153 FERC ¶ 61,144
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

San Diego Gas & Electric Company	Docket Nos. EL00-95-280
	EL00-95-271
v.	EL00-95-281

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

ORDER ON REHEARING

(Issued November 4, 2015)

1. In this order, we address requests for clarification and rehearing of Opinion No. 536,[1] which partially affirmed factual findings in the underlying Initial Decision,[2] directed compliance filings, and ordered refunds. This order denies the rehearing requests and clarifies Opinion No. 536's holding on the remedy. Specifically, as discussed below, we clarify that the Respondents found to have engaged in tariff violations impacting the market clearing price are directed to disgorge the amounts received above the marginal cost-based proxy price for *all* sales they made during the trading hours in which the market clearing price was affected by their tariff violations. As a result of this clarification, we dismiss as moot the compliance filings submitted by the Respondents in Docket No. EL00-95-281. We also invite comments by interested parties and the California Independent System Operator Corporation (CAISO) and the California Power Exchange Corporation (CalPX) on the process of allocating disgorged

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

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

amounts and accounting for the interest shortfall in the compliance phase of this proceeding.

2. This order also reaffirms the Commission's prior determination in Opinion No. 536 that Exelon Generation Company LLC (Exelon)[3] owes $2,845,024 plus interest in refunds and provides Exelon with 30 days from the date of issuance of this order to file a cost recovery claim. In addition, this order addresses requests for rehearing of the Commission's order affirming the finding in a partial Initial Decision.[4] Specifically, this order dismisses CAlifornians for Renewable Energy, Inc.'s (CARE) rehearing request for failure to set forth any alleged errors in Opinion No. 536 and rejects the California Parties'[5] claim that the Commission is required to order market-wide refunds in this case.

I. Rehearing of Opinion No. 536

3. Opinion No. 536 partially affirmed factual findings in the Initial Decision, vacated certain findings, dismissed settled parties and non-jurisdictional entities from the proceeding, directed compliance filings, and ordered Constellation to refund $2,845,024 plus interest. To determine whether the transactions executed by the Indicated Respondents[6] and APX Inc. (APX) constituted tariff violations, the Commission examined whether there was a consistent pattern of market activities indicating, due to their sheer volume and frequency, and other simultaneously undertaken activities, that a seller engaged in the behavior that rendered the transactions at issue unjustifiable as a legitimate business practice. To assess the volume and frequency of such behavior, the Commission used the marginal cost-based proxy screens developed by the California

[3] Exelon states that it is a successor-in-interest to Constellation NewEnergy, Inc. (Constellation). Exelon at 1.

[4] *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv*., 141 FERC ¶ 61,088 (2012) (Order Affirming Partial Initial Decision) (affirming *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 140 FERC ¶ 63,015 (2012) (Partial Initial Decision)).

[5] The People of the State of California, *ex rel.* Kamala D. Harris, Attorney General of the State of California; the Public Utilities Commission of the State of California; Pacific Gas and Electric Company; and Southern California Edison Company.

[6] Hafslund Energy Trading L.L.C. (Hafslund); Illinova Energy Partners, Inc. (Illinova); MPS Merchant Services, Inc. (f/k/a Aquila Power Corporation) (MPS); Koch Energy Trading, Inc. (Koch); and Shell Energy North America (US), L.P. (f/k/a Coral Power, L.L.C.) (Shell).

Parties as a measure of just and reasonable rates. Opinion No. 536 found that this proxy price methodology produces a conservative estimate of what the market price would have been in a specific hour at issue absent a tariff violation, noting the lack of any specific evidence showing that a marginal cost-based proxy price as an evaluative measure is unjust and unreasonable. Further, Opinion No. 536 adopted the California Parties' price effect analysis, which evaluated each tariff violation to determine whether the transaction had a price-increasing effect on the market clearing price during the relevant trading hours.[7]

4. As a result, the Commission in Opinion No. 536 found that the Indicated Respondents and APX engaged in the following types of tariff violations that affected the market clearing prices during the relevant trading hours: Types II and III Anomalous Bidding, False Exports, False Load Scheduling, and sale of ancillary services without market-based rate authorization. Specifically, Opinion No. 536 concluded that: (1) Shell engaged in Types II and III Anomalous Bidding, as well as False Exports and False Load Scheduling, and these tariff violations impacted the market clearing price; (2) MPS engaged in False Exports and False Load Scheduling, and these tariff violations impacted the market clearing price; (3) APX engaged in Type III Anomalous Bidding and False Load Scheduling, and these tariff violations impacted the market clearing price; (4) Illinova and Hafslund engaged in False Load Scheduling and their tariff violations impacted the market clearing price; (5) Koch engaged in sale of ancillary services without market-based rate authorization and this tariff violation impacted the market clearing price.[8] The Commission directed the Indicated Respondents and APX to submit compliance filings providing calculations of their excess payments and overcharges due for disgorgement based on the California Parties' marginal cost-based proxy methodology and allowed parties to provide evidence of cost offsets that the Indicated Respondents and APX may be entitled to.[9]

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

[8] The joint offer of settlement between the California Parties and Koch releasing Koch from all claims arising from this proceeding was approved by the Commission in *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Servs.*, 153 FERC ¶ 61,018 (2015). As a result, Koch is dismissed as a respondent from the instant proceeding. *See San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 135 FERC ¶ 61,183, at P 10 (2011) (Rehearing Order).

[9] Opinion No. 536, 149 FERC ¶ 61,116 at P 3.

5. The California Parties, Shell, MPS, Illinova, APX, Hafslund, Exelon, American Electric Power Service Corporation (AEP),[10] and BP Energy Company (BP Energy) seek rehearing of Opinion No. 536.

A. APX

6. On rehearing, APX requests that the Commission clarify that it did not make any finding that APX itself engaged in Anomalous Bidding or False Load Scheduling. APX states that, if the Commission did intend such a finding, it requests rehearing. According to APX, it was merely a third-party service provider in the California market, and any schedules and bids submitted through APX were submitted by and on behalf of APX's customers. APX further argues that no evidence was presented suggesting that APX knowingly assisted its customers in engaging in either False Load Scheduling or Anomalous Bidding during the Summer Period,[11] or that APX benefitted from such practices.[12] According to APX, while there may or may not be grounds to conclude that certain of APX's customers may have engaged in tariff violations, there is absolutely no evidence or other basis to conclude that APX itself engaged in such behavior on its own behalf.[13]

7. APX asserts that the Commission erred by stating that APX may be held jointly and severally liable for refunds where refund liability cannot be apportioned to individual APX customers.[14] APX argues it was a net buyer during the Summer Period and thus the Commission was wrong to assume that APX would have to pay refunds at all, and to discuss how refund liability should be apportioned among APX and its customers.[15]

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[10] In this proceeding, AEP includes American Electric Power Service Corporation, Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Ohio Power Company, Public Service Company of Oklahoma, Southwestern Electric Power Company, AEP Texas Central Company, and AEP Texas North Company.

[11] The Summer Period is May 1, 2000 to October 1, 2000. S*ee* Opinion No. 536, 149 FERC ¶ 61,116 n.25.

[12] APX at 11-12 (citing APX Brief on Exceptions at 20-22).

[13] *Id*. at 12.

[14] *Id*. 9-10.

[15] *Id*. at 10-11.

8. APX further argues that the issue of its potential refund liability has been resolved pursuant to a settlement that was negotiated between APX and its customers in 2007 and approved by the Commission.[16] APX states that the settlement specifies that APX itself is not to be held liable for any refunds associated with the Summer Period transactions, and that such refund obligations are instead to be apportioned solely among APX's customers.[17] Accordingly, APX requests that the Commission grant rehearing and find that the apportionment of any refund liability among APX and its customers should be determined in accordance with the APX Settlement.[18]

9. Next, APX states that there are three possible refund options pertaining to APX: (1) the APX portfolio could be treated like the California Parties' portfolio, and thus have the portfolio's refund obligation or entitlement calculated on a net basis, and under this option, APX would be entitled to receive refunds because it was a net buyer during the Summer Period; (2) the Commission could adopt the zero refund compromise proposal made by the California Parties under which the APX portfolio would not be required to pay any refunds, but would not be entitled to receive any refunds; and (3) the Commission could require the APX portfolio to make refunds for sales made during the Summer Period without the right to receive refunds for purchases.[19]

10. APX argues that option (3), above, incorrectly treats the APX portfolio as a net seller during the Summer Period, rather than as a net buyer.[20] APX asserts that this option discriminates against the APX portfolio *vis-à-vis* the California Parties and other entities that were net buyers during the Summer Period, and that it is also inequitable to require the APX portfolio to pay refunds for sales made at market prices that were determined to be artificially high, but preventing the portfolio from receiving refunds for purchases made at those very same artificially high prices.[21] Finally, APX asserts it has not given up its own right to refunds now that remedies are an issue post Opinion

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[16] *Id*. (citing *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs*., 118 FERC ¶ 61,168 (2007) (APEX Settlement Order).

[17] *Id*. at 10.

[18] *Id*. at 11.

[19] *Id*. at 7.

[20] *Id*.

[21] *Id*. at 7-8.

No. 536.[22] Accordingly, APX requests that the Commission clarify that it did not intend to adopt option (3), and, based on that clarification, grant rehearing of the requirement that APX submit a compliance filing.[23] APX argues that the Commission should clarify which of the two remaining refund options should be adopted if a settlement with the California Parties cannot be negotiated.[24]

11. Further, APX argues that option (1) is the far more reasonable of the two remaining options, because, according to APX, it does not discriminate against the APX portfolio and is consistent with the way refunds were calculated in previous phases of this proceeding. However, APX states that it recognizes that the California Parties incurred substantial costs in filing and prosecuting their claims in this proceeding, and that simply adopting the first option would arguably enable the APX portfolio to free ride on the California Parties' efforts. Accordingly, APX concedes that it would likely be reasonable to adjust the net refund entitlement of the APX portfolio by some amount to reflect a sharing of the costs incurred by the California Parties.[25]

12. In their joint rehearing request, AEP and BP Energy state that since they were APX customers, known as APX Participants, Opinion No. 536 now suggests they may be liable for refunds.[26] AEP and BP Energy assert they have settled all issues with the California Parties and, as a result, were dismissed as respondents.[27] AEP and BP Energy further assert that their comprehensive settlements with the California Parties bar a finding in this proceeding that they could bear refund liability for the Summer Period.[28]

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[22] *Id*. at 8.

[23] *Id*. at 4, 8-9.

[24] *Id*. at 9.

[25] *Id*.

[26] AEP & BP Energy at 2.

[27] *Id*. at 1-2 (citing *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Servs.*, 120 FERC ¶ 61,017 (2007); and *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Servs.*, 137 FERC ¶ 61,156 (2011)).

[28] *Id.* at 7-8.

AEP and BP Energy state that their respective settlement agreements with the California Parties expressly release them from any and all claims related to this proceeding.[29]

13. AEP and BP Energy also argue that Opinion No. 536 ignores settlements made between APX and APX Participants.[30] AEP and BP Energy contend that it is legal error for the Commission to initiate procedures intended to establish individual APX Participant liability for the Summer Period without first making a finding that APX owed net refunds for the Summer Period.[31] AEP and BP Energy explain that under the APX Settlement, APX Participants' individual refund obligations will be determined only if APX is found to owe refunds on an aggregate basis.[32] AEP and BP Energy assert that neither the Initial Decision nor Opinion No. 536 has found that APX owes net refunds.[33] AEP and BP Energy assert that viewing refunds on an aggregate basis in this case is also consistent with the Commission's policy of offsetting costs to purchase against sales when determining refund obligation, plus a 10 percent cost adder in the case of marketers.[34]

14. AEP and BP Energy assert that, if the Commission intended through its order to find that APX owed net refunds for the Summer Period, then such a finding is not supported by evidence and is arbitrary and capricious. AEP and BP Energy argue that, if anything, APX should be a net refund recipient. According to AEP and BP Energy, during the hearing, APX submitted expert testimony demonstrating that APX should be a net refund recipient, and no party challenged that testimony.[35]

15. Finally, AEP and BP Energy assert that the Commission erred in finding that APX and/or APX Participants violated market rules, because the alleged violations that

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[29] *Id.* at 8-9.

[30] *Id.* at 2-3 (citing APX Settlement Order, 118 FERC ¶ 61,168).

[31] *Id.* at 4-5.

[32] *Id.* at 5-6 (citing APX Settlement Order, 118 FERC ¶ 61,168 at P 31).

[33] *Id.* at 5.

[34] *Id.* at n.18 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs*., 112 FERC ¶ 61,176, at PP 1, 115 (2005), *order on reh'g*, 121 FERC ¶ 61,184, at PP 111, 117 (2007)).

[35] *Id*. at 8 (citing Ex. APX-1 at 6 and APX-4).

the Commission found APX and/or APX Participants to have committed were not possible to commit due to the way in which the APX platform functioned, and that Opinion No. 536 failed to address this issue.[36]

Commission Determination

16. As an initial matter, we reaffirm Opinion No. 536's finding that APX engaged in Anomalous Bidding Type III and False Load Scheduling that impacted the market clearing prices. We recognize that APX committed these tariff violations on behalf of its customers. Whether APX knew that its customers were acting in violation of the tariff and intended to commit the tariff violations on their behalf has no bearing on the outcome of this case because it has long been settled that the unique situation of APX requires that APX and its sellers be held jointly and severally liable for refunds where the refund liability cannot be apportioned based on specific transactions to an individual seller.[37] There is no reason for us to revisit this issue here. Further, we find that APX has not presented sufficient evidence challenging the finding affirmed by the Commission that APX engaged, on behalf of its customers, in Anomalous Bidding Type III and False Load Scheduling. This finding remains unchanged as well.

17. Further, while we acknowledge that BP Energy and AEP have been dismissed from the instant proceeding as a result of their settlements with the California Parties,[38] we disagree with their interpretation of the APX Settlement Agreement; but for their settlement with the California Parties, the APX Settlement Agreement would not release BP Energy and AEP from any refund liability in regard to the refunds ordered in this proceeding. The APX Settlement Agreement resolved all disputes and claims among APX Participants regarding appropriate allocation of net refunds due to APX. Section 4.1.4 of the APX Settlement Agreement[39] explicitly provides that the settlement

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[36] *Id*. at 11.

[37] *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 127 FERC ¶ 61,269, at P 272 (2009) (citing *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*,105 FERC ¶ 61,066, at P 170 (2003); and *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 122 FERC ¶ 61,274, at PP 54-56 (2008)).

[38] Rehearing Order, 135 FERC ¶ 61,183, at P 10.

[39] Joint Offer of Settlement and Motion for Expedited Consideration, Docket No. EL00-95-000, Attachment B, APX Settlement and Release of Claims Agreement, section 4.1.4 (Jan. 5, 2007).

does not address who is responsible for any refunds that the Commission may direct be paid to CAISO and/or the CalPX in respect of APX transactions prior to the refund effective date of October 2, 2000 established in the Refund Proceeding.[40] The APX Settlement Agreement thus only bars claims for intra-APX market refunds, not all future claims related to APX transactions during the Summer Period. Accordingly, we clarify that APX Participants that did not settle with the California Parties directly may be liable for overcharges and excessive payments received as a result of Anomalous Bidding Type III and False Load Scheduling transactions in which APX engaged on their behalf.

18. On the issue of refund apportionment raised by APX and its customers, we note that section 7 of the APX Settlement Agreement explicitly provides that, to the extent APX is either owed or liable for any refund amounts from the pre-Refund Period, such amounts will be determined on an aggregate basis and handled by APX, rather than by individual APX Participants. Under section 7, if APX is found to owe refunds for this period, APX and its participants will provide a schedule showing, with percentages, the specific APX Participants that will be obligated to pay.[41] Accordingly, Opinion No. 536 directed APX to address the issue of apportionment in its compliance filing. We find that this directive was consistent with the APX Settlement Order.

19. We now turn to the issue of the remedy for APX's actions. The APX Settlement Agreement was entered into on the assumption that APX would be a net refund recipient during the period from May 1, 2000 to June 21, 2001 (i.e., the Summer Period and the Refund Period). However, this conclusion was based on schedules, bids, and offers for energy and ancillary services submitted by APX, on behalf of its customers, in the CalPX and CAISO markets during the Refund Period, which covers only the period from October 2, 2000 through June 20, 2001.[42] Although APX has maintained that it was a net buyer during the Summer Period, APX has made no claims in regard to transactions it made on behalf of its customers during the Summer Period. There is no record on which the Commission can base its decision to absolve APX of the refund liability and to allow

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[40] The Refund Proceeding was instituted by the Commission in August 2000 "to investigate the justness and reasonableness of the rates and charges of public utilities that sell energy and ancillary services to or through" the CAISO and CalPX markets during the period of October 2, 2000 – June 21, 2001(Refund Period). *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs*., 92 FERC ¶ 61,172 (2000).

[41] APX Settlement Order, 118 FERC ¶ 61,168 at P 31.

[42] The Settlement Period covers both the Refund Period and the earlier period from May 1, 2000 through October 1, 2000 (Summer Period).

it to claim refunds at this time. Accordingly, we deny APX's request for rehearing and direct it to submit a compliance filing within 60 days of the date of issuance of this order, as discussed in the Remedy section below.

20. In their Motion on Overcharges and Refunds,[43] the California Parties stated their willingness to absolve APX of any refunds APX might owe in exchange for APX not receiving any refunds in exchange.[44] On rehearing, APX argues against this option; however, it acknowledges that it did not expend time and resources to make any claims that it was a net buyer for the Summer Period and thus offers to adjust the potential net refund entitlement of the APX portfolio by some amount to reflect a sharing of the costs incurred by the California Parties.[45] The California Parties' proposal may be a reasonable approach to resolve claims to both the California Parties' and APX's satisfaction, and APX may wish to consider pursuing outreach with the California Parties to resolve these issues. We note that the Commission's Dispute Resolution Division is available to the parties if they require assistance in resolving outstanding issues.

B. Summer Period

1. Evidentiary Framework and Marginal Cost-Based Proxy Methodology

21. On rehearing, Shell argues that the caselaw and Commission precedent cited in Opinion No. 536 do not validate what Shell describes as circular reasoning of both the Initial Decision and Opinion No. 536. According to Shell, the caselaw and Commission precedent require a complainant to state a *prima facie* case in support of its complaint and, once that *prima facie* case is contested, to prove by a preponderance of the evidence that its premise is more likely true than not.[46] Shell argues that both the Initial Decision and Opinion No. 536 start with the premise that an hour, transaction, or quantity caught in one of the California Parties' data screens is a tariff violation, and then conclude that a

[43] Opinion No. 536, 149 FERC ¶ 61,116 at P 203.

[44] California Parties May 3, 2013 Motion for Determination of Overcharges and for Refunds at 24.

[45] APX at 9.

[46] Shell at 4 (citing *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 277–78 (1994); *Nantahala Power & Light Co*., 19 FERC ¶ 61,152, at 61,276, *reh'g denied*, 20 FERC ¶ 61,430, *reconsideration denied*, 21 FERC ¶ 61,222 (1982)). *See also id*. at 9

Respondent seller's failure to prove that each individual hour, transaction, or quantity should not have been caught in the data screen is proof by a preponderance of the evidence that the Respondent seller committed the tariff violation.[47]

22. On rehearing, Illinova and MPS argue that the Commission erred in accepting the California Parties' screens as they were flawed and defective. Illinova and MPS contend that during the hearing the Respondents presented detailed testimony and analysis exposing the numerous defects in the screens but the Commission disregarded this evidence as not sufficiently specific.[48] According to Illinova and MPS, the Commission did not articulate before the trial the requirement that evidence to refute the California Parties' *prima facie* case must be transaction-specific.[49] Illinova and MPS state that they are now virtually defunct companies with no employees and no access to business records and thus have no ability to provide a specific-transaction rebuttal to the California Parties' screens.[50]

23. Illinova and MPS further contend that the California Parties' expert testimony and analysis pertaining to the marginal cost-based screens fail threshold tests for admissibility under the analysis established by the United States Supreme Court in *Daubert*.[51] Illinova and MPS further state that while *Daubert* does not directly apply to administrative proceedings, the courts have held that "the spirit of *Daubert*" is applicable to such proceedings as well.[52]

24. Further, Illinova and MPS argue that the marginal cost-based proxy prices used in the California Parties' screens do not represent competitive price outcomes because they reflect the engineered marginal cost (fuel and variable O&M) of the "marginal" unit. According to Illinova and MPS, it is now a widely accepted, mathematically proven concept that in the absence of capacity markets, capped energy-only markets do not result

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[47] *Id*.

[48] *E.g*., Illinova at 8. We note that Illinova's and MPS's requests for rehearing on this issue are virtually identical.

[49] *Id*. at 11.

[50] *Id*. at 12.

[51] *Id*. at 8 (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993) (*Daubert*)).

