

138 FERC ¶ 61,092  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Philip D. Moeller, John R. Norris,  
and Cheryl A. LaFleur.

San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services      Docket Nos. EL00-95-265

Investigation of Practices of the California Independent System Operator Corporation and the California Power Exchange      EL00-98-245

California Independent System Operator Corporation      ER03-746-040

ORDER DENYING REHEARING

(Issued February 3, 2012)

1. In this order, we deny the California Parties' (Cal Parties)<sup>1</sup> request for rehearing of an order issued on July 15, 2011 that accepted the preparatory rerun compliance filings of the California Independent System Operator Corporation (CAISO) and the California Power Exchange Corporation (CalPX), and provided guidance to CalPX on a number of issues related to the finalization of refund calculations.<sup>2</sup>

**I. Background**

2. The preparatory rerun compliance filings set a baseline for computing refunds in the California refund proceeding, which stems from the Western energy crisis of 2000-2001. The evolution of the preparatory rerun compliance filing procedures and the

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<sup>1</sup> For the purposes of this rehearing request, Cal Parties are the People of the State of California *ex rel.* Kamala D. Harris, Attorney General; the California Public Utilities Commission; Pacific Gas and Electric Company; and Southern California Edison Company.

<sup>2</sup> *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 136 FERC ¶ 61,036 (2011) (Preparatory Rerun Compliance Order).

relevant tariff adjustments has been discussed at length in other proceedings,<sup>3</sup> so only the relevant background details are described briefly here. In March 2003, the Commission issued an order directing CAISO and CalPX to make certain adjustments to their respective refund calculations and complete a preparatory rerun of the settlements and invoices in their markets.<sup>4</sup> In response, CAISO and CalPX filed amendments to their respective tariffs to segregate energy crisis transactions so that a baseline accounting could be established for the CAISO and CalPX markets for the entire Refund Period.<sup>5</sup>

3. Subsequently, in a related, but separate, refund proceeding, the United States Court of Appeals for the Ninth Circuit held that the Commission did not have the jurisdiction to order governmental entities to pay refunds.<sup>6</sup> On remand, the Commission concluded that, because non-jurisdictional entities would not have any refund liability, they should receive any remaining past due amounts owed to them for sales made during the Refund Period, but noted that it would not order disbursements of these amounts until the Commission: (1) approved preparatory rerun compliance filings by CAISO and CalPX; and (2) ruled on filings by entities seeking designation as non-public utilities.<sup>7</sup> The Commission issued its order regarding non-public utility designations in 2008.<sup>8</sup>

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<sup>3</sup> *Cal Indep. Sys. Operator Corp.*, 105 FERC ¶ 61,203 (2003) (accepting CAISO Amendment No. 51, which made certain tariff revisions to facilitate the performance of the preparatory rerun); *Cal. Power Exch. Corp.*, 105 FERC ¶ 61,273 (2003) (amending the PX tariff to align the PX's preparatory rerun procedures with those included in CAISO Amendment No. 51 (PX Amendment No. 23)).

<sup>4</sup> *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 102 FERC ¶ 61,317 (2003).

<sup>5</sup> The Refund Period is defined as the period from October 2, 2000 through June 20, 2001. See *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Servs.*, 95 FERC ¶ 61,418 (2001).

<sup>6</sup> *Bonneville Power Admin. v. FERC*, 422 F.3d 908, 920 (9<sup>th</sup> Cir. 2005) (*Bonneville*).

<sup>7</sup> *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 121 FERC ¶ 61,067, at P 42, 57 (2007) (*Bonneville Remand Order*), *order on reh'g*, 125 FERC ¶ 61,297, at P 27 (2008) (*Bonneville Remand Rehearing*).

<sup>8</sup> *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 125 FERC ¶ 61,297 (2008).

4. CAISO submitted its preparatory rerun compliance filing on April 16, 2010, and CalPX followed with its compliance filing on May 4, 2010. In its filing, CalPX requested Commission guidance on a number of issues related to the disbursement of past due principal amounts to the non-public utilities and the final refund calculations. In the Preparatory Rerun Compliance Order, the Commission accepted the CAISO and CalPX compliance filings and provided the requested guidance.

