

110 FERC ¶ 61,293
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, and Joseph T. Kelliher.

San Diego Gas & Electric Company,

Complainant

Docket Nos. EL00-95-098,
EL00-95-114,
EL00-95-117, and
EL00-95-124

v.

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

Respondents

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

Docket Nos. EL00-98-086,
EL00-98-101,
EL00-98-104, and
EL00-98-111

ORDER GRANTING IN PART AND DENYING IN PART REHEARING,
PROVIDING CLARIFICATION, AND EXTENDING DEADLINE FOR
SUBMISSION OF FUEL COST ALLOWANCE CLAIMS

(Issued March 18, 2005)

1. In this order, we address various filings pertaining to the fuel cost allowance (FCA) claims. We deny rehearing and provide clarification in part of the order issued on September 24, 2004,¹ grant rehearing of our October 27, 2004 Order,² grant in part and

¹ *San Diego Gas & Electricity Co. v. Sellers of Energy and Ancillary Services*, 108 FERC ¶ 61,311 (2004) (*September 24 Order*).

² *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 109 FERC ¶ 61,074 (2004) (*October 27 Order*).

deny in part rehearing and provide clarification of the order issued on December 20, 2004,³ provide clarification, as requested by Ernst & Young (E&Y), of certain aspects of the Commission-established methodology for calculating FCA amounts, address issues pertaining to the cost of the audits being performed by E&Y, and deny a motion for waiver.

2. This order benefits customers by further clarifying aspects of the FCA methodology and finalizing certain key issues pertaining to the FCA to facilitate the calculation of refunds for electricity purchases made in organized spot markets in California during the period from October 2, 2000 through June 20, 2001 (Refund Period).

Background

3. After determining that the rates produced by the California Power Exchange (PX) and California Independent System Operator, Inc. (CAISO or ISO) spot markets were unjust and unreasonable during the Refund Period, the Commission declared that prices for this period must be reset. To accomplish this, the Commission first adopted a mitigated market clearing price (MMCP) to serve as a proxy for competitively-set market clearing prices, and required refunds of any amounts in excess over this MMCP. In the order issued March 26, 2003, the Commission subsequently modified the MMCP formula to use natural gas producing prices plus a tariff transportation allowance. Recognizing that this revised methodology might reduce the MMCP to a point below sellers' actual fuel costs, the Commission provided sellers with the opportunity to make FCA claims to recover the difference between their actual fuel costs for mitigated sales and the proxy for gas prices used in calculating the MMCP.⁴

4. This order is the culmination of a series of orders providing guidance on how to assign actual fuel costs to mitigated transactions. The March 26 Order required each generator to base its FCA claim on the actual daily cost of fuel incurred to make spot sales in the PX and CAISO spot markets. This approach required the generator to determine what portion of its daily fuel supply portfolio was used for spot sales, and what portion was used for longer term, bilateral sales. The Commission required each generator to rank its fuel supplies by term and allocate its fuel supply to its spot power requirement, starting with the shortest term fuel supply, proceeding sequentially to the

³ *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 109 FERC ¶ 61,297 (2004) (*December 20 Order*).

⁴ *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 102 FERC ¶ 61,317 (2003) (*March 26 Order*).

next shortest term supply, until a generator's spot power demand was met. The average cost of this portion of the generator's fuel supply portfolio would comprise the cost of fuel for FCA purposes.

5. On April 22, 2003,⁵ the Commission clarified a few important aspects of the March 26 Order. Among other clarifications, the April 22 Order stated that financial and contractual commitments that affected a generator's fuel costs must be factored into the FCA;⁶ only fuel supplies actually allocated to spot power sales – as impacted by any applicable financial or contractual arrangements – are to be included in FCA claims;⁷ and the use of incremental heat rates in calculating the FCA claim is consistent with the calculation of the MMCP.⁸

6. The audit requirement for FCA claims was first established by the Commission's May 12, 2004 Order,⁹ in which we directed that before the FCA claims are submitted directly to the CAISO, they must be verified by an independent auditor and attested to by a responsible company official. In a subsequent order issued on September 2, 2004,¹⁰ we approved E&Y to be the sole auditor responsible for conducting independent review of all FCA claims, and required generators making FCA claims to pay the auditing costs. On September 24, 2004, the Commission issued an order denying rehearing, clarifying a number of FCA issues and accepting in part the CAISO's compliance filing. Notably, the September 24 Order held that the FCA is an offset to available refunds, and not an assessment of costs to customers.

7. The following parties sought rehearing and/or clarification of the September 24 Order: AES Placerita, Inc. (AES); Arizona Electric Power Cooperative, Inc. (AEPCO); California Parties;¹¹ City of Redding, California (Redding), Silicon Valley Power of the

⁵ *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 103 FERC ¶ 61,078 (2003) (*April 22 Order*).

⁶ *Id.* at P 11.

⁷ *Id.* at P 13.

⁸ *Id.* at P 18.

⁹ *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 107 FERC ¶ 61,166 (2004) (*May 12 Order*).

¹⁰ *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 108 FERC ¶ 61,219 (2004) (*September 2 Order*).

¹¹ The California Parties are the People of the State of California *ex rel.* Bill Lockyer, Attorney General, the California Electricity Oversight Board, the Public Utilities Commission of the State of California (CPUC), Pacific Gas and Electric Company, and Southern California Edison Company.

City of Santa Clara, California (SVP) (together “Cities”); Los Angeles Department of Water and Power (LADWP); Modesto Irrigation District (Modesto); the Northern California Power Agency (NCPA) and Puget Sound Energy, Inc. (Puget).

8. On October 7, 2004, Commission Staff convened a technical conference (Technical Conference)¹² to discuss FCA issues, including the CAISO’s August 17, 2004 compliance filing. Post-Technical Conference comments were submitted on October 15, 2004, and reply comments on October 20, 2004. LADWP, Puget, Enron Power Marketing, Inc. (Enron), and California Parties filed Post-Technical Conference comments and/or reply comments that raise issues pertinent to the heat rate related determinations set forth in the September 24 Order. Consequently, the Commission will address those comments in this order.¹³

9. In the October 27 Order, we denied Williams’ rehearing request for an exemption from the audit requirement, or, in the alternative, permission to use a different auditor. On November 24, 2004 Williams filed a request for rehearing of the October 27 Order, stating that it must use a different auditor, due to the fact that E&Y had informed Williams that it could not perform the FCA audit work for Williams because doing so would violate the Sarbanes-Oxley Act of 2002.¹⁴ In the October 27 Order, we also denied a rehearing request by Cities to allocate audit costs on a *pro rata* basis, as well as Cities’ request for a separate auditor.

10. On December 20, 2004, the Commission Staff requested that E&Y provide further information on the audit cost estimates and the manner in which these costs will be allocated among the FCA claimants. A similar data request was sent to Cities. On December 22, 2004, and on December 29, 2004, the Commission received responses to these data requests from E&Y and Cities, respectively. The City of Anaheim, California (Anaheim), AEPCO, NCPA and Puget filed supplementary letters,¹⁵ and E&Y filed a follow-up letter on January 18, 2005. E&Y filed a status report on February 4, 2005.¹⁶

¹² See Notice of Technical Conference, Docket No. EL00-95-000 (September 27, 2004); and Notice of Agenda, Docket No. EL00-95-000 (October 4, 2004).

¹³ *December 20 Order* at P 92 (determining that heat rate issues are more appropriately addressed in the order issued on rehearing of the *September 24 Order*).

¹⁴ 15 U.S.C. § 7201 *et seq.* (2004).

¹⁵ Letters filed by AEPCO (January 3, 2005), NCPA (January 5, 2005) and Puget (January 7, 2005) in Docket No. EL00-95-000; Anaheim Comments on Cost-Based Recovery Methodology, Docket No. EL00-95-000 (January 10, 2005).

¹⁶ E&Y’s First Interim Status Report on Testing of Fuel Cost Allowance Claims, Docket Nos. EL00-95-114 and EL00-98-101 (February 4, 2005).

11. In addition, on December 8, 2004, E&Y submitted a filing requesting clarification of certain issues pertaining to E&Y's task of verifying the claimants' data and calculation of FCA amounts.¹⁷ The following parties submitted comments in response to E&Y's request for clarification: the California Parties, LADWP, Powerex Corp. (Powerex), and Puget.

12. The December 20 Order addressed the CAISO's compliance filing (as directed by the May 12 Order) detailing its proposed methodology for allocating the recovery of the FCA. The December 20 Order conditionally accepted the CAISO's compliance filing, including the CAISO's proposed format for submission of FCA claims (FCA Template). The order also responded to comments on the Technical Conference, granted in part and denied in part the Indicated Generators' emergency motion to reject the FCA Template, explained further certain principles of the FCA allocation methodology, and granted an extension of time of 90 days from December 20 for submitting FCA claims. The following parties filed requests for clarification or rehearing of the December 20 Order: the CAISO; California Parties; the City of Vernon; California (Vernon); AEPCO; and Automated Power Exchange, Inc. (APX).

13. On February 4, 2005, Mirant Americas Energy Marketing, LP and Mirant California, LLC (Mirant) and California Parties filed a joint motion for waiver of FCA filing requirements, shortened answer period and expedited consideration. Mirant and California Parties request that the Commission: (1) stay Mirant's obligation to file an audited FCA claim until after the Commission issues an order concerning Mirant's comprehensive settlement with the California Parties;¹⁸ and (2) in the event the Commission approves the settlement, not require Mirant to submit an audited FCA claim. NCPA, Enron, Powerex, LADWP, the Cities of Anaheim, Azusa, Banning, Colton, and Riverside, California (Southern Cities), Cities, and Vernon filed answers to the joint motion.