[52] *Id*. at 10 and n.12, 13.

in just and reasonable rates because they fail to produce prices that appropriately reflect scarcity conditions.[53] Illinova and MPS explain that the core design principle of the CAISO and CalPX markets during the Summer Period was "reliability through markets", which would produce price outcomes that reflect scarcity at levels sufficient to support new entry when entry is needed. According to Illinova and MPS, under that market design, the only way for scarcity to emerge was for suppliers to offer into the CalPX and CAISO spot markets at prices reflecting scarcity, which required suppliers to offer prices far in excess of system marginal cost whenever scarcity existed. Otherwise, Illinova and MPS argue, there would be no conceivable way for those markets ever to reflect the cost of new entry, on average and over time.[54]

25. MPS and Illinova further argue that the Initial Decision and Opinion No. 536 ignore Professor Hogan's testimony demonstrating that there can be no colorable complaint about energy-only price outcomes that are consistent with long-run marginal cost—the cost of new entry—which is much higher than system short-run marginal cost. According to Illinova and MPS, the unrebutted evidence shows that prices in the Summer Period actually were far too low to move California to long-run marginal cost levels, given the low prices that existed before and after the crisis. Illinova and MPS thus conclude that the California Parties' marginal cost-based proxy prices substantially understate competitive price outcomes.[55]

26. Illinova and MPS further argue that the Commission erred by failing to find that prices during the Summer Period were driven by market fundamentals, not by Respondents' market transactions. Specifically, they state that the Respondents' expert analysis demonstrated that the prices experienced in Summer 2000 reflected shortage conditions, which under today's shortage pricing regimes would automatically produce much higher prices than they were under the California Parties' price-cap approach. According to Illinova and MPS, the California Parties' analysis failed to control for supply and demand conditions and therefore there was not probative evidence in the

[53] *Id.* at 57 (citing Ex. CSG-21 (Paul L. Joskow, *Capacity payments in imperfect electricity markets: Need and design*, 16 Utilities Policy 159 (2008)).

[54] *Id*. at 58 (citing Tr. at 3875:4-8 (Hildebrandt)).

[55] *Id*. at 58-59 (citing Ex. CSG-1 at 89:14-91:18; Ex. CSG-13; and Tr. at 654:3-662:12 (Stern)).

record that shows that any alleged tariff violation caused the high prices in the Summer Period.[56]

27. Further, Illinova and MPS recite a number of causes that, in their opinion, affected the availability of supply during the Summer Period. Among the causes cited by Illinova and MPS are the weather that caused California to receive less hydroelectric power than usual; systematic shortage of alternate supplies of electric generation, particularly natural gas-fired generation; environmental regulations; and California's poorly designed regulatory system.[57]

Commission Determination

28. We reject Shell's assertion that the Commission applied the wrong evidentiary framework. In Opinion No. 536, the Commission found that, consistent with Commission and court precedent, the Presiding Judge correctly placed the burden of proof in this proceeding on the California Parties. The Commission explained that this burden of proof including initially coming forward with a *prima facie* case and once this initial burden is met, the burden to produce evidence shifts to the Respondents.[58] However, the ultimate burden of persuasion remains with the proponent,[59] and the party bearing the burden of proof will prevail only if the preponderance of evidence supports its position.[60] The Commission further found that once the Respondents offered their rebuttal, the Presiding Judge appropriately determined whether the California Parties made their case by a preponderance of the evidence. Accordingly, the Commission concluded that the Presiding Judge applied the correct evidentiary framework to analyze this case.[61] Shell has not persuaded us on rehearing that the Commission erred in so finding, and we reaffirm Opinion No. 536 on this issue.

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[56] *Id*. at 60-61 (Ex. CSG-1 at 71:10-88:7, 82:20-88:7, 85 tbl.16, 88:17-21, 105:1-8, 193:12-194:19; Tr. at 8243:14-8245-24 (Hogan)).

[57] *Id*. at 61-66.

[58] Opinion No. 536, 149 FERC ¶ 61,116 at P 46 (citing *Dir. OWCP v. Greenwich Collieries*, 512 U.S. 267, 273 (1994) (*Greenwich Collieries*)).

[59] *Id*. P 45 (citing *Greenwich Collieries*, 512 U.S. at 273, 279-80).

[60] *Id*. (citing *S. Co. Serv., Inc*., 23 FERC ¶ 63,018 (1983)).

[61] *Id.* PP 46, 49.

29. We also reject Shell's argument that the Commission inappropriately presumed that if a transaction was captured by the California Parties' marginal cost-based proxy screens, it must be a tariff violation. In Opinion No. 536, the Commission explained at length the rationale for its conclusion that the California Parties' marginal cost-based proxy price methodology produces a conservative estimate of what the market price would have been in a specific hour at issue absent a tariff violation.[62]

30. Specifically, as explained in Opinion No. 536, while "in a competitive market … sellers have the incentive to bid their marginal costs,"[63] bidding above marginal cost is not a tariff violation *per se*.[64] The Commission found that it is the bidding and market behavior *patterns* in relation to marginal costs that are indicative of tariff violations.[65] We reiterate that the Commission's analysis of the Respondents' transactions did not assume that the marginal cost-based proxy screens employed by the California Parties to detect tariff violations implicate any bid or transaction that was made in excess of marginal cost as a *per se* tariff violation.[66] We affirm Opinion No. 536 that the analysis proffered by the California Parties demonstrates the collective pattern and consistency of sellers' bids and transactions in excess of marginal costs, not just that a series of single bids or transactions found in isolation exceeded marginal cost. Our determination of whether the Respondents' market behavior constitutes a tariff violation was based on the California Parties' showing of a persistent reoccurrence of the same market activity in violation of the then-effective tariffs.[67]

31. Further, in Opinion No. 536, the Commission addressed all arguments challenging the California Parties' marginal cost-based proxy methodology and noted the lack of any specific evidence in the record showing that a market-based proxy price as an evaluative measure is unjust and unreasonable.[68] Shell's request for rehearing does not raise any

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[62] *Id*. PP 82-90.

[63] *San Diego Gas & Elec. Co. v. Seller of Energy and Ancillary Servs*., 97 FERC ¶ 61,275, at 61,212 (2004).

[64] Opinion No. 536, 149 FERC ¶ 61,116 at P 82.

[65] *Id*.

[66] *Id*. P 82

[67] *Id*.

[68] *See, e.g., id.* PP 2, 82-90, 106-107, 129, 134, 174-175.

arguments that have not been fully addressed in Opinion No. 536, nor does it provide any specific evidence that would change the Commission's finding in regard to the justness and reasonableness of the marginal cost-based proxy methodology. Accordingly, we deny Shell's request for rehearing.

32. On the same grounds, we also deny the requests for rehearing by Illinova and MPS that argue that the California Parties' screens were flawed and defective and therefore inadmissible as unreliable evidence. The Commission previously found that the prices produced by the Mitigated Market Clearing Price (MMCP) methodology[69] during the Refund Period served as a "reasonable proxy for the rates that a competitive energy market would have produced."[70] This reasoning is equally applicable to the Summer Period, since the essential market rules that established market pricing remained unchanged for that period. In addition, because the marginal cost-based proxy methodology incorporates the actual fuel costs, demand, and unit availability for each hour, the fundamentals that affect pricing were built into the California Parties' methodology. Even if the fundamental conditions changed between the Summer Period and the Refund Period, the marginal cost proxy price accounts for such changes, and accurately reflects the maximum level that market clearing prices would have reached had the Respondents not violated the tariffs.[71] For these reasons, we also reject MPS's and Illinova's general arguments that high prices during the Summer Period were caused by events outside their control. As previously stated, general arguments will not suffice to rebut the specific hour-by-hour evidence presented by the California Parties.[72] Illinova and MPS also argue that the Commission did not put the Respondents on notice that they would have to present transaction-specific evidence to refute the California Parties' *prima facie* case. Opinion No. 536 addressed this issue.[73] We reiterate here that throughout this proceeding, the Commission has emphasized numerous times that the California Parties would be required to present specific evidence of specific conduct

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[69] The MMCP serves as a proxy price based on the marginal cost of the most expensive unit dispatched to serve load in CAISO's real-time imbalance energy market. *See San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 97 FERC ¶ 61,275.

[70] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*,, 127 FERC ¶ 61,250, at P 12 (2009).

[71] Opinion No. 536, 149 FERC ¶ 61,116 at P 87.

[72] *Id*. PP 47 & 90.

[73] *Id*. PP 47-48.

violating then-existing tariffs and the tariff violation's effect on the market clearing price in a specific trading hour.[74] We believe that the language in the Remand Order and two subsequent orders on rehearing was clear and explicit in that the Commission requires specific evidence on all the issues set for hearing.[75] Moreover, we note that the

[74] We note that footnote 107 of Opinion No. 536 lists several instances in which the Commission emphasized the importance of producing transaction-specific evidence. *See* Opinion No. 536, 149 FERC ¶ 61,116 n.107 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 129 FERC ¶ 61,147, at P 22 (2009) (Remand Order)). Also, in the Rehearing Order, the Commission stated that "[t]he hearing will focus only on *specific* conduct by *specific* respondents." Rehearing Order, 135 FERC ¶ 61,183 at P 37 (*emphasis added*). The Commission explained that "[t]o succeed on the merits, the California Parties are thus required to demonstrate that a *specific* trading practice violated a *specific* provision in the seller's own tariffs." *Id.* P 28 (emphasis added). The Commission also warned the California Parties that they "are expected to be *very specific* when presenting their arguments and evidence on this issue." *Id*. P 27 (emphasis added). The Commission also stated that "[t]he California Parties are required to *specify* which tariff provision and/or portion of the tariff provision the above identified conduct […] violated and that "[g]*eneral allegations will not suffice*." *Id*. (emphasis added). The Commission also held that "[t]he California Parties will be required to demonstrate the nexus between the market clearing price in a *specific* trading hour and the unlawful conduct committed by a *specific* seller at another time." *Id*. P 38 (emphasis added). Moreover, the Commission further clarified that "each respondent is potentially liable only in the *specific* instances in which its own tariff violations are shown to have adversely affected market-clearing prices in a *specific* hour and not vicariously liable in the event that other sellers' tariff violations affected the market clearing prices in a trading hour in which the said respondent transacted." *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs*., 141 FERC ¶ 61,087, at P 11 (2012) (emphasis added).

[75] This finding is consistent with Commission orders in proceedings related to the Western Energy Crisis. *See, e.g.*, *Pub. Utils. Comm'n of the State of Cal. v. Sellers of Long-Term Contracts to the Cal. Dept. of Water Resources*, 150 FERC ¶ 61,079, at P 14 (2015) (stating that general allegations of market dysfunction or high prices in the California markets are an insufficient basis to overcome the *Mobile-Sierra* presumption for certain long-term contracts); *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity at Wholesale into Electric Energy or Capacity Markets in the Pacific Northwest, Including Parties to the Western Sys. Power Pool Agreement*, 137 FERC ¶ 61,001, at P 21 (2011) (making a similar finding as applied to the Pacific Northwest market).

Commission did not disregard general allegations challenging the validity of the California Parties' marginal cost-based proxy methodology. As discussed above, all the arguments were fully addressed in Opinion No. 536 and the Commission found them unpersuasive.

33. We further reject Illinova's and MPS's argument that the California Parties' marginal cost-based proxy prices are invalid, as they do not reflect the scarcity conditions caused by regulatory and market flaws and supply shortages. As noted in Opinion No. 536, the Presiding Judge addressed repeated assertions by the Respondents that generation shortages and high demand explained the high prices. The Presiding Judge noted that, even though on some days the prices were over 900 percent above normal rates, the Respondents' "lack of discussion of gaming activities, despite Enron-related evidence showing that the CAISO market was manipulated by the price raising schemes of marketers, raised questions about the completeness of the Respondents' expert testimony."[76] Opinion No. 536 agreed with the Presiding Judge that an appropriate rebuttal in this case should have included specific countervailing evidence, not general statements.[77] As we have consistently noted, the California Parties produced a transaction-specific analysis *via* the marginal cost-based proxy screens and corroborating evidence of market manipulation that explains market outcomes in measurable terms, while MPS and Illinova have not provided comparable transaction-specific metrics to further bolster their claims regarding scarcity and market flaws over such manipulative behavior.[78]

34. Lastly, we reject MPS's and Illinova's contention that the California Parties' expert testimony and the marginal cost-based screens analysis fail threshold tests for admissibility established in *Daubert*. In the Initial Decision, the Presiding Judge concluded that contrary to Respondents' assertion, analyzing CalPX and CAISO data and methods to identify transactions that connote anomalous market behavior does not require engineering or managerial expertise or consultation with the Respondents' experts.[79] Opinion No. 536 affirmed this finding, reasoning that with regard to the credibility of witnesses, and the amount of weight to be accorded to particular testimony or evidence, as the trier of fact, the Presiding Judge had the opportunity to observe the

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[76] Opinion No. 536, 149 FERC ¶ 61,116 at P 34.

[77] *Id.* P 48

[78] *See., e.g., id*. PP 2, 48, 86.

[79] Initial Decision, 142 FERC ¶ 63,011 at P 158.

witnesses' live testimony and demeanor, and was thus in the best position to evaluate the witnesses' credibility.[80] We continue to agree with the Presiding Judge's conclusion and are not persuaded that the Presiding Judge erred in accepting the California Parties' expert witness qualifications and affording weight to their testimony and evidence.

2. Anomalous Bidding

35. Shell argues that Opinion No. 536 errs in concluding that offers to sell at prices exceeding the California Parties' marginal cost-based proxy prices are anomalous or violated any applicable tariff provision.[81] Shell claims that, operating as a marketer, the cost to Coral was the prevailing market price, which was almost always significantly higher than the production costs reflected in the marginal cost-based proxy price, and is the reason why many of Coral's transactions are caught in the California Parties' screens.[82] Shell claims that Coral did not cause the tight supply and demand imbalance that resulted in the elevation of prevailing market prices, but that it did have to pay the resulting high prices to obtain energy for resale to willing buyers, including CAISO.[83] Shell maintains that Opinion No. 536 and the Initial Decision offer no proof or explanation as to why Coral or any other Respondent seller would pay or have an incentive to pay more than the lowest price available.[84] Shell further argues that the Initial Decision and Opinion No. 536 ignored evidence that the CAISO real-time market is not the last market to operate, and that other options were available to a seller after the

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[80] Opinion No. 536, 149 FERC ¶ 61,116 at P 49 (citing *Inwood Lab. Inc. v. Ives Lab., Inc*., 456 U.S. 844, 856 (1982) (holding that "determining the weight and credibility of the evidence is the special province of the trier of fact."); *El Paso Natural Gas Co*., 67 FERC ¶ 61,327, at 62,156 (1994) (finding that "[in matters where a decision had to be made as to the relative weight to be accorded the testimony of a witness, we will give great deference to the decision of the ALJ"); and *Williams Natural Gas Co*. (formerly *Northwest Central Pipeline Corp.*), 41 FERC ¶ 61,037, at 61,095 (1987) (finding that "the rationale for affording deference to the determinations of the trier of fact on credibility is that the trier of fact is in the best position to evaluate such elusive factors as motive or intent.").

[81] Shell at 52.

[82] *Id*. at 53-54.

[83] *Id*. at 54-55 (citing Ex. CSG-1 at 114:10–18; Ex. POW-233 at 23:4–27:11).

[84] *Id*. at 55.

CAISO real-time market closed, including the bilateral markets in the Western Electricity Coordinating Council (WECC).[85] Shell also claims that Coral's business model of not committing to make a purchase until after a sale was confirmed was common, and that the Commission reached an unprecedented conclusion when it found that selling before purchasing violated a number of provisions in the CAISO tariff.[86]

36. Shell claims that Opinion No. 536's finding that certain bidding patterns indicative of Anomalous Bidding are unreasonable and unsupported because the identified patterns as they pertain to Coral are not patterns at all, and involved legitimate business practice that is indicative only of competitive market trading. Shell claims that a price in excess of the production cost of an inefficient California generator does not become anomalous or abnormal simply because the accusation is repeated twice. With regard to Type I Anomalous Bidding, Shell claims that nothing in the Market Monitoring and Information Protocol (MMIP)[87] or CAISO tariff requires that all portions of an offer to sell be at the same price or that a price-segmented offer was not permitted during the relevant period. According to Shell, the Initial Decision and Opinion No. 536 disregarded evidence demonstrating that submitting offer curves containing different and changing prices, as in Dr. Berry's "hockey stick," "walking cane," and "all-in" offers, was a common and legitimate business practice, and not *per se* unlawful.[88]

37. With regard to Type II Anomalous Bidding, Shell claims that Opinion No. 536's reliance on the California Parties' Type II bidding data screen for detecting anomalousness was unreasonable and unsupportable because the Type II screen is based on false allegations of other tariff violations. According to Shell, the Type II screen fails to prove a tariff violation because false export is an unrelated export and import occurring

[85] *Id*. at 56 (citing Ex. POW-203 at 35:18–24; Ex. CAX-455 at 5; Tr. at 8663:12–8664:9 (Hogan)).

[86] *Id*. at 57-59 and fn. 143.

[87] As explained in the Remand Order, the MMIP barred all participants in the CAISO and CalPX markets from engaging in gaming or anomalous behavior in those markets. The Remand Order also defined which categories of the MMIP violations would be addressed in the hearing, which the Commission later expanded on rehearing. *See* Remand Order, 129 FERC ¶ 61,147 at PP 20-22; Rehearing Order, 135 FERC ¶ 61,183 at PP 26-28.

[88] Shell at 59-62 (citing Tr. at 8294:15–8295:16 (Hogan); Ex. CSG-1 at 40–48, 262-267; Ex. POW-217 at 108:14–19 and Ex. POW-257 at 45:20–24).

in the same hour, Overscheduling was a common practice encouraged by the CAISO, and Coral could not withhold energy or capacity from the market as a marketer.[89]

38. With regard to Type III Anomalous Bidding, Shell contends that Coral owned no generation at the time it made its sale offers and therefore was in no position to prevent any energy or capacity from being generated or made available in the market. Shell further argues that the California Parties' witness Dr. Berry never identified any transaction on which Coral profited from an offer that was not accepted because of alleged withholding.[90]

Commission Determination

39. We reaffirm that Opinion No. 536 correctly found that Type I, Type II, and Type III Anomalous Bidding constitute tariff violations. Despite Shell's contentions, the marginal cost-based proxy screens were appropriately applied to the Summer Period as a factor to determine which bids were anomalous and constituted tariff violations. As noted in Opinion No. 536, the screens adopted by the Presiding Judge and affirmed in Opinion No. 536 appropriately considered elements of opportunity costs, which for a marketer like Shell is represented by the disposal price.[91] While Shell merely repeats its generalized argument that market clearing prices more accurately reflect its marginal costs as a marketer, the California Parties provided a specific screening methodology, which is based on valid assumptions that incorporated operational realities within the CAISO market.

40. The Commission noted in Opinion No. 536 that "sellers had limited choices if their bids were not chosen in the CAISO real-time markets" and outlined what options were available to such a seller in an effort to demonstrate how the adopted screens incorporated opportunity costs.[92] Although Shell states that there were other options to sell energy beyond the real-time market, it made no specific demonstration of how

[89] *Id*. at 63.

[90] *Id*. at 63-64 (citing Ex. CSG-1 at 10:11–20, 27:4–15).

[91] Opinion No. 536, 149 FERC ¶ 61,116 at P 84 (holding that the maximum disposal price would be the marginal cost of the most expensive generator). As noted in Opinion No. 536, the disposal price reflects the discounted price at which a seller could sell energy that was bid in but not accepted into the CAISO real-time market to a generator that could back down its physical resource. *Id*.

[92] *Id*.

incorporating such an assumption would result in a marginal cost different from the marginal cost-based proxy price developed by the California Parties. We reiterate here that Shell's argument is without merit because Shell failed to incorporate any alternative proxies into its own methodology to demonstrate the California Parties' analysis was flawed.[93] As noted above, the Commission expected Respondents to rebut the California Parties' evidence with specific countervailing evidence rather than present generalized arguments. Shell failed to do so and we reject its arguments here on rehearing.

41. Further, we reiterate that the California Parties' marginal cost-based proxy price accurately reflects the disposal price Shell would have received had it been acting in accordance with CAISO's then-existing procurement rules. Although Shell continues to argue that its business practice of shorting its sales to CAISO was common and legitimate, we continue to find that Shell's practice of waiting to receive acceptance of its bid or dispatch instruction before committing to buy energy violated a number of provisions in the CAISO tariff at the time.[94]

42. Further, we disagree with Shell's repeated argument that its bidding practices represented competitive market trading. With regard to Type I Anomalous Bidding, the Commission found in Opinion No. 536 that Coral engaged in "excessive Type I bidding patterns in relation to the marginal cost proxy price" and that the California Parties' methodology was capable of identifying such bidding violations since it "detects bid prices that deviate significantly from what would be expected in a workably competitive market."[95] We are not persuaded to depart from that finding, which was based on record evidence before the Commission.

43. Shell's assertion that the Commission ignored evidence that certain offer curves were not *per se* unlawful is misplaced. As explained in Opinion No. 536, "it is the pattern and consistency of the bidding at above the marginal cost that indicate that this bidding behavior was a tariff violation, not that all bids in isolation were deemed *per se* tariff violations."[96] The Commission found that the California Parties have demonstrated that a majority of Coral's Type I bids remained far above marginal cost even when the

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[93] *Id*. P 86.

[94] *Id*. P 86 nn.188 and 189.

[95] *Id*. P 91.

[96] *Id*. P 92.

marginal cost-based proxy prices were increased by 10 and 25 percent sensitivity factors.[97]

44. Despite Shell's contentions that the repetitive bidding in excess of marginal cost did not indicate anomalous market activity, the California Parties also demonstrated that it was not necessary to submit Anomalous Bids to profitably participate in the CAISO real-time market during the Summer Period. As stated in Opinion No. 536, certain companies submitted nominal amounts of what were classified as Type I Anomalous Bids, while 79 percent of the bids Shell submitted were determined to be Type I Anomalous Bids.[98] We do not agree that Coral was merely acting in accordance with prevailing market conditions when the record evidence shows that other parties did not have to engage in similar bidding patterns to competitively participate in the market.