5. On August 15, 2011, Cal Parties filed a request for rehearing. Cal Parties' rehearing request does not challenge the Commission's acceptance of the preparatory rerun compliance filings, but challenges the guidance provided by the Commission on issues related to a \$5 million deficit in CalPX's settlement clearing account, the appropriate interval for netting purchases and sales, and the need for additional security to ensure that governmental entities pay any amounts owed.<sup>9</sup>

## II. Discussion

### A. Allocation of \$5 Million CalPX Deficit

6. In the Preparatory Rerun Compliance Order, the Commission found that a \$5 million deficit in CalPX's settlement clearing account was attributable to an accounting error on the part of CalPX. The Commission found that, given the delay in discovering that the funds had erroneously been transferred from the settlement clearing account to the operating account, it appeared unlikely that CalPX would "be able to determine how, precisely, this \$5 million was used, separate and apart from other funds in the operating account during the same period."<sup>10</sup> Therefore, based on the circumstances surrounding the deficit and the Commission's previous treatment of similar issues,<sup>11</sup> the Commission found that the most efficient and equitable solution was

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<sup>9</sup> Cal Parties August 15, 2011 Request for Rehearing (Cal Parties Rehearing Request).

<sup>10</sup> Preparatory Rerun Compliance Order, 136 FERC ¶ 61,036 at P 59.

<sup>11</sup> *E.g.*, Bonneville Remand Order, 121 FERC ¶ 61,067 at P 39 (allocating refund shortfall based on net refund recipients' *pro rata* share of total net refunds); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 110 FERC ¶ 61,336, at P 25 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 105 FERC ¶ 61,066, at P 105 (2003) (allocating the interest shortfall based upon the final net interest position for each participant in relation to total amount of the interest shortfall)) (Interest Shortfall Order).

to treat the settlement account deficit “like a refund shortfall and allocate the shortfall among all net refund recipients in proportion to their final refund positions.”<sup>12</sup>

7. On rehearing, Cal Parties argue that the Commission’s decision regarding the allocation of the \$5 million deficit is inconsistent with prior Commission orders related to the allocation of refund shortfalls. Cal Parties contend that, despite the Commission’s statement that the deficit should be allocated to “all market participants,” the Preparatory Rerun Compliance Order allocates the deficit, without reasoned explanation, to net buyers alone. Cal Parties also assert that in allocating the costs solely to buyers, who were not the cause of the deficit, the Commission violates basic cost causation principles.<sup>13</sup> Cal Parties claim that here, the Commission replicates errors it made in an earlier case, related to the allocation of CalPX’s wind-up costs, that were ultimately reversed by the United States Court of Appeals for the D.C. Circuit.<sup>14</sup>

8. Cal Parties also allege that imposing this deficit on refund recipients may violate a Commission-approved settlement surrounding the allocation of CalPX’s wind-up charges.<sup>15</sup> Cal Parties explain that the Wind-up Settlement treats costs differently, depending upon when they were incurred and how the funds were used. Further, Cal Parties assert that if, and to the extent that, the \$5 million deficit costs are not subject to the Wind-up Settlement, the deficit should be allocated pursuant to the CalPX tariff. Thus, Cal Parties argue that allocation of the deficit is dependent on when and how the funds were actually used, making the Commission’s decision regarding the allocation arbitrary, capricious, and an abuse of discretion.

### **Commission Determination**

9. We deny rehearing on this issue. First, we reject Cal Parties’ claim that allocation of the deficit to net refund recipients is inconsistent with prior Commission orders. In the Preparatory Rerun Compliance Order, the Commission stated that it has previously determined that “when shortfalls have arisen due to CalPX’s own actions, and were not primarily attributable to the buyers or sellers ... the most equitable manner of addressing

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<sup>12</sup> Preparatory Rerun Compliance Order, 136 FERC ¶ 61,036 at P 59.

<sup>13</sup> Cal Parties Rehearing Request at 7-8.

<sup>14</sup> *Id.* at 8 (citing *Pacific Gas and Elec. Co. v. FERC*, 373 F.3d 1315 (D.C. Cir. 2004) (CalPX Wind-up Charge Order)).

