

175 FERC ¶ 61,122
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
Neil Chatterjee, Allison Clements,
and Mark C. Christie.

San Diego Gas & Electric Company

Docket No. EL00-95-310

v.

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

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING

(Issued May 20, 2021)

1. This order addresses arguments raised by Salt River Project Agricultural Improvement and Power District (Salt River Project) and Sacramento Municipal Utility District's (SMUD) on rehearing of a prior Commission order¹ that addressed a compliance filing submitted by APX, Inc. (APX) in the Summer Period Proceeding in this proceeding.²

2. Pursuant to *Allegheny Defense Project v. FERC*,³ the rehearing request filed in this proceeding may be deemed denied by operation of law. However, as permitted by section 313(a) of the Federal Power Act,⁴ we are modifying the discussion in the

¹ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 163 FERC ¶ 61,080 (2018) (Compliance Order).

² The Summer Period refers to the period from May 1 - October 2, 2000. *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, Opinion No. 536, 149 FERC ¶ 61,116 (2014), *order on reh'g*, Opinion No. 536-A, 153 FERC ¶ 61,144 (2015), *order on reh'g*, Opinion No. 536-B, 154 FERC ¶ 61,063 (2016), *order on reh'g*, Opinion No. 536-C, 158 FERC ¶ 61,076 (2017), *aff'd in part sub nom. MPS Merchant Servs., Inc. v. FERC*, 836 F.3d 1155 (9th Cir. 2016).

³ 964 F.3d 1 (D.C. Cir. 2020) (en banc).

⁴ 16 U.S.C. § 825l(a) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon

Compliance Order and continue to reach the same result in this proceeding, as discussed below.⁵

I. Background

3. The genesis of the Summer Period Proceeding is the 2000-2001 energy crisis in the West. In Opinion No. 536 and subsequent orders, the Commission found that certain respondents violated the then-effective tariffs of the California Independent System Operator Corporation (CAISO) and the California Power Exchange Corporation (CalPX) during the Summer Period. The Compliance Order addressed compliance filings submitted pursuant to Opinion No. 536-A⁶ and Opinion No. 536-B,⁷ which directed disgorgement of all overcharges and excess payments the respondents in the Summer Period Proceeding that had not settled or were otherwise dismissed from the proceeding received for all of their sales during all hours of the Summer Period during which the market prices were inflated by tariff violations committed by any of the respondents. APX was among these remaining respondents during the Summer Period, and served as a scheduling coordinator submitting bids and schedules on behalf of its participants, two of which included Salt River Project and SMUD.

4. In regard to APX, the Commission in the Compliance Order found that APX complied with the Commission's directive and accepted APX's compliance filing calculating the disgorgement amount it owed. The Commission established that APX's disgorgement liability for the Summer Period is \$59,888,731.02, plus interest.⁸ However, the Commission concluded that, while APX was found to have engaged in tariff violations affecting market clearing prices, it engaged in more purchases at these inflated prices than sales, and as a net buyer, it would be entitled to receive net refunds for the purchases it made at the inflated prices.⁹ The Commission absolved APX of its

reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.”).

⁵ *Allegheny Def. Project*, 964 F.3d at 16-17. The Commission is not changing the outcome of the Compliance Order. *See Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

⁶ Opinion No. 536-A, 153 FERC ¶ 61,144.

⁷ Opinion No. 536-B, 154 FERC ¶ 61,063.

⁸ Compliance Order, 163 FERC ¶ 61,080 at P 32.

⁹ *Id.* P 34.

disgorgement liability but, in making this finding, it also concluded that APX is not entitled to receive any refunds that may potentially be owed to it.¹⁰

II. Rehearing Request

5. On rehearing, two APX participants, Salt River Project and SMUD, ask the Commission to confirm that it did not intend to require any recoupment of refunds already allocated to APX and ultimately to net buyers that made purchases through APX, such as Salt River Project and SMUD, or to require net buyers that made purchases through APX to pay money out of their own pockets for any cash shortfall that may result in the absence of the allocation of net refunds to APX for the Summer Period.¹¹ Salt River Project and SMUD seek confirmation that when the Commission stated, in paragraph 36 of the Compliance Order, that APX should both be absolved of its disgorgement obligation and not “receive any refunds that may potentially be owed to it,” the reference to “any refunds that potentially may be owed to it” was intended to be limited to refunds owed to APX for the Summer Period, not the refunds that are currently being calculated and finalized in the Refund Proceeding.¹² Salt River Project and SMUD also ask for clarification that the Commission did not intend to modify already approved settlement agreements allocating refunds to APX. Salt River Project and SMUD state that they do not object to the Commission’s ruling in the Compliance Order as long as the Commission did not unwind prior settlement agreements or require net buyers, such as Salt River Project and SMUD, to pay out of their own pockets for any APX cash shortfall that potentially may occur.¹³