45. With regard to Type II Anomalous Bidding, the Commission correctly affirmed the Presiding Judge's finding that Coral engaged in above marginal cost bidding in conjunction with anti-competitive tariff strategies, which violated the CAISO MMIP.[99] Despite Shell's continued efforts to call into question the California Parties' screening methodology, Opinion No. 536 explicitly addressed why the Commission accepted the California Parties' Type II Anomalous Bidding screens. As noted in Opinion No. 536, the Commission's finding was not solely based on the fact that anti-competitive strategies, such as False Load, False Export, and Economic Withholding, were used in conjunction with simultaneous imports and exports. Opinion No. 536 explained that "the pattern of bidding and the consistency of such bidding in excess of marginal cost has been a guiding determinant in finding whether any Respondents violated the tariff."[100] We note that the Commission vacated the Presiding Judge's finding with regards to MPS on the ground that the identification of an isolated bid within the California Parties' Type II screen did not constitute a pattern of market behavior that would amount to Anomalous Bidding.[101] In contrast, the consistency of Coral's Type II bidding activity demonstrates a pattern of market behavior that cannot be justified as a legitimate business practice. Even when under the California Parties' sensitivity analysis, the marginal cost

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[97] *Id*. P 92 and n.200 (citing Ex. CAX-260).

[98] *Id*. P 92; *see also* Ex. CAX-260 at 30 tbl 2 (revised Mar. 26, 2012).

[99] Opinion No. 536, 149 FERC ¶ 61,116 at P 94.

[100] *Id*. P 95.

[101] *Id*. P 96.

proxy threshold for the various Type II bids was increased by 10 percent and then by 25 percent, a majority of Coral's bids still exceeded the adjusted thresholds.[102] This demonstrates that the California Parties' screens were conservative and consistently identified anomalous behavior. For these reasons, we affirm that Opinion No. 536's use of the California Parties' screening methodology was reasonable and we reject Shell's request for rehearing.

46. In its rehearing request, Shell reiterates the arguments about Type III Anomalous Bidding that have already been addressed in Opinion No. 536. First, the Commission rejected the assertion that withholding of generation was irrelevant to importers who did not have generation assets. Specifically, the Commission stated that, "although an importer who was a marketer was not required to identify the generation unit associated with its bids into the market, such bidding was a confirmation that some capacity/energy was available."[103] The rules delineated in the CAISO MMIP are not distinguishable based on an importer's specific business position or model (e.g., whether a marketer or a generator).[104] As stated in Opinion No. 536, "[s]ellers that chose to participate in the CAISO market are not exempt from the rules because they have the option not to participate."[105] Second, the Commission addressed Shell's arguments pertaining to profitability by stating that "just because a single offer is not accepted and does not raise real-time prices in isolation, does not mean that the impact on the market is not felt," and that "sellers had a portfolio of transactions in the market at any given hour, and economic withholding was used to raise the price received by the rest of their portfolio in a given hour."[106] Third, Opinion No. 536 found that Dr. Berry's withholding analysis identifies MWhs that were not sold when it would have been economically rational to sell them.[107] We continue to find that Shell's arguments on these points are without merit and we reaffirm Opinion No. 536's conclusions on each of them. For these reasons, we reject Shell's rehearing request.

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[102] *Id*.; *see also* Ex. CAX-260 at 67-68 tbls 11, 12 (revised Mar. 26, 2012).

[103] *Id*. P 105.

[104] Ex. CAX-100 at 1031 (CAISO MMIP § 2.1.1.1).

[105] Opinion No. 536, 149 FERC ¶ 61,116 at P 106.

[106] *Id*. P 104.

[107] *Id*. P 105; Ex. CAX-260 at 87 tbl 16 (revised Mar. 26, 2012); *See also* Ex. CAX-100 at 1031 (CAISO MMIP § 2.1.1.1).

3. False Export

47. On rehearing, Shell and MPS both claim that the Commission wrongly relied on the data screen of California Parties' witness Mr. Taylor to prove False Export violations. Shell and MPS reiterate previous arguments that, besides demonstrating that an export and import occurred during the same hour, the data screen does not consider whether the export and import had to match in terms of quantity, location or counterparty.[108] Shell discounts the California Parties' verification in Coral's trader books on similar grounds by stating that the verification was a sham because, like the data screen, reviewing trader book data merely determined that both the CAISO data and Coral trader books agreed that an export and import occurred during the same hour.[109] MPS argues that multiple industry and economic experts disproved the idea that simultaneous exports and imports were "unusual" or "anomalous."[110]

48. Both MPS and Shell claim that the Commission provides no basis for adopting the results of the False Export screen as a presumption of the Respondents' wrongdoing. MPS contends that the Commission applied its generic implication of fraud and misrepresentation to all "matches" found by the California Parties' screen, and ignored record evidence, widespread industry practices, and North American Electric Reliability Council (NERC) standards and scheduling protocols that showed that, unless some proven act of fraud took place, simultaneous exports and imports were legitimate business transactions.[111] MPS generally claims that, in the absence of proof that a Respondent made a false statement with the intent to deceive, fraud cannot be demonstrated.[112] Similarly, Shell argues that neither the California Parties nor the Commission presented evidence that any schedule submitted by Coral was false, and that there was no indication that the information Coral submitted "did not correspond to actual load."[113] Shell reiterates that Mr. Taylor's screens do not identify related transactions and that no trade confirmations, emails, or trader audiotapes corroborate any

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[108] Shell at 10-12, 16-21(citing Tr. at 4792:19–4793:7 and 4795:1–4796:16 (Taylor); MPS at 48-50, 58-59).

[109] *Id*. at 11 (citing Tr. at 4789:7-10 and 4870:14–4871:2 (Taylor)).

[110] MPS at 94.

[111] *Id*. at 56, 71-77.

[112] *Id*. at 63-69.

[113] Shell at 16 (citing Opinion No. 536, 149 FERC ¶ 61,116 at P 120).

linkage.[114] According to Shell, "the Opinion is replete with sweeping findings about the behavior of undifferentiated 'Respondents' that are wholly inapplicable to Coral and not supported by evidence."[115]

49. Shell and MPS also contest the Commission's conclusion that False Export violations do not constitute legitimate arbitrage. Shell argues that the False Export screen was incapable of identifying and eliminating unrelated and legitimate exports and imports, even when every hour contains the hallmarks of independent transactions.[116] Shell argues that Opinion No. 536 disregards legitimate reasons for exporting power out of and importing power into the control area in the same hour.[117] MPS further contends that the Commission has failed to undertake the fact-intensive analysis that is required to support a finding that such market activity is manipulative rather than legitimate. MPS states that the Commission's misunderstanding of the market design led it to mistake standard forms of arbitrage for tariff violations, and that the Commission must explain how its conclusion is consistent with the history, context, and development of California's market design.[118] MPS argues that the Commission failed to address evidence that demonstrated the legitimate and planned function of locational and temporal arbitrage in the California market design.[119]

50. With regard to parking, Shell argues that there is no evidence that Coral used parking providers, and that Mr. Taylor conceded that he did not allege Coral parked in connection with False Exports.[120] Shell claims that Opinion No. 536 also cites to documentary evidence regarding parking arrangements that are unfounded. First, Shell claims that Opinion No. 536 cites to exhibits for the general proposition that unnamed parking providers allowed their customers to use their name for scheduling and bidding purposes, and that these exhibits all relate to parking services provided by Public Service Company of New Mexico, which, according to Shell, Coral never contracted for parking

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[114] *Id*. at 17.

[115] *Id*. at 12.

[116] *Id*. at 11-12 (citing Tr. at 4799:22–4800:12 (Taylor)).

[117] *Id*. at 26-27, n.51.

[118] MPS at 51.

[119] *Id*. at 51-55.

[120] Shell at 10, 12-16 (citing Tr. at 4822:15–22 (Taylor)).

services.[121] Second, Shell argues that, by the time the Marketing Services Agreement between Coral and the City of Glendale, California was signed on July 31, 2000, half of the 110 hours of alleged False Exports had already occurred, and that this agreement contains no reference to transactions that would meet any definition of False Export.[122] Third, Shell maintains that another document related to the Coral-City of Glendale Marketing Agreement contains descriptions of more than a dozen types of potential transactions, but provides no evidence that Coral ever implemented even one of the listed transactions.[123] Fourth, Shell argues that there is no record of any exports or imports involving Coral and the City of Colton in any of the 110 hours of alleged False Export.[124]

51. Shell cites to the fact that there are dissimilarities and incongruities between Coral's imports and exports, demonstrating that exports and imports were separate and unrelated. For instance, Shell maintains that it presented evidence, which the Commission ignored, that the export quantity matched the import quantity in only eight of the 110 hours of alleged False Export. Shell reasons that although the Commission stated that an exact match in quantities was not necessary, this does not explain how Coral's import quantity was larger than its export quantity in 17 of 110 hours. Shell also states that Coral's exports and imports paired in the screen occurred at the same location in only 65 out of 110 hours, and therefore, one would expect to see a sale and repurchase at the same location if Coral used a parking provider. Shell further maintains that, if Coral used a parking provider, one would expect to see a sale and repurchase from the same counterparty providing the parking service, but in the 110 hours caught in the data screen, Coral had both short-term sales and purchases from the same counterparty in only 39 hours. Shell also states that there are no hours in which Coral's import quantity matches its export quantity and Coral's buyer and seller are the same.[125]

52. With regard to parking, MPS claims that parking was not prohibited and was an acceptable way to increase competition and market liquidity by allowing marketers to have access to control area services.[126] MPS also argues that the California Parties

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[121] *Id*. at 21 (citing Ex. CAX-030, Ex. CAX-184 and Ex. CAX-200).

[122] *Id*. at 22 (citing Ex. CAX-035).

[123] *Id*. (citing Ex. CAX-026).

[124] *Id*. at 22-23 (citing Ex. CAX-036).

[125] *Id*. at 17-20.

[126] MPS at 64, 91-93.

cannot establish a *prima facie* case of False Export against marketers by simply assuming parking existed.[127] MPS argues that much of the referenced documentary evidence in Opinion No. 536 regarding its parking agreements fall outside the timeframe applicable to the alleged MPS False Export transactions.[128] MPS also argues that, of the parking agreements that date to the relevant timeframe, nothing links that service to any False Export transaction data.[129] MPS also states that the Commission's conclusion that market participants engaged in False Export to earn profits from the high real-time prices does not appear to apply to MPS given that it only made $159,147 in excess of what it would have made in the CalPX day-ahead market.[130] MPS states that the coincidental and random nature of any overlap and lack of profit indicates that the parking provided by Public Service Company of New Mexico to MPS was most likely a legitimate control area service having nothing to do with any False Export strategy of nefarious intent of MPS.[131]

53. MPS further argues that the Commission erred in finding that False Exports constitute a violation of various sections of CAISO's MMIP, since the MMIP does not prohibit simultaneous exports and imports. Specifically, MPS maintains that the Commission erred in holding that False Exports violated MMIP section 2.2.11.1, as it is a section of the MMIP that does not exist, and thus, could not have been violated.[132] Further, MPS argues that, even if the MMIP prohibited specific transactions, the Commission erred in holding that the transactions defined as False Export by the California Parties meet the criteria necessary to run afoul of these tariff provisions.[133] Given that it adhered to universally applicable NERC scheduling conventions and that there is no support in the record that it engaged in parking as part of a False Export

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[127] *Id*. at 77-78.

[128] *Id*. at 88-89.

[129] *Id*. at 89-90.

[130] *Id*. at 90-91 (citing Ex. CAX-383, tbl. III-3 at 1(revised)).

[131] *Id*.

[132] *Id*. at 82 (citing CAX-100 at 36).

[133] *Id*. at 82-83 (citing MMIP Sections 2.1.1.1 and 2.1.1.5 and Scheduling provisions in section 2.2.11 of the CAISO Tariff).

strategy, MPS claims that there is no proof that it violated section 2.2.11 or section 2.1.1.5 of the CAISO tariff.[134]

54. MPS further argues that there is no proof that it withheld capacity from the CalPX day-ahead market to raise prices in the real-time market in violation of MMIP section 2.1.1. MPS asserts that the Commission ignored the fact that it did not buy the majority of its day-ahead power from the CalPX, and that it only purchased from the CalPX market during a couple of hours for a total of 195 MWhs during the May to June timeframe. According to MPS, the allegation that MPS purchased and scheduled for export the remaining MWhs is based on Dr. Fox-Penner's speculative assumptions that, but for MPS's purchase from some non-CalPX source, that supply would have been sold into the CalPX at the marginal cost-based proxy price developed by the California Parties. According to MPS, the Commission's finding that suppliers withheld capacity from day-ahead markets to raise prices in real-time markets makes no sense and is not reasoned decision-making.[135]

55. Shell and MPS both argue that Opinion No. 536's treatment of False Exports is inconsistent with the approach the Commission adopted in the Gaming Proceeding.[136] MPS argues that the Commission failed to provide a reasoned explanation of why its holding in the Gaming Proceeding, where it held that simultaneous exports and imports, *per se*, were not manipulation, has been reversed in the instant proceeding.[137] According to MPS, the Commission previously did not view what the California Parties now call False Export as manipulative activity in violation of the MMIP, and for the Commission now to hold that False Export is a violation of vague provisions in a tariff that were not invoked until several years after the fact violates the Respondents' rights to fair notice and due process.[138] Similarly, Shell contends that the Commission should disavow on rehearing Opinion No. 536's condemnation of Coral's legitimate transactions because it

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[134] *Id*. at 93-94.

[135] *Id*. at 94-100.

[136] *Am. Elec. Power Serv. Corp.*, Order to Show Cause Concerning Gaming and/or Anomalous Market Behavior, 103 FERC ¶ 61,345 (2003) (Gaming Order), *order on reh'g*, 106 FERC ¶ 61,020 (2004).

[137] MPS at 79-81.

[138] *Id*. at 82-86.

is contrary to Commission precedent.[139] Shell argues that the Commission disregarded legitimate reasons for exporting power out of and importing power into a control area in the same hour that were acknowledged in the Gaming Proceeding.[140]

56. Shell further claims that condemning False Export as a tariff violation based on Mr. Taylor's screen sets a dangerous precedent for power marketers and other wholesale market participants who regularly export out of and import into a control area in the same hour. According to Shell, Opinion No. 536 will force marketers and wholesale market participants to choose between the export and import, even when both are economical, or somehow account specifically for these transactions and document how they are unrelated.[141] MPS similarly states that, if the California Parties' definition of a False Export is allowed to stand, all marketers will be forced to choose between either a real-time or day-ahead transaction, because choosing to do both would result in *prima facie* evidence of a tariff violation.[142]

57. Shell also states that Opinion No. 536 wrongfully dismissed evidence that its transactions were legitimate and unrelated on the ground that Shell did "not effectively demonstrate that actual power flowed through its simultaneous imports and exports," when such a demonstration is impossible, since specific power flow on the grid cannot be traced.[143] Shell also claims that this finding reversed the burden of proof from the California Parties who had the burden to prove by a preponderance of the evidence that Coral submitted false information and to show that no scheduled power actually flowed.[144]

58. MPS claims that the Commission erred in finding it liable for tariff violations based upon what other market participants may have done or said. According to MPS, the Commission failed to recognize that the California Parties produced no similar specific evidence against MPS and that the evidence that the California Parties did

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[139] Shell at 12 (citing Gaming Order, 103 FERC ¶ 61,345 at P 67, *order on reh'g*, 106 FERC ¶ 61,020, at P 88 (2004)).

[140] *Id*. at 26-28.

[141] *Id*. at 11-12, 27-28.

[142] MPS at 62.

[143] Shell at 25 (citing Opinion No. 536, 149 FERC ¶ 61,116 at P 130).

[144] *Id*.

produce relating to MPS was not relevant or applicable to the False Export allegations against MPS. MPS claims that there are no emails, trader tapes, correspondence, or internal documents that justify treating it the same as other entities about which the California Parties did offer such evidence.[145]

Commission Determination

59. We reaffirm Opinion No. 536's finding that False Export transactions are tariff violations. Despite MPS's and Shell's assertions, the Commission thoroughly justified its analytical framework. In addition to outlining the fundamental premise of False Exports, Opinion No. 536 thoroughly explained why the Commission relied on the California Parties' marginal cost-based screens.[146] Specifically, the Commission stated that "Mr. Taylor appropriately applied the marginal cost-based screens for potential False Export MWh quantities, by seller and hour, comparing exports in the day-ahead and hour-ahead markets to imports in the real-time market."[147] The Commission also noted the measures the California Parties took to corroborate their analysis through data verification.[148] Further, the Commission examined the number of bidding hours and total MWhs of energy during the Summer Period captured by Mr. Taylor's marginal cost-based screens, to determine whether there was a consistent pattern of behavior associated with the level of False Export activity identified within the screens.[149] For example, in Opinion No. 536, the Commission found that Koch's transactions did not reflect a pervasive pattern of False Export activity.[150] Conversely, the evidence demonstrated that Shell and MPS reflected a consistent pattern of False Export activities for hundreds of hours during the Summer Period, and the California Parties linked thousands of MWhs of forward and real-time sales.[151] The Commission also identified supporting documentary evidence that Shell and MPS engaged in parking arrangements, which further

[145] *Id*. at 86-92.

[146] Opinion No. 536, 149 FERC ¶ 61,116 at PP 122, 127, and 131.

[147] *Id*. P 131 (citing Ex. CAX-108 at 2-8).

[148] *Id*. (citing Ex. CAX-108 at 9-11; Ex. CAX-001 at 86-87 (revised)).

[149] *Id*. P 127.

[150] *Id*. PP 127-128.

[151] *Id*. PP 127, 131.

corroborates the California Parties' analysis that parking was used as a means to facilitate strategies that circumvented the CAISO tariff.[152]

60. We find no merit in the repeated assertions by Shell and MPS that Mr. Taylor's screen only demonstrates that an export and an import occurred during the same hour but does not match the imports and exports to demonstrate that transactions were linked. In Opinion No. 536, the Commission found that Mr. Taylor's screening methodology is a reasonable method to identify signatures of False Export transactions.[153] We reiterate that an exact match between forward transactions and offsetting real-time transactions is not necessary. As explained in Opinion No. 536, the quantities that were taken in a real-time auction were not known until the real-time dispatch, and therefore, it was possible for CAISO to accept only a portion of a False Export bid.[154] Shell contends that Coral's import quantity was larger than its export quantity in 17 of the 110 hours, seeking to demonstrate that Mr. Taylor's screening methodology is generally flawed by capturing separate, unrelated exports and imports that occur during the same hour. However, Shell offers no transaction-specific evidence to show that, within those specified hours, any portion of the import quantity was unrelated.[155] We reiterate that the Commission expected the Respondents to rebut the California Parties' evidence with specific countervailing evidence rather than with generalized arguments.

61. The notion that not 100 percent of the identified False Export transactions share one or more factors such as same location, counterparty, or quantity does not discredit the validity of the False Export screen. Throughout his testimony, Mr. Taylor made it clear that it was in the interest of suppliers to disguise False Export transactions, and that various business practices and strategies enabled suppliers to manipulate transactions so that one would not expect one-to-one matching.[156] The Commission was unpersuaded by the Respondents' arguments to the contrary,[157] and remains so here. We therefore deny rehearing on this issue.

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[152] *Id*. PP 120, 122-123, 129-130.

[153] *Id*. P 131.

[154] *Id*.

[155] *See* Shell at 18 and n. 20.

[156] Ex. CAX-167 at 137 (revised Mar. 28, 2012); *see also* Opinion No. 536, 149 FERC ¶ 61,116 at P 131.

[157] *Id.* P 131.

62. We reiterate that there is no merit to MPS's and Shell's arguments that False Export violations constituted legitimate arbitrage. As stated before, at issue in this case are discrete acts of tariff violations, not arbitrage.[158] In Opinion No. 536, the Commission identified a number of sections of the CAISO tariff that were violated because of False Export transactions.[159] The Commission further stated that "the California Parties' failure to evaluate potential scenarios does not alone discount the analysis proffered by the California Parties to demonstrate the False Export violations."[160] As noted in Opinion No. 536, the Presiding Judge was not required to specifically address the merits of every hypothetical argument or conjectural scenario, and although the Commission considered all facts and arguments before it, it is also not required to individually address each of the generalized conjectural hypotheses in order to affirm the Presiding Judge's findings.[161]

63. Further, we clarify that in explaining the premise behind what constitutes False Exports, we used generic terms such as "Respondents" and "suppliers" to represent those entities that engaged in the behavior that constitutes False Export, not as a tool to implicate all individual Respondents in such behavior.[162] Despite attempts by Shell and MPS to characterize Opinion No. 536's findings as undifferentiated and inapplicable, we have noted that we examined each of the remaining Respondents based on the False Export screens, patterns, and documentary evidence attributable to that Respondent. We also note that all evidence offered by Shell and MPS was given due consideration by the Commission, but the evidence presented by the California Parties in whole was more compelling, as discussed herein, and thus, able to meet the burden to demonstrate by a preponderance of evidence that Shell and MPS committed False Export violations.

64. We reaffirm the Commission's finding that the California Parties presented evidence in the record linking the pattern of Shell's False Exports with parking

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[158] Initial Decision, 142 FERC ¶ 63,011 at P 157. *See* Opinion No. 536, 149 FERC ¶ 61,116 at P 117.

[159] *See id*. P 120.

[160] *Id.* P 125.

[161] *Id.* P 126.

