149 FERC ¶ 61,116 at PP 82-88; Opinion No. 536-A, 153 FERC ¶ 61,144 at PP 29-34.

[122] Opinion No. 536, 149 FERC ¶ 61,116 at PP 82, 87; Opinion No. 536-A, 153 FERC ¶ 61,144 at P 32.

[123] *Id.*

[124] Opinion No. 536, 149 FERC ¶ 61,116 at P 48; Opinion No. 536-A, 153 FERC ¶ 61,144 at P 33.

price outcomes have been understated in this proceeding. Therefore, we reject MPS's arguments on this point.

45. Further, we reiterate in this order that the marginal cost-based proxy prices adopted in this proceeding are calculated based on the same formula as the Mitigated Market Clearing Price (MMCP) established by the Commission to calculate refunds during the Refund Period.[125] 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.[126] As the Commission stated in paragraph 87 of Opinion No. 536:

> 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.' 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. (*internal footnotes omitted*).

46. We therefore find that relying on the marginal cost-based proxy prices as a basis for disgorgement is appropriate given that this Commission-accepted methodology establishes a reasonable proxy for the prices sellers would have received absent the tariff

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[125] The Refund Period is the period from October 2, 2000 through June 21, 2001.

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

violations.[127] As stated before, by committing tariff violations that affected the market clearing price, the Respondents benefitted from the sales made at the inflated price, and therefore, these unjust overcharges must be disgorged.[128] Accordingly, we disagree with the Respondents' assertion that the directive to disgorge profits for all affected sales impermissibly imposes vicarious liability. The Respondents have been shown by substantial evidence in the record in this proceeding to have committed tariff violations impacting the market clearing prices during the Summer Period, as affirmed by the Ninth Circuit in *MPS*, and thus the Respondents were directed to disgorge excess amounts they received for the sales impacted by tariff violations. The amount each remaining Respondent is responsible to disgorge includes only excess payments and overcharges that this particular Respondent received above the filed rate from its *own* sales at prices impacted by tariff violations. We emphasize here that no Respondent will have to disgorge amounts that any other seller collected, as discussed further below.

47. Further, we reject the Respondents' arguments that they are not responsible for disgorgement of profits for all sales impacted by tariff violations of any of the Respondents. The Commission found persuasive Dr. Fox-Penner's arguments that the tariff violations had intertemporal effects during the California crisis. Contrary to the Respondents' assertions, Dr. Fox-Penner's analysis was not a general or vague statement, but was founded on a statistical analysis of CAISO's markets.[129] The Respondents continue to attempt to contradict Dr. Fox-Penner's analysis with anecdotal evidence concerning their own tariff violations and vague explanations concerning the market fundamentals during the Summer Period. However, the Commission and the Presiding Judge have consistently found this evidence to be an insufficient rebuttal to the type of comprehensive analysis performed by Dr. Fox-Penner, which, among other things, shows

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[127] We also note that while the Ninth Circuit in *MPS* did not explicitly address the marginal cost-based proxy price methodology, it affirmed the Commission finding of tariff violations, which was based on the marginal cost-based proxy price methodology.

[128] *See* Opinion No. 536-A, 153 FERC ¶ 61,144 at P 142; Opinion No. 536-B, 154 FERC ¶ 61,063 at P 8.

[129] Ex. CAX-143 at 93-99.

that tariff violations were interdependent and had effects beyond the hours in which they were committed.[130]

48. Thus, we disagree with the Respondents' contention that the Commission is impermissibly imposing vicarious liability on the Respondents. We reiterate the Commission's prior finding that the remaining Respondents did commit tariff violations, and their tariff violations were not isolated incidents and contributed to artificially raising market prices during the Summer Period.[131] Accordingly, the remaining Respondents have been directed to disgorge profits they received from their sales at prices artificially inflated by tariff violations addressed in this order. However, no Respondent is responsible for disgorgement of excess amounts and overcharges collected by other Respondents or any other seller.