<sup>15</sup> CalPX Wind-Up Charge Settlement Agreement, Docket No. ER05-167-000, *et al.*, at § 15 (filed September 1, 2005) (Wind-up Settlement). The uncontested settlement was approved in *Cal. Power Exchange Corp.*, 113 FERC ¶ 61,017 (2005).

the shortfall was to allocate it on a *pro rata* basis among all market participants.”<sup>16</sup> Specifically, the Commission was referencing a case in which the interest rate actually earned by the CalPX on monies held in the CalPX settlement account was less than the interest rate required by the Commission’s regulations. In that case, the loss was allocated among all market participants based on their net interest positions in relation to the total interest shortfall in recognition of the fact that most market participants were both buyers and sellers that would owe or be owed interest. As a result, the financial impact of the interest shortfall allocation was not limited to just net refund recipients or just net sellers with refund liability. Therefore, the Commission found that an allocation among all market participants was appropriate.<sup>17</sup> Here, however, only net refund recipients will be affected by a reduction in the total amount of refunds available. Thus, we find that the result here is consistent with the result in the CalPX interest shortfall proceeding because the parties with a financial stake in the outcome have been included in the allocation.

10. The result here is also consistent with the refund shortfall allocation addressed in the *Bonneville* remand proceeding. When faced with the challenge of allocating refund shortfalls,<sup>18</sup> the Commission found that a *pro rata* reduction in the amount that would be received by net refund recipients was the most equitable allocation method. The refund shortfall was allocated only to net refund recipients (net buyers) because they are the only market participants that will be financially affected by the reduction in the total amount of available refunds. The Commission found that its approach to allocating the refund shortfall was consistent with how the Commission decided to allocate the interest shortfall, i.e., allocating the shortfall in a fair and proportional manner.<sup>19</sup>

11. As noted in the Preparatory Rerun Compliance Order, the circumstances surrounding the deficit here are similar to those surrounding the *Bonneville* refund shortfall.<sup>20</sup> Here, as with the *Bonneville* refund shortfall, the Commission is faced with

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<sup>16</sup> Preparatory Rerun Compliance Order, 136 FERC ¶ 61,036 at P 59.

<sup>17</sup> *See* Interest Shortfall Order, 110 FERC ¶ 61,336 at P 25, 36, 56.

<sup>18</sup> As a result of the holding in *Bonneville*, the total amount of refunds that otherwise would have been paid by governmental entities and other non-public entities for their sales into the CAISO and CalPX markets during the Refund Period had to be reflected in the reduced refund amounts that buyers will receive.

<sup>19</sup> *See* Bonneville Remand Order, 121 FERC ¶ 61,067 at P 39; Bonneville Remand Rehearing Order, 125 FERC ¶ 61,214 at P 10, 11.

<sup>20</sup> Preparatory Rerun Compliance Order, 136 FERC ¶ 61,036 at P 59, n.92.

an unanticipated reduction in the total amount of available refunds that is not attributable to the actions of market participants, but will only have a financial impact on net refund recipients. Thus, we find that the allocation of the \$5 million deficit was appropriately modeled after the refund shortfall allocation established in the Bonneville Remand Order, and is consistent with prior Commission orders on this issue.

12. We find that Cal Parties' reliance on principles of cost causation is misplaced. The Commission has taken the approach it has in allocating the interest and refund shortfalls specifically because these shortfalls were not attributable to any action on the part of market participants.<sup>21</sup> The concept of cost causation was not applicable to interest or refund shortfall allocation methodologies because the market participants whose interest or refunds must be reduced were not the cause of the shortfalls. Further, we find that the CalPX Wind-up Charge Order, cited by Cal Parties in support of their cost causation argument, is not relevant here. That order dealt with the allocation of new charges related to CalPX's wind-up costs. The Ninth Circuit held that the Commission's approval of an allocation method that based the new charges on account balances for past services violated cost causation principles because outstanding account balances bore no relationship to each customer's stake in CalPX's wind-up activities.<sup>22</sup> Here, we are not dealing with new charges; we are merely addressing a refund reduction, caused by CalPX itself, in the total amount available for refunds in the CalPX settlement clearing account. Based on the facts and circumstances presented in this case, we continue to find that the *pro rata* method used to allocate the refund shortfall arising out of *Bonneville*, whereby the reduction of funds available for refunds is allocated among net refund recipients on the basis of their final net refund positions, continues to provide the most equitable and efficient allocation of the \$5 million deficit in the CalPX settlement clearing account.