[162] *Id.* P 122.

arrangements it had with certain California municipalities.[163] For example, the Marketing Services Agreement between Coral and the City of Glendale, California contemplates the development of a marketing plan that will enlist strategies Glendale and Coral will jointly pursue.[164] Another supplemental document reflects the development of such a plan and outlines certain strategies that correspond to patterns of manipulative behavior.[165] Further, the Marketing Services Agreement is dated during the Summer Period, at a time when False Export transactions were identified by Mr. Taylor. Mr. Taylor also demonstrated that many of the transactions that reflect False Exports for Coral are at tie points on the City of Glendale's system.[166]

65. Shell cites to the timing of the agreements in an effort to discount the transactions captured by the California Parties' screen. We find this argument unpersuasive. Although Shell argues that half of the transactions could not reflect False Export tariff violations due to the timing of the formalization of the Marketing Services Agreement, the pattern of behavior identified in the screens is similar before and after the date of the formal agreement. As highlighted in Opinion No. 536, the pattern of behavior, as measured through the transactions captured by Mr. Taylor's False Export screen, was a key indicator of consistent behavior of tariff violations that permeated throughout the Summer Period.[167] The documentary evidence related to parking further corroborates Mr. Taylor's False Export analysis, but it is viewed in the context of the other layers of evidence, not in isolation from other facts demonstrating that Coral engaged in the False Export transactions at hand.

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[163] *Id.* P 130. We clarify that any arrangement Shell had with the City of Colton, as recognized in Ex. CAX-36, is unclear with respect to whether Shell utilized parking services in an illegitimate manner. Shell is correct that the California Parties do not present sufficient evidence linking Shell's alliance with Colton as a means to commit False Export violations. However, this does not alter our overall finding or the finding pertaining to Shell and the City of Glendale, as depicted in Ex. CAX-26 and Ex. CAX-35, which weighs as sufficient corroborating evidence that Shell and the City of Glendale's parking arrangement was used as a means to commit False Export violations.

[164] Ex. CAX-35.

[165] Ex. CAX-26.

[166] Tr. 4822: 9-13 (Taylor).

[167] Opinion No. 536, 149 FERC ¶ 61,116 at P 127.

66. With regard to MPS's arguments related to parking, we reaffirm the Commission's finding that MPS committed False Export violations, and that the various arrangements it had with parking providers corroborated the California Parties' False Export analysis.[168] Although MPS continues to frame parking as an acceptable business practice that allowed marketers access to control area services, the Commission's determination that MPS committed tariff violations was not based solely on the practice of parking energy. However, the fact that parking was used as a means to gain illegitimate access to the CAISO market is relevant. As stated in Opinion No. 536, documentary evidence demonstrates that MPS also had parking arrangements with a Southwest parking provider, a Pacific Northwest public utility, and two California municipalities.[169] Further, MPS's arrangement with a Pacific Northwest public utility parking provider explicitly allowed sending power out of California and back into CAISO for a charge.[170]

67. MPS also attempts to dispel the documentary evidence by arguing that the timeframe within the parking services agreements is inapplicable to its False Export transactions. As explained above, in determining whether a certain market activity constituted a legitimate business practice or a tariff violation, the Commission examined a pattern of such activity. Accordingly, the Commission found that the California Parties demonstrated that certain MPS transactions were False Exports by capturing such transactions within Mr. Taylor's screen that identified a signature of False Export and by establishing a consistent pattern of such activity, and the evidence of illegitimate instances of parking was further corroborating evidence that MPS was engaging in False Exports.[171]

68. Despite MPS's claim that it did not earn substantially excessive profits from engaging in False Exports than what it would have earned in the CalPX day-ahead market, the Commission correctly found that the California Parties demonstrated that, for a majority of bids, the False Export strategy resulted in higher revenues, and

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[168] *Id*. P 129.

[169] *Id*.; Ex. CAX-032; Ex. CAX-038; Ex. CAX-039; Ex. CAX-040, CAX-041, and CAX-200; *see also* City of Pasadena's Data Responses to the FERC Staff in Docket No. PA02-2.

[170] Opinion No. 536, 149 FERC ¶ 61,116 at P 129; Ex. CAX-037; Ex. CAX-001 at 89.

[171] Opinion No. 536, 149 FERC ¶ 61,116 at PP 127 and 129.

subsequently higher profits, than selling the energy in the day-ahead market.[172] We are not convinced by the argument that lack of substantial profits accruing to MPS demonstrates that parking services provided by Public Service Company of New Mexico was a legitimate control area service. First, as the Commission already found, the documentary evidence regarding its parking services with Public Service Company of New Mexico demonstrate that the parking arrangement was tactically used to circumvent CAISO market rules.[173] Second, the Commission previously rejected a similar argument by stating that False Export resulted in "inherent benefits that were realized most of the time regardless of whether False Export was employed 100 percent effectively by the Respondents."[174] MPS still received a profit of $159,147 greater than what it would have received by selling the same energy in the day-ahead market.

69. We clarify that MPS experienced greater profitability in 58 percent of the hours in which False Export occurred during the Summer Period, while Coral was more profitable by engaging in False Export during 87 percent of the time.[175]

70. We continue to find that, contrary to MPS's assertions, False Exports constitute a violation of a number of applicable sections of the CAISO tariff and MMIP.[176] The

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[172] *Id*. P 134.

[173] Ex. CAX-041; Ex. CAX-200. *See* Opinion No. 536, 149 FERC ¶ 61,116 at P 129.

[174] *Id*. P 134.

[175] Ex. CAX-383, Table III-2 (revised). *See also* Opinion No. 536, 149 FERC ¶ 61,116 at P 134 and n.297. We clarify that the discrepancy between the numbers provided above and the original calculations presented by the California Parties is due to the Commission's inadvertent error. In Opinion No. 536, the Commission erroneously cited to the original calculations in Ex. CAX-167 (dated Mar. 28, 2012), while the updated calculations appear in Ex. CAX-383 (dated May 31, 2012). Although the updated numbers reflect slight changes in the percentage of time when it was more economic to offer False Exports, the analysis of the data remains the same, given that both Shell and MPS realized more profits by engaging in False Exports than they would have by offering the energy in accordance with then-effective tariff rules into the CalPX day-ahead market. *See also* Tr. 5232:2-5236:12 (Taylor).

[176] Opinion No. 536, 149 FERC ¶ 61,116 at P 120. We note that, in referring specifically to section 2.2.11.1, we are referencing scheduling provisions in the CAISO tariff, not the MMIP.

Commission did not base its conclusion on the fact that simultaneous imports and exports occurred, but found that the Respondents subverted export scheduling requirements through the submission of false information to CAISO. Since scheduling and bidding protocols required specific information regarding import and export points, the external control area ID, interchange IDs, and other identifying elements of the various transactions, such information would have been false for energy that was sourced from and sunk within CAISO.[177] In addition, given the Commission's repeated discussion on the merits of the California Parties' evidence, we reiterate that other provisions of the CAISO MMIP specifically regarding "unusual activity or circumstances relating to imports from or exports to other markets or exchanges" were also violated.[178] Finally, we maintain the finding that MPS effectively withheld capacity from the day-ahead market to raise prices in the real-time market.[179] Despite MPS's claims that it only minimally purchased from the CalPX day-ahead market, we find that the alternative use of the power possessed by sellers who committed False Export tariff violations would have been to bid their power into the CalPX day-ahead market at the marginal cost-based proxy prices.[180]

71. Although both Shell and MPS continue to argue that the ruling in Opinion No. 536 on False Exports is inconsistent with the Gaming Order, we reiterate that the Commission is following the mandate of the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) in *CPUC Decision* to allow the California Parties "to offer evidence concerning all behaviors that violated tariffs, whether or not those violations were addressed in the Commission's enforcement proceeding."[181] In addition, as noted in Opinion No. 536, the California Parties have effectively distinguished False Export transactions in this proceeding from the Ricochet transactions in the Gaming Order.[182] We reiterate that although there may be transactional similarities between the two types

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[177] *Id*.; *see also* Ex. CAX-167 at 104-105.

[178] Opinion No. 536, 149 FERC ¶ 61,116 at P 120; Ex. CAX-001 at 32-33.

[179] Opinion No. 536, 149 FERC ¶ 61,116 at P 120; Ex. CAX-023 at 9.

[180] Ex. CAX-310 at 61.

[181] *See* Opinion No. 536, 149 FERC ¶ 61,116 at P 121 (citing Rehearing Order, 135 FERC ¶ 61,183 at PP 23-25); *see also Pub. Util. Comm'n of the State of Cal. v. FERC*, 462 F.3d 1027, 1051 (9th Cir. 2006) (*CPUC Decision*).

[182] Opinion No. 536, 149 FERC ¶ 61,116 at P 121.

of transactions, the falsification of information constitutes a tariff violation, and the analysis of False Exports here is not bound by the analysis of Ricochet transactions in the Gaming Order.

72. We also do not find any merit behind MPS and Shell's assertions that our findings on False Export violations will set a harmful precedent for power marketers and other wholesale market participants. We clarify that the findings regarding False Exports are limited to the specific facts and circumstances in this proceeding. Throughout the proceeding, the Commission's framework for analysis has been limited by the evidence presented by the California Parties and the Respondents with regard to specific transactions within a certain market structure during the relevant time period. This narrow scope does not automatically implicate other market participants in potential violative behavior and force their hand with regard to business decisions and operations. Like any other instance of alleged manipulative behavior, the Commission evaluates such claims on a case-by-case basis, based on the limited facts and circumstances surrounding such claims.

73. In response to Shell's arguments, we further clarify that the Commission's finding that Coral engaged in False Export violations was not because Shell did not specifically trace power flow on the grid. As outlined in Opinion No. 536 multiple times, the Commission's conclusion that Shell engaged in False Exports was the result of the review of multiple tiers of evidence presented by the California Parties, which ultimately outweighed any countervailing evidence presented by Shell that such transactions were unrelated. The California Parties met their evidentiary burden by capturing Coral's transactions within the False Export screen, establishing a pattern of such behavior, and further corroborating such evidence with documentary evidence of illegitimate use of parking. We reiterate that the premise behind the California Parties' False Export analysis is that parking providers were used by suppliers as a scheduling convenience to conceal self-cancelling transactions in which no power actually flowed at the intertie.[183] The Commission's finding that Shell did not "demonstrate that actual power flowed through its simultaneous imports and exports" merely indicates that Shell was unsuccessful in its attempts to discredit the narrative offered by the California Parties. After the California Parties presented multiple layers of evidence that Coral engaged in False Exports, the burden shifted to Shell to rebut such evidence, which Shell failed to do.[184] Therefore, the Commission's findings on False Export tariff violations in this proceeding remain unchanged.

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[183] *Id.* P 122.

[184] *Id.* P 130.

4. Price Effect

74. On rehearing, Shell and MPS contend that the price effect analysis conducted by the California Parties' witness Dr. Fox-Penner is flawed because it does not properly examine price effects within all relevant markets. Shell claims that Dr. Fox-Penner analyzed only the single market that would show the greatest price increase and ignored the interrelated market or markets showing price decreases or no price effect at all.[185] Thus, Shell contends that Opinion No. 536's acceptance of the price effect analysis does not show a nexus between a tariff violation and price.[186] According to MPS, Dr. Fox-Penner's model wrongly treats bids at a particular price and quantity in one market as synonymous with those in different markets.[187] MPS further argues that Dr. Fox-Penner's model is incomplete and biased because it only examines the day-ahead market for price effects and looks only at the market where he was likely to find price increases.[188]

75. Both Shell and MPS contend that Dr. Fox-Penner's analysis uses a low threshold that finds price effects within the margin of error of his methodology. For instance, Shell contends that most violations with directional, isolated, positive price effects were within one dollar, and that such low price effects are miniscule proportionately to prevailing market prices.[189] Shell further argues that Dr. Fox-Penner's analysis was incapable of replicating actual market-clearing prices within one dollar per MWh for 14 percent of the time in the southern part of CAISO and 13 percent of the time in the northern half of CAISO,[190] and therefore, this invalidates Dr. Fox-Penner's analysis given that a majority of price effects are less than one dollar.[191] MPS states that minimal price discrepancies make up a sizeable percentage of price effects within Dr. Fox-Penner's model given that

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[185] Shell at 66 (citing Tr. at 2488:11–15 (Fox-Penner)).

[186] *Id.* (citing Rehearing Order, 135 FERC ¶ 61,183 at P 38).

[187] MPS at 103 (citing Ex. CAX-143at 43 tbl.2; Ex. CSG-1at 205:6-12).

[188] *Id.* at 104-105.

[189] Shell at 71 (citing Tr. at 2517:4–9, 2517:23–2518:13, 2956:18–2960:9 and 2960:13–19 (Fox-Penner)).

[190] *Id.* at 72-73 (citing Ex. CAX-145 at 8 (2nd revised)).

[191] *Id.* at 73 (citing Tr. at 2960:13-19 (Fox-Penner)).

three-quarters of all findings were price effects of less than one dollar and thirty-nine percent were within one penny.[192]

76. Shell and MPS also attack the logic behind the price effects model presented by Dr. Fox-Penner. Shell argues that Dr. Fox-Penner's review of only the CalPX day-ahead energy market is illogical because the price effect of False Export would be to reduce prices in the CAISO real-time market, creating price convergence with the day-ahead market, and because Mr. Taylor and Opinion No. 536 both find that False Export is a violation of the CAISO tariff and not the CalPX tariff.[193] Further, because none of Coral's alleged False Exports were sourced from the CalPX market, Shell alleges that Dr. Fox-Penner, therefore, analyzed Coral's price effect in a market that Coral's alleged False Exports did not affect.[194] MPS states that Dr. Fox-Penner wrongly assumed that, in the absence of their allegedly violative transactions, the Respondents would have instead engaged in the closest possible legal alternative.[195] MPS argues that the Commission must disregard Dr. Fox-Penner's price effect analysis when applied to power sold to MPS under bilateral contracts, which occurs for at least 15,777 hours of alleged False Exports.[196] MPS also contends that it was too small of a market participant to adversely affect market prices given that it represented an average share of CAISO load of only 0.11 percent.[197]

77. Shell further contends that Dr. Fox-Penner's price effect analysis is flawed with regard to his examination of Anomalous Bidding. According to Shell, although Dr. Fox-Penner determined that there was a price effect in the CAISO real-time imbalance energy market, his analysis of Type III Anomalous Bidding is highly speculative given that it requires analyzing offers that were not accepted and never set a market clearing-price. Shell argues that his analysis examines only unrealistic, isolated price effects. For Type II Anomalous Bidding, Shell claims that Dr. Fox-Penner simply

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[192] MPS at 106 (citing Tr. at 2517:2-14, 2517:19-2519:8, 2920:22-2923:8, 2956:18-2957:6, 2826:21–2834:18 and 2960:13-19 (Fox-Penner)).

[193] Shell at 66-67 (citing Ex. SNA-3 at 17:11–18:20; Opinion, 149 FERC ¶ 61,116 at P 120)

[194] *Id.* (citing Taylor, Ex. CAX-001 at 88 tbl. V-2 (revised)).

[195] MPS at 102 (citing Ex. CAX-143 at 39:17-18 and 40:10).

[196] *Id.* at 113-114.

[197] *Id.* at 109-110 (citing Ex. MI-9 and Tr. 8960:3-8 (Kalt)).

reused the same analysis from his False Export, False Load Scheduling, and Type III Anomalous Bidding tests, and therefore, Type II bidding does not have a separate analysis and suffers from the same deficiencies as the underlying claims of False Export, False Load Scheduling, and Type III Anomalous Bids.[198]

Commission Determination

78. In Opinion No. 536, the Commission found that the California Parties' witness, Dr. Fox-Penner, accurately constructed a price effect model that compared the actual market clearing price in the hour of a violation to the marginal cost-based proxy price that would result if the tariff violation is removed in that hour and replaced with an alternative transaction that comports with the requirements of the tariff."[199]

79. We are not persuaded by MPS's and Shell's arguments that Dr. Fox-Penner did not examine all relevant markets. As noted in Opinion No. 536, absent the False Export tariff violations, "the seller would have sold its day-ahead power into the CalPX as the market design intended."[200] Further, historical data corroborated the assumptions that went into Dr. Fox-Penner's model. Opinion No. 536 noted that "the real-time market typically provided about one percent of power delivered to load within CAISO."[201] These data indicate that those who had power sources within CAISO nearly always scheduled through the day-ahead and hour-ahead markets by selling to the CalPX.[202]

80. Although Shell and MPS claim that it is illogical to only review the price impact of the CalPX market when False Export is considered a violation of the CAISO tariff, a necessary aspect of the False Export violation was sourcing power from the CalPX or other sources internal to California. In Opinion No. 536, the Commission found that "the closest alternative for the sale involving a tariff violation into the California markets is generally a sale into the same markets but with no violation."[203] If in the absence of False Export violations sellers would have sold power in the day-ahead market as the

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[198] Shell at 68-69.

[199] Opinion No. 536, 149 FERC ¶ 61,116 at P 132.

[200] *Id*. P 132.

[201] *Id*. (citing Ex. CAX-310 at 4 (2nd revised version)).

[202] Ex. CAX-310 at 33 (2nd revised version).

[203] Opinion No. 536, 149 FERC ¶ 61,116 at P 132.

market design intended, there would not have been an adverse price impact in the CalPX market and sellers would not have been able to subsequently violate the CAISO tariff by selling internally-sourced power in the real-time markets. Although Shell and MPS repeat their assertion that the effect of False Exports would be price convergence and lower real-time prices, as stated in Opinion No. 536, we are not persuaded by arguments that False Export transactions had a beneficial effect on market clearing prices.[204]

81. On rehearing, MPS and Shell continue to assert that the price effect methodology incorporates an excessively low threshold. We reaffirm Opinion No. 536's finding that the price effect model "does not intend to incorporate the precise magnitude of a violation's price effect because the violations are examined in isolation and do not reflect seller interactions and other combined effects."[205] We agree with the California Parties' expert witness Dr. Fox-Penner that the treatment of the price impacts of each tariff violation in isolation is a conservative measure of the direction of the impact.[206] There were many forms of inter-temporal and inter-seller interactions that linked the actions of many sellers within and across hours, which would provide a more complete and accurate measure of the price impact.[207] Although MPS and Shell attempt to portray Dr. Fox-Penner's methodology as flawed due to the level of nominal price effects within a margin of error, as noted in Opinion No. 536, the narrow and more conservative approach adopted by Dr. Fox-Penner is consistent with the Commission's directive in the Remand Order to determine whether specific tariff violations affected market clearing prices.[208] We also note that the Respondents could have submitted an opposing methodology to demonstrate why a higher price threshold should be warranted and to specifically rebut Dr. Fox-Penner's claims that his approach was conservative. However, the Respondents failed to offer an alternative approach.

82. We similarly find no merit in Shell's arguments that Dr. Fox-Penner's price effect analysis is flawed with regards to Anomalous Bidding. Dr. Fox-Penner correctly

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[204] *Id*. P 133.

[205] *Id*. (citing Ex. CAX-310 at 3, 76 fn.64, 78 (2nd revised version); CAX-143 at 36, 39, 97 (revised)).

[206] Ex. CAX-310 at 3 (2nd revised version); CAX-143 at 37 (revised).

[207] Ex. CAX-143 at 35 (revised).

[208] Opinion No. 536, 149 FERC ¶ 61,116 at P 133 (citing Remand Order, 129 FERC ¶ 61,147 at P 3; Rehearing Order, 135 FERC ¶ 61,183 at P 31).

examined whether real-time market clearing prices would have been lower had each anomalous bid instead been replaced by the same quantity bid at a workably competitive price level.[209] Given that Dr. Fox-Penner employs the Commission-approved marginal cost-based proxy prices as the basis for such alternative bids, we are not persuaded by Shell that his analysis of Type III Anomalous Bidding is speculative. Additionally, Dr. Fox-Penner conducted a sensitivity analysis that increased the marginal cost-based proxy prices by 10 percent, and he found that of the 5,033 violations originally identified as having price effects, 4,825 violations continue to have individual directional price effects following the sensitivity analysis.[210] Although Shell claims that Dr. Fox-Penner's examination of the price impact of Type II Anomalous Bidding suffers from the same illogic as the underlying claims of his False Export, False Load Scheduling, and Type III Anomalous Bidding analyses, we have not found any deficiencies in these related price effect tests, and therefore, we do not find any merit in Shell's argument.

83. We also find no merit to MPS's argument that it was too small of a market participant to adversely affect market prices. The Commission did not make a finding that MPS committed tariff violations because of an exercise of market power, but that MPS engaged in tariff violating behavior, such as False Exports, that had a price increasing effect on market prices. MPS's unsupported position does not rebut the data-driven analysis offered by Dr. Fox-Penner that demonstrates that even a small market participant can impact market clearing prices through such tariff violating behavior.

5. False Load Scheduling

84. On rehearing, Hafslund states that the Commission failed to address arguments that the CAISO tariff did not prohibit False Load Scheduling.[211] Hafslund states that the Commission ignored or confused defined terms in reaching its conclusion. Hafslund states that the Commission replaced "Demand" with "Load" in its interpretation of section 2.2.7.2 of the CAISO tariff.

85. Hafslund argues that the Commission also failed to take into account the actual language in tariff section 2.2.11.1, as well as the fact that CAISO suggested Hafslund execute a meter service agreement. Hafslund states that the meter service agreement created an arrangement where the amount of energy scheduled by Hafslund could be

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[209] Ex. CAX-310 at 6 (2nd revised version).

[210] *Id*. at 6-7.