14. Accordingly, in this order, we will address rehearing and clarification requests of the September 24 Order, Williams' request for rehearing of the October 27 Order, rehearing and clarification requests of the December 20 Order, E&Y's filing seeking clarification of certain FCA issues, issues pertaining to the audit costs raised in the Cities' and E&Y's responses to the data requests, and Mirant's request for waiver.

¹⁷ E&Y's Request for Clarification Regarding the Calculation of the Actual Daily Cost of Gas for the Additional Fuel Cost Allowance, Docket No. EL00-95-098 (December 8, 2004).

¹⁸ Joint Offer of Settlement of Mirant Parties, Docket Nos. ER01-889-000 and EL00-95-000 (January 31, 2005).

Discussion

A. Clarification of FCA Calculations

Use of Actual and Verifiable Incremental Heat Rates

15. LADWP requests clarification of the September 24 Order to allow sellers located outside the CAISO control area, who do not have heat rates on file with the CAISO, to use their own actual heat rates to calculate their FCA claim.¹⁹ LADWP argues that, without such clarification, additional time will be needed for sellers to revise their FCA claims, and the Commission will need to give additional guidance on how to proceed. In support of its request for clarification, LADWP points out that the September 24 Order requires sellers who did not have heat rates on file with the CAISO to “determine the incremental heat rates of the most efficient comparable unit for which the CAISO has on file.”²⁰ LADWP states that this phrase could be read to preclude sellers who did not have heat rates on file with the CAISO from employing their own actual, unit-specific heat rates to calculate fuel consumed in making mitigated spot sales to the CAISO and PX.²¹ LADWP argues that this language potentially conflicts with other provisions of the September 24 Order, as well as other orders concerning the FCA. LADWP explains that it has already used its own incremental heat rates to rank marginal generation resources, per the direction of prior FCA orders. LADWP seeks to buttress its position with paragraph 52 of the September 24 Order, which states that, under the Commission’s methodology, “sellers may have submitted FCA claims that assign the heat rate from their least efficient generation to these power sales.”²² LADWP argues that it does not believe the Commission intended to require portfolio sellers who do not have heat rates on file with the CAISO to “start from scratch” to compute their fuel cost claims.

16. Puget argues in its request for rehearing that the Commission erred by requiring a seller who did not sell the entire output of a generating unit during a particular interval to use the heat rates of a “comparable” unit on file with the CAISO, rather than its own unit’s heat rate, to calculate its FCA claim.²³ Puget states that parties at the Technical Conference “were largely in agreement” that claimants should be allowed to use their own heat rate data in calculating FCA claims.²⁴ Puget reiterates that the Commission

¹⁹ LADWP’s Request for Rehearing and Clarification at 6.

²⁰ *Id.* (citing *September 24 Order* at P 51).

²¹ *Id.* at 6-7.

²² *Id.* at 8 (citing *September 24 Order* at P 52).

²³ Puget’s Request for Clarification and Rehearing at 4.

²⁴ *Id.* at 5.

should permit sellers that have “detailed and verifiable” heat rate information on their own generating units to use that information to calculate their FCA claims.²⁵ Puget argues that use of such data would ensure that sellers are able to recover their actual fuel costs and present to the Commission accurate FCA claims.

17. NCPA argues on request for clarification or rehearing that the Commission should allow parties to use heat rates currently on file with the CAISO for units for which no heat rate was on file during the Refund Period.²⁶ NCPA explains that it has one steam-injected turbine in Lodi (Lodi STIG) for which no heat rates were on file at that time. NCPA states that it does not have any comparable units to the Lodi STIG, and it doubts that searching through the CAISO’s list of generating resources would yield a comparable generating unit. NCPA states that it now has heat rate information on file with the CAISO for the Lodi STIG, and NCPA understands that those heat rates on file today are the same as what the heat rates would have been during the Refund Period.

18. In its comments concerning the Technical Conference, LADWP states that the CAISO represented at the Technical Conference that, if paragraph 51 of the September 24 Order were construed to preclude sellers from using their own actual heat rates, the CAISO would not be in a position to help such sellers. LADWP further asserts that the CAISO appeared to agree at the Technical Conference that using actual unit-specific heat rates would result in more accurate determination of sellers’ actual fuel costs.²⁷

19. Puget’s comments on the Technical Conference state that requiring claimants to use the incremental heat rate of other comparable units on file with the CAISO, instead of their own easily verifiable heat rates, will result in the calculation of inaccurate claims. Puget complains that this requirement has been particularly vexing for Puget because the generating units for which it is preparing FCA claims were dual-fired units that utilize both oil and gas, and none of the heat rates for oil combustion on file with the CAISO appear to match those of Puget. Puget argues that permitting sellers that have detailed and verifiable heat rate information on their own generating units to use that information to calculate FCA claims would ensure that FCA claims are accurate and sellers are able to recover their actual fuel costs.²⁸

²⁵ *Id.* at 5-6.

²⁶ NCPA Request for Rehearing/Clarification at 5.

²⁷ *See* LADWP’s Comments on Technical Conference at 4.

²⁸ Comments of Puget on Technical Conference at 4-6.

20. California Parties, in their reply comments, state that they do not object to the use of actual incremental heat rate data, provided the CAISO can verify the calculation of the incremental data, and such data can be audited as part of the FCA validation process.²⁹ California Parties note that validation of these incremental heat rates may require more than mere acceptance of the heat rates submitted by the parties who do not currently have heat rate data on file with the CAISO.³⁰ If data cannot be adequately verified, California Parties assert that comparable data available to the CAISO should be used per paragraph 51 of the Commission's September 24 Order.

Commission Determination

21. The Commission will grant parties' request to allow sellers whose heat rates were not on file with the CAISO during the Refund Period to use their own actual and verifiable incremental heat rate data to calculate their FCA claims. The Commission has previously required generators to use incremental heat rates to determine how much fuel was burned by a unit at a particular level of output.³¹ Consistent with the principle of marginal purchase discussed in our May 12 Order,³² and to accord all FCA claimants equivalent treatment, the Commission has directed every generator to use incremental heat rate data, rather than average heat rate data. We emphasize, however, that incremental heat rate data not on file with the CAISO must be verified by the independent auditor. If such data cannot be verified, sellers must use heat rate data from a comparable unit on file with the CAISO. Alternatively, sellers retain the right to submit cost evidence, demonstrating that their overall costs have not been recovered.

22. The Commission will also grant NCPA's request and allow parties to use incremental heat rates currently on file with the CAISO for units for which no heat rate data was on file during the Refund Period.

²⁹ California Parties' Reply Comments in Response to Technical Conference on Fuel Cost Allowance and Allocation Issues at 13.

³⁰ *Id.* at n.29 (citing *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 101 FERC ¶ 63,026 at P 40-77 (2002)).

³¹ *See April 22 Order* at P 18 (finding use of incremental heat rates to calculate fuel cost allowance consistent with the calculation of the *MMCP*); *May 12 Order* at P 51 (finding use of incremental heat rates most appropriate because a predominately incremental use of generation occurred during the last MWh produced by the unit and most sellers' generation was sold at non-mitigated rates).

³² *See May 12 Order* at P 51.

AEPCO's Calculation of the FCA

23. AEPCO requests rehearing of the December 20 Order, which denied AEPCO the opportunity to use a different formula in the template to calculate the FCA. AEPCO seeks approval to use this alternate formula because a portion of its mitigated sales involved generators with higher heat rates than the MMCP heat rates.³³ In prior comments on this issue, AEPCO provided the following example comparing its preferred formula to the one ultimately chosen by the Commission.³⁴ In an interval where the ISO marginal heat rate is 10 and the Harris series gas price is 4, the MMCP gas cost would be 40. If the generator had a heat rate of 11 and a gas cost of 5, its actual gas cost would be 55. According to the formula endorsed by the Commission, however, the generator's recovery after the FCA would be $40 + [(5-4)*11]$, or 51, which would still result in an under-recovery of 4.

24. AEPCO argues it is improper for the Commission to afford a FCA to sellers that have higher gas costs than the MMCP gas proxy price, while denying a FCA to those that have higher heat rates than the MMCP proxy heat rate. AEPCO further states that “[i]n affording relief to one class of sellers but denying relief to another and establishing a confiscatory result, the [December 20 Order] is arbitrary and capricious, an abuse of discretion, not in accordance with law, in excess of statutory jurisdiction, authority, or limitation, short of statutory right and unsupported by substantial evidence.”³⁵

Commission Determination

25. We will deny AEPCO's request for rehearing for three reasons: (1) because it is a collateral attack on our prior orders; (2) because granting an exception for AEPCO would undermine the goal of consistency in calculating FCA claims; and (3) because the cost-based recovery mechanism would provide AEPCO an opportunity to recover costs incurred.

³³ AEPCO's Request for Rehearing of December 20 Order at 1.

³⁴ See AEPCO Initial Comments on Technical Staff Conference held October 7, 2004 at 6.

³⁵ AEPCO's Request for Rehearing at 1.

26. Per the already established refund formula, fuel costs are the product of two factors, heat rate and per-unit gas cost. The heart of AEPCO's challenge is that the FCA template chosen prevents AEPCO from recovering its full fuel costs for transactions where its generators' heat rates were substantially higher than the MMCP.³⁶ The heat rate factor in the MMCP is based on the highest marginal cost of electricity sold into the CAISO, and does not reflect the heat rates of PX sales.³⁷ This factor in the MMCP calculation has remained constant since July 25, 2001.³⁸ In the March 26 Order, the Commission only changed the gas proxy price component of the MMCP. The Commission recognized that this revision of the per unit gas price component of the MMCP would tend to reduce the MMCP, potentially below sellers' actual fuel costs. Consequently, the Commission, in its March 26 Order, provided sellers with the opportunity to make claims for an FCA "to recover the difference between their actual fuel costs for mitigated sales and the proxy for gas prices used in calculating the MMCP."³⁹ In other words, the sole purpose of the FCA is to reimburse sellers whose per unit gas price was higher than the gas proxy used in the MMCP – precisely the goal that AEPCO now complains is arbitrary and capricious. AEPCO's effort to recover fuel costs for transactions where its generators' heat rate was in excess of the MMCP is a collateral attack on early orders setting the MMCP heat rates. It is also a collateral attack on the March 26 Order, and subsequent FCA orders, which allowed for recovery based on the heat rate of the marginal ISO generator. AEPCO is estopped from raising the heat rate arguments at this late juncture in the FCA proceedings.