49. The Respondents' contention that the Commission is reversing its precedent denying vicarious liability as the vehicle for requiring retroactive refunds under FPA section 309 entirely misconstrues Opinion No. 536-B. The Respondents fail to differentiate the circumstances in this proceeding from the cases they cite to on vicarious liability. Indeed, in prior cases and in this proceeding itself, the Commission has refused to extend liability under FPA section 309 absent a showing that a seller's tariff violations led to price levels that exceeded the filed rate.[132] Here, the Commission *has* determined that it was the Respondents' individual and collective tariff violations that drove prices to levels that exceeded the filed rate levels that would have existed absent their violations.

50. Thus, the Commission is ordering each Respondent to refund the amounts that it collected above the filed rate, in violation of the relevant tariffs. In turn, the

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[130] *See, e.g.*, Initial Decision, 142 FERC ¶ 63,011 at P 76. We also note that the Commission specifically permitted the California Parties to offer evidence showing a price impact of a tariff violation outside the trading hour in which it was committed. *See San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 135 FERC ¶ 61,183 at P 38.

[131] Opinion No. 536-B, 154 FERC ¶ 61,063 at PP 9-11.

[132] *See Lockyer*, 125 FERC ¶ 61,016 at P 38; *Brown*, 135 FERC ¶ 61,178 at P 80. *See also* prior opinions in this proceeding: *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 141 FERC ¶ 61,088 at PP 24-25; Opinion No. 536-A, 153 FERC ¶ 61,144 at P 32 n.74, P 142; *San Diego Gas & Elec. Co. v. Sellers of Ancillary Servs.*, 135 FERC ¶ 61,183 at P 38; Opinion No. 536, 149 FERC ¶ 61,116 at P 48 n.107.

Commission's orders do not hold any seller vicariously liable because in line with our precedent and the Ninth Circuit's directives: (1) we are only applying the remedy to sellers that committed tariff violations affecting market clearing prices; and (2) no Respondent will have to refund amounts that any other seller collected.[133]

51. Further, the Respondents claim that the Commission did not take into account the policy ramifications of its directive to disgorge profits, stating that this will make suppliers reluctant to sell into organized electricity markets. The Respondents' claim is speculative. The Respondents also ignore an important countervailing policy interest that the Commission's directive will discourage tariff violations that artificially raise market prices. Market participants that did not violate the tariff have not been required to disgorge profits, so there is no disincentive for a market participant to lawfully participate in organized electricity markets. The Commission seeks to encourage this sort of participation, but it will not allow parties that violated a filed tariff to raise prices to escape with the fruits of their misbehavior.

52. We also reject the Respondents' assertion that they were somehow singled out to disgorge profits for affected sales because they did not settle with the California Parties. We reiterate that the California Parties have demonstrated by substantial evidence that the remaining Respondents engaged in tariff violations and these violations increased the market clearing prices. Just because other sellers chose to settle with the California Parties instead of continuing litigation does not relieve the remaining Respondents of the obligation to disgorge the amounts they received above the filed rate.

4. APX's Rehearing Request

53. On rehearing of Opinion No. 536-A, APX asks the Commission to clarify the timing of cost offset filings to be submitted by APX participants. APX argues that its participants should have 60 days to submit cost offsets after the Commission issues an order approving an apportionment of refund liability among the APX participants.[134] Further, APX requests that the Commission defer the filing of comments on the apportionment of refund entitlements until 60 days after the Commission issues an order

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[133] Moreover, the settlements concerning the Summer Period liability that the California Parties have reached with other sellers will remain unaffected; those sellers will not have to pay any amounts above the amounts agreed to in their settlements.