[211] Hafslund at 1.

verified as delivered under the meter service agreement.[212] Hafslund states that contrary to the Commission's assertions, scheduling is not required to relate to actual Load but only to Demand. Hafslund further states that CAISO's own reliance on section 2.2.11.1 to assess Hafslund's scheduling compliance demonstrates that the Commission's reading of section 2.2.7.2 is wrong or that the tariff provisions at issue are unclear.[213] Hafslund further states that the Commission's affirmation that the California Parties' interpretation of the tariff as "reasonable" constitutes an impermissibly low bar for the complainants to meet.[214]

86. Hafslund further argues that the plain language of the CAISO tariff did not prohibit Overscheduling because schedules submitted needed to match energy to be provided to a zone by Hafslund with demand and not the load to be served in that zone.[215] Hafslund notes that the definition of Load in the CAISO tariff expressly states that it should not be confused with Demand.

87. Hafslund also argues that the Commission ignored evidence that CAISO advised Hafslund on committing Overscheduling.[216] Hafslund states that documentary evidence shows that CAISO and Hafslund worked together on its Overscheduling practices and that CAISO's interpretation of the tariff was the same as Hafslund's interpretation.[217] According to Hafslund, CAISO contemplated Overscheduling long before the energy crisis and determined it was beneficial to the market.[218]

88. Hafslund further states that the California Parties' analysis fails to provide the Commission with the appropriate information on price effects, and ignores instances

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[212] *Id*. at 9.

[213] *Id*. at 10.

[214] *Id*. at 11.

[215] *Id*. at 12.

[216] *Id*. at 13

[217] *Id*. at 14-15.

[218] *Id*. at 19.

where prices were lowered by Hafslund's sales.[219] Hafslund states that many instances of price effects are triggered by an impossibly small price effect.[220]

89. MPS states that no specific evidence shows that Overscheduling violates any tariff provision.[221] MPS argues that the tariff must be interpreted to allow what it does not expressly prohibit. MPS states that because the tariff provision is ambiguous, conduct of parties at the time must be weighed heavily. MPS argues that tacit approval by CAISO and the ubiquitous practice of Overscheduling compels the conclusion that MPS did not violate the tariff. MPS further states that the Commission erred in citing Terry Winter's and Eric Hildebrandt's testimonies as evidence that CAISO disapproved of Overscheduling. MPS argues that Mr. Winter's testimony concerned overgeneration. MPS also argues that Dr. Hildebrandt had a limited role at CAISO in the summer of 2000 and that his testimony should be given little weight. [222]

90. Further, MPS argues that Overscheduling does not constitute the false submission of information. MPS states that that Overscheduling, as a practice, was widely known and encouraged.[223] Moreover, MPS argues that "Demand" on Respondents' schedules represents schedules of investor owned utilities' forecasted demand not served by CalPX.[224] MPS concludes that Overscheduling was thus an appropriate response to Underscheduling.[225]

91. Further, MPS disputes the Presiding Judge's formulation that various tariff provisions collectively prohibit the submission of false information. MPS states that this practice is contrary to established rules of textual interpretation. MPS states that the Commission should rely on the plain language of the tariff.[226] MPS further states that

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[219] *Id*.

[220] *Id*. at 20.

[221] MPS at 22.

[222] *Id*. at 23-24

[223] *Id*. at 25.

[224] *Id*. at 24-25.

[225] *Id*. at 25.

[226] *Id*. at 26.

CAISO tariff section 2.2.7.2, which required entities to submit a balanced schedule, merely requires forecast generation to be equal to forecast demand. MPS argues that the Commission has failed to quote the portion of section 2.2.7.2 that explains the consequences for failing to follow the tariff. According to MPS, the tariff required CAISO to reject a schedule that was not a balanced schedule and provided the Scheduling Coordinator an opportunity to correct the schedule.[227] MPS argues that this demonstrates that the plain language supports its interpretation of the CAISO tariff. MPS also argues that the Commission confuses metered load with forecast demand.[228] MPS also argues that the Commission erred by finding that Overscheduling violated MMIP sections 2.1.1.3 and 2.1.1.5. MPS states that these sections constitute "rules of the road" but do not impose binding requirements on market participants.[229] MPS argues that it cannot be held responsible for violating such provisions because it did not have notice that it was subject to any requirements.[230] Further, MPS argues that Overscheduling was not an anomalous market activity but rather a widespread and common activity. MPS also argues that the MMIP was aimed at curbing abuses that harmed market efficiency, while, according to MPS, Overscheduling enhanced the efficiency of markets.[231]

92. On rehearing, Shell echoes many of the arguments raised by Hafslund and MPS, such as that Opinion No. 536 confuses forecast demand with metered load,[232] and that CAISO unambiguously approved of Overscheduling in the Gaming Proceeding. Specifically, Shell argues that MMIP section 2.2.7.2 makes no reference to load. Shell states that had CAISO intended scheduling coordinators to submit demand schedules equal to contractual metered load then the tariff would have explicitly required that as it does for long-term scheduling. Shell argues that the California Parties' witness

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[227] *Id*. at 28-29 (citing CAISO tariff section 2.2.7.2: "If a Scheduling Coordinator submits a Schedule that is not a Balanced Schedule, the ISO shall reject that Schedule provided that Scheduling Coordinators shall have an opportunity to validate their Schedules prior to the deadline for submission to the ISO by requesting such validation prior to the applicable deadline.").

[228] *Id*. at 30-31.

[229] *Id.* at 32.

[230] *Id.* at 33-34.

[231] *Id.* at 35-36.

[232] Shell at 33.

Mr. Taylor's tariff interpretation would lead to absurd results, stating that, under his interpretation, the tariff would not allow for schedule adjustments by CAISO. Shell also states that Mr. Taylor's interpretation would require investor owned utilities to schedule metered load in order to submit a balanced schedule to CAISO.[233]

93. Shell further states that it never scheduled load and only scheduled to supply forecast demand and its demand was not fictitious but based on forecasted demand. Shell also states that the demand is the rate at which power is scheduled to be delivered to load. Shell claims that every Coral schedule was balanced[234] but denies that Overscheduling was unusual.[235] According to Shell, the investor owned utilities also overscheduled and underscheduled load, and Shell explains that Overscheduling was a response to Underscheduling.[236] Shell states that CAISO was aware of Overscheduling and sought tariff amendments to address Overscheduling. According to Shell, scheduling coordinators received training that only stipulated that the sources of supply had to add up to scheduled usage. Shell also states that CAISO encouraged Overscheduling.[237]

94. Further, Shell contends that the Commission disregarded evidence that Overscheduling benefitted reliable grid operations. Shell argues that Overscheduling was an effort to reduce prices in the CalPX, and as a result benefited the market as a response to Underscheduling.[238] Shell also argues that Dr. Fox-Penner did not find a price effect in the market where the violation occurred.[239] Shell further asserts that the price threshold for finding that the violation increased the price is impermissibly small.[240]

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[233] *Id*. at 36-37.

[234] *Id*. at 36.

[235] *Id*. at 42.

[236] *Id*. at 30-33

[237] *Id*. at 44.

[238] *Id*. at 48.

[239] *Id*. at 68.

[240] *Id*. at 72.

Commission Determination

95. As a preliminary matter, we will address the Respondents' assertion that the Commission approved of or found Overscheduling to be a legal market activity in the Gaming Proceeding. Although the findings in the Gaming Proceeding are irrelevant to our analysis in this proceeding, as explained above, we reiterate that in the Gaming Proceeding, which was a Commission enforcement proceeding, the Commission found that Overscheduling was a violation of the MMIP; however, the Commission chose not to impose penalties for Overscheduling pursuant to its prosecutorial authority under 18 C.F.R. § 1b.1 *et seq*.[241]

96. On rehearing, the Respondents argue that the Commission confuses the concept of Load and Demand in analyzing whether Overscheduling was a violation of the CAISO tariff. The Respondents' argument rests on the fact that the CAISO concept of Demand does not require them to follow the legal process of bidding and scheduling in the CAISO markets. We disagree. Under the intended functioning of CAISO's organized markets, load-serving entities were supposed to acquire all the energy they required in the day-ahead time frame through the CalPX market; market participants that wanted to sell energy into CAISO were also supposed to bid into the day-ahead market; and CAISO's real-time market was intended to function as an imbalance market.[242] The whole purpose of the balanced schedule requirement in section 2.7.2.2 of the CAISO tariff is to ensure that load-serving entities acquire sufficient energy for forecast demand in the day-ahead market, and that all energy available is offered in the day-ahead market. The balanced scheduling requirement would be a meaningless exercise if it did not ensure these results because there would be no point to simply require scheduling coordinators to affirm that demand would equal supplied energy at some point by the time real-time market commences. If this were the case, a scheduling coordinator would have been allowed to represent that they were buying or selling any excess or shortfall in real time. The whole purpose of the balanced schedule requirement is to ensure that sufficient energy is purchased in advance of the real-time market.

97. As discussed in Opinion No. 536, the record evidence shows that the Respondents manipulated these dual markets by using False Load Scheduling to remove supply from the CalPX market and push that supply into the real-time market.[243] The Commission

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[241] Gaming Order, 103 FERC ¶ 61,345 at P 60.

[242] Ex. CAX-1 at 17.

[243] Opinion No. 536, 149 FERC ¶ 61,116 at P 172

reasonably concluded that this market behavior was clearly a violation of section 2.7.2.2 of the CAISO tariff. Contrary to the Respondents' assertions, the balanced scheduling requirement did not authorize every scheduling coordinator with generation to make their own estimations as to what load would need to be served in real time. As the California Parties' witness Gerald Taylor points out, the tariff clearly states that the scheduling coordinator must submit a balanced schedule "with respect to all entities for which a [S]cheduling [C]oordinator schedules in each zone."[244] That requirement was consistent with the function of the CalPX day-ahead market: the load- serving entities forecast demand was supposed to be met by purchases in that market.[245] Scheduling false load to meet this requirement is a circumvention of the rules CAISO set up to have its market function.

98. Further, the Respondents argue that their schedule falsifications were legitimate because the energy they scheduled in the day-ahead market was eventually delivered. However, the Respondents' false scheduling created fraudulent demand that competed with actual demand for which load-serving entities were attempting to acquire energy. As a result, load-serving entities were forced to pay higher prices for the power acquired in the day-ahead CalPX market.[246] The fact that this power was eventually delivered is beside the point because the Respondents manipulated the market through submission of false schedules to inflate the price of energy in CAISO's markets.

99. We also reject the Respondents' interpretation of CAISO's tariff, as it would turn the vital showing of a balanced schedule into a meaningless requirement that could be satisfied with fictional MWs, so long as those MWs were equivalent or "balanced." A market participant could make up amounts of generation and load in submitting their schedules for dispatch into CAISO from the CalPX market. This would allow market participants to sell in whatever market they desired, to withhold power with the aim of increasing prices in the day-ahead market, and to create the impression of duplicate loads for CAISO system operators. We reject the Respondents' claim that this is not the implication of their argument as there was a process used by CAISO to check their fraudulent schedules against power flows to ensure that their fraudulent schedules were accurate. There is no evidence that CAISO systematically checked these schedules and verified their accuracy. Respondents have not produced any evidence or testimony supporting the existence of such a procedure.

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[244] Ex. CAX-167 at 31.

[245] CAX-1 at 17.

[246] Opinion No. 536, 149 FERC ¶ 61,116 at P 176.

100. In addition, even if we accepted the Respondents' contention that they were not acting maliciously in withholding power from the day-ahead market, the Respondents' interpretation of the CAISO tariff is at odds with requiring load-serving entities to contract for all their needed energy in the day-ahead market. While buyers would be obliged to buy power in the day-ahead market, sellers could pick between the day-ahead and real-time markets to offer their power. Buyers would be forced to accept whatever price prevailed in the day-ahead market, while sellers would be allowed to adjust their offerings in the day-ahead and real-time markets to manipulate the price and maximize profits. This would constitute CAISO's rules being set up to deliberately encourage market manipulation.

101. We find that the Respondents have failed to demonstrate that the CAISO tariff is ambiguous. The CAISO tariff is not required to explicitly state that numbers reported must be factual; such a requirement is appropriately implied. Applying this principle to other tariff provisions where entities are required to submit information to CAISO would undermine the tariff and make those provisions meaningless. For example, nothing would prevent a load-serving entity from reporting fictional generation as a way to satisfy the balanced scheduling requirement with the justification that it would eventually show up. While the Respondents argue that they were allowed to report fictional load to CAISO because they had no responsibility under the tariff to forecast the demand they reported, in reality the Respondents were forecasting that they were going to sell their energy to load in real time in violation of the structure of the California markets.

102. The Respondents' efforts to demonstrate that CAISO knew of and approved of their actions amount to numerous cites and ambiguous pieces of evidence, but, tellingly, provide nothing that amounts to the substantial evidence they reference in their pleadings. In an effort to support their assertions on this issue, the Respondents offer contracts establishing "take out" points, testimony from their own employees alleging undocumented meetings with CAISO staff, and CAISO market reports from which they extract much significance. We will address these pieces of evidence in detail below, but it should be noted at the outset that despite voluminous evidence in the record in this proceeding, there is not a single piece of evidence clearly showing that CAISO approved of and encouraged the practice, as the Respondents claim.

103. Hafslund argues that its actions were approved by CAISO, but all of its evidence to this extent amounts to testimony from one of its own employees, Josef Mueller, and emails with a single CAISO employee, John Goodin. Hafslund's pleading describes Hafslund getting in-person confirmation from Mr. Goodin that its trading activity was permissible, and independent confirmation from CAISO's scheduling desk. However, we find that the evidence does not bear this out. Hafslund does not cite any record of

these conversations, and there is no evidence in the record otherwise demonstrating that such discussions occurred. Mr. Goodin was only able to confirm that he once met with Hafslund's representatives but did not confirm the substance of the conversation.[247] Without independent confirmation, we do not know what exactly CAISO's and Hafslund's representatives agreed to, if indeed anything was agreed to. Instead, we are being asked to rely on the unsupported recollection of one of Hafslund's employees over a decade from the initial conversations.

104. Hafslund's email evidence is equally unconvincing. It consists of a few emails in which the False Load Scheduling strategy was discussed among CAISO employees. None of the employees gave any indication that the strategy was consistent with the tariff or should be encouraged. This email evidence shows that CAISO made adjustments to account for the trading strategy. It should be noted that CAISO declined to provide confirmation that Mr. Goodin was qualified to notify Hafslund of tariff violations. It is therefore unclear that Mr. Goodin was aware of the implications of the trading strategy. In any event, we do not agree that a very limited number of emails among a few CAISO employees, without more, provide sufficient evidence that CAISO effectively endorsed these trading schemes. Taken together with the other evidence that Hafslund proffered, as well as the countervailing evidence in the record, the Commission remains unconvinced that Hafslund's email evidence reasonably demonstrates that CAISO sanctioned or tacitly encouraged these trading practices.[248]

105. Hafslund also argues that its meter service agreement with CAISO is a significant piece of evidence because it demonstrates that CAISO worked with Hafslund to encourage False Load Scheduling.[249] Hafslund cites an email exchange among CAISO employees apparently indicating that "Load and Demand Resources" need to be added to CAISO's Master File for Hafslund.[250] A routine contract and a single terse reference to load and demand in a multi-item email do not amount to evidence that CAISO conspired with Hafslund in its False Load Scheduling plan. If CAISO was assisting Hafslund to engage in False Load Scheduling, there are no records of any such arrangements being

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[247] Ex. HAF-19.

[248] Hafslund's email evidence is contained in Ex. HAF-3, HAF-4, HAF-5, HAF-10, and HAF-11. Mueller's Testimony is contained in Ex. HAF-1. Hafslund's meter service agreement with CAISO is contained in HAF-16.

[249] Ex. HAF-16.

[250] Ex. HAF-17.

made. Indeed, there is no evidence in the voluminous record of any encouragement from CAISO to Hafslund to engage in False Load Scheduling. Therefore, we find that Hafslund has failed to show that CAISO approved of or otherwise encouraged Hafslund to engage in False Load Scheduling.

106. Further, Shell cites numerous documents alleging that False Load Scheduling was encouraged and authorized by CAISO. However, Shell's documentary evidence establishes that False Load Scheduling was widespread. It also shows that CAISO made efforts to better handle the submission of false load schedules. Neither of these facts are in dispute. What Shell does not show is clear evidence that the practice was approved or encouraged by CAISO. Shell makes an attempt to do so by citing two affidavits[251] by individuals who participated in False Load Scheduling schemes, claiming that CAISO employees encouraged False Load Scheduling. However, CAISO does not confirm the substance of these claims, and the documentary evidence of these claims is nonexistent. For these reasons, we cannot rely on the Respondents' claims and evidence to conclude that their False Load Scheduling activities were sanctioned by CAISO.

107. Shell also cites CAISO's "Annual Report on Market Issues" that describes the practice of "intentional mis-scheduling" and its effects.[252] However this report merely describes the practice, and does not endorse it as being consistent with CAISO's tariff. In fact, later in the same report, CAISO similarly describes how resources engage in economic withholding by intentionally deviating from their schedules in an attempt to exercise market power.[253] Thus, we reject Shell's attempt to use CAISO's report as evidence of CAISO's approval or encouragement of False Load Scheduling.

108. In addition, Shell attempts to demonstrate that CAISO essentially admitted that False Load Scheduling was consistent with its tariff by showing that proposals were made to amend the tariff to provide for immediate penalties if scheduling coordinators failed to comply with the balanced scheduling requirement. However, this does not prove that Shell's interpretation of the tariff is correct. CAISO frequently files tariff amendments to enhance the enforcement of particular tariff provisions.[254] Therefore,

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[251] Ex. POW-002 and POW-253.

[252] Ex. POW-245 at 125.

[253] Ex. POW-245 at 128.

[254] *See e.g., Cal. Indep. Sys. Operator Corp.*, 131 FERC ¶ 61,009 (2010) (conditionally accepting for filing CAISO's proposed revision to its Market Redesign and Technology Upgrade tariff to impose additional financial penalties for late payments).

CAISO's proposal to amend the tariff in fact strengthens the interpretation of the balanced schedule requirement in section 2.7.2.2 as being a real one that is tied to actual demand bid in the day-ahead market and not demand registered with the intent of raising the price of energy in the day-ahead market and making a financial gamble that demand would be present in the real-time market.

109. A reasonable reading of the evidence in the record shows that False Load Scheduling was practiced by a number of entities, and that employees at CAISO were aware of the practice. It is also clear that CAISO did not take immediate action to put a stop to the practice. However, neither of these facts constitutes approval by CAISO of the practice, as argued by the Respondents. As California Parties' witness Mr. Taylor notes, there could be many reasons for CAISO's failure to bring scheduling coordinators in line with accepted tariff practice.[255] CAISO's staff was under tremendous pressure during the crisis, and it may have not been clear that False Load Scheduling was an enforcement priority in that atmosphere.[256] Thus, we conclude that the Respondents have failed to show that CAISO approved of and encouraged False Load Scheduling.

110. We also reject the Respondents' argument that Overscheduling was justified because it was in response to Underscheduling. The Commission has already addressed this claim.[257] We reiterate here that the Respondents did not present evidence that False Load Scheduling was strictly a response to Underscheduling. They did not present evidence that load Underscheduling by load-serving entities is a tariff violation. Moreover, the Respondents ignored evidence that even in cases where load was underestimated, False Load Scheduling made it impossible to acquire energy at a reasonable price.[258]

111. Finally, we reject Shell's argument that the MMIP was not intended as binding rules but rather a notification of how CAISO would enforce market rules. The MMIP was part of CAISO's tariff and contained provisions allowing CAISO to assess fines and recommend corrective action for anomalous transactions under the MMIP to regulatory agencies.[259] Shell further argues that False Load Scheduling could not be an anomalous

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[255] Ex. CAX-167 at 58.

[256] *Id.*

[257] *See* Opinion No. 536, 149 FERC ¶ 61,116 at PP 180-183

[258] *See Id.* PP 182-183 (citing Ex. CAX-167 at 63-64 and 65-66).

[259] *See* Ex. CAX-100 at 1034.

practice because it was so widely practiced. We disagree. False Load Scheduling is a behavior that departs from what would be expected in a competitive market not requiring regulation, and is thus anomalous under the MMIP.

5. Phantom Ancillary Services

112. On rehearing, Shell argues that the Commission made no specific finding in Opinion No. 536 as to phantom ancillary violations allegedly committed by Coral. Shell explains that Coral sold ancillary services capacity to CAISO in the day-ahead market during the Summer Period. According to Shell, unrebutted evidence showed that Coral would survey the capacity resources available to it through its network of enabling agreements to assure itself that it had access to and could provide capacity resources on short notice, but would only commit to a purchase of the associated energy once it had received a dispatch instruction from CAISO.[260] Shell states that the evidence showed that Coral provided ancillary services at an exemplary rate of 96.5 percent of the hours in which it was dispatched. Shell explains that it achieved this high level of performance by having ready access to the capacity resources required and as a result, never sold or scheduled ancillary services anywhere near its certified capacity.[261]

113. Shell further states that in some instances, Coral chose to buy back its day-ahead commitment in the hour-ahead market, which Coral often did when the hour-ahead repurchase price had fallen below the day-ahead sale price. Shell argues that it is uncontested that Coral's buybacks were fully authorized and consistent with the CAISO tariff. In support, Shell cites to the Gaming Proceeding's finding that ancillary services buyback constitutes legitimate arbitrage pursuant to the Commission-accepted Amendment No. 4 to the CAISO tariff, which allowed buyback and sellback of ancillary services in the hour-ahead market.[262]

Commission Determination

114. First, we address Shell's argument that the Commission has already found in the Gaming Proceeding that the ancillary services buyback constitutes legitimate arbitrage, not a gaming practice. The Commission's finding in the Gaming Proceeding is not

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[260] Shell at 74 (citing Ex. SNA-1 at 3:13–4:2).