13. We also reject Cal Parties' contention that allocating the \$5 million shortfall in the manner set forth in the Preparatory Rerun Compliance Filing may violate the Wind-up Settlement. Section 15 of the Wind-Up Settlement expressly states:

issues relating to the collateral held by the PX, or *arising from the FERC Refund Proceeding in San Diego Gas & Elec. Co., et al., Docket No. EL00-95-000, et al., and in Coral Power, L.L.C., et al., Docket No. EL01-36-000, et al., or in any related appeals or other civil proceedings, are not included within the issues resolved herein, and such issues are expressly included in this reservation of rights, without*

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<sup>21</sup> See Interest Shortfall Order, 110 FERC ¶ 61,336 at P 25; Bonneville Remand Order, 121 FERC ¶ 61,067 at P 39.

<sup>22</sup> CalPX Wind-up Charge Order, 373 F.3d at 1321.

limitation as to other issues that also may be included. Additionally, nothing in this Settlement is intended to resolve or address billing disputes (*including, but not limited to disputes arising from the FERC rerun process*) or other similar payment adjustments applicable to transactions conducted through the PX market.<sup>23</sup>

According to CalPX, the \$5 million at issue here arose over a billing dispute involving subscription fees that had been issued to two customers and were subsequently reversed, but only after the amount invoiced had been transferred from the settlement clearing account to the operating account. CalPX stated that it discovered the accounting error in the course of processing the refund rerun and reconciling the cash in the settlement clearing account with the refund calculations.<sup>24</sup> Both of these circumstances appear to be contemplated by section 15 of the Wind-up Settlement. Cal Parties do not dispute the origin of the \$5 million deficit or the circumstances surrounding its discovery of the accounting error. We find, therefore, that the \$5 million deficit falls squarely within the reservations specified in section 15 of the Wind-Up Settlement, meaning that the issue of how to allocate the resulting shortfall was not resolved as part of the settlement. As such, the allocation method set forth in the Preparatory Rerun Compliance Order does not violate the Wind-up Settlement.

#### **B. Hourly Netting**

14. In the Preparatory Rerun Compliance Order, the Commission found that in order to calculate the total refund shortfall resulting from *Bonneville*, CalPX, like CAISO, should net sales and purchases over hourly intervals. The Commission explained that “the reasons supporting the Commission’s determination to require hourly netting for the CAISO apply with equal force” to CalPX.<sup>25</sup> The Commission stated that it required hourly netting for CAISO based on a tariff requirement pertaining to how the CAISO markets were settled.<sup>26</sup> The Commission determined that the CalPX tariff also mandated

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<sup>23</sup> Wind-Up Settlement at § 15 (emphasis added).

<sup>24</sup> CalPX May 4, 2010 Preparatory Rerun Compliance Filing, Docket No. EL00-95-244, *et al.*, at 10.

<sup>25</sup> Preparatory Rerun Compliance Order, 136 FERC ¶ 61,036 at P 40.

<sup>26</sup> *Id.* (citing *Bonneville Remand Rehearing*, 125 FERC ¶ 61,214 at P 19).

an hourly settlement period and, therefore, directed hourly netting of purchases and sales in order to reflect the period during which the obligation was incurred.<sup>27</sup>

15. On rehearing, Cal Parties repeat many of their previous arguments regarding the appropriate interval for netting, arguing that the Commission's decision to impose hourly netting in the CalPX market is arbitrary, capricious, and an abuse of discretion. Cal Parties again claim that this issue "affects millions of dollars of ratepayer money,"<sup>28</sup> and continue to insist that hourly netting is not consistent with the CAISO and CalPX tariffs and conflicts with prior Commission decisions.<sup>29</sup> Cal Parties reiterate that, although CAISO and CalPX initially netted transactions on an hourly basis, transactions were subsequently netted for the trading day, and then further netted for the trading month in order to produce an invoice. Cal Parties assert that the CAISO and CalPX tariffs make clear that period-wide netting is required, pointing to CAISO Amendment No. 51 and CalPX Amendment No. 23, which walled off the transactions during the Refund Period. Cal Parties contend that those amendments "were implemented to permit a walled-off settlement process, where the entire Refund Period would be rerun as a whole ... with all amounts netted period wide."<sup>30</sup> Cal Parties also argue that these amendments implemented "the Commission's repeated calls for period-wide netting."<sup>31</sup> Cal Parties contend that even the Preparatory Rerun Compliance Order requires the netting of the past due principal amounts owed to the governmental entities across markets for the entire Refund Period.<sup>32</sup>

16. Cal Parties argue that hourly-only netting discriminates against ratepayers because it improperly permits governmental entities to receive unlawfully excessive rates charged

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<sup>27</sup> *Id.* (citing CalPX Tariff, § 6.7.2).