27. We are not persuaded to allow AEPCO to use a different formula to calculate its FCA. Permitting use of this alternate formula would undermine the original purpose of the FCA – to allow recovery of actual fuel costs where the gas proxy price is too low – and open the FCA to gaming of formulas. We have emphasized the need for consistency throughout this proceeding to guard against gaming and to ensure fairness in the FCA process. AEPCO may not use the FCA as a means to reopen the issue of the appropriate heat rate in the already established refund formula.

³⁶ *See Id.* at 2.

³⁷ *See San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services*, 96 FERC ¶ 61,120 at 61,517 (2001) ("The June 19 Order established a mitigated price based on the marginal cost of the last unit dispatched to meet the load in the ISO's real-time market.").

³⁸ *Id.*

³⁹ *May 12 Order* at P 3 (emphasis added).

28. Though we have found that the formula cannot be changed, we note that for fuel costs over and above the gas proxy price used in the MMCP formula, generators may use their own heat rates to calculate their FCA claim. However, if AEPCO believes that it will not recover its actual gas costs through the FCA, it has an option to file for a cost-based recovery.

Stacking Units on the Basis of Efficiency Level

29. Puget argues in its request for clarification or rehearing of the September 24 Order and in its comments on the Technical Conference that the Commission should permit stacking of units on the basis of actual merit dispatch order (or incremental cost), and not by heat rate (or efficiency level), as required by the Commission.⁴⁰ In particular, Puget requests the Commission to clarify that sellers with “organized, detailed and verifiable data on their actual merit order dispatch may calculate their fuel cost claims by stacking their generating units in accordance with that dispatch order.”⁴¹ Puget notes that, although incremental cost and operating efficiency are related, they are not synonymous. Puget points out that, whereas two of its generating resources used to make mitigated sales to the CAISO had identical heat rates, they had different operating costs. While Puget’s Whitehorn resource had to pay certain charges to a natural gas local distribution company, Frederickson was subject to environmental restrictions that “significantly” impacted the costs of operating that unit during that period.⁴² Puget states that, when the local distribution company charges and the environmental restrictions were factored into the equation, Frederickson actually had a higher incremental cost than Whitehorn and, therefore, was dispatched after Whitehorn during the Refund Period. Puget further states that actual merit dispatch order of its generating units reflects Puget’s calculation of incremental costs at the time sales were made, and actual merit dispatch order can be proven, and is not likely to be the subject of significant disputes.⁴³

30. In their reply comments concerning the Technical Conference, the California Parties oppose Puget’s request to stack units on the basis of incremental costs, chiefly because Puget indicates that it intends to define incremental costs to include opportunity costs that are not reflected in the efficiency level of the unit. The California Parties argue

⁴⁰ Puget’s Request for Clarification and Rehearing at 2; Puget’s Comments on Technical Conference at 6.

⁴¹ Puget’s Request of Clarification and Rehearing at 4.

⁴² *Id.*

⁴³ *Id.* at 3.

that opportunity costs are “often difficult to measure and validate, and may vary from generator to generator [.]” The California Parties argue that permitting such stacking on the basis of incremental costs, including opportunity costs, would unnecessarily complicate and provide opportunities to game the FCA process.⁴⁴

Commission Determination

31. The Commission rejects Puget’s request to stack units on the basis of incremental cost, rather than efficiency level. The purpose of the FCA is to reimburse claimants for actual fuel costs for mitigated sales made during the Refund Period that exceed the proxy for gas prices used in calculating the MMCP, and not reimbursement for other related, but incidental, expenses. As we have explained in prior orders, for parties pursuing an FCA, the FCA acts as a floor below which the fuel portion of the MMCP may not fall.⁴⁵ While opportunity costs, such as the environmental restriction raised by Puget, may impact the cost of running a generator, such costs are not actual fuel costs.

Net vs. Gross Calculation and Allocation of FCAs

32. Our December 20 Order found that both the calculation of FCA claims and the allocation of FCA amounts should be done on a gross basis. Generators will thus: (1) owe refunds and be eligible to file a FCA claim on their mitigated sales; and (2) receive refunds and be allocated an FCA amount on their mitigated purchases. The December 20 Order explained that the approach to allocating FCA amounts should match the approach to calculating FCA claims, which in turn should match the methodology for determining refund liabilities.⁴⁶

33. The CAISO requests clarification that the calculation of FCA claims and the allocation of FCA amounts relating to uninstructed energy should be based on each Scheduling Coordinator’s net sales of uninstructed energy in each 10-minute interval. Specifically, the CAISO notes that because uninstructed deviations are settled on a net basis for each Scheduling Coordinator’s entire portfolio of supply and demand as part of the CAISO’s normal settlement process, there is no sales transaction price for positive uninstructed energy from individual units during intervals when the Scheduling Coordinator’s overall portfolio-level uninstructed deviation was negative. The CAISO

⁴⁴ Reply Comments of California Parties at 13-14.

⁴⁵ *E.g.*, *December 20 Order* at P 2.

⁴⁶ *See December 20 Order* at P 19-21.

adds that, under such circumstances, the Scheduling Coordinator is treated as a net buyer of uninstructed energy for the ten-minute interval, and is simply charged based on its net negative deviation. The CAISO states that this is consistent with its normal settlement process, as set forth in its tariff, as well as the approved refund calculation methodology.

34. On rehearing, California Parties argue that a gross method for calculating FCA claims is fundamentally flawed. They submit that even though the FCA is an offset to refund liabilities, it is not necessary to calculate FCA claims in the same way that refunds are calculated. California Parties state that in the case of net generators who sold into the market and purchased from the market in the same time interval, it is reasonable to treat their sales as having served their own purchases. California Parties repeat their argument that, “because sales are being mitigated to a single price [the MMCP], netting MWhs, and doing so across all markets, yields an appropriate measure of reliance on the overall market.”⁴⁷ Further, they assert that the December 20 Order failed to substantively address the examples and evidence included in their pleadings, which detail why a gross approach would allow sellers to obtain higher prices than was originally received in the market.

35. California Parties also continue to argue that the allocation of FCA amounts should be performed on a net basis. They maintain that this approach results in an allocation based on a purchaser’s actual dependence on the spot market and appropriately removes the effect of spot market electricity purchases that were supplied by a purchaser’s own sales. California Parties assert that a gross allocation is in conflict with the Commission’s prior determination to reject the gross load methodology and cite a prior order where the Commission states that “recovery of the [FCA] should be assigned to those that relied on energy sales spot market.”⁴⁸ California Parties submit that the December 20 Order ignored the fact that using gross purchases would allocate a disproportionate share of costs to purchasers who offset a portion of their purchases with sales in the PX and CAISO spot markets. California Parties conclude that the effect of adopting the gross allocation approach will be that the utilities, the state of California, and their customers will be required to pay the fuel costs of gas-fired generators for energy that was actually generated using the utilities’ own hydroelectric and nuclear generation.

⁴⁷ See California Parties’ Request for Rehearing of December 20 Order at 6.

⁴⁸ See California Parties’ Request for Rehearing at 7 (citing *May 12 Order* at P 63).

36. California Parties further argue that “the Commission compounds its error” [of rejecting netting] by requiring that each Scheduling Coordinator Identification Number (SC ID) remain separate. California Parties state that the resulting separate allocation of costs to each SC ID is inappropriate because SC IDs may reflect both sales and purchases by the same entity. According to the California Parties, this ensures that costs will be over-allocated to net buyers who self-supplied energy.

Commission Determination

37. We will grant the CAISO’s clarification and find that the calculation of FCA claims and the allocation of FCA amounts related solely to uninstructed energy⁴⁹ transactions should be performed on a net basis. As indicated by the CAISO, there is no sales transaction price for positive uninstructed energy from individual units during intervals when the Scheduling Coordinator’s overall portfolio-level uninstructed deviation was negative. Consequently, this energy does not have a specific sales price, and calculating the Scheduling Coordinator’s FCA claim for uninstructed deviations based on a gross approach would not make sense.

38. With regard to California Parties’ arguments against the calculation of FCA claims on a gross basis, we find they have raised no new arguments. We continue to believe that the same approach should be used to determine both refunds and the offset (*e.g.*, the FCA) to refunds. The MMCP applies to gross sales into the ISO and PX markets and it follows that FCA claims should be on a gross basis since the purpose of the FCA claims is to provide an opportunity to recover the actual cost of gas burned to make those sales. As to California Parties’ assertion that the December 20 Order did not address their examples and evidence which detail why a gross approach would allow sellers to obtain higher prices than was originally received in the market, it was unnecessary to do so since the December 20 Order specifically prevents the situation of concern from occurring by limiting the final purchase price after mitigation to no greater than the price at which the market originally cleared.⁵⁰

39. With respect to the allocation of FCA amounts on a gross basis, we again find that California Parties repeat arguments that we have already addressed. We reiterate that a net allocation is inconsistent with the refund and FCA calculations.⁵¹ We also emphasize the distinction between a gross load allocation, which the Commission previously

⁴⁹ The CAISO defines uninstructed energy as a real-time change in generation or demand other than that instructed by the CAISO.

⁵⁰ *See December 20 Order* at P 40. We note that, as indicated elsewhere in this order, we modify this finding to incorporate the impact of charge type 481 charges on the price of uninstructed energy during the time the soft caps were in place.