[261] *Id*. at 75-76 (citing Ex. SNA-3 at 34:10–20 and 38:12–39:5).

[262] *Id*. at 75 (citing *Am. Elec. Power Serv. Corp.*, 106 FERC ¶ 61,020 at P 92 and *Cal. Indep. System Operator Corp.*, 82 FERC ¶ 61,327 (1998)).

dispositive in the instant case.[263] In the *CPUC Decision*, the Ninth Circuit found that the Commission's investigation and enforcement proceeding does not preclude a civil proceeding instituted by a third party complaint.[264] Consistent with this finding, the Commission has ruled that the trading practices that were addressed in the investigative proceedings may also be examined in the instant proceeding.[265]

115. That said, we agree with Shell that the buyback of ancillary services in the hour-ahead market does not constitute a tariff violation because under then-effective Amendment No. 4 to the CAISO's tariff, scheduling coordinators were allowed to buy back and sell back ancillary services in the hour-ahead market.[266] However, in order to determine whether a market participant engaged in phantom ancillary services transactions, we must examine whether the market participant bid ancillary services, for which it did not have the resources to supply. Consistent with our analysis of other tariff violations in this proceeding, the inquiry should focus on whether the California Parties have succeeded in demonstrating by preponderance of evidence that there was a pervasive pattern of market activities indicating, due to their sheer volume and frequency, and other simultaneously undertaken activities, that a seller engaged in the behavior that rendered the transactions at issue unjustifiable as a legitimate business practice.[267] While it is not a tariff violation to buy back ancillary services in the hour-ahead market, as noted above, it is unlawful to bid into the day-ahead market ancillary services not backed by real capacity resources and then avoid meeting the ancillary services obligations by "buying back" in the hour-ahead market.

116. First, we note a significant difference in the amount between ancillary services sold by Coral in the presence and absence of buybacks.[268] The record evidence indicates that when hour-ahead buybacks were made, Coral sold on average nearly six times the

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[263] We note that in the Gaming Proceeding the Commission found the ancillary services buyback to be a legitimate arbitrage, as Shell states. *Am. Elec. Power Serv. Corp.*, 106 FERC ¶ 61,020 at P 92. In this proceeding, however, we are examining whether Coral engaged in tariff violations, not simply the buyback of ancillary services.

[264] *CPUC Decision*, 462 F.3d at 1049-51.

[265] Rehearing Order, 135 FERC ¶ 61,183 at PP 16-17.

[266] *Cal. Indep. System Operator Corp.*, 82 FERC ¶ 61,327.

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

[268] Ex. CAX-001 at 142:19–143:1, and 147:5–149:31.

amount of ancillary services in the day-ahead market than when no buybacks were made.[269] This suggests that Coral was not able to provide the ancillary services sales without relying on the buybacks. We agree with the California Parties that Coral's inability to perform when called upon to deliver on many of its commitments not purchased back,[270] and Coral's periodic purchases hour-ahead at an unprofitable buyback rate show that Coral either abandoned its commitment because it did not have the resources it sold or sought to mask its fraudulent sales through unprofitable purchases in the hour-ahead markets.[271]

117. As discussed above, the inquiry here focuses on whether the California Parties have succeeded in demonstrating that there was a pervasive pattern of market activities indicating that a seller engaged in the behavior that rendered the transactions at issue unjustifiable as a legitimate business practice. We find that the frequent and significant difference between the amount of ancillary services that were purchased back in the hour-ahead market and the amount of ancillary services sold in the day-ahead market without subsequent buybacks constitutes such a pattern. Shell's claim that these increased sales were simply brought on by a better opportunity for arbitrage,[272] only concedes that Coral based its decision to increase day-ahead sales on how much it could profit from the short sale, and not on how much capacity it actually possessed.[273] Taking this into account

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[269] Ex. CAX-001 at 141:3-7, 142:22-26.

[270] Ex. CAX-001 at 145:1-9, Table V-13.

[271] Ex. CAX-001 at 147:5-13.

[272] Ex. SNA-3 at 37:19-21.

[273] Further evidence in the record indicates that, in tandem with others, Coral was submitting high bids to game the price of energy in the day-ahead market. *See* Ex. No. CAX-271; Ex. No. CAX-110 27:11–32:8 (testimony of Dr. Berry demonstrating that Coral and others strategically and simultaneously bid far above marginal production costs to dramatically increase profits, since "[t]ogether, the impact of all sellers had a dramatic effect on ISO [real-time] market-clearing prices"). This contradicts Shell's assertion that its increased buyback sales were based on predictions from *observed* market tendencies. *See* Ex. SNA-1, 6:21–7:2. Rather, given the record evidence noted above, we conclude that its decision was more likely based on knowledge of its own and others' abilities to manufacture the price disparity themselves.

with the persistent lack of attention it paid to its own capacity availability,[274] it becomes clear that Coral engaged in the buybacks, *even when* the ancillary services resources it sold were not actually available to it at the time the sales were made.

118. Further evidence indicates that the ancillary services resources were indeed unavailable in several of these instances. For example, Shell's assertion that a "trader who perceived that increasing scarcity not surprisingly would have decided to take that loss [hour ahead] as opposed to a potentially greater loss in [real time],"[275] is not supported, since the evidence presented by Shell fails to demonstrate that in each of the instances it was advantageous to take a loss in the hour-ahead market, as opposed to real time. Rather, given Shell's assertion that its final decision to buy back was made at the time the buyback occurred,[276] it is clear that Shell could have avoided many of these losses if it actually possessed the resources.

119. Shell's own testimony further indicates it did not possess the resources it sold. For example, Shell argues that Coral was "in *a position* to provide the energy," but not that it *had* the energy.[277] On the same basis, the "network of enabling agreements" referenced by Shell[278] does not rebut the California Parties' evidence. For instance, pursuant to the agreements described by Shell, Coral "would only commit to a purchase of the associated energy," but not until "it had received a dispatch instruction from the [CA]ISO."[279] Indeed, the agreements did not determine "price, location, and tenure," and as such remained unbinding with regard to any particular transaction.[280]

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[274] Ex. CAX-001 at 147:5-13 (agreement with a California municipality expressly agreeing to pursue "Phantom Ancillary Services" they were not in a position to supply); Ex. CAX-001 at 147:14–148:8 (internal emails explicitly discussing tactics on how to submit "phantom" ancillary services bids); CAX-001 at 148:9–149:31 (conversation between traders conveying knowledge that Coral did not have the resources being sold to CAISO).

[275] Ex. SNA-3 at 38:3-38:8.

[276] Ex. SNA-1 at 10:8.

[277] Ex. SNA-3 at 35:14-22 (emphasis added).

[278] Shell at 74-75 & n.204.

[279] Ex. SNA-1 at 3:13–4:2;

[280] *Id.* at 3:13-21.

120. Lastly, unspecific references to Coral's company-wide purchases and sales[281] are unpersuasive, without simultaneously demonstrating whether the resources referenced were uncommitted.[282] Therefore, we find that the California Parties have demonstrated by preponderance of the evidence that Coral's behavior did not constitute a legitimate business practice, and that Shell was indeed in violation of the CAISO tariff.

6. Remedy for the Summer Period

121. On rehearing, the California Parties request that the Commission clarify that in Opinion No. 536, it intended to require all public utility Respondents to refund all Summer Period amounts above the marginal cost-based proxy price, calculated for each hour of the Summer Period.[283] The California Parties argue that the Commission's finding that the Respondents engaged in thousands of violations throughout the Summer Period raising the market clearing prices received by all sellers supports the requested relief. The California Parties argue that the Commission's finding that the Respondents engaged in pervasive tariff violations amounts to the finding of "systematic dysfunction in the wholesale energy market," which led to the market-wide price mitigation in the Refund Period based on the Commission-established MMCP.[284] The California Parties further contend that similarly to the application of the MMCP in the Refund Period, which "resulted in an individualized analysis of the rates charged in each operating hour,"[285] the mitigation of all sales made by the Respondents in the Summer Period based on the marginal cost-based proxy price would "have the same individualized effect."[286]

122. Further, the California Parties argue that sales that violated then-effective tariffs caused all Respondents to collect unlawful rates above the filed rate in violation of Federal Power Act (FPA) section 205.[287] According to the California Parties, the

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[281] Ex. SNA-3 at 34:4-34:2.

[282] Ex. CAX-001 at 143:1-144:20.

[283] California Parties at 11.

[284] *Id*. at 15.

[285] *Id*. at 16 (citing *CPUC Decision*, 462 F.3d at 1055).

[286] *Id*.

[287] *Id*. at 17-18 (*People of the State of Cal., ex rel. Edward G. Brown, Jr., Attorney General of the State of Cal. v. Powerex Corp.*, 135 FERC ¶ 61,178 at P 77 n.116 (2011)).

Commission has the authority to enforce the filed rate in this proceeding pursuant to FPA section 309.[288] In support, the California Parties refer to the Ninth Circuit holding in the *CPUC Decision*, finding that FPA section 309 "gives FERC authority to order refunds if it finds violations of the filed tariff and imposes no temporal limitations."[289] The California Parties further contend that in the single-price auction markets at issue in this proceeding, the Commission can meet its obligation to enforce the filed rate by applying the marginal cost-based proxy price to correct all prices down to the lawful tariff rate and requiring each public utility Respondent to refund all amounts collected above the filed rate. In the California Parties' opinion, anything less would allow some public utility Respondents to retain rates above the filed rate in violation of FPA section 205[290] and would result in consumers obtaining insufficient relief for the unlawful charges that they paid. This, the California Parties argue, would violate the Commission's primary responsibility of protecting consumers.[291] Accordingly, the California Parties request that the Commission clarify that all Respondents must disgorge amounts they received above the marginal cost-based proxy price for any Summer Period sales,[292] and that anything less would allow Respondents to retain unlawful rates to the detriment of California's consumers.[293] In addition, the California Parties note that California consumers were required by the Commission to purchase power through the CAISO and CalPX markets, while some of the Respondents were under no obligation to bid into the organized market but they voluntarily chose to participate and received a windfall as a result of committing tariff violations.[294]

123. The California Parties state that FPA section 205 requires sellers to give notice to the Commission before they may charge any rate other than the filed rate, and this requirement "bars a regulated seller . . . from collecting a rate other than the one filed

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[288] 16 U.S.C. § 824d (2012).

[289] California Parties at 18 (citing *CPUC Decision*, 462 F.3d at 1045, 1048-49).

[290] 16 U.S.C. § 825h (2012).

[291] California Parties at 19 (citing *NAACP v. FERC*, 520 F.2d 432, 438 (D.C. Cir. 1975)).

[292] *Id.* at 24, 27.

[293] *Id.* at 39.

[294] *Id.* at 40-41.

with the Commission."[295] The California Parties further argue that when sellers collect a rate higher than that allowed by the tariff – as the Respondents did in this case – they violate FPA section 205 and the filed rate doctrine. According to the California Parties, FPA section 205 and the filed rate doctrine put sellers on notice that they may receive only the filed tariff rate, that any other rate is unlawful, and that the Commission may correct the rate back to the filed rate.[296]

124. Further, the California Parties argue that the Commission's instruction to the Respondents to use, when seeking cost offsets, the template established by the Commission in the Refund Proceeding and applied to a period-wide resetting of prices, not on a transaction-specific basis, indicates that the Commission intended the Respondents to pay back all amounts received in excess of the marginal cost-based proxy price for all sales during the Summer Period.[297] Accordingly, the California Parties urge the Commission to clarify that this is the case.

125. Alternatively, if the Commission refuses to clarify that the Respondents must disgorge all the amounts they received above the marginal cost-based proxy price in the Summer Period, the California Parties seek rehearing of Opinion No. 536. Specifically, the California Parties argue that the Ninth Circuit rejected the Commission's and sellers' argument that violation- and seller-specific relief, such as that available in the Commission's various enforcement proceedings, was sufficient.[298] The California Parties further elaborate that the Ninth Circuit directed the Commission to do more than just order the violating company to pay refunds only for the unlawful transactions, when all sellers received the same unlawful single-market clearing price. According to the California Parties, the Ninth Circuit held that the California Parties had submitted "significant evidence of pervasive tariff violations," that they had "filed a cognizable request for relief and tendered credible evidence in support of their request," and that the Commission's "categorical rejection of the California Parties' request for § 309 relief was

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[295] *Id.* at 38 (citing *Pac. Gas & Elec. Co. v. FERC*, 373 F.3d 1315, 1319 (D.C. Cir. 2004) (quoting *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 578 (1981)).

[296] *Id*.

[297] *Id.* at 28 (citing Opinion No. 536, 149 FERC ¶ 61,116 at P 212).

[298] *Id*. at 29 (citing *CPUC Decision*, 462 F.3d at 1049-51; Br. of Resp. FERC on the Scope/Transaction Cases at 29, 47-54, *CPUC v. FERC*, No. 01-71051, *et al*. (9th Cir. Jan. 31, 2005); Br. of Indicated Generators at 3-4, 6-34, *CPUC v. FERC*, No. 01-71051, *et al*. (Feb. 9, 2005)).

arbitrary, capricious, and an abuse of discretion."[299] Thus, the California Parties conclude, the Ninth Circuit mandate was for the Commission to consider the evidence for the relief for all Summer Period sales based on the marginal cost-based proxy price. The California Parties further argue that by excluding and ignoring the California Parties' evidence showing that the Respondents committed tens of thousands of violations in virtually every hour of the Summer Period, thereby increasing the market clearing price that all sellers received, the Commission would be violating the Ninth Circuit's mandate.[300]

126. The California Parties further argue that the Commission declined to order relief for all Summer Period sales based on the refund amount calculations provided in their Motion on Overcharges and Refunds, despite the fact that it accepted the marginal cost-based proxy methodology developed by the California Parties and ordered disgorgement of excess charges and overpayments based on that methodology. Specifically, the California Parties challenge the holding in Opinion No. 536 stating that the California Parties' evidence concerning remedy based on the marginal cost-based proxy price was "outside the scope of the hearing as the hearing did not include fashioning of the remedy."[301] The California Parties argue that regardless of how the Commission structures the proceeding, it cannot refuse to rule on the merits of the California Parties' evidence on the very issue that the Ninth Circuit remanded. The California Parties further contend that the Commission erred in ruling that "Respondents did not have an opportunity to challenge the California Parties' evidence" and "there is not sufficient evidence for the Commission to accept the California Parties evidence."[302] The California Parties further argue that the Commission's decision to allow the Respondents to submit additional evidence in their compliance filings, by rejecting the California Parties' evidence pertaining to the remedy, the Commission violated the Ninth Circuit mandate to adjudicate "what relief is appropriate."[303]

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[299] *Id*. (citing *CPUC Decision*, 462 F.3d at 1051).

[300] *Id*. at 30-31 (citing *Atl. City Elec. Co. v. FERC*, 329 F.3d 856, 859 (D.C. Cir. 2003)).

[301] *Id*. at 30 (citing Opinion No. 536, 149 FERC ¶ 61,116 at P 209).

[302] *Id.* at 34-35.

[303] *Id*. at 36-37 (citing *CPUC Decision*, 462 F.3d at 1051).

127. Further, the California Parties request that the Commission clarify that the Respondents must pay interest calculated pursuant to section 35.19a of the Commission's regulations on the excess amounts subject to disgorgement. To the extent the Commission does not do so, the California Parties state that they seek rehearing. The California Parties argue that it is the Commission's "general rule" that "a customer entitled to a refund should also be awarded interest in order to make it whole," and this policy helps to make the consumer whole for the time value of money that it otherwise would have had available for its uses.[304]

128. The California Parties argue that the Commission should allocate the relief for the Summer Period to the parties that were net buyers in the CAISO and CalPX markets during the Summer Period, with the exception of APX, due to its unique position. In connection with this, the California Parties request the Commission to adopt the schedule of Summer Period allocation factors previously submitted by the California Parties as Attachment H to their Motion for Overcharges and Refunds. The California Parties explain that the allocation percentages themselves are based on those agreed to in prior settlements.[305]

129. Further, the California Parties argue that the Commission should clarify the process for calculating the interest shortfall. According to the California Parties, the Commission has ruled that determining interest shortfall is the last step of the refund process and the Commission's orders contemplate a combined treatment of the CAISO and CalPX markets in determining the interest shortfall to be allocated among market participants.[306]

130. The California Parties explain that the CalPX interest shortfall results from the mismatch between (1) the interest accrual required pursuant to the tariff and the Commission's regulations and (2) the actual interest earned in the CalPX Settlement

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[304] *Id.* at 42 (citing *Panhandle E. Pipe Line Co. v. FERC*, 95 F.3d 62, 72 (D.C. Cir. 1996); *New Charleston Power, L.P.*, 83 FERC ¶ 61,281, at 62,168 (1998); and *Pub. Serv. Co. of Col. And Cheyenne Light, Fuel and Power Co.*, 82 FERC ¶ 61,058, at 61,215 (1998)).

[305] *Id.* at 43-44.

[306] *Id*. at 44-45 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 136 FERC ¶ 61,036, at PP 41, 43 (2011); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 127 FERC ¶ 61,268, at PP 18 & nn.31, 38 & n.54 (2009)).

Clearing Account, where hundreds of millions of dollars relating to these markets have been held in escrow for years. The California Parties further state that because the Commission interest rate is higher than the low-risk rates that the CalPX Settlement Clearing Account earns, there is a shortfall — interest that will be owed to market participants, but that has not been earned in the CalPX escrow account. According to the California Parties, the Commission has held that the shortfall is not attributable solely to buyers or sellers, and that, instead, all market participants should bear it, in proportion to their overall net interest position.[307] The California Parties add that the overall net interest position of the parties depends on the cash positions of the parties at the time this proceeding concludes, as well as the overall refunds and receivables owed by or to market participants, and thus has not yet been calculated or allocated.

131. The California Parties request the Commission to clarify that the Summer Period refunds owed by the Respondents will be factored into the interest shortfall calculation. The California Parties argue that because these amounts will be paid, in the first instance, from and to the same pool of funds as the Refund Period charges, it is appropriate that they be factored into the allocation of shortfalls arising in that pool of funds.

132. In addition, the California Parties ask the Commission to clarify that the interest position of parties, used for the allocation of interest shortfall, should include actual interest amounts from the settlement, to ensure that all participants and all interest flows bear their proportionate share of the shortfall. The California Parties argue that this is a fair and reasonable approach for all market participants, whether buyers or sellers, and takes into account the reality that, in the past decade, hundreds of millions of dollars have flowed through the CalPX accounts, or been credited against the CalPX accounts, as a result of settlements and other orders. The California Parties also contend that this approach is also consistent with the many settlements between the California Parties and settled sellers, and the Commission's acceptance of those settlements, as well as the accepted CalPX methodology.[308]

133. Finally, the California Parties request the Commission to clarify that the amounts owed by and owing to each market participant, aggregated and netted across both the CAISO and CalPX accounts, will be used to determine the overall net interest position of

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[307] *Id*. at 45 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 110 FERC ¶ 61,336, at PP 37, 41, 56 (2005), *reh'g denied*, 112 FERC ¶ 61,226 (2005), *appeal docketed sub nom. Pac. Gas & Elec. Co. v. FERC*, No. 05-71831, *et al.* (9th Cir. filed Apr. 1, 2005)).

[308] *Id*. at 46-47.

that participant as part of the shortfall allocation. The California Parties claim that power sold in the CAISO and CalPX markets ultimately flowed to serve load in the CalPX. Thus, since the CalPX accounts relate to the entirety of the market activity, the California Parties assert that it is reasonable for the Commission to clarify that net interest balances will be calculated for each participant based on the aggregate of that participant's CAISO and CalPX net interest positions.[309]

134. On rehearing, MPS and Illinova argue that it is fundamentally inequitable to order disgorgement against MPS and Illinova in this case. According to MPS and Illinova, as a threshold matter, the Commission should have considered whether it is appropriate to order disgorgement against any individual respondent and the Commission has failed to follow its own precedent requiring that it consider individual circumstances before ordering this remedy.[310] MPS and Illinova further contend that disgorgement is a form of equitable relief that is only appropriate in certain types of circumstances.[311] MPS and Illinova also argue that because "the purpose of disgorgement is to nullify the value of gains acquired through misconduct,"[312] disgorgement may be ordered only where it "relates to a violation of a rule, statute, regulation, or order which has a causal connection to unjust profits obtained by the violator as a result of its violation."[313]

135. Further, MPS and Illinova contend that ordering disgorgement here cannot be reconciled with the Commission's decision to deny such relief for Overscheduling in the Gaming Order. MPS and Illinova state that even if the Commission adheres to the conclusion that MPS engaged in either Overscheduling or False Export that violated the CAISO tariff, that does not mean that the Commission is required to order any remedy

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[309] *Id*. at 47.

[310] *E.g.*, MPS at 115.

[311] *Id.* at 114 (citing *Transcon. Gas Pipe Line Corp.*, 58 FERC ¶ 61,289 at 61,927-28 (1992); *Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 109(D.C. Cir. 1984)).

[312] *Id*. (citing *Enforcement of Statutes, Orders, Rules, and Regulations*, 113 FERC ¶ 61,068 at P 19 (2005)).