[134] APX Request for Rehearing of Opinion No. 536-A, Docket No. EL00-95-287, at 3-5 (Dec. 14, 2016) (APX).

on final refund amounts.[135] In addition, APX requests that the Commission provide guidance on how APX's liability should be calculated in the compliance filing directed in Opinion No. 536-A.[136]

54. We reject as premature APX's request regarding the procedural timelines pertaining to the compliance phase of the proceeding. We note that throughout the proceeding, APX has maintained that it was a net buyer and therefore is entitled to refunds.[137] In such case, APX participants may choose not to claim any cost offsets. In any event, APX participants will be provided with additional time to submit their cost offset claims after their individual refund liability is determined. These issues are more properly addressed in the pending compliance proceeding in Docket No. EL00-95-288. We also dismiss as moot APX's request for the Commission's guidance regarding its compliance filing. On February, 4, 2016, APX submitted a compliance filing that is currently pending before the Commission in Docket No. EL00-95-288.

5. Cost Offsets

55. MPS and Illinova state that the Commission should reverse its holding in Opinion No. 536-B requiring that the cost calculation include all costs and revenues during the entire Summer Period. MPS and Illinova state that there is no case law that supports a cost analysis outside the scope of the tariff violation under FPA section 309. MPS and Illinova state that the Commission's reference in Opinion No. 536-B to a previous order establishing a period-wide cost offset procedure for an FPA section 206 refund period is inapposite to the instant proceeding under section 309.[138] MPS and Illinova state that, at the very least, in the case of MPS, who was not found to have committed any tariff violations after July 24, 2000, all costs and revenues after such date should be irrelevant, and the Commission should clarify that they are not to be included in the cost offset analysis.[139]

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[135] *Id*. at 5-8.

[136] *Id*. at 6-9.

[137] APX Rehearing Request of Opinion No. 536, Docket No. EL00-95-280, at 7-8 (Dec. 10, 2014). *See also* APX at 1.

[138] MPS and Illinova at 50 (citing Opinion No. 536-B, 154 FERC ¶ 61,063 at P 15).

[139] *Id.*

56. The Indicated Respondents state that the Commission erred in Opinion No. 536-B by including sales not subject to mitigation in its cost offset calculations.[140] The Indicated Respondents argue that this is a reversal of an earlier decision to restrict cost offset calculations to transactions subject to mitigation.[141] The Indicated Respondents maintain that this approach is applicable to section 206 of the FPA but not section 309 of the FPA, which controls the Summer Period refunds. The Indicated Respondents argue that cost offsets under section 309 of the FPA must be transaction-specific.

57. We reject arguments by MPS and Illinova and the Indicated Respondents that cost offsets should be made on a transaction-by-transaction basis. Disgorgement of profits has been ordered for transactions that span an entire defined period, i.e., the Summer Period. In determining whether the adopted marginal cost-based proxy price methodology results in confiscatory rates, it is appropriate for the Commission to consider all costs and revenues over the entire defined period. While the Respondents might prefer the Commission to restrict itself to mitigated transactions, the extent and number of tariff violations under consideration in this proceeding justify a broader approach that considers all costs and revenues throughout the Summer Period.[142]

58. We disagree that section 309 of the FPA requires the cost offset calculations to be transaction-specific. In Opinion No. 536-B, the Commission ordered disgorgement of profits for all sales during trading hours impacted by the Respondents' tariff violations. As we reaffirm in this order, the Commission has the authority under section 309 to order this remedy. Considering that sales subject to disgorgement encompass almost an entire Summer Period, there is no reason to require that cost offset claims be transaction-specific.[143]

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[140] Indicated Respondents at 16.

[141] *Id.* (citing Opinion No. 536-A, 153 FERC ¶ 61,144 at P 150).

[142] We note that this finding with respect to MPS in particular is limited by our determination above that MPS is liable for disgorgement up to and including August 8, 2000.

[143] We, however, find that as it pertains to MPS, its cost offset claim should reflect the portfolio costs for the time period ending August 8, 2000.