⁵¹ *See Id.* at P 30-31.

rejected, and a gross spot purchase allocation, which we believe reflects the degree to which a buyer relied on the spot market to obtain energy. Regardless of their energy sales, the investor-owned utilities relied upon all of their spot purchases to obtain energy and serve load. Furthermore, we believe that California Parties are mistaken in equating the energy they sold into the spot markets with the energy they purchased. It is not possible to match or tag a megawatt-hour sold into the mitigated ISO and PX markets with another megawatt hour purchased from the mitigated ISO and PX markets. Accordingly, we will deny California Parties request to have the calculation and allocation of FCAs performed on a net basis.⁵²

40. Finally, we note that California Parties' opposition to requiring SC IDs to remain separate is based on their arguments against a gross calculation and allocation of FCAs. Consistent with our determination above, we deny California Parties request for rehearing to aggregate SC IDs.

Limit on Final FCA Amounts

41. The December 20 Order found that "the final FCA amount is limited so that the final purchase price after mitigation (MMCP plus FCA amount) is not greater than the original market clearing price."⁵³

42. The CAISO requests clarification that the purchase price for uninstructed energy, for purposes of FCA calculations and allocations, should equal the market clearing price (MCP) plus any charge type 481 charges for supply costs in excess of the soft caps. The CAISO notes that, due to the \$250/\$150 soft caps in place during much of the Refund period, the total purchase price for uninstructed energy prior to mitigation exceeded the MCP. The CAISO states that total charges for net uninstructed energy should thus be equal to the sum of the MCP plus an allocation for costs of energy purchased above the MCP.

Commission Determination

43. We will grant the CAISO's clarification and modify our finding from the December 20 Order to acknowledge the impact of the soft cap during the Refund period. Accordingly, we find that the final FCA amount associated with uninstructed energy transactions is limited so that the final purchase price after mitigation (MMCP plus FCA amount) is not greater than the MCP plus any charge type 481 charges for supply costs in excess of the soft caps.

⁵² We note that this ruling will only apply to transactions in the instructed and PX markets.

⁵³ *December 20 Order* at P 40.

Use of Scheduling Coordinator

44. The September 24 Order clarified that any claimant using another entity as a Scheduling Coordinator may not recover an FCA, and this determination is not limited to City of Burbank.⁵⁴ The Commission justified this determination on the basis that refund liability in this proceeding generally attaches to the Scheduling Coordinator of each transaction. Consequently, sellers may not receive an FCA offset for purchases for which they will not be held refund liable.

45. AES, NCPA, Modesto, and Cities request rehearing or clarification on this issue. The parties primarily argue that the Commission should not preclude generators that utilized Scheduling Coordinators for some transactions, and acted as their own Scheduling Coordinator for others, from claiming and receiving an FCA offset for those transactions for which the entity acted as its own Scheduling Coordinator.

46. AES states that it presented testimony to Presiding Administrative Law Judge Birchman in Docket No. EL00-95-045 demonstrating that, although AES NewEnergy, Inc. (NewEnergy)⁵⁵ was acting as AES' Scheduling Coordinator, AES negotiated December 2000 sales directly with the CAISO.⁵⁶ According to AES, the CAISO contacted AES, not NewEnergy, seeking additional supplies of energy, and negotiated the terms of the sale.⁵⁷ AES expresses concern that, even though AES negotiated the sale directly with the CAISO and sold the power from its unit to the CAISO, under the September 24 Order, AES' relationship with NewEnergy as its Scheduling Coordinator would abrogate the CAISO-AES contract.

⁵⁴ *September 24 Order* at P 95. The *May 12 Order* found that the City of Burbank (Burbank) may not file for an FCA for its purchases that used Sempra Energy Trading Corp. as its Scheduling Coordinator. *Id.* at P 18. As the Commission explained in that order, the FCA is an offset granted to permit a generator to recover its cost of fuel for transactions for which it has refund liability. Since the Commission has generally held that refund liability in this Refund Proceeding rests with the Scheduling Coordinator for the transaction, the Commission held that Burbank may not receive an FCA offset for purchases for which it will not be held refund liable because Sempra was the Scheduling Coordinator for the transactions. *Id.*

⁵⁵ NewEnergy is now Constellation NewEnergy, Inc. because the AES Corporation, Placerita's parent, sold NewEnergy to Constellation Power Source in September 2002. *See* AES Rehearing and/or Clarification at 3, n.8.

⁵⁶ *Id.* at 3-4 (*citing* Exh. No. AES-6 at 1:23-2:4; Exh. No. AES-2 at 5:2-7).

⁵⁷ *Id.* at 3-4.

47. NCPA seeks clarification that the very fact of a Scheduling Coordinator-to-Scheduling Coordinator trade does not prevent recovery for such sale.⁵⁸ In particular, NCPA seeks clarification that all sales from its gas-fired units into the ISO or PX markets made by NCPA under the auspices of its own Scheduling Coordinator or by NCPA as a PX market participant are eligible for inclusion in an FCA claim. NCPA explains that, to make sales from NCPA gas-fired generation resources located in PG&E's existing contract Scheduling Coordinator portfolio (PGAE/PGAB portfolio), NCPA had to schedule a Scheduling Coordinator-to-Scheduling Coordinator trade, which enabled the CAISO to recognize the resources belonging to NCPA. NCPA gives the example where NCPA, acting as Scheduling Coordinator, schedules a 20 MW trade from one of its Roseville units (located in the PGAE portfolio) into the NCPA portfolio, and that 20 MW could be provided to either the PX or ISO markets. If such sale were made in a mitigated hour, NCPA's sale price for that sale would be mitigated. NCPA asserts that this is exactly the kind of sale – from a gas-fired resource, where the owner purchased gas at above the MMCP – that should receive an FCA. NCPA states that the Commission is seeking refunds for that sale of NCPA's resources into the ISO/PX, and NCPA believes that an FCA should apply.⁵⁹

48. Modesto requests clarification that “a generator with another generator acting as Scheduling Coordinator may recover an additional FCA at least for transactions that did not rely on another entity acting as Scheduling Coordinator.”⁶⁰ Modesto states that, while it used PG&E as its Scheduling Coordinator for sales of emergency power during the Refund Period, it also used its own Scheduling Coordinator, “MIDI1,” to make sales to the CAISO during that same time. Modesto expresses concern that, read out of context, the Commission's language could be construed to deny Modesto the opportunity to recover an FCA claim for sales made via Modesto's own Scheduling Coordinator, MIDI1. Modesto states that, if the Commission determines that clarification has already been denied in its September 24 Order, then Modesto requests rehearing. In such case, Modesto asserts that the Commission erred in denying generators that have other entities acting as Scheduling Coordinators for some transactions from recovery of FCAs for sales made via their own Scheduling Coordinators.⁶¹

⁵⁸ Motion for Clarification or in the Alternative Request for Rehearing of the NCPA at 4.

⁵⁹ *Id.*

⁶⁰ Modesto's Request for Clarification/Rehearing at 3.

⁶¹ *Id.* at 4-6.

49. AEPCO takes issue with the Commission's statement in the September 24 Order that "for any claimant using another entity as its Scheduling Coordinator . . . a [FCA] may not be recovered."⁶² AEPCO states that the PX was the Scheduling Coordinator for the CAISO. AEPCO appears to request the Commission to clarify that sales to the PX in its capacity as Scheduling Coordinator for the CAISO are eligible for inclusion in FCA claims.⁶³

50. Cities argues that the September 24 Order appears to "drastically reverse course" by excluding any claimant that used another entity as a Scheduling Coordinator from recovery of fuel costs. Cities asserts that Redding's directly negotiated bilateral sales to the CAISO do not fall within the scope of the Commission's reasoning in the May 12 Order with respect to Burbank's sales to Sempra. According to Cities, the Commission's reasoning is flawed because it is based on the presumption that all parties that utilized Scheduling Coordinators are not responsible for refund obligations.⁶⁴

Commission Determination

51. The Commission will clarify that a generator may submit an FCA claim for a transaction for which the generator is directly liable for possible refunds as part of the Refund Proceeding and burned fuel to make a mitigated sale, regardless of the Scheduling Coordinator.⁶⁵ For example, a generator that directly negotiated or acted as its own Scheduling Coordinator for some transactions with the CAISO/PX, and has refund liability for those transactions, may claim an FCA offset for those transactions, even though the generator used a separate Scheduling Coordinator for other transactions with the CAISO/PX during the Refund Period. We will also grant NCPA's request for clarification and find that the mere fact of a Scheduling Coordinator-to-Scheduling Coordinator trade does not *per se* preclude an entity from making an FCA claim. Again, the entity entitled to make an FCA claim in such circumstances would be the entity that has refund liability.

⁶² *Id.* at 2 (quoting *September 24 Order* at P 28).

⁶³ *Id.*

⁶⁴ Cities' Request for Clarification or Rehearing at 3-5.

⁶⁵ We note that the generator making the FCA claim must also comply with other guidelines the Commission has established in this and other orders for making an FCA claim.

Implications of Determination on Disaggregation of SC IDs

52. The December 20 Order stated:

[O]ur determinations here are based on the understanding of the SC ID as the entity that transacted with the CAISO. We will deny any aggregation of SC IDs, as well as the disaggregation of any one SC ID. This refund proceeding has focused on transactions in the CAISO and PX markets. Generators used SC services to make transactions in those markets, and it is the SC that has the contractual relationship with the CAISO and PX, not the generators. It is the SC's purchase or sale position that is at issue in the refund proceeding. SCs, not the generators that used SC services, are respondents in this refund proceeding. [...] Consistent with the approach taken in the refund proceeding, the FCA should be treated on the basis of transactions made in the CAISO and PX markets. The refund liability applies to each SC, and the SCs are the entities that performed the transactions with the CAISO and PX.⁶⁶
(footnotes omitted)

53. In its request for clarification of the December 20 Order, the CAISO asks the Commission to clarify the role of the PX with respect to the allocation of FCA amounts related to the PX markets and participants for which the PX served as the Scheduling Coordinator with the CAISO. The December 20 Order prohibits the disaggregation of any SC ID in performing allocations of FCA amounts. The CAISO points out that because the PX served as the Scheduling Coordinator for multiple participants, including the state's three major investor-owned utilities, the bulk of energy purchases in the CAISO's real time market through January 2001 appear as transactions for which the PX served as the Scheduling Coordinator with the CAISO. Thus, in order to comply with the prohibition of disaggregating SC IDs, it would be necessary for the CAISO to allocate FCA amounts for purchases of CAISO spot market energy to the PX, and for the PX to then allocate these amounts to participants for whom the PX served as the Scheduling Coordinator.⁶⁷

⁶⁶ See *December 20 Order* at P 58-59.