6. Salt River Project and SMUD further request that the Commission clarify that they will retain a right to protest if a cash shortfall occurs when CAISO and CalPX submit in the Refund Proceeding their final rerun filings to clear the market and determine who owes what to whom, including any adjustments or calculations to bring interest current to a cash clearing date. Salt River Project and SMUD argue that they should not have to both forgo the receipt of net refunds for purchases they made through APX during the Summer Period and then to also fund out of their own pockets any portion of a cash shortfall that would not have occurred if the Compliance Order had allocated net refunds

¹⁰ *Id.* P 36.

¹¹ Rehearing Request at 1-2.

¹² The Refund Proceeding in Docket No. EL00-95 established a process for calculating refunds for unjust and unreasonable rates and charges of public utilities that sold energy and ancillary services to or through CAISO and CalPX markets during the period from October 2, 2000 - June 20, 2001.

¹³ Rehearing Request at 6.

to APX for the Summer Period, particularly when the Commission has acknowledged that APX would have been entitled to receive those refunds.¹⁴ According to Salt River Project and SMUD, these net refund allocations would provide a financial cushion in the event that APX is required to pay for any cash shortfalls in the Refund Proceeding. If the Commission declines to provide this clarification, Salt River Project and SMUD request rehearing of the Compliance Order because the remedy in the Compliance Order would be inequitable and neither just nor reasonable. Salt River Project and SMUD further contend that the Compliance Order would be arbitrary and capricious because it would modify or depart, without reasoned explanation, from prior settlement agreements that the Commission has encouraged and approved as well as exceed the scope of APX's compliance filing and the instant compliance proceeding, which is now limited to the Summer Period, not the main Refund Proceeding.¹⁵

III. Commission Determination

7. At the outset, we note that neither APX nor the California Parties sought rehearing of the Compliance Order. Salt River Project and SMUD's request for clarification and rehearing is the only rehearing request submitted in the instant proceeding. We also note that on April 22, 2020, in Docket No. EL00-95-291, the California Parties submitted a petition for Commission approval of the settlement overlay filing designed to reconcile various settlements among market participants with the refund amounts calculated by CAISO and CalPX for the Refund Period.¹⁶ Although SMUD filed comments on the settlement overlay filing, the California Parties informed the Commission on September 25, 2020, that they have reached agreement with SMUD concerning the amount to be paid by it to implement its remaining obligations under a 2011 settlement agreement.¹⁷ Specifically, the California Parties state that their settlement-implementing arrangement with SMUD resolves and satisfies all obligations and liabilities SMUD has to, and all account balances SMUD has in, the CAISO and CalPX relating to the January 1, 2000 through June 20, 2001 period, and any other amounts set forth for SMUD in the overlay compliance filing, as may be amended.¹⁸ Because the California Parties and SMUD have

¹⁴ *Id.* at 8-9.

¹⁵ *Id.* at 9.

¹⁶ See *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 164 FERC ¶ 61,019 (2018).

¹⁷ See *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 135 FERC ¶ 61,059 (2011)

¹⁸ California Parties Notice Concerning Settlement Implementation Arrangement with SMUD, Docket No. EL00-95-291 (Sept. 25, 2020).

resolved issues pertaining to both the Summer Period and Refund Period Proceedings, we find that the rehearing request is moot as it relates to SMUD but will address issues raised on rehearing by Salt River Project.¹⁹

8. In response to Salt River Project's request that the Commission clarify that neither APX nor its participants will be held liable for cash shortfalls for the Summer Period, we reiterate that the Summer Period Proceeding is distinct from the Refund Proceeding because, unlike the Refund Proceeding that reset the entire market, the inquiry and the resulting remedy in the Summer Period Proceeding are seller-specific.²⁰ In Opinion No. 536-C, the Commission also explained that no respondent is responsible for disgorgement of excess amounts and overcharges collected by other respondents or any other seller.²¹ We also note that the ruling in the Compliance Order will not affect the terms of settlements previously approved by the Commission in any of the proceedings addressing the Western energy crisis of 2000-2001.

9. Salt River Project further requests that the Commission clarify that it will retain a right to protest if a cash shortfall occurs when CAISO and CalPX submit in the Refund Proceeding their final refund rerun filings. We find this matter moot. As stated above, the settlement overlay filing was submitted on April 22, 2020. Salt River Project did not submit comments on that filing.