C. ***Mobile-Sierra***[144]

1. Rehearing Request

59. MPS and Illinova contend that prices for transactions that were not found to be in violation of then-existing tariffs are entitled to protection under the *Mobile-Sierra* presumption.[145] MPS and Illinova argue that under Commission and court precedent, *Mobile-Sierra* protection applies when the rate is set not "unilaterally by tariff" with a single entity in control, but "by contract" reflecting action by at least two parties.[146] According to MPS and Illinova, in the CAISO and CalPX markets, the market clearing price was established in a multi-lateral bidding process that formed contracts for all of the supply that cleared the market in any interval and no single supplier dictated what the clearing price would be. MPS and Illinova thus conclude that the transactions that were not in violation of the tariff cannot be abrogated without a showing of the public interest.[147]

2. Commission Determination

60. We reject MPS and Illinova's contention that the prices established by the CAISO and CalPX auction markets are contract rates subject to the public interest standard of review.

61. The *Mobile-Sierra* doctrine "public interest" presumption applies only where there are certain characteristics that justify the presumption. In ruling on whether the characteristics necessary to justify a *Mobile-Sierra* doctrine presumption are present, the Commission must determine whether the rates at issue embody either: (1) individualized rates that apply only to sophisticated parties who negotiated them freely at arm's-length;

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[144] *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).

[145] MPS and Illinova at 46-48 (citing *Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008)).

[146] *Id*. at 47 (citing *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165 (2010) (*NRG*); *Devon Power LLC*, 134 FERC ¶ 61,208, *reh'g denied*, 137 FERC ¶ 61,073 (2011) (*Devon Power)*; *New Eng. Power Generators Ass'n v. FERC*, 707 F.3d 364, 369 (D.C. Cir. 2013) *(New England Power)*; *Cf. Richmond Power & Light v. FPC*, 481 F.2d 490, 496-97 (D.C. Cir. 1973)).

[147] *Id*. at 47-48.

or (2) rates that are generally applicable or that arose in circumstances that do not provide the assurance of justness and reasonableness associated with arm's-length negotiations. Unlike the latter, the former constitute contract rates that necessarily qualify for a *Mobile-Sierra* doctrine presumption. In *New England Power Generators Association v. FERC*,[148] however, the D.C. Circuit determined that the Commission is legally authorized to impose a more rigorous application of the statutory "just and reasonable" standard of review on future changes to agreements that fall within the second category described above.

62. The prices set by the CAISO and CalPX auction markets do not constitute contract rates because they result from a generally applicable auction mechanism set forth *via* tariff.[149] As MPS and Illinova concede, "the [CAISO and CalPX] market clearing price was . . . established in a multi-lateral bidding process" where "no single suppliers dictated what the clearing price would be."[150]

63. In the alternative, MPS and Illinova ask the Commission to extend the *Mobile-Sierra* protection, as granted in the ISO New England, Inc. (ISO New England) proceeding on remand from the United States Supreme Court's decision in *NRG*.[151] However, the circumstances in that proceeding differ significantly from those in the instant case. In that proceeding, the Commission approved a settlement that provided *Mobile-Sierra* protection for final rates resulting from the forward capacity auction mechanism provided for in that settlement.[152]

64. By contrast, here, the CAISO and CalPX Tariffs did not incorporate into their terms a public interest standard of review.[153] Though the Commission has discretion to

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[148] *New England Power*, 707 F.3d at 370-71.

[149] *See* CAX-100 at 123-26 (CAISO Tariff sections 2.5.10 – 2.5.17, establishing methodology for bidding and market clearing price determination); CAX-101 at 15-21, 70-93 (CalPX Tariff section 3 & schedules 3 - 4, establishing methodology for bidding and market clearing price determination).

[150] MPS and Illinova at 48.

[151] *Id*. at 47 n.114, 49.

[152] *New England Power*, 707 F.3d at 370-71.

[153] *Cf. Devon Power*, 134 FERC ¶ 61,208 at P 23.

apply *Mobile-Sierra* protection to non-contract rates,[154] it did not do so here. To the contrary, in *Exelon Generation Co., LLC v. FERC*,[155] the Ninth Circuit Court of Appeals affirmed the Commission's determination in Opinion Nos. 536 and 536-A, that the "*Memphis* Clause" in section 19 of the CAISO Tariff precluded tariff-based transactions from *Mobile-Sierra*'s public interest protection.