⁶⁷ The CAISO notes that this would not be the case for the PX day-ahead and hour-ahead markets. The PX may allocate claims directly because no netting of PX and ISO sales and purchases is permitted.

54. APX requests the Commission to clarify that this does not alter the Commission's finding in its order issued on October 16, 2003.⁶⁸ In that order, the Commission held that APX, as a Scheduling Coordinator, generally should not be held liable for refunds in this proceeding. Instead, the Commission ruled that entities that retained APX as their Scheduling Coordinator should be held liable for refunds. The order states that "the APX as an independent scheduling service provider has more similarities to the PX than with energy producers."⁶⁹ The Commission based this decision on "the unique nature of APX's business operation as an independent scheduling service provider and its similarity to the PX and given that sellers who use APX's services, not APX itself, retain the vast majority of the revenue that resulted from the excessively high electricity prices in California during this period."⁷⁰ APX asks the Commission to clarify that the statements in paragraphs 58-60 of the December 20 Order do not apply to the issue of APX's liability as addressed in the Commission's October 2003 Order.

Commission Determination

55. Regarding APX's request for clarification, we clarify that our determination in paragraphs 58-60 of the December 20 Order, as clarified in a prior section above, does not apply to the issue of APX's liability as addressed in the Commission's October 2003 Order. That order stated, and the Commission still holds:

We will grant APX's rehearing request on this issue and find that APX Participants, along with Scheduling Coordinators such as APX, are liable for refunds in this proceeding. The Commission has very broad discretion as to whether and when to order refunds to ratepayers. 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 circumstances that the possessor will give offense to equity and good conscience if permitted to retain it." The APX as an independent scheduling service provider has more similarities to the PX than with energy producers. In fact, APX through its operation of hourly spot markets competed with the PX, not with electricity producers. Given the unique nature of APX's business operation as an independent scheduling service provider and its similarity to the PX and given that sellers who used APX's services, not APX itself, retained the vast majority of the revenue that resulted from the excessively high

⁶⁸ See *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services*, 105 FERC ¶ 61,066 at P 166-169 (2003) (*October 2003 Order*).

⁶⁹ *Id.* at P 166.

⁷⁰ *Id.* at P 166.

electricity prices in California during this period, we find it reasonable that customer refunds be paid by these sellers because it 'will give offense to equity and good conscience if [they are] permitted to retain [excessive revenues].' Therefore, the Commission is exercising its broad discretion over refunds in this instance to assign refund liability in a way consistent with equitable considerations, including assigning the refund liability to include APX Participants.⁷¹ (*footnotes omitted*)

56. The CAISO requests clarification of the PX's role with respect to the allocation of FCA amounts relating to the PX markets and participants for which the PX served as Scheduling Coordinator. We clarify that the CAISO should allocate FCA amounts for purchases of ISO spot market energy to the PX, and that the PX, as part of its compliance filing,⁷² should then allocate these FCA amounts to participants for whom the PX served as the Scheduling Coordinator.

Time Granularity of the FCA Submissions

57. LADWP seeks rehearing of the September 24 Order with respect to what it considers the Commission's apparent direction to generators to use ten-minute intervals for mitigated ISO sales to calculate and prove FCA claims.⁷³ LADWP argues that the Commission erred by not accurately reflecting the fact that energy import sales into the CAISO from sellers outside the CAISO control area were made on an hourly basis, and not a ten-minute basis. LADWP points out that the Commission's prior decisions found that the CAISO erred by mitigating such sales using 10-minute interval MMCPs, and ordered the CAISO to mitigate such sales using hourly average MMCPs.⁷⁴ LADWP asks the Commission to adhere to its prior decisions, which held that sellers located outside the CAISO control area made energy import sales to the CAISO on an hourly basis. In addition, LADWP asked the Commission to clarify that generators who made energy import sales to the CAISO should: (1) submit their fuel cost claims on an hourly basis to the CAISO, as directed elsewhere in the September 24 Order; (2) use hourly average MMCPs to calculate and demonstrate their FCA claims; and (3) affirm that the CAISO will mitigate such energy import sales using hourly average MMCPs.

⁷¹ See *October 2003 Order* at P 166-169.

⁷² See *San Diego Gas & Electric Company, et al.*, 109 FERC ¶ 61,218 at P 88-89 (2004).

⁷³ See *September 24 Order* at P 85.

⁷⁴ See LADWP's Request for Rehearing and Clarification at 4 (*citing San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 101 FERC ¶ 63,026 (2002), *adopting in relevant part proposed findings*, 102 FERC ¶ 61,317 at P 79 (2003)).

58. NCPA similarly seeks clarification that submission of hourly data is acceptable even for sales to the CAISO, particularly for units without Participating Generator Agreements.⁷⁵ NCPA asserts that it lacks ten-minute settlement information from those units, which includes sales to the CAISO. NCPA argues that it would be more rational to accept hourly information than for NCPA to take the hourly information it has and disaggregate this information.

Commission Determination

59. As an initial matter, we note that LADWP correctly points out that our statement in the September 24 Order describing mitigated ISO sales as having been transacted on a 10-minute basis overlooks certain hourly imports. We continue to maintain, however, that whatever time granularity is used to determine refund liability for a particular transaction should also be used to calculate the FCA claim associated with that transaction. For example, to the extent imports were mitigated on an hourly basis, and such hourly intervals were used to determine refund liability, hourly intervals should be used to compute the FCA.⁷⁶ This is consistent with our determination that the approach to calculating FCA claims should match the methodology for determining refund liability.⁷⁷

B. Submission of FCA Claims

The CAISO's Proposed Template

60. The December 20 Order states that “unless the CAISO can explain otherwise, we thus see no reason why 10-minute interval data is necessary and direct the CAISO to remove the variable from its template.”⁷⁸

61. The CAISO requests clarification that, for the FCA template, sellers should include 10-minute interval data for both instructed and uninstructed energy sales, except in cases where a supplier's FCA claim involves imports with a constant transaction price for all intervals within an hour. The CAISO explains that the calculation of most sales of instructed and uninstructed energy in the ISO Markets must be made on a 10-minute basis because transaction prices and quantities are settled and vary on a 10-minute basis.

⁷⁵ NCPA's Request for Rehearing/Clarification at 4-5.

⁷⁶ Similarly, if hourly average MMCPs were used to determine refund liability, then hourly average MMCPs should be used to calculate the fuel cost allowance claim.

⁷⁷ *E.g.*, December 20 Order at P 19.

⁷⁸ December 20 Order at P 80.

The CAISO concludes that it will need first to identify mitigated purchase quantities on a 10-minute interval basis, and then aggregate these data to an hourly level in order to allocate hourly FCA totals.

Commission Determination

62. We agree that the CAISO will need first to identify mitigated purchase quantities on a 10-minute interval basis before it aggregates this data to allocate FCA amounts on an hourly basis. Accordingly, we clarify that sellers submitting their FCA claims for instructed and uninstructed energy must include 10-minute interval data in the template, except as noted above for certain imports.

Participation in the Development of Additional FCA Templates

63. Our December 20 Order directs parties to work together to develop appropriate templates for the submission of FCA claims. California Parties request clarification that they be allowed to participate in the development of additional templates; to the extent they are excluded from participating, they cite a violation of due process. Further, they request that the CAISO should develop appropriate procedures, such as posting the templates on its website and using market notices, to provide an opportunity for all parties to participate in the developmental process. California Parties argue that, in the alternative, the Commission should adopt procedures for developing the FCA templates that are similar to what it has adopted for responding to clarification requests by E&Y.

Commission Determination

64. We clarify our intent as follows. We note that while Ordering Paragraph (C) of the December 20 Order directs “parties” to work together in developing additional FCA templates, in the body of the order we direct “the CAISO to work with sellers and the independent auditor (if necessary) to develop appropriate templates for the submission of fuel cost information needed for the CAISO to complete the refund process.”⁷⁹ The templates merely serve to present the FCA data so that the CAISO can adequately and efficiently process FCA claims. We remind all parties that the Commission has set the methodology to calculate and allocate the FCAs, and that the templates themselves raise no merits issues. To ensure that the relevant template exists for each transaction in which a seller claims an FCA, we have directed the CAISO to work with the sellers. However, we see no reason why other parties need to participate, and find unnecessary the California Parties’ alternative suggestion that any additional templates should be filed with the Commission for comment and approval. Accordingly we clarify that only the CAISO, sellers, and to the extent necessary, E&Y, may participate in the development of any additional FCA templates.

⁷⁹ *December 20 Order* at P 68.

Identity of FCA Claimants

65. The December 20 Order denied California Parties' request to require claimants to inform the Commission of their decision to forgo an FCA claim. E&Y notes that while 22 parties originally filed for an FCA claim on May 12, 2003, it has received data from only 14 claimants.

66. On rehearing, California Parties argue that there is no basis to permit some entities to work in secret with the auditor, leaving it to the California Parties to guess which entities will continue to seek an FCA and which have elected to withdraw. California Parties assert that, to the extent some claimants have elected to withdraw, a notification requirement will not affect their decision to proceed, while any claimant that is still undecided can simply indicate it is still considering such a claim.