<sup>28</sup> Cal Parties Rehearing Request at 10.

<sup>29</sup> *Id.* at 10-14.

<sup>30</sup> *Id.* at 12.

<sup>31</sup> *Id.* at 12-13 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 105 FERC ¶ 61,066, at P 180 (2003) ("amounts owed both by and to parties, as determined in [the refund proceedings] will be offset against each other, and only the net result of this offset will flow to or from the parties.") (October 16, 2003 Order); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 115 FERC ¶ 61,171, at P 34 (2006) (rejecting requests to allocate cost offset amounts to separate markets, scheduling intervals or time periods) (May 12, 2006 Order)).

<sup>32</sup> *Id.* at 13.

for sales made in one hour, while collecting refunds if that same entity happened to buy power in another hour, or in a different market in that same hour. Cal Parties assert that period-wide netting would reduce the burden on ratepayers by reducing the overall amount of the refund shortfall caused by the fact that the Commission cannot order the governmental entities to pay refunds.<sup>33</sup>

17. Cal Parties also contend that netting across markets is necessary to protect ratepayers and request the Commission to clarify that amounts in the CAISO and CalPX markets will be netted against each other, consistent with the ruling in the Preparatory Rerun Compliance Order that the markets should be cleared jointly.<sup>34</sup>

### **Commission Determination**

18. We deny Cal Parties' request for rehearing on this issue. First, the Commission previously found that the relevant CAISO tariff during the Refund Period, the CAISO Settlement and Billing Protocols Tariff (SABP Tariff), provided that CAISO "will calculate for each charge the amounts payable by the relevant [s]cheduling [c]oordinator ... for *each Settlement Period* of the trading day, and amounts payable to that [s]cheduling [c]oordinator for each charge *for each Settlement Period* of that trading day and shall arrive at a net amount payable for each charge by or to that [s]cheduling [c]oordinator for each charge for that trading day."<sup>35</sup> Moreover, the Commission also noted that, under the CAISO Tariff, "settlement period" is defined as beginning at the start of an hour and ending at the end of the hour."<sup>36</sup> Thus, the Commission found that the hourly netting process is consistent with how the CAISO markets were settled at the time under the SABP Tariff and is thus consistent with market participants' expectations.<sup>37</sup> In the Preparatory Rerun Compliance Order, the Commission found that the CalPX tariff also used hourly settlement periods and, therefore, concluded that the same rationale used to support hourly netting with respect to CAISO also requires CalPX to use hourly netting.<sup>38</sup> Cal Parties have provided no evidence refuting this conclusion.

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 14.

<sup>35</sup> CAISO SABP Tariff, § 3.2.1 (emphasis added).

<sup>36</sup> Bonneville Remand Rehearing, 125 FERC ¶ 61,214 at P 18.

<sup>37</sup> *Id.* P 19.

<sup>38</sup> Preparatory Rerun Compliance Order, 136 FERC ¶ 61,036 at P 40.

19. Additionally, we find that Cal Parties' reliance on trading periods and invoicing procedures to support the concept of netting over the entire Refund Period, a nine-month interval, is misplaced. The fact that the CAISO and CalPX tariffs provide for netting in certain situations over an interval shorter than an hour or that charges are first netted for the hour and are later summed over the day and over the entire month to generate the monthly invoice offers no support for Cal Parties' contention that the netting interval should be nine months long. Regardless of how charges netted on an hourly basis are subsequently rolled into a monthly invoice, CalPX netted its sales and purchases over hourly intervals during the Refund Period, consistent with its relevant tariff provisions at the time. We find that Cal Parties fail to cite any specific tariff provisions which would support their proposition that netting should take place over the entire nine-month Refund Period.