IV. Refund Period - Exelon's Fuel Cost Allowance Claim

A. Request for Rehearing

65. Exelon claims that in Opinion No. 536-B the Commission ignored the evidence Exelon included to support its fuel cost allowance submission and summarily rejected it without reasoned explanation. Exelon argues that the Commission dismisses the substantial volume of evidence it submitted, and that the evidence amply demonstrates that AES Placerita[156] incurred fuel costs to produce the power and that it paid the SoCal Border Index price for the fuel.[157] Exelon cites to a transcript of a call between the Plant's president and CAISO, where CAISO agreed to pay the Plant's costs and what those costs were.[158] Exelon contends that it is not clear how the plant could have produced the power it sold CAISO without purchasing gas to burn to make that power.

66. Exelon contends that the Commission's requirement that Exelon submit invoices for the fuel purchases in order to bring a successful fuel cost allowance claim departed from precedent without justification and was unjust and unreasonable. Exelon argues that this was the first time the Commission explicitly mandated that a fuel cost allowance

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[154] *New England Power*, 707 F.3d at 370-71 ("Whether the auction results are contract rates or not, FERC's determination that the logic of *Mobile-Sierra* still applied is 'a reasonable choice within a gap left open by Congress' and so within the purview of the agency's discretion under [section] 205(a) of the FPA.").

[155] *Exelon*, 2016 WL 4137672.

[156] AES Placerita was a close affiliate of Constellation NewEnergy, Inc.'s (Constellation) predecessor, AES NewEnergy Inc. *See* Opinion No. 536-A, 153 FERC ¶ 61,144 at P 179. Exelon is a successor-in-interest to Constellation. *See* Exelon Request for Rehearing of Opinion No. 536, Docket No. EL00-95-280, at 1 (Dec. 10, 2014).

[157] Exelon Request for Rehearing of Opinion No. 536-B, Docket No. EL00-95-289, at 3-4.

[158] *Id*. at 4 (citing Ex. CEI-11).

claim can only be successful if the entity provides an invoice for the fuel. Exelon states that the Commission did not previously instruct it to provide invoices, and that Exelon followed the format the Commission established for fuel cost allowances for generators, as instructed. According to Exelon, neither of the orders the Commission cited required entities seeking a fuel cost allowance to provide copies of invoices.[159]

67. Exelon states that the Commission previously delegated the review of the cost offset claims to an auditor, which were then sent directly to CAISO for processing.[160] According to Exelon, the Commission previously dismissed the California Parties' argument that directly sending the auditor's findings on the cost offset claims to CAISO did not permit parties to challenge or evaluate the claims and prevented Commission review.[161] However, Exelon notes that the Commission ultimately allowed for parties to raise concerns regarding the verification of the cost offset claims with the auditor following submission to CAISO.[162] In making these arguments, Exelon contends that the Commission required far more from Exelon than it previously required of other parties. Exelon states that it followed the Commission's instructions and provided the required data to the auditor in the prescribed format, and that the auditor was satisfied with the validity of Exelon's claim, despite the fact that Exelon did not have invoices available.[163] Exelon states that it provided the auditor with evidence that the fuel was purchased at the SoCal Index Price and the cost information from CAISO's billing records. Exelon, therefore, argues that the claim should have been sent directly to CAISO for processing, but that the Commission announced a new requirement in Opinion No. 536-B that Exelon must provide invoices of the fuel purchases.[164]

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[159] *Id*. at 5 (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.*, 108 FERC ¶ 61,311, at PP 86, 92-94 (2004)).

[160] *Id*. at 5-6.

[161] *Id*. at 6 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 108 FERC ¶ 61,311 at P 86).

[162] *Id*. (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 108 FERC ¶ 61,311 at P 93).

[163] *Id*. at 6-7 (citing Exelon's Fuel Cost Allowance, Accountant's Report, Docket No. EL00-95-287, at 2 (Dec. 4, 2015)).

[164] *Id*. at 7 (citing Opinion 536-B, 154 FERC ¶ 61,063).