[313] *Id*. (citing *State of California, ex rel. Bill Lockyer v. British Columbia Power Exchange Corp.*, 122 FERC ¶ 61,260, at n.2 (2008)).

here. MPS argues that it is well-established that demonstrating customer injury does not mean that the Commission is obligated to impose a remedy.[314]

136. Next, MPS and Illinova argue that there are compelling reasons not to order disgorgement here, including the widespread Underscheduling that the Commission previously concluded was the reason for sellers' Overscheduling conduct and which distorted prices in the CalPX day-ahead market. According to MPS and Illinova, a party should "not be able to turn to the Commission for deliverance," in the form of disgorgement, "from a situation which it deliberately created."[315] MPS and Illinova conclude that it would be the height of inequity for the Commission to reward the California Parties and punish the Respondents for conduct that was essentially two sides of the same coin. MPS and Illinova argue that this was an important part of the Commission's rationale for not imposing any remedy for Overscheduling in the Gaming Proceeding but the Commission has reversed course here without providing a rationale for its decision.[316]

137. Hafslund states that the courts and the Commission have required that remedial actions under FPA section 309 be tailored to the specific facts of the violation it seeks to address, and proportional to that violation.[317] Hafslund argues that Opinion No. 536 does not reflect any tailoring at all and the refunds ordered are in grave disproportion to the act of Overscheduling, which the Commission has found in the Gaming Proceeding did not set the market clearing prices and was in direct response to Underscheduling.[318] Hafslund further argues that the Commission departed from this precedent under FPA section 309 by ordering refunds even though the alleged violations occurred in a separate

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[314] *Id*. at 115-16 (citing *Transcontinental Gas Pipe Line Corp. v. FERC*, 998 F.2d 1313, 1324 n.11 (5th Cir. 1993)).

[315] *Id*. at 116 (citing *San Diego Gas & Elec. Co.*, 55 FERC ¶ 63, 016, at 65,111 (1991)).

[316] *Id*. (citing *Gaming Order*, 103 FERC ¶ 61,345 at P 60).

[317] Hafslund at 16 (citing *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 818-19 (D.C. Cir. 1998); *Gulf Power Co. v. FERC*, 983 F.2d 1095, 1098, 1101 (D.C. Cir. 1993); *Towns of Concord, Norwood, & Wellesley, Mass. v. FERC*, 955 F.2d 67, 75 (D.C. Cir. 1992); *Enforcement of Statutes, Orders, Rules, and Regs.*, 113 FERC ¶ 61,068 at P 4).

[318] *Id*. at 17 (citing Gaming Order, 103 FERC ¶ 61,345 at P 60).

market than the price effects.[319] Hafslund also argues that the Commission's departure from its prior finding regarding Overscheduling is, in itself, arbitrary, capricious, and fails to reflect reasoned decision making because nothing has changed and the Commission provides no explanation for its change in view of the practice of Overscheduling in the last thirteen years.[320] Hafslund adds that the Commission failed to address the equity of requiring refunds in light of guidance from CAISO personnel to overschedule.[321]

138. Further, MPS and Illinova argue that ordering disgorgement for Overscheduling and False Exports would be particularly inequitable given the lack of notice to the Respondents that their transactions would be deemed 14 years later to be unlawful, given the total lack of any evidence that MPS acted intentionally, and given the infinitesimally small alleged price effect alleged by the California Parties in the day-ahead market, and pricing and reliability benefits in the real-time market.[322]

139. MPS also argues that ordering it to disgorge profits from alleged Overscheduling will result in impermissible double-dipping[323] and will give the California Parties a windfall. MPS explains that the California Parties have already received a settlement from the City of Azusa for $905,000 that covered the same transactions that are now being attributed to MPS.[324]

140. MPS and Illinova further argue that ordering disgorgement would also be inequitable because the conduct in question enhanced reliability, improved efficiency and lowered prices.[325] MPS and Illinova state that the bifurcation of the CalPX day-ahead and CAISO real-time markets was an intentional design feature of the California energy market as a whole. According to MPS, this bifurcation resulted in price differentials

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[319] *Id*. at 16-17.

[320] *Id*. at 17.

[321] *Id*. at 19.

[322] *E.g*., MPS at 117.

[323] *Id*. at 119 (citing *SEC v AbsoluteFuture.com*, 393 F. 3d 94, 95 (2d. Cir. 2004)).

[324] *Id*. at 117-18 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 123 FERC ¶ 61,244 (2008)).

[325] *Id*. at 120-22.

between the two markets during the high demand of the Summer Periods. MPS and Illinova admit that these price differentials may have induced some respondents to shift power into the higher-priced CAISO real-time market from the lower-priced CalPX day-ahead market during the Summer Period but these transactions were no more than competitive arbitrage, designed to achieve a legitimate business purpose and which ultimately served to reduce the price in the more expensive market to the benefit of rate payers.[326] Further, MPS and Illinova state that to the extent the Commission intended to require the use of the marginal cost-based proxy prices as the metric for disgorgement *without* allowing a cost offset to reflect actual CalPX prices as the opportunity cost of the transactions, they seek rehearing.

141. MPS and Illinova further contend that the Commission erred in holding that the cost offset template that was developed for a nine-month market-wide refund period could be applied equally to a transaction-specific disgorgement penalty before the amount or methodology for calculating the disgorgement is fixed. MPS and Illinova explain that the template followed in the Refund Proceeding was designed to evaluate and "stack" all transactions engaged in by the applicable entity (including retail transactions, in some instances), in order to calculate an overall amount of costs above its MMCP-based refund obligation that such entity would be able to recover. MPS and Illinova argue that there appear to be significant differences between the mechanisms of the previous template and the cost analysis that the Commission references in Opinion No. 536. In MPS's opinion, it is not clear from Opinion No. 536 exactly what is contemplated in a compliance filing that accounts for various cost offsets. MPS and Illinova further argue that it is premature for the Commission to arbitrarily and without context decide what will and will not be considered from a cost offset standpoint, when it is not at all clear what parts of the Refund Proceeding template are applicable to the compliance filings order in Opinion No. 536. MPS and Illinova request that the Commission clarify the details of the cost analysis after it reviews the compliance filings.[327]

Commission Determination

142. In Opinion No. 536, the Commission found that the appropriate remedy for Types II and III Anomalous Bidding, False Export, and False Load Scheduling tariff violations

[326] *Id*. (citing Ex. CSG-1 at 31:5-6, 31:7-14, 34:5-15, and 51:12-52:8; Ex. SNA-3 at 7:12-16, Ex. MI-1 at 6:14-21, 14:20-15:2, 47:17-19; Ex. MI-6; Ex. MI-7; Tr. at 7514:17-7515:18 (Pirrong) and 7749:17-19 (Tranen)).

[327] *Id*. at 133-35.

that affected the market clearing prices is the disgorgement of payments the Respondents received above the applicable marginal cost-based proxy price. In this order, we clarify that the Respondents found to have engaged in tariff violations impacting the market clearing price are directed to disgorge the amounts received above the marginal cost-based proxy price for *all* sales they made during the trading hours in which the market clearing price was affected by their tariff violations. By committing a tariff violation that affected the market clearing price, the Respondents benefitted from the sales made at the inflated prices. These unjust overcharges must be disgorged. We agree with the California Parties that the filed rate doctrine prohibits the Respondents from profiting from rates impacted by their own wrongdoing.[328] Accordingly, we grant the California Parties' request for clarification. However, we reiterate that the remedy ordered in this proceeding is seller-specific and applies only to those sellers that committed tariff violations affecting the market clearing prices.[329]

143. As a result of this clarification, we dismiss as moot the compliance filings submitted by the Respondents in Docket No. EL00-95-281. The Respondents are hereby directed to file new compliance filings within 60 days of the date of issuance of this order.

144. We also agree with the California Parties that the disgorged amounts should be allocated to the net buyers during the relevant trading hours. However, we cannot accept the allocation matrix proposed by the California Parties in its Motion on Overcharges and

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[328] The filed rate doctrine precludes marketers from charging rates different from those filed with or fixed by the Commission. *See, e.g., City of Holland, Michigan v. Midwest Indep. Transmission Sys. Operator, Inc.*, 111 FERC ¶ 61,076, at P 24 (2005) (holding that "[t]he Commission may order refunds for past periods where a public utility has either misapplied a formula rate or otherwise charged rates contrary to the filed rate."); *N.Y. Indep. Sys. Operator, Inc., et al*., 97 FERC ¶ 61,155, at 61,682 (2001) (holding that "[i]n the absence of a tariff violation, we cannot order the retroactive calculation of prices under the FPA.")

[329] The fact that alleged tariff violations committed prior to the October 1, 2000 refund effective date established in this proceeding are being examined pursuant to FPA section 309 does not eliminate the section 206 notice requirement. Sellers that complied with existing tariffs had no notice that the price at which they transacted may be later changed due to uncovered tariff violations by other market participants. Therefore, imposing refund liability on sellers that were in compliance with the existing tariffs would be inconsistent with the section 206 notice requirement. Order Affirming Partial Initial Decision, 141 FERC ¶ 61,088 at P 25).

Refunds, because it is outside the scope of this order. We will address it in the compliance portion of this proceeding, which will be addressed in a separate order, and encourage the parties to submit comments on the proposed allocation matrixin the compliance phase of this proceeding. We also invite CAISO and the CalPX to provide comments on the proposed allocation matrix. Further, the California Parties seek clarification that the Respondents are required to pay interest on the overcharges and excess payments they received as the result of their tariff violations. We grant this request and clarify that pursuant to section 35.19a of the Commission's regulations,[330] the Respondents must pay interest on the amounts subject to disgorgement.

145. The Commission, however, denies the California Parties' request for clarification on issues related to the interest shortfall calculation.[331] The approach adopted by the Commission in the Refund Proceeding to address the interest shortfall resulting from the difference between the Commission's interest rate and the interest rate for the CalPX Settlement Clearing Account assigns each "share fraction . . . from the absolute value of each participant's interest for its final account balances in relation to the total amount of the interest shortfall."[332] The California Parties have failed to clearly demonstrate how and why this approach is applicable to the instant proceeding. In the Refund Proceeding, the Commission determined that buyers and sellers were to be held jointly accountable for the interest shortfall.[333] We reiterate that here, unlike in the Refund Proceeding, we are not resetting the entire market for the Summer Period. Rather, the remedy ordered in this proceeding is seller-specific—and thus the approach developed in the Refund Proceeding to address the interest shortfall appears to be inapplicable in the instant proceeding. Accordingly, we deny the California Parties' request for clarification at this time; however, we invite interested parties, including CAISO and CalPX, to comment on the applicability of the interest shortfall approach to the Summer Period in the compliance filing phase of this proceeding.

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[330] 18 C.F.R. § 35.19a (2015).

[331] California Parties at 44-47.

[332] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 110 FERC ¶ 61,336 at PP 41, 56.

[333] *Id.* P 36.

146. Next, we address the arguments advanced by MPS and Illinova in their requests for rehearing.[334] MPS and Illinova argue that disgorgement is appropriate only where it "relates to a violation of a rule, statute, regulation, or order which has a causal connection to unjust profits obtained by the violator as a result of its violation."[335] We reiterate that the record evidence in this proceeding demonstrates that MPS and Illinova (as well as other Respondents) engaged in tariff violations and the California Parties' price effect analyses has established a causal connection between those tariff violations and the increases in market clearing prices during the Summer Period. As discussed above, by committing tariff violations that inflated the market clearing prices, MPS and Illinova received unjust profits which now have to be disgorged. When MPS and Illinova engaged in behaviors in violation of the then applicable tariffs, they were on notice that the windfall they received as a result would be subject to refund due to the unlawful nature of their actions.

147. We also reject MPS's and Illinova's argument that disgorgement is not appropriate in this case because the California Parties engaged in Underscheduling. The Commission has already addressed the same argument in paragraph 182 of Opinion No. 536 by stating that:

> …the Respondents did not make a compelling case based on record evidence that the identified False Load Scheduling violations were strictly a response to Underscheduling by load serving entities, nor did they present a compelling case demonstrating that the California Parties engaged in Underscheduling and that Underscheduling was a tariff violation.

As the Commission has emphasized throughout this proceeding, general arguments will not suffice; parties must present specific evidence in support of their claims and counterclaims.[336]

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[334] We note that on the issue of disgorgement, MPS's and Illinova's rehearing requests are identical.

[335] *E.g.*, MPS at 114 (citing *State of California, ex rel. Bill Lockyer v. British Columbia Power Exchange Corp.,* 122 FERC ¶ 61,260 at n.2 (2008)).

[336] *See, e.g.*, Opinion No. 536, 149 FERC ¶ 61,116 n.108; Rehearing Order, 135 FERC ¶ 61,183 at PP 27-28, 37-38; *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 141 FERC ¶ 61,087 at P 11.

148. We disagree with MPS's assertion that disgorging profits from False Load Scheduling will result in impermissible double-dipping because the money has already been allocated to the California Parties pursuant to their settlement with Azusa, and thus give the California Parties a windfall. While the transaction at issue in this proceeding is the same transaction that was part of the California Parties-Azusa settlement, the record evidence shows that MPS engaged in a separate tariff violation, which increased the market clearing price, as discussed above. The agreement with Azusa granting MPS the ability to make uninstructed sales was one of the many similar agreements with other municipalities,[337] which enabled MPS to engage in False Load Scheduling, as discussed above. Therefore, we reaffirm here that the excess payments received by MPS for all sales during the trading hours affected by its False Load Scheduling must be disgorged.

149. Further, we reject MPS's and Illinova's argument that disgorgement is inappropriate because Overscheduling was simply a type of arbitrage transaction that enhanced reliability, and improved efficiency and lowered prices. In paragraph 172 of Opinion No. 536, the Commission addressed at length the argument that Overscheduling was helpful arbitrage since Overscheduling removed energy from a low price market and into a high price market where it was presumably in more demand and could do more good. Specifically, the Commission stated:

> …this ignores the plain fact that the CalPX market and the real-time market were not two separate markets serving different consumers. The CalPX and the real-time market were two parts of the same market structure serving the same consumers. Moving a megawatt between the two markets is not a transaction to legitimately serve higher demand, but to exploit the essentially inelastic demand for electricity that is common to all real-time energy markets, and that all market structures seek to mitigate by rules and regulations. In the CalPX market, the risk of not being able to sell energy is supposed to discipline market participants to bid their marginal cost. By contrast the real-time market was not designed to handle large amounts of power sales and was more susceptible to manipulation. Circumventing CAISO tariff provisions to eliminate the incentive to bid at marginal cost does not serve this market structure, but instead helps to destroy it.

150. Consistent with the clarification provided in this order in regard to the remedy, we will also clarify the application of costs offsets. In Opinion No. 536, the Commission permitted the Respondents to provide specific evidence on revenue derived from and

[337] Ex. CAX-001 at 193-95.

costs related to specific transactions subject to mitigation, including emission costs and fuel costs, and directed the Respondents to follow the template for cost offset filings previously established by the Commission in the Refund Proceeding.[338] The remaining respondents in this proceeding are all marketers, and neither NOx emission cost offset nor the fuel cost allowance is available to marketers.[339] However, in the Refund Proceeding, the Commission established a portfolio-wide cost-based backstop to prevent application of the MMCP refund methodology to sales in the CAISO and CalPX market from causing confiscatory rates. Consistent with the Commission's approach in the Refund Proceeding,[340] we will permit the Respondents to submit evidence as to whether the marginal cost-based proxy price methodology applied in this proceeding results in an overall revenue shortfall for their transactions during the relevant trading hours. Specifically, consistent with the Commission's approach in the Refund Proceeding, we will limit cost recovery to the costs incurred to make sales into the CAISO and CalPX markets during the relevant trading hours.[341]

151. Further, while some sellers may be able to clearly match specific resources from their portfolios of generation and purchased power with specific sales into the CAISO and CalPX markets during the relevant trading hours, others may not have this ability. For the former group, we will require that those Respondents match specific sales to specific resources, provided that they can clearly demonstrate each sale with a specific resource. This demonstration must include: (1) the relevant NERC tag or CAISO tag; and/or (2) a transaction-by-transaction accounting of resources matched with sales, together with corresponding documentation, e.g., letter agreements, transaction confirmations.[342]

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[338] Opinion No. 536, 149 FERC ¶ 61,116 at P 212.

[339] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 107 FERC ¶ 61,166, at P 15 (2004); and *San Diego Gas & Elec. v. Sellers of Energy and Ancillary Servs.*, 97 FERC ¶ at 62,208.

[340] *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Servs.*, 97 FERC ¶ at 62,254; *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Servs.*, 99 FERC ¶ 61,160, at 61,656 (2002).

[341] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 112 FERC ¶ 61,176, at P 63 (2005) (Cost Offset Filings Order).

[342] *Id*. P 65.

152. For those Respondents that are unable to match and document transactions to specific resources, we will permit them to calculate their average energy cost-based on the subset of a resource portfolio that was available for sale into the CAISO and CalPX markets during the relevant trading hours subject to mitigation. Any Respondent wishing to avail itself of the use of an average approach must submit fully-supported actual costs and transactions with testimony, as well as an attestation of a corporate officer, as required under section 35.13(d)(7) of the Commission's regulations, verifying the claim and the fact that the company has not kept books and records that would allow it to match sales into the CAISO/CalPX markets to specific resources.[343] Accordingly, a Respondent's total energy cost will equal: (1) the aggregate cost of energy for matched sales; and (2) the product of the average portfolio cost of energy and the MW-hours of unmatched sales into the CAISO and CalPX markets during the relevant trading hours.[344]

153. The Respondents, being marketers, must calculate an average cost of energy for their unmatched sales based on their portfolio of short-term purchases. For the purpose of the cost offsets, short-term purchases include all transactions of less than one month in term. This portfolio shall exclude any short-term purchases previously committed or unavailable for sale into the California spot markets.[345] The cost offset submittals must comply with the requirements set forth in paragraphs 103-105 of the Cost Offset Filings Order.

154. Further, we reject MPS's and Illinova's request to allow a cost offset to reflect actual CalPX prices as the opportunity cost of the transactions. The marginal cost-based proxy price methodology applied in this proceeding is intended to replicate the price that would be paid in a competitive market, in which sellers have the incentive to bid their marginal costs. Furthermore, as discussed in Opinion No. 536, the marginal cost-based proxy price methodology included elements of opportunity costs.[346]

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[343] *Id*. P 68.

[344] *Id*. P 69.

[345] *Id*. P 70.

[346] We will not restate the discussion of this issue here; it can be found in paragraphs 84-85 of Opinion No. 536.

II. Refund Period – Forward Market Transaction

155. On rehearing, Exelon states that the Commission failed to take into account evidence that its plant costs met or exceeded the cost of the transaction.[347] Exelon cites evidence that a contract was negotiated between the AES Placerita (AESP) and CAISO to sell electricity at cost.[348] Exelon also states that generation logs show that the parties agreed to an at-cost sale.[349] Exelon further argues that transcripts and testimony show that the terms of the sale were intended to recover AESP's variable production costs.[350] Exelon argues that the economic analysis of witness Cavicchi offered economic testimony showing the cost-based nature of the transaction.[351] According to Exelon, the Commission Staff's witness, having reviewed Mr. Gavicchi's testimony, concluded that there is "no evidence that AESP made significant profits, if any at all, on the … transaction[]" in question.[352] Exelon states that CAISO billing dispute resolutions showed these sales were intended to be made at cost.[353] Exelon adds that the California Parties did not dispute this evidence.[354]

156. Exelon further argues that the Commission wrongly applies the standard for information on cost offsets to its sale. According to Exelon, cost offset filings were made in a prior phase of the California Refund Proceeding after the Commission had already found that underlying transactions were unjust and unreasonable. Exelon states that it did not seek cost offsets during the hearing because the Commission had not yet found that the forward market transaction at issue was unjust and unreasonable and that the MMCP is the appropriate price mitigation methodology.[355] Exelon further states that a cost offset

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[347] *Exelon* at 15.

[348] *Id*. at 17 (citing Ex. CEI-1 at 8:6-8, Ex. CEI-7, and Ex. CEI-8 at 2).

[349] *Id*. at 18-19 (citing Ex. CEI-1 at 7:17-8:4; Ex. CEI-3 at 1-5, 8-9; Ex. CEI-8 at 6; Ex. CEI-10 at 2-3).

[350] *Id*. at 19-20 (citing Ex. CEI-10 at 2:1-15 and Ex. CEI-11).

[351] *Id*. at 21-23 (citing Ex. CEI-15 at 6:19-7:2, 7:4-5, 10-12, 14:7-14; Ex. CEI-19)

[352] *Id*. at 23 (citing Ex. S-13 at 10:17-19, 18:9-11, 18:23-19:1, 19:9-11).

[353] *Id*. at 24-25 (citing Ex. CEI-18 and CEI-15 at 14:20-15:1).

[354] *Id*. at 25 (citing Tr. at 1263:12-24, 1265:2-3, 1267:13-18 (Berry)).

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

filing allowed in the California Refund Proceeding compared the overall market revenues that a seller received from the market after mitigation, versus the seller's overall costs of selling in the market. Exelon argues that the cost offset filing is not applicable in this case, as the forward market transactions did not occur in the California auction markets. According to Exelon, the application of the MMCP to the forward market transaction at issue is confiscatory[356] because the parties did not exercise market power and the sale occurred at the price that reflects only variable costs and did not even include the return on investment.[357]

157. Further, Exelon argues that the cost offset filings requirements are not applicable to the transaction at issue because the cost offset filings are based upon comparing the overall revenues received from the centralized clearing market after mitigation with the seller's overall costs of making sales into the market, while other out-of-market transactions, such as the forward market transaction at issue, had no nexus with the California single-price auction markets. In support, Exelon quotes the Ninth Circuit's finding in regard to CERS transactions[358] that those transactions were "two-party contracts of varying prices, terms and duration that were mutually negotiated – ostensibly at arm's length – outside the CalPX and Cal-ISO markets" and "occurred in a market that was not directly influenced by the market manipulations in the Cal-ISO and CalPX spot markets."[359] According to Exelon, the Commission should have first established that there was direct nexus between the forward market transaction at issue and the dysfunctional spot market.[360]

158. Exelon further argues that the Commission erred in ignoring record evidence demonstrating the difference between forward and out-of-market (OOM) spot

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[356] *Id*. at 28 (citing *Alabama Electric Coop., Inc., et. al. v. FERC*, 684 F.2d 20 (D.C. Cir. 1982)).