Commission Determination

67. We are establishing a new deadline, as described below, for submitting FCA claims to E&Y for review. By that time, all claimants must decide whether or not they will file for an FCA. Accordingly, we direct claimants to file with the Commission their intent to seek an FCA concurrent with the deadline for claimants to file their claims with E&Y.⁸⁰

C. Miscellaneous Issues

Motion to Lodge

68. On September 24, 2003, December 4, 2003, February 6, 2004, and August 16, 2004, the California Parties filed motions to lodge in this proceeding various Commodity Futures Trading Commission (CFTC) settlement orders and related consent agreements documenting gas price and index manipulation.⁸¹ The California Parties request rehearing of the Commission's decision to deny these motions, and point out that the Commission has not yet ruled on the merits of the February 6, 2004 motion.⁸² California Parties assert that these filings supplement the record with respect to the Commission's

⁸⁰ As noted elsewhere in this order, Williams, and, potentially, Mirant, will be provided an extension of this deadline. Therefore, each must file with the Commission notification of its intent to seek an FCA by the date of its individual deadline to submit an FCA claim to E&Y.

⁸¹ California Parties' Request for Rehearing of September 24, 2004 Order Denying California Parties' Third Supplemental Motion To Lodge Commodity Futures Trading Commission Orders Relating To Gas Price Misreporting Investigations at 2.

⁸² *Id.* at 3-4.

determination that California border prices were not reliable or verifiable for use in the MMCP calculations. California Parties argue that, “while it may be true” that the record of this proceeding “may be closed” with respect to the appeals before the Ninth Circuit in Case No. 01-7105, the Commission continues to render decisions concerning the FCA.⁸³ They further assert that the CFTC orders provide evidence of gas index manipulation for several of the FCA claimants.⁸⁴

Commission Determination

69. In the September 24 Order, the Commission ruled that the record with respect to the Commission’s finding that California border prices were unreliable is “sufficient as it stands.”⁸⁵ The arguments on rehearing do not justify supplementing the record. Regardless whether an entity manipulated gas price indices, an entity may receive an FCA if it is able to demonstrate that its actual fuel costs for mitigated sales exceed the proxy for gas prices used in calculating the MMCP.⁸⁶ This proceeding concerns the establishment of a just and reasonable rate. There are separate proceedings looking into allegations of manipulation. This is consistent with the Commission’s policy of ensuring that a refund obligation does not penalize a seller from recovering its variable costs.⁸⁷ Furthermore, the Commission clarifies that it intended to deny the February 6, 2004 Motion to Lodge in its September 24 Order.

Use of Auditor Is Consistent With Commission Authority

70. In their request for rehearing of the December 20 Order, the California Parties accuse the Commission of abdicating its responsibility to ensure just and reasonable rates by allowing E&Y to provide audited claims directly to the CAISO.⁸⁸ California Parties further assert that the Commission “apparently does not intend to play a role in overseeing the results” of E&Y’s audit.⁸⁹

⁸³ *Id.* at 4.

⁸⁴ *Id.*

⁸⁵ *September 24 Order* at P 73.

⁸⁶ *See December 20 Order* at P 2.

⁸⁷ *See, e.g., Coastal Oil & Gas Corp. v. FERC*, 782 F.2d 1249 at 1253 (5th Cir. 1986) (ruling that disgorgements must still let a seller recover its costs); *Carolina Power & Light Co.*, 87 FERC ¶ 61,083 (1999) (requiring utility to make refunds for violation of *Central Maine* doctrine, but allowing it nevertheless to recover its variable costs).

⁸⁸ Request for Rehearing of California Parties at 2, 12-13.

⁸⁹ *Id.* at 12.

Commission Determination

71. From a procedural standpoint, this argument comes too late. California Parties first raised this issue in their request for rehearing of the May 15 Order.⁹⁰ On rehearing of that order, the Commission explained in the September 24 Order why use of an independent auditor to verify data under parameters carefully circumscribed by the Commission is consistent with the FPA.⁹¹ Moreover, the September 24 Order established a process whereby parties could challenge verified claims after their submission by E&Y to the CAISO.⁹² Significantly, this process also provides for Commission oversight by allowing parties to bring unresolved disputes concerning the FCA to the Commission's attention in the form of protests to the CAISO's refund compliance filing.⁹³ Procedurally, California Parties are no longer entitled to make, yet again, the claim submitted in their request for rehearing of the May 15 Order that use of E&Y to verify the FCA is an abdication of Commission authority. This issue was decided on rehearing in the September 24 Order. If the California Parties believed the new aspect of the September 24 Order, *i.e.*, the establishment of a post-audit submission challenge phase and Commission review of unresolved audit disputes, failed to satisfy the FPA or due process, the California Parties should have raised this issue on rehearing of the September 24 Order. The California Parties did not do so.⁹⁴ Having failed to raise timely the issue on rehearing, California Parties are procedurally barred from reiterating this argument on rehearing of a subsequent order, the December 20 Order, which concerns other distinct audit issues.

Vernon's Concern Regarding the Consistency between the FCA and Refund Calculation Methodologies

72. Vernon requests that the Commission expressly provide that if its previous determinations not to net for overall refund purposes are reversed in the future, and a netting approach is adopted, its determination in the December 20 Order not to net for FCA purposes will be reopened and reversed. Vernon states that "the Commission must

⁹⁰ See California Parties' Request for Rehearing of May 12, 2004 Order Addressing Fuel Cost Allowance Issues at 29-34.

⁹¹ See *September 24 Order* at P 92-94.

⁹² *Id.* at P 93.

⁹³ *Id.*

⁹⁴ See California Parties' Request for Rehearing of September 24 Order Denying California Parties' Third Supplemental Motion to Lodge Commodity Futures Trading Commission Orders Relating to Gas Price Misreporting Investigations.

provide that its determinations here cannot become final (and thus not legally subject to change), so long as the previous Commission determinations that it relies upon are subject to change.”⁹⁵ Vernon highlights the Commission’s statements that “the methodology used to allocate FCA amounts should match the methodology used to calculate FCA claims,” and “because the FCA claims are direct offsets to refund liabilities owed by seller, the approach to calculating FCA claims should match the methodology for determining the refund liability.”⁹⁶ Vernon concludes from these statements that the Commission’s analysis is devoted to ensuring that the FCA methodology is consistent with the previously determined, non-netted methodology for determining the overall refund liability.

Commission Determination

73. While we agree that one of the bases for our choice of FCA calculation methodology was its consistency with the methodology used for calculating refunds, the issue of whether the FCA calculation methodology should be changed to conform to the revised refund methodology is not before us. The refund calculation methodology is not being revisited in this order or any other proceeding currently before the Commission. Vernon’s concerns are too speculative and may never materialize. For this reason, we will not address this issue.

D. Audit-Related Issues

E&Y December 8, 2004 Request for Clarification

74. At the October 7, 2004 Technical Conference, the Commission Staff proposed a procedure for addressing questions that E&Y might have regarding the auditing process. Specifically, the Commission Staff suggested that E&Y should submit questions in the form of a formal filing with the Commission, after which the Commission Staff would have a properly noticed telephone conference in the presence of all interested parties.

75. On December 8, 2004, E&Y submitted a filing requesting clarification of certain issues pertaining to E&Y’s task of verifying the claimants’ data and calculations of FCA amounts. The issues raised in E&Y’s filings are substantive in nature and thus cannot be resolved in a Staff technical conference. For this reason, we will address E&Y’s filing in this order.

⁹⁵ Request for Rehearing of City of Vernon at 1.

⁹⁶ *December 20 Order* at P 19.

76. E&Y requests clarification of three issues: (1) calculating the actual daily cost of gas; (2) determining the term of the purchase contract used in stacking gas purchases from shortest to longest term; and (3) determining the spot power sales volumes used to convert to gas burn volumes in calculating the actual daily cost of gas.

1. Calculation of the Actual Daily Cost of Gas

77. In its filing, E&Y states that the claimant calculations it has seen thus far exhibit at least four different methods of calculating the actual daily cost of gas, but that, in its opinion, only one method (Method A) is the most consistent and objective based on the Commission's orders. Method A divides all purchases within a given day into "tranches," or groupings of like-term. Thus, as E&Y explains, all one-day deals become a tranche, all three-day deals become a second tranche, *etc.* Once the tranches are established, a weighted average price per MMBTU of gas within each tranche is computed. The tranches are then stacked in order of shortest to longest term for purposes of matching the calculated weighted average price per MMBTU of gas for each tranche times the applicable volume burned from the tranche until the spot power demand for gas is met. Finally, a weighted average price per MMBTU of gas for the day is calculated by adding the total cost of gas burned for each tranche and dividing this sum total by the total volume burned to supply spot power sales into the CAISO and PX markets. Within any given tranche or grouping of like-term, all gas is priced at the average. There is no attempt to determine which particular gas purchase within the grouping might have been burned first.⁹⁷

78. E&Y states that Method B is similar to Method A, in that all purchases are divided into tranches or groupings of like term. E&Y explains, however, that once the prices are established, purchases within each tranche are sorted by price in descending order. According to E&Y, the fundamental difference between Methods A and B is that in Method B, the most expensive gas within any tranche that is not fully depleted is always deemed to be used first. E&Y also describes other methods used by claimants and argues that they are not consistent with current guidance from the Commission.⁹⁸

79. E&Y believes that Method A is consistent with the Commission's guidance to determine pricing on a daily basis, based on an average, and that it is also consistent with the instruction to deem the shortest-term gas to be first used for generation of power sold into the CAISO and PX spot markets. E&Y states that Method A also has the advantage

⁹⁷ See E&Y's Request for Clarification at 5-7.