68. Exelon states that, in the initial round of fuel cost allowance submissions for generators, the Commission did not identify any "proof" that must be submitted along with claims, leaving validation of the claims in the auditor's hands.[165] On the contrary, Exelon states that the second round of fuel cost allowance submissions was permitted for marketers, and that the Commission identified specific examples of evidence sellers should submit to substantiate their claims, which included, but was not limited to, invoices.[166] However, Exelon argues that the precedent for a generator's sale should apply because the AES Placerita Plant was not a marketer for the sale at issue, and therefore, the precedent applicable to marketers is not relevant.[167]

69. Exelon explains that it does not have the invoices associated with the purchase of fuel for the sales to CAISO in question because the AES Corporation sold AES New Energy to Constellation Power Source, Inc., but did not sell the AES Placerita Plant. Exelon further contends that record evidence confirms the gas price for the fuel that the plant used to generate the sale. Exelon maintains that the Commission's imposition of a new requirement that invoices must be submitted for the Plant's fuel purchases was without justification and a departure from precedent.[168]

70. Exelon also maintains that, as the sale from the plant was a cost-based sale, any refunds Exelon is ordered to pay for the sale will result in a confiscatory rate if Exelon cannot recover the cost the plant spent on fuel to produce the power sold. Exelon contends that well-established Commission and court precedent holds that mitigation below a seller's costs violates the prohibition on confiscatory ratemaking.[169]

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[165] *Id*. (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 107 FERC ¶ 61,166 at PP 77-80).

[166] *Id*. at 7-8 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 114 FERC ¶ 61,070, at P 60 (2006)).

[167] *Id*. n.23.

[168] *Id*. at 8.

[169] *Id*. at 9 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 121 FERC ¶ 61,067, at P 43 (2007); *Braintree Elec. Light Dep't*, 112 FERC ¶ 61,079, at P 99 (2007); *Transcontinental Gas Pipe Line Corp.*, 93 FERC ¶ 61,268, at 61,867 (2000); *FERC v. Pennzoil Producing Co.*, 439 U.S. 508, 519 (1979); *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942)).

B. Commission Determination

71. We deny Exelon's request for rehearing of Opinion No. 536-B on the issue of its fuel cost allowance submission. The Commission considered the full array of evidence, noting certain CAISO records submitted by Exelon related to the transaction, but ultimately finding that Exelon had not "clearly linked any evidence of its actual incurred costs to the resource and sale at hand."[170] We disagree with Exelon that the Commission departed from precedent by requiring it to submit evidence that Exelon, as a successor-in-interest to AES NewEnergy, directly procured or paid for the fuel related to the transaction. In allowing Exelon a second opportunity to submit evidence of cost offsets applicable to the forward market transaction in Opinion No. 536-A, 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."[171] We do not find that the evidence proffered by Exelon was sufficient to make this demonstration, and the Commission therefore correctly rejected Exelon's second attempt to justify a fuel cost allowance.[172]

72. In Opinion No. 536-B, the Commission indicated that one example of the lack of such evidence was the inability of Exelon to provide proof through an invoice that the fuel supplied for the transaction at hand was procured and paid for by Exelon. The Commission did not base its decision on a limited requirement that an invoice be produced, but on the broader deficiency that Exelon did not provide any direct evidence that substantiates the linkage between its purchase and/or procurement of the fuel and the transaction at issue. As noted in both Opinion No. 536-A and Opinion No. 536-B, the Commission has only allowed marketers such as Exelon to receive a fuel cost allowance when the marketer takes on key characteristics of a generator by "directly procuring and

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[170] Opinion No. 536-B, 154 FERC ¶ 61,063 at P 27.

[171] *Id.*; Opinion No. 536-A, 153 FERC ¶ 61,144 at P 171 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*,107 FERC ¶ 61,166 at PP 74-77; *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 102 FERC ¶ 61,317, at PP 98-122 (2003)).