10. Salt River Project also contends that the ruling in the Compliance Order deprived it of a "financial cushion" in the form of the net refunds for the Summer Period while it may be liable to pay for cash shortfalls in the Refund Proceeding. To the extent that Salt River Project argues that it should be absolved of the liability to pay for any potential cash shortfalls in the Refund Proceeding based on the fact that it will not be receiving refunds for the Summer Period, we note again that the Summer Period Proceeding and the Refund Proceeding are two separate and distinct proceedings.²² Specifically, the Commission determined that, in the Summer Period Proceeding, the focus would be on the activities of named respondents, thereby necessitating a seller-specific remedy, as

¹⁹ In a concurrently issued order, the Commission accepts the settlement overlay compliance filing. *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 175 FERC ¶ 61,121 (2021).

²⁰ *See, e.g., San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 135 FERC ¶ 61,183, at P 37 (2011), *order on reh'g*, 141 FERC ¶ 61,087, at P 15 (2012); Opinion No. 536-A, 153 FERC ¶ 61,144 at P 145.

²¹ Opinion No. 536-C, 158 FERC ¶ 61,076 at P 48.

²² *See supra* note 12 and accompanying text.

opposed to the Refund Proceeding's market-wide remedy.²³ This distinction is important for addressing shortfalls. In Opinion No. 536-A, the Commission denied the California Parties' request that the Summer Period disgorged amounts be factored into the interest shortfall calculations in the Refund Proceeding.²⁴ Opinion No. 536-A explained that, in the Summer Period Proceeding, "unlike in the Refund Proceeding, we are not resetting the entire market for the Summer Period," and that the "approach developed in the Refund Proceeding to address the interest shortfall appears to be inapplicable" to the seller-specific remedy in the Summer Period Proceeding.²⁵ In the Compliance Order, the Commission continued to find that the Refund Proceeding approach to interest shortfall was inapplicable to the Summer Period Proceeding.²⁶ Thus, the Commission has considered this matter in both Opinion No. 536-A and the Compliance Order, and reached the same conclusion in both orders. Salt River has not persuaded us to revisit those determinations.

11. We also note that, while the Commission found that APX was a net buyer in the Compliance Order and thus might have been entitled to receive net refunds, the amount of APX's potential net refund entitlement was not determined.²⁷ As the Commission explained in the Compliance Order, such a determination would require a close examination of all APX purchases to ensure they do not include the transactions found to be in violation of then-effective tariffs.²⁸ To conserve the parties' resources and to achieve resolution in this matter, the Commission adopted an approach that had been

²³ See, e.g., Opinion No. 536-A, 153 FERC ¶ 61,144 at P 142.

²⁴ *Id.* at PP 131, 145. The interest shortfall results from the difference between the Commission's interest rate and the interest rate for the CalPX Settlement Clearing Account. See *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 110 FERC ¶ 61,336, at PP 41, 56 (2005). The issue of interest shortfalls has been summarily addressed in the concurrently issued order accepting the settlement overlay compliance filing. See *supra* note 18. in the Refund Proceeding.

²⁵ *Id.* P 145. The Commission invited comment on the interest shortfall approach during the compliance phase of the Summer Period Proceeding. *Id.* However, the Commission received no comments on this matter other than from California Parties, which raised the same arguments it had raised earlier.

²⁶ Compliance Order, 163 FERC ¶ 61,080 at PP 60-61.

²⁷ *Id.* P 33.

²⁸ *Id.* P 35.

advocated by the California Parties and APX,²⁹ and absolved APX of its disgorgement liability without the right to receive potential net refunds.³⁰ The Commission continues to find that this is a just and reasonable outcome that brings closure to this complex and lengthy proceeding.

The Commission orders:

In response to the request for rehearing, the Compliance Order is hereby modified and the result sustained, as discussed in the body of this order.

By the Commission. Commissioner Danly is not participating.

(S E A L)

Debbie-Anne A. Reese,
Deputy Secretary.

²⁹ *Id.* PP 34, 36. As explained in the Compliance Order, in an earlier motion filed in this proceeding, the California Parties stated that they did not object to absolving APX of its disgorgement obligation, as long as APX did not receive any refunds. Later, in its Summer Period compliance filing, APX asked that the Commission find that APX's participants were not required to pay refunds on excess amounts earned on sales unless they also received refunds for excess amounts paid on purchases. *Id.* P 36. Moreover, as noted above, neither the California Parties nor APX sought rehearing of the Compliance Order.

³⁰ *Id.* (noting that "[t]he Commission's discretion is at its zenith when fashioning a remedy.") (citing *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967)).