⁹⁸ *Id.* at 7-10.

of consistency and predictability, in that every molecule of gas within a given term tranche is considered indistinguishable from the others in that same term tranche. E&Y believes that Method A is the most consistent and objective methodology.⁹⁹

80. The California Parties support E&Y's proposal to use Method A as the most consistent with the Commission's required methodology. Puget, LADWP and Powerex each disagree with E&Y and prefer Method B, *i.e.*, allocating the purchases within each tranche in order of highest to lowest price, arguing that this approach most closely follows the Commission's statement that "if the generator ha[d] sold one less MW of spot power in the ISO and PX markets, it would have bought one less unit of the shortest-term gas available."¹⁰⁰ AEPSCO submits that claimants should have some flexibility in how they prepare their FCA claims.

Commission Determination

81. We clarify that a weighted average, *i.e.*, Method A, should be used to determine the price per MMBTU of gas within each tranche, and that treating all gas of a given term equally is the most consistent and objective methodology. With respect to the contention that stacking by price within each tranche most closely resembles the Commission's "marginal" approach, we note that we cannot apply an incremental theory to associate individual contracts within the tranche to specific uses because there was no way to incrementally take gas from an individual contract to minimize cost because the gas within a tranche was purchased in advance of use.

2. Determination of the Term of the Purchase Contract Used in Stacking Gas Purchases From Shortest Term to Longest Term

82. E&Y states that some claimants determined the term of the transaction solely by the duration of the contract, without regard to interim changes in the daily volumes or daily prices, while others determined the term of the transaction based on variations in the requested volumes and prices. Under the second method, if a monthly transaction was based on daily index prices and/or the requested volume changed each day, it was classified as multiple 1-day and 3-day (for weekends) transactions throughout the month. According to E&Y, the second method generally results in better consistency in pricing among transactions in a like-term tranche, and more closely reflects the substance of the transaction.¹⁰¹

⁹⁹ *Id.* at 6 and 7.

¹⁰⁰ Puget Response to Request for Clarification of E&Y at 3 (citing *May 12 Order* at P 25).

¹⁰¹ E&Y Request for Rehearing at 12-13.

83. Puget, LADWP and Powerex agree with E&Y that the price duration within the contract should be used to define the term of the contract. According to these claimants, even though these contracts appear to be monthly, they function like daily contracts. The California Parties disagree, arguing that the term should be determined solely by the term of the contract.

Commission Determination

84. We clarify that if prices vary within a contract's term, the duration of the price level should be used as the contract term. To do otherwise would require averaging of costs of the term (by month, for example) and the resulting average monthly cost would not reflect the incremental cost at the time of use. We clarify that price duration and/or requested volume changes should define the placement of the contract within an appropriate like-term tranche.

3. Differing Methods of Determining Spot Power Sales Volumes Used to Determine Gas Burn Volumes in Calculating the Actual Daily Cost of Gas

85. In verifying that the gas burn volume used to make spot power sales into the CAISO and PX markets is complete, accurate and in compliance with the Commission's orders, E&Y is basing its calculations on converting spot power sales to gas burned, to determine how much of the gas purchase supply should be used when calculating the actual daily cost of gas. E&Y requests that the Commission clarify whether only mitigated CAISO and PX spot sales should be converted to gas volumes, or whether both mitigated and non-mitigated CAISO and PX spot sales should be converted to gas volumes, for purposes of calculating the actual daily cost of gas.¹⁰²

86. The California Parties and Powerex argue that both mitigated and non-mitigated sales volumes should be used. The California Parties argue that mitigated spot sales and unmitigated spot sales are equally "marginal," and that for calculating the average cost of gas, both mitigated and unmitigated sales should be used. Powerex argues that using only mitigated spot power sales in calculating the gas volume burned would imply that the shortest-term gas purchases were used first to generate spot power in hours and at prices that would later prove to be mitigated. Powerex argues that there is no logical foundation for assuming that such preferential use of gas could have been made at the time, and, therefore, both mitigated and non-mitigated total spot power sales to the CAISO and PX markets should be used in determining the volume of gas burned.

¹⁰² *Id.* at 16.

87. Puget and LADWP assert that only mitigated sales volumes should be used. Puget argues that the Commission has previously indicated that the FCA calculations incorporate only the cost of fuel used to make mitigated sales, and should again make plain that the cost of fuel used for non-mitigated sales has no place in the FCA calculations. LADWP argues that in order to be consistent with the purpose of the FCA, *i.e.*, to permit sellers to recover the actual fuel costs incurred to make sales that are subject to mitigation, only the volume of fuel associated with the mitigated sales should be used to determine the actual daily cost of fuel.

Commission Determination

88. We find that mitigated and non-mitigated sales to the CAISO and PX should both be used to determine how far into the gas supply stack the assignment process must go to determine the average unit cost of gas for FCA computation. We agree with Powerex that there is no logical reason to assume that generators would have used gas for non-mitigated spot power sales before mitigated sales. However, the volume of fuel used to calculate the FCA is only that volume associated with the mitigated sales.

Williams' Request for Rehearing

89. In the September 2 Order and the October 27 Order, the Commission denied Williams' request for Commission permission to engage a different auditor to verify its FCA claim. Specifically, we found:

... Williams' contention that it would not be able to utilize Ernst & Young's services due to potential conflict of interests to be without merit. For the second time on rehearing, Williams makes this contention and fails to provide any explanation other than that Ernst & Young performed work as Williams' auditor on other matters. Ernst & Young is one of the "big four" accounting firms that employs a great number of professional accountants to work on various projects. Ernst & Young is bound by professional ethics standards, and we expect that Ernst & Young will undertake every precaution to avoid any potential conflict of interests when performing the claim verification task for parties to the instant proceeding.¹⁰³ (*footnotes omitted*).

90. On rehearing of the October 27 Order, Williams again argues that the Commission erred in denying its rehearing request seeking the appointment of a different auditor to verify Williams' FCA claim due to potential conflict of interests. In support of its rehearing request, Williams has submitted affidavits by three employees of E&Y stating

¹⁰³ See *October 27 Order* at 11 .

that the performance of the FCA audit for Williams will constitute prohibited services of an independent auditor under the current law. Williams argues that by requiring it to use E&Y's services, the Commission would essentially deny Williams an opportunity to receive the FCA. Williams further contends that such special circumstances dictate that it is allowed to use a different auditor, which, it believes, would not prejudice other claimants.

Commission Determination

91. While in its previous filings Williams alleged the potential conflict of interest problem, this is the first time it has provided evidence in support of its allegation. In light of these special circumstances, we will grant Williams' rehearing request and allow it to use a different auditor to verify its FCA claim. Consistent with the process to select the original auditor, we direct that Williams and parties that have filed notices of opposition to Williams' FCA claim¹⁰⁴ must all agree on the choice of the independent auditor and inform the Commission of their choice within 10 days of issuance of this order. If parties are unable to agree, they are directed to submit a list of no more than three proposed auditors to the Commission, from whom the Commission will choose the auditor for the parties. Once the Commission approves the auditor for Williams, Williams must then comply with the timelines established in this order. Specifically, Williams will have two weeks to prepare its claim and supporting documentation for submission to E&Y, after which E&Y will have 120 days to audit Williams' claim.

Mirant's Request for Waiver of the Audit Requirement

92. On February 4, 2005, Mirant Americas Energy Marketing, LP and California Parties (Mirant) filed a joint motion requesting certain exceptions pertaining to Mirant's FCA claim. Specifically, Mirant requests a stay of the deadline for submitting its FCA claim to the CAISO until the Commission acts on Mirant's settlement with the California Parties and the Commission's Office of Market Oversight and Investigation. The proposed settlement would settle all claims in respect to Mirant in the Refund Proceeding, including Mirant's FCA claim. According to Mirant, the settlement also provides a mechanism for other parties to opt-in to the settlement.

93. In addition, Mirant requests that, in the event that Mirant's settlement is approved by the Commission, the Commission exempt Mirant from the requirement to have its FCA claim verified by the auditor. Mirant explains that the requested waiver of the audit requirement will permit the parties to devote their attention and resources to

¹⁰⁴ Those parties are: City of Pasadena, California; Powerex; City of Seattle, Washington; Cities; Vernon; Californians for Renewable Energy, Inc.; NCPA; Southern Cities; and Enron.

implementing the terms of the settlement and allow them to avoid unnecessary expenses associated with the audit. Seven entities (LADWP, Powerex, NCPA, Enron, Southern Cities, Cities and Vernon) filed comments in opposition to Mirant's request for a waiver of the audit requirement. NCPA and Powerex also oppose any delay in preparation and submission of Mirant's FCA claim.

Commission Determination

94. Consistent with the September 2 Order granting a similar request for stay by Duke Energy North America, LLC and Duke Energy Trading and Marketing L.L.C.,¹⁰⁵ we will grant Mirant a temporary stay. Mirant may delay submitting its FCA claim while the settlement is pending before the Commission. Once the Commission acts on Mirant's settlement, Mirant must then comply with the timelines established in this order. Specifically, Mirant will have two weeks to prepare its claim and supporting documentation for submission to E&Y, after which E&Y will have 120 days to audit Mirant's claim.

95. We will, however, deny Mirant's request for waiver of the audit requirement at this time. In the September 2 Order, we ruled that a settling party is exempted from the audit requirement only if its claim is not opposed by parties that have not joined the settlement. We also held that parties have 10 days after the Commission's approval of the settlement to notify the Commission of their opposition to the settling party's FCA claim. Because the terms of Mirant's settlement have not yet been approved by the Commission, we cannot act on Mirant's request for a waiver at this time. We reiterate in this order that any party deciding not to opt-in to Mirant's settlement, as approved by the Commission, must notify the Commission within 10 days of the Commission order approving the settlement whether it will oppose Mirant's FCA claim.¹⁰⁶ Mirant's FCA claim will not require verification by the auditor only if no party expresses an intent to oppose Mirant's claim within 10 days of the Commission's approval of the settlement. Finally, we remind Mirant and all other generators whose preparatory and auditor costs would exceed their expected benefits from submission of FCA claims, that they are free to forego their FCA claims.