[172] That the Commission in Opinion No. 536-A permitted Exelon to make a second attempt to justify a fuel cost allowance, over the objections of the California Parties, when Exelon had already had a first bite at the apple, further confirms that there is no merit to Exelon's contention that the Commission is requiring more of Exelon than it required for others.

paying for fuel that is directly tied to its sales in CAISO/CalPX markets."[173] While Exelon's submitted generation logs and reports, CAISO records documenting the sale, and handwritten notes and transcripts indicating that fuel was procured and used in the sale by the Plant, this evidence does not show that the Plant's affiliate, Exelon, as the successor-in-interest to AES New Energy, incurred those fuel costs. Exelon mistakenly contends that the Commission misapplies the precedent applicable to generators for this transaction. In rejecting Exelon's request for the fuel cost allowance in Opinion No. 536-B, the Commission cited precedent requiring that "generators must base their claims for additional fuel cost allowances on their *actual* daily cost of gas incurred to make spot power sales."[174] Exelon disregards the fact that establishing a clear linkage between its direct purchase and/or procurement of the fuel and the transaction at issue was a fundamental demonstration necessary for it to be eligible for the fuel cost allowance, as noted in Opinion No. 536-A.[175]

73. We further disagree with Exelon's contention that the Commission should have delegated the verification of its fuel cost submission to the auditor. As noted above, the Commission required Exelon to make a showing that it is eligible to receive a cost offset. Therefore, the Commission must rule on the merits of whether Exelon has met the directive outlined in Opinion No. 536-A. In Opinion No. 536-B, the Commission found that despite Exelon's attempt to demonstrate its fuel cost offset, its demonstration was not consistent with Commission precedent that defined the criteria necessary for an entity to receive a fuel cost offset. The Commission will not delegate its discretion as to whether Exelon's demonstration was consistent with Commission precedent to the findings of an auditor. That is the responsibility of the Commission, not the auditor. The auditor's role is to assist in verifying data and calculation methodologies to support the fuel cost allowance, which does not impact the Commission's preliminary decision here. Therefore, Exelon's request for rehearing on this issue is denied.

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[173] Opinion No. 536-A, 153 FERC ¶ 61,144 at P 171 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 107 FERC ¶ 61,166 at P 16); Opinion No. 536-B, 154 FERC ¶ 61,063 at P 27.

[174] Opinion No. 536-B, 154 FERC ¶ 61,063 at P 27 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 103 FERC ¶ 61,078, at P 11 (2003) (emphasis in original)); *see also San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 102 FERC ¶ 61,317 at P 61).

[175] *See* Opinion No. 536-A, 153 FERC ¶ 61,144 at P 171.

74. Finally, we find that Exelon's argument that the Commission's ruling on its fuel cost allowance will result in confiscatory rates is without merit. The Commission found that Exelon has not satisfied the basic threshold to demonstrate that it did, in fact, incur the fuel costs related to the transaction at hand. Without establishing that Exelon did incur the fuel costs associated with this transaction, it is illogical to conclude that the associated refund would result in mitigation below Exelon's costs. Further, while Exelon argues that it is not clear how the Plant could have produced the power it sold to CAISO without purchasing the gas to burn to make that power, as we have stated, the directives outlined in Opinion No. 536-A were clear that Exelon would need to present evidence of costs that were directly linked to the sale at question. We will not rely on the presumption that Exelon must have purchased gas to burn to make its sales as sufficient to compensate for Exelon's inability to meet the clear evidentiary standards outlined in previous Commission rulings. Therefore, Exelon's request for rehearing on this issue is also denied.

The Commission orders:

(A) Requests for rehearing of Opinion No. 536-B are hereby denied in part, granted in part, and dismissed in part, as discussed in the body of this order.

(B) MPS's request for rehearing of Opinion No. 536-A is hereby dismissed in part and denied in part, as discussed in the body of this order.

(C) APX's request for rehearing and clarification of Opinion No. 536-A is hereby dismissed, as discussed in the body of this order.

(D) MPS is hereby directed to submit a revised compliance filing in Docket No. EL00-95-288 within 15 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.