20. We also find that Cal Parties' references to CAISO Amendment 51 and CalPX Amendment 23 are misplaced and do not support Cal Parties' contention that netting across the entire Refund Period is required. These amendments revised the CAISO and CalPX tariffs to segregate transactions that occurred during the Refund Period from current transactions for purposes of performing the settlement reruns and invoice adjustments that were the necessary prerequisites to calculating final refunds. These amendments did not address the question of how to calculate the total net refunds owed by each governmental entity.

21. Cal Parties' references to prior Commission orders are equally unpersuasive. In the October 16, 2003 Order, the Commission merely affirmed that amounts owed to sellers would be netted out against refunds owed to buyers before refunds would be paid out.<sup>39</sup> The Commission did not specify an interval in which refunds should be netted. Cal Parties also misinterpret the May 12, 2006 Order. In that order, the Commission noted that the refunds were "calculated on a net dollar basis, netting each market participant's refund obligation (amount of energy sold at prices above the [mitigated market clearing pricing]) with its refund receipt (amount of energy purchased at prices above the [mitigated market clearing price])."<sup>40</sup> The May 12, 2006 Order simply does not address the period over which the refunds should be netted. Thus, Cal Parties argument that hourly netting is inconsistent with previous refund orders misreads those orders.

22. Finally, we find that Cal Parties have failed to provide support for their claims regarding the financial impact this issue may have on ratepayers. Throughout this proceeding, Cal Parties have repeatedly asserted that netting on an hourly basis, rather

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<sup>39</sup> October 16, 2003 Order, 105 FERC ¶ 61,066 at P 180.

<sup>40</sup> May 12, 2006 Order, 115 FERC ¶ 61,171 at P 34.

than over the entire Refund Period, would result in massive refund shortfalls but have not offered any data or documentation to substantiate these assertions. Moreover, our decision to require hourly netting was based on a straight-forward interpretation of the CAISO's and CalPX's then-applicable tariffs. Cal Parties have failed to raise any argument that refutes this interpretation. Therefore, Cal Parties request that we reconsider this issue is denied.

23. Regarding the need to net purchases and sales across markets, we find that the Commission has already addressed this issue. In the Preparatory Rerun Compliance Order, the Commission agreed with Cal Parties that the CAISO and CalPX markets should be financially cleared together. To that end, the Commission directed CalPX to net purchases and sales of the governmental entities across the CAISO and CalPX markets prior to releasing the principal funds to the governmental entities.<sup>41</sup> As a result, we find that further clarification on this issue is not necessary.

### **C. Amounts Owed by Governmental Entities**

24. In the Preparatory Rerun Compliance Order, the Commission found that any balance owed by the governmental entities to CalPX must be paid when the past due principal amounts are disbursed.<sup>42</sup> However, the Commission declined to require any additional security to guard against potential future shortfalls that may arise in relation to the governmental entities. The Commission explained that it had set only two preconditions to the release of these funds (the rulings on non-public entity designations and acceptance of the preparatory rerun compliance filings), and stated that upon acceptance of the compliance filings, both conditions would have been satisfied. The Commission also observed that it had previously considered and denied Cal Parties' requests to require CAISO and CalPX to retain the collateral of the governmental entities until the refund calculations were complete. The Commission found that netting any future shortfalls or balances owed by governmental entities against the interest owed at the end of the refund process is an efficient method for achieving a final settlement.<sup>43</sup>

25. On rehearing, Cal Parties continue to insist that the Commission should provide for reserves as a reasonable and necessary measure to protect against liabilities that may go unpaid if funds are not held back by CalPX. Cal Parties argue that the Commission's decision not to require extra security conflicts with the principle the Commission has

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<sup>41</sup> Preparatory Rerun Compliance Order, 136 FERC ¶ 61,036 at P 30.