¹⁰⁵ See *September 2 Order* at P 24.

¹⁰⁶ See *Id.* at P 23.

Audit Costs

96. In the September 2 Order, we directed generators making FCA claims to bear all audit costs. The September 2 Order noted that generators, in their Auditor Proposal Filing,¹⁰⁷ had originally informed the Commission that E&Y's audit fees would be allocated among each generator on a *pro rata* basis and would constitute 1-3 percent of each individual claim. The September 2 Order also stated that a generator may choose to forego filing an FCA claim if it believes that the audit costs would exceed the benefit of an FCA offset.

97. In subsequent rehearing requests of the September 2 Order and the September 24 Order, Cities argued that the Commission's appointment of E&Y was based on inaccurate assumptions regarding E&Y's fees. Specifically, Cities asserted that E&Y did not plan to bill generators on a *pro rata* basis and that E&Y's cost estimates were much greater than 1-3 percent of an individual FCA claim. Consequently, Cities requested that the Commission allow generators with small, simple FCA claims to have their claims reviewed by a certified public accounting firm of their choice. Alternatively, Cities requested that the Commission allocate audit costs in proportion to the dollar amount of the claim and cap the costs for any generator at two percent of its claim (absent verifiable, material data problems).

98. On rehearing, the Commission reiterated that the use of one auditor, rather than many, would allow for increased efficiency and consistency in reviewing, verifying and evaluating the FCA claims.¹⁰⁸ The Commission also directed E&Y to provide an explanation to the claimant if its actual charges exceed the original estimate of 1-3 percent of a claim, as provided in the Auditor Proposal Filing. More recently, the Commission issued separate letters directing the Cities and E&Y to indicate the status of costs incurred to audit Cities' FCA claims.

99. In their filed reply to the data request, Cities state that their concern over audit costs has not been resolved. SVP explains that, because E&Y's initial estimate of \$75,000 is almost 50 percent of SVP's claim, it may forego its FCA claim. According to SVP, the E&Y audit costs would greatly exceed its costs of preparing a claim for cost-based recovery. Redding states that, while it had retained E&Y, it later asked E&Y to stop work altogether when Redding received a bill for \$35,000, which is \$10,000 more than a required stopping point previously established by Redding. Cities conclude that,

¹⁰⁷ Designated Claimant's Proposed Fuel Cost Allowance Auditor Filing, Docket No. EL00-95-000, Appendix A (June 14, 2004) (Auditor Proposal Filing).

¹⁰⁸ See *October 27 Order* at P 19 and 20.

although they did not oppose the Proposed Auditor Filing, they did not expressly support selection of E&Y, nor did they waive their right to challenge or seek rehearing of the auditor costs.

100. In its response to the data request, E&Y states that its original fee estimate of 1-3 percent of the original FCA claims is still valid, but only as a percentage of all claims in the aggregate. E&Y asserts that in initial discussions with claimants, it pointed out that a certain amount of audit work would be independent of the size or complexity of a claim and that the percentage relationship between E&Y's fees and the size of certain smaller claims could be substantially higher than 1-3 percent – in one case potentially over 50 percent. In addition, E&Y asserts that it made claimants aware that only common time would be subject to a *pro rata* allocation.¹⁰⁹ E&Y argues that 16 claimants, including Redding and SVP, understood these issues when they submitted the Proposed Auditor Filing, which advocated E&Y as the auditor.

101. In response to Cities' proposal to allocate audits costs in proportion to each generator's claim and cap the costs at 2 percent, absent verifiable, material data problems, E&Y argues that it has already encountered numerous material data problems. In particular, E&Y alleges that several claims are "unnecessarily complex" and/or provide little or no supporting documentation. Further, E&Y argues that allocating all audit costs (and not just common time) in proportion to the claim penalizes those claimants who have prepared their claims in a thorough and accurate manner.

102. The City of Anaheim, California, AEPCO, NCPA and Puget filed supplementary letters to voice their concerns over the high costs that E&Y has already billed, given the limited review that E&Y has conducted to date, and the apparent lack of control over the final audit costs. AEPCO believes that the key factors to these high costs are: (1) the high level of E&Y's basic fee structure; (2) E&Y's lack of familiarity with AEPCO's situation; and (3) the unrealistic time schedule specified by the Commission.

103. In their follow-up letter, E&Y argues that tight deadlines, the large number of claimants, and the potential magnitude of the FCA claims has made its audit work more expensive. E&Y adds that its audit of the FCA claims is different from a financial statement audit, which is performed using Generally Accepted Accounting Principles and rely upon a claimant's internal control structure. E&Y argues that these aspects make a financial statement audit more efficient and less expensive to perform. E&Y also reiterates that once all work is completed, the common time will be re-allocated to reflect a *pro rata* allocation according to actual hours billed for each of the parties.

¹⁰⁹ E&Y notes that it has initially allocated common time equally across all claimants, but will reallocate this common time at the completion of its work on a *pro rata* basis according to actual hours billed for each of the parties.

104. E&Y suggests that audit costs can be minimized going forward by extending the deadline for submission of audited claims to the CAISO. E&Y proposes that once all outstanding issues in the FCA proceeding have been resolved, parties should adhere to a two-week deadline to submit complete data support for their FCA calculations to E&Y. After this two-week period, E&Y suggests that the Commission should allow 90-120 days for E&Y to complete its audit. E&Y further proposes that failure to comply with this two-week deadline should result in an absence of any guarantee by E&Y that a claimant's FCA would be audited and available for submission to the CAISO by the Commission-imposed submission deadline.

Commission Determination

105. We will again deny the Cities' request to use a separate auditor to review their FCA claims, due to the overarching need for consistency and uniformity in evaluation of FCA claims. To the extent possible, all claimants must be audited equivalently to ensure fairness in the claim process. We refer to our October 27 Order, which states:

[I]t is our belief that the use of one auditor, rather than many, will allow for increased efficiency and consistency in reviewing, verifying and evaluating the fuel cost allowance claims...We believe that verification by the same auditor of all claims calculated in accordance with the same uniform standards will warrant consistency and uniformity.¹¹⁰

106. We also deny the Cities' proposal to cap audit costs. Such a cap could truncate E&Y's review and thus invalidate the entire auditing process. In addition, the Cities have failed to justify its proposal to allocate total audit costs in proportion to the dollar amount of the FCA claim. Such allocation could result in subsidization by large FCA claimants of small FCA claimants' baseline audit costs. We note that E&Y already has a process in place for allocating certain appropriately shared auditing expenses. Given the nature of the auditing process and E&Y's assertion that there is great variance in the accuracy and completeness of claims that have been submitted for its review, further averaging of auditing expenses is not warranted.

¹¹⁰ See *October 27 Order* at P 20.

107. We believe that our decision to appoint E&Y as the sole auditor is just and reasonable, provided E&Y's final audit fee is 1-3 percent of all claims.¹¹¹ As E&Y explains, it is reasonable that smaller claimants pay proportionately more because this is consistent with the private auditing process and fee structure. A different auditor would most likely establish a similar pattern of costs. We again remind claimants who believe their audit fees are too high that they have the option to forego their FCA and/or file for cost-based recovery. We note, however, that the cost-based filings may have their own associated costs.

108. The Commission, nevertheless, is concerned about the cost of the audits. We acknowledge that our deadlines for submission of FCA claims may have played a role in contributing to higher fees. Consequently, to minimize audit costs prospectively, we will accept E&Y's proposal to extend the deadline for submission of FCA claims. We believe that all outstanding issues with regard to the calculation and submission of FCA claims have been addressed by the Commission. We therefore direct all claimants to submit their FCA claims to E&Y within two weeks of the date of issuance of this order. At that time, E&Y will have 120 days to review the claims before they are submitted to the CAISO. Any generator that submits its FCA claim to E&Y after the two-week deadline forfeits any guarantee that E&Y will complete the audit of its FCA claim on time for the submission to the CAISO.

109. Finally, in light of E&Y's complaint regarding the material data problems it has already encountered, we caution claimants to prepare their FCA claims carefully. The Commission believes that it is the responsibility of each generator to submit an FCA claim that is clear and forthright, and strives to conform to the Commission's methodology. We believe such claims would cost less to audit. By the same token, we direct E&Y to continue to work with claimants, particularly, those with small FCA claims, to contain auditing costs.

Commission orders:

(A) Further clarification is hereby given on certain aspects of the methodology for calculating FCA amounts.

(B) The Commission hereby denies rehearing and grants clarification of the September 24 Order, as discussed in the body of this order.

¹¹¹ We note that the auditing expenses are justified by the necessity of consistency in auditing, even if the ultimate fee is 1-3 percent of all claims rather than 1-3 percent of each claim.

(C) Williams' request for rehearing of the October 27 Order is hereby granted for the reasons discussed in the body of this order.

(D) The Commission hereby grants in part and denies in part rehearing and provides clarification of the December 20 Order, as discussed in the body of this order.

(E) Williams and parties that have filed notices of opposition to its claim are hereby directed to inform the Commission of their choice of an independent auditor to verify Williams' FCA claim within 10 days of issuance of this order.

(F) The deadline for submission of FCA claims to the CAISO is hereby extended to 2 weeks plus 120 days, or 134 days within the date of issuance of this order; the FCA claimants are hereby requested to submit to E&Y their FCA calculations and supporting documentation, as required by E&Y, within 2 weeks of the date of issuance of this order.

(G) The parties are hereby directed to notify the Commission of their intent to seek an FCA within 2 weeks of the date of issuance of this order, *i.e.*, by the time they are to submit their FCA claim calculations and supporting documentation to E&Y.

(H) The Commission hereby grants in part and denies in part Mirant's request for waiver.

By the Commission. Commissioner Kelly not participating.

(S E A L)

Linda Mitry,
Deputy Secretary.