<sup>42</sup> *Id.*

<sup>43</sup> Preparatory Rerun Compliance Order, 136 FERC ¶ 61,036 at P 43.

followed in past decisions<sup>44</sup> and fails to consider the magnitude of unfunded potential liabilities that may occur absent the existence of sufficient reserves. Cal Parties claim that the universe of potential shortfalls includes not just interest shortfalls, but also potential future seller bankruptcies. Cal Parties assert that it would be unfair to excuse governmental entities from shouldering their fair share of such liabilities. Cal Parties hypothesize that if such shortfalls arise, it is likely that the governmental entities will argue that the Commission lacks jurisdiction to order them to pay back any obligations to the market. Thus, Cal Parties request the Commission to ensure that sufficient funds are on hand to satisfy the governmental entities' future liabilities. To that end, Cal Parties also recommend that the Commission should "attempt to make a reasoned quantitative determination of how much the governmental entities may owe in future liabilities," and take steps to protect market participants from the risk that the governmental entities will not pay.<sup>45</sup>

### **Commission Determination**

26. We deny rehearing on this issue. We find that Cal Parties' request constitutes an impermissible collateral attack on the prior orders that set the preconditions for disbursing the past due principle amounts for the governmental entities and denied Cal Parties' requests to retain the collateral of the governmental entities as security against potential future shortfalls.<sup>46</sup> As the Commission stated in the Preparatory Rerun Compliance Order, "Cal Parties have not presented any arguments in this proceeding that have not already been considered thoroughly by the Commission in its many orders addressing the refund methodology."<sup>47</sup> Further, Cal Parties' offer no support for their concerns about potential future shortfalls, in terms of either the likelihood or magnitude of such possibilities, other than speculation that the retained interest may be insufficient to make for any such future shortfalls.

27. Even if we were to consider Cal Parties' request, we would deny it. Regarding Cal Parties' contention that the Commission has previously adhered to a policy of requiring CalPX to wait to disburse certain funds until a final computation of refunds has

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<sup>44</sup> Cal Parties Rehearing Request at 14-15 (citing *Pac. Gas and Elec. Co.*, 109 FERC ¶ 61,027, at P 47 (2004) (stating that "the disbursement of funds should wait until a final computation of who owes what to whom.") (2004 Chargeback Order)).

<sup>45</sup> *Id.* at 15-16.

<sup>46</sup> Bonneville Remand Order, 121 FERC ¶ 61,067 at P 68, *aff'd on reh'g*, Bonneville Remand Rehearing Order, 125 FERC ¶ 61,214 at P 28.

<sup>47</sup> Preparatory Rerun Compliance Order, 136 FERC ¶ 61,036 at P 43.

been completed, we find that the 2004 Chargeback Order does not support Cal Parties' request. Specifically, the Commission specified in the 2004 Chargeback Order that the collateral retained in the chargeback proceeding was not to be used to offset any general shortfalls. On rehearing of the 2004 Chargeback Order, the Commission affirmed that:

the chargeback funds held by the PX are not to be used to make up any general shortfall, but may be retained only until the individual PX account of the PX participant that made a chargeback payment is resolved in the Refund Proceedings, either at the conclusion of the Refund Proceeding or when the PX participant that made the chargeback payment settles its portion of the Refund Proceeding.<sup>48</sup>

Here, in contrast, Cal Parties specifically request that we require CalPX to hold onto the amounts due to the governmental entities, or require some other type of security from the governmental entities, to make up for potential general shortfalls. Thus, we find that Cal Parties misapply the relevant precedent on this issue.

28. Finally, to the extent that payment of potential future liabilities may be affected by the Commission's lack of authority to order governmental and other non-public utilities to pay refunds, the Commission has previously noted that a remedy may lie in a contract claim rather than a refund proceeding.<sup>49</sup> The Commission has reiterated this same principle in several orders, i.e., once parties have exhausted their rights before the Commission, they may have a contract claim for those amounts which are beyond the Commission's jurisdiction.<sup>50</sup> Accordingly, Cal Parties have not convinced us that reconsideration of their request for additional security is warranted.

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<sup>48</sup> *Coral Power, L.L.C. v. Cal. Power Exchange*, 110 FERC ¶ 61,288, at P 3 (2005).

<sup>49</sup> *Bonneville*, 422 F.3d 908 at 920 and 925. (citations omitted).

<sup>50</sup> *See, e.g., Bonneville Remand Order*, 121 FERC ¶ 61,067 at P 3, 37. (“[t]he Commission's inability to order non-public utility entities to pay refunds under FPA section 206 does not preclude such parties from seeking a remedy in state/federal courts.”).

The Commission orders:

Cal Parties' request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.