[357] *Id*. at 31 (citing *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990); *Farmers Union Central Exchange v. FERC*, 734 F.2d 1486, 1510 (D.C. Cir. 1984)).

[358] The term "CERS contracts" refers to purchases of power made directly by the California Energy Resources Scheduling Division on behalf of California consumers. These purchases were made in bilateral contracts outside the CalPX and CAISO markets.

[359] *Id*. at 32 (citing *CPUC Decision*, 462 F.3d at 1062).

[360] *Id*. at 38.

transactions.[361] Exelon states that the Commission provides no reasoning for mitigating the forward market transaction.[362] Exelon contends that the Commission and courts always recognized the difference between spot and forward markets. Exelon argues that the Commission has violated its own principle by its finding in Opinion No. 536 that the OOM spot transactions and the forward market transaction at issue are similar.[363] Exelon also states that in *CPUC Decision*, the Ninth Circuit upheld the Commission's decision to mitigate some – but not all – OOM spot transactions, reasoning that the Commission did not arbitrarily mitigate all of the transactions.[364]

159. Further, Exelon states that it has presented evidence showing that the OOM spot transactions mitigated in the Refund Proceeding are different from multi-day transactions, such as the transaction at issue, in many aspects. Specifically, Exelon argues that the prices in the OOM spot transactions were based upon the marginal supplier's offer price, while the price in forward market transaction was negotiated on a forward basis based upon expected supply and demand over the course of the relevant time period for the transaction.[365] Exelon also states that the forward market transactions were entered into before the day-head market had cleared and were akin to hedging and the price in the forward market transaction was based on the expectation of future prices, not on the spot market price at the time.[366] Exelon further argues that unlike the OOM

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[361] OOM spot transactions are out of market purchases "made by [CA]ISO from sellers outside the [CA]ISO single price auction market within 24 hours or less of delivery." *CPUC Decision*, 462 F.3d at 1051. OOM spot transactions were mitigated based on the Commission-approved MMCP. *See San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 96 FERC ¶ 61,120, at 61,515-16 (2001), *affirmed in CPUC Decision*, 462 F.3d at 1051-53.

[362] Exelon at 35-36.

[363] *Id*. at 37 (citing *People of the State of Cal., ex rel. Edmund G. Brown, Jr., Attorney General of the State of Cal. v. Powerex Corp*., 135 FERC ¶ 61,178 at P 32, *reh'g denied*, 139 FERC ¶ 61,210 (2012), *reh'g denied*, 140 FERC ¶ 61,115 (2012); and *Investigation of Wholesale Rates of Pub. Util. Sellers of Energy and Ancillary Services in The Western Market Systems Coordinating Council*, 135 FERC ¶ 61,176, at P 19 (2011)).

[364] *Id*. (citing *CPUC*, 462 F.3d at 1053).

[365] *Id.* 41-42 (citing Ex. CEI-15 at 8:21-9:1, 9:3-7).

[366] *Id*. at 40-41.

spot transactions, which were necessary to meet demand during the operating day to ensure the reliability of the electric power grid, the forward market transaction at issue was exacerbating reliability issue on the grid, which is one reason why CAISO stopped making the purchases from AESP.[367]

160. Exelon further argues that there is no record evidence that the forward market transaction was tainted by exercise of market power. According to Exelon, when the Commission ordered mitigation of the OOM spot transactions, the Commission stressed that it was mitigating these sales because they were made after the real-time market failed to produce enough supply to meet demand; therefore, sellers knew that CAISO was in a "must buy" situation and could use this fact to exercise market power.[368] Exelon continues to argue that in a forward market transaction, CAISO would not yet know what its actual real-time supply situation would be; therefore, sellers could not exercise market power over the CAISO when making such sales. Exelon adds that the California Parties' witness testified that she did not allege that AESP or Constellation exercised market power.[369]

161. On the *Mobile-Sierra*[370] issue, Exelon essentially restates Constellation's arguments in the brief on exceptions. Specifically, Exelon argues that as a bilateral sale of wholesale power for resale negotiated at arm's length, the forward market transaction in question is entitled to the *Mobile-Sierra* protection.[371] Exelon states that the transaction at issue was a negotiated agreement between the parties on the specifics of the transaction and that there was no evidence presented required to overcome the *Mobile-Sierra* presumption.[372]

162. Further, Exelon contends that the Commission erred in finding that CAISO's tariff applies to the forward market transaction at issue. According to Exelon, CAISO does not

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[367] *Id*. 39-40 (citing *See* Ex. CEI-11 at 2).

[368] *Id.* at 43 (citing *CPUC Decision*, 462 F.3d at 1052).

[369] *Id*. at 43-44.

[370] *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) and *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956).

[371] Exelon at 44-47.

[372] *Id*. at 46-49.

administer forward markets and the forward market transaction at issue was not made through CAISO's single –price clearing auction market for real-time energy.

163. Exelon further argues that the Commission erred in finding that CAISO tariff section 2.3.5.1.5 applies to the forward market transaction at issue because when section 2.3.5 is read in its entirety, it becomes clear that that section 2.3.5.1.5 applies to CAISO's obligation to meet its annual planning and operating reserve criteria and is triggered only after CAISO receives all bids for generation planning and operating reserves as part of its annual bidding process. According to Exelon, the record does not indicate that CAISO's forecast for planning year 2000 predicted a shortfall in planning and operating reserves or that CAISO solicited bids for deficiencies in its planning and operating reserves for 2000 based on such forecast.[373]

164. Alternatively, Exelon asserts that, assuming *arguendo* that the CAISO tariff applies to the forward market transaction at issue, the Commission erred in concluding that section 19 of the CAISO tariff[374] contains a *Memphis*

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[373] *Id*. at 50-54.

[374] CAISO Tariff section 19 provides that

> Any amendment or other modification of any provision of this [CA]ISO Tariff must be in writing and approved by the [CA]ISO Governing Board in accordance with the bylaws of the [CA]ISO. Any such amendment or modification shall be effective upon the date it is permitted to become effective by FERC. Nothing contained herein shall be construed as affecting, in any way, the right of the [CA]ISO to furnish its services in accordance with this [CA]ISO Tariff, or any tariff, rate schedule or SC Agreement which results from or incorporates this [CA]ISO Tariff, unilaterally to make an application to FERC for a change in rates, terms, conditions, charges, classifications of service, SC [schedule coordinator] Agreement, rule or regulation under FPA Section 205 and pursuant to the FERC's rules and regulations promulgated thereunder. Nothing contained in this [CA]ISO Tariff or any SC Agreement shall be construed as affecting the ability of any Market Participant receiving service under this [CA]ISO Tariff to exercise its rights under Section 206 of the FPA and FERC's rules and regulations thereunder.

Clause[375] and it can be applied to the forward market transaction. Specifically, Exelon argues that pursuant to court precedent, the *Memphis* Clause permits only prospective, not retroactive, changes to the contract rate.[376] Exelon adds that mitigating a bilateral contract will have a chilling impact on suppliers that CAISO may call upon to provide power on a forward basis and will threaten the sanctity of contracts.[377]

165. Exelon further argues that the Commission acted arbitrarily and capriciously in affirming the Presiding Judge's decision to mitigate the forward market transaction at issue based on the Commission–established MMCP. According to Exelon, MMCP was narrowly tailored for California's single-price clearing auction spot market and thus cannot be applied to the forward market transaction in question.[378] Exelon states that according to its expert witness, the spot market and the forward market respond to different underlying price drivers, and thus it cannot be assumed that prices in the two markets are materially interdependent.[379] Exelon adds that the price in the forward market transaction at issue was based on the AESP's plant variable costs that have no relationship to the offer prices of marginal supplies in CAISO's hourly spot markets at the time. Exelon further states that it did not present an alternative refund methodology because there could be none, since the sale in question was at the cost-based rate.[380]

166. Further, Exelon argues that the Commission erred in holding that Constellation acted as a Scheduling Coordinator for the transaction at issue. Exelon states that while it is true that Constellation served as a Scheduling Coordinator for AESP for day-ahead and hourly schedules into the markets, the record evidence demonstrates that this was not the type of transaction that could be entered into by a Scheduling Coordinator under the tariff. According to Exelon, Constellation's witness testified that CAISO directly called AESP to negotiate the multi-day forward sale, and Constellation did not act as the

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[375] *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103, 110-13 (1958) (*Memphis*).

[376] Exelon at 55-56.

[377] *Id*. at 56-57.

[378] *Id*. at 58-59.

[379] *Id*. at 59-62 (citing Ex. CEI-15 at 8:4-6, 8:15-21, 16-18; Tr. at 9207-9208 (Cavicchi)).

[380] *Id*. at 62.

Scheduling Coordinator for AESP. Exelon asserts that the California Parties failed to refute this evidence.[381]

167. Lastly, Exelon challenges Opinion No. 536's finding that there is no need for the refund rerun process and the refunds can be allocated to net buyers in the real-time market. Exelon argues that the Commission's decision fails to consider potentially significant impacts. Exelon asserts that contrary to the Commission's finding, the refund rerun is not a cumbersome process because the CalPX is still in the wind-up process, engaged in market re-run calculations.[382]

Commission Determination

168. Exelon argues that because AESP's sales to CAISO were at cost, this transaction should not be subject to mitigation. Regardless, Exelon's argument does not provide sufficient ground for excluding the forward market transaction from the inquiry conducted in this proceeding. In the *CPUC Decision*, the Ninth Circuit reversed the Commission's decision to exclude forward market transactions, reasoning that the Commission did not offer sufficient "justification for excluding the transactions [at issue]" based on their duration of greater than 24 hours and that "later evidence suggested that forward prices had not been reigned in by FERC's mitigation of the spot markets, and that sellers had successfully manipulated forward markets to raise prices."[383] To comply with the Ninth Circuit's directive on remand, the Commission directed the Presiding Judge to determine "which […] forward market transactions are subject to mitigation and to calculate the refunds" and to "utilize the MMCP-based refund methodology previously established by the Commission in this proceeding, or another methodology the ALJ deems more appropriate."[384] By applying the Commission-established MMCP, the Presiding Judge concluded that the rate in the forward market contract at issue was not just and reasonable. Opinion No. 536 affirmed this finding. In this order, we reaffirm this decision, as discussed below in more detail.

169. In the Remand Order, the Commission explicitly invited the submission of cost offsets evidence to prevent the application of a mitigation methodology from having a

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[381] *Id*. at 63-64 (citing Ex. CEI-14 at 2:1-5).

[382] *Id*. at 64-65.

[383] *CPUC Decision*, 462 F.3d at 1057-58.

[384] Remand Order, 129 FERC ¶ 61,147 at P 28.

confiscatory effect.[385] However, the Initial Decision found that Constellation produced no evidence of cost offsets. We affirmed this decision because Exelon has failed to meet the requirements for demonstrating cost offsets, as established by the Commission in prior orders.[386] In the Refund Proceeding that reset the spot market clearing prices for all hours of the Refund Period, the Commission allowed the sellers of energy and ancillary services to present evidence on costs not reflected in the MMCP, to offset their refund liability.[387] These costs are NOx emission costs,[388] fuel cost allowances,[389] and other cost offsets.[390] In the Refund Proceeding, the cost offset process was established to provide sellers the opportunity to demonstrate that "the MMCP does not allow them to recover their costs of selling power into ISO/PX markets."[391]

170. Exelon argues that it did not submit the cost offsets evidence during the hearing because it was premature, since the Commission had to first find the transaction at issue to be unjust and unreasonable and establish the appropriate mitigation methodology. We agree and will provide Exelon with a second opportunity to submit evidence of the cost offsets applicable to the transaction at issue in the format previously prescribed by the Commission. Specifically, we find that the following cost offsets apply to the transaction at issue: the fuel cost allowance and the NOx emission costs offset. To claim these cost offsets, Exelon must provide evidence in a format prescribed by the Commission, as

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[385] *Id*.

[386] *See* Initial Decision, 142 FERC ¶ 63,011 at P 127; and Opinion No. 536, 149 FERC ¶ 61,116 at P 237.

[387] *See San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 102 FERC ¶ 61,317, *order on reh'g*, 105 FERC ¶ 61,066 (2003).

[388] *See San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 96 FERC ¶ 61,120 at 61,519.

[389] *See San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 107 FERC ¶ 61,166 (2004).

[390] *San Diego Gas & Elec. v. Sellers of Energy and Ancillary Servs.*, 97 FERC ¶ 61,275.

[391] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 127 FERC ¶ 61,250 at P 31.

described in Commission orders addressing cost offset filings.[392] We note that our intention is to bring resolution to this matter as soon as possible. For this reason, we will allow only 30 days from the date of issuance of this order for Exelon to submit its claim for cost offsets if it wishes to do so.

171. Exelon further argues that the cost offsets established by the Commission in the California Refund Proceeding do not apply to the forward market transaction at issue because those cost offsets are based on the comparison of the overall revenues received by the seller from the market after the price mitigation and the overall costs of selling into the market, while the forward transaction at issue was an out-of-market transaction. We agree that the portfolio-based cost offsets would not apply here because we are dealing with a single transaction traceable to a specific resource. However, Exelon has an option of presenting evidence of marginal costs that are directly attributable to the incremental sale in question. Because Exelon can match the transaction at issue to the specific resource, we would expect these types of costs to be clearly linked with the resource and the sale, and easily verifiable by supporting evidence.[393] The transmission costs and losses paid to make the sale in question may also be included in the cost filing. These should include the marginal costs that were paid to deliver energy to CAISO, but should not include costs associated with transmission reserved or acquired for other uses. We will not allow credit risk or O&M expenses, as well as emissions and natural gas costs outside the emissions cost offset and fuel cost allowance discussed above.[394] We will also not allow Exelon to claim a cost offset for return available to marketers[395] because the transaction at issue is traceable to the specific resource and Exelon claims that the transaction was at the price equal to variable costs. If Exelon chooses to claim the cost offset, its cost offset filing must meet the requirement outlined in paragraphs 103-105 of the Cost Offset Filings Order.

172. We reject Exelon's argument that the forward market transaction in question should not be subject to mitigation because Constellation did not exercise market power.

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[392] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 107 FERC ¶ 61,166 at PP 74-77; *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 102 FERC ¶ 61,317 at PP 98-122.

[393] Cost Offset Filings Order, 112 FERC ¶ 61,176 at P 77.

[394] *Id.* P 78.

[395] *Id.* P 81.

In a prior order in this proceeding, the Commission specifically found that an abuse of market power is not required for a determination that rates are unjust and unreasonable.

173. Exelon further argues that the forward market transaction at issue is not similar to the OOM spot transactions previously mitigated by the Commission, but rather it is more like CERS transactions that were also made in the forward market. We disagree. In the *CPUC Decision*, the Ninth Circuit rejected the Commission's argument that forward market transactions cannot be subject to mitigation because they were conducted over periods greater than 24 hours as an insufficient basis for denying relief.[396] In Opinion No. 536, the Commission followed the Ninth Circuit's mandate to include forward market transactions in the scope of its Refund Proceeding, and as with OOM spot transactions, we reviewed individually each of the forward market transactions remaining in the proceeding at that time. Based on the specifics of the transaction in question, the Commission concluded that there is no reason to exclude it from mitigation other than its duration, which, as the Ninth Circuit held, is not a sufficient ground.[397]

174. Exelon argues that section 2.3.5.1.5 of CAISO's tariff applies to CAISO's obligation to meet its annual planning and operating reserve criteria and is triggered only after CAISO receives all bids for generation planning and operating reserves as part of its annual bidding process. We disagree. CAISO's obligation to meet the applicable WECC/NERC Reliability Criteria does not end with ensuring the accurate forecast and soliciting bids to meet that forecast. Section 2.3.5.1.5 cannot be construed that narrowly. As explained in Opinion No. 536:

> CAISO is a non-profit entity created to independently manage its transmission system. By entering into the forward market transaction at issue in anticipation of future power shortage, CAISO was performing its primary function of providing service to its customers by ensuring uninterrupted power supply and thus was acting pursuant to its tariff authority in section 2.3.5.1.5. Moreover, in a Commission order on August 23, 2000, the Commission directed CAISO to "adopt a more forward approach" in acquiring resources to reliably operate the grid. So, the forward market transaction appears to be a Commission-directed

[396] *CPUC Decision*, 462 F.3d at 1055-59 & 1061. The detailed discussion of similarities between the previously mitigated OOM spot transactions and the forward market transaction at issue can be found in paragraphs 231-234 of Opinion No. 536 and we will not restate them here.

[397] Opinion No. 536, 149 FERC ¶ 61,116 at P 233.

> extension of CAISO's authority to make OOM spot transactions.[398] (*footnotes omitted*).

175. Therefore, we reaffirm Opinion No. 536's finding that CAISO's tariff governs the terms and conditions of the forward market transaction at issue, including the *Memphis* Clause in CAISO tariff section 19, and, therefore, the *Mobile-Sierra* presumption does not apply.

176. Exelon argues that the *Memphis Clause* in CAISO tariff section 19 does not apply to retroactive changes in the contractual rate of the forward market transaction at issue. We find Exelon's argument to be misplaced. The Commission is not engaging in retroactive ratemaking in this proceeding. The forward market transaction at issue was made after the refund effective date of October 2, 2000 established by the Commission. The Ninth Circuit explicitly found that the Commission's "section 206 refund authority [is not limited] to only 'spot market' transactions."[399] Specifically, the Ninth Circuit explained that:

> [t]he original complaint explicitly referred to both short-term and forward sales in the Cal-ISO and CalPX markets… The complaint clearly challenged rates for forward transactions, asserting that "until workable competition is established, supply bids into the California *forward and real-time markets* should be capped at $250 per Mwh." (emphasis added). The complaint logically did not reference sales outside the ISO and PX's formal markets because SDG&E was, at that time, required to purchase energy through the formal spot markets. However, within that limitation, SDG & E cast as wide a net as possible, including challenging those forward transactions it was allowed to enter. The original complaint did not limit FERC's section 206 refund authority to only "spot market" transactions. Thus, the primary reason given by FERC for excluding the transactions is without adequate foundation in the record.[400]

177. We also disagree with Exelon's assertion that mitigation of the forward market transaction at issue will have a chilling impact on suppliers to CAISO and will threaten the sanctity of contracts. When the Commission established the refund effective date and

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[398] *Id*. P 234.

[399] *CPUC Decision*, 462 F.3d at 1057.

[400] *Id*.

instituted the Refund Proceeding, it put all sellers in CAISO's control area on notice that their sales may be subject to refund. Moreover, in this proceeding, we order mitigation of one specific forward market transaction and this decision is very fact-specific with no bearing on other suppliers and transactions.

178. Further, we reject Exelon's argument that the application of the MMCP established to mitigate spot market transactions was inappropriate. Considering that CAISO was operating under the supply deficiency conditions, the only alternative for the forward market transaction at issue would have been an OOM spot transaction. The Commission mitigated the OOM spot transactions based on the MMCP, as affirmed by the Ninth Circuit. Moreover, we note that the forward market transaction at issue represents two remaining segments of the continuous sale that were left unmitigated, as they were originally considered forward market transactions, not subject to mitigation in the Refund Proceeding. The third segment of the same sale transaction was found to be an OOM spot transaction and was mitigated based on the MMCP.[401] We find that the Commission reasonably exercised its discretion in applying the same MMCP methodology to the forward market transaction at issue,[402] particularly considering the Ninth Circuit's mandate to include forward market transactions in the Refund Proceeding and the Commission's instruction in the Remand Order, which was not challenged by any of the parties, to use the Commission-established MMCP methodology.[403]

179. We reject Exelon's assertion that it should not be held liable for the refunds because Constellation did not serve as a Scheduling Coordinator for the forward market transaction at issue. AESP was a close affiliate of Constellation's predecessor, AES NewEnergy Inc. (AES NewEnergy). In fact, the record demonstrates that as a result of their close affiliation, the two acted as substantially one and the same entity. In particular, AES NewEnergy would not schedule AESP's power into the organized markets when the $250/MWh capped market clearing price was uneconomic for AESP. As a result, CAISO was forced to negotiate an out-of-market purchase of power at a higher out-of-market price.[404] Considering the nature of this relationship, we find that AES NewEnergy and AESP acted as one and the same in regard to the forward

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[401] Initial Decision, 142 FERC ¶ 63,011 at PP 486-490.

[402] *See Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967).

[403] Opinion No. 536, 149 FERC ¶ 61,116 at PP 233-34.

[404] Ex. CEI-1 at 4:12; Ex. CEI-7 at 8:6-13.

market transaction at issue. Moreover, throughout the California Refund Proceeding, AESP and AES NewEnergy acted jointly and did not argue that AESP and AES NewEnergy were unrelated entities, but merely that the transaction at issue was out of market.[405] Accordingly, we affirm the prior finding that Exelon, as a successor in interest to Constellation, is jointly and severally liable for the refund.[406]

180. We reject Exelon's contention that the refund rerun is necessary to allocate the refunds due from Exelon. The refunds ordered in this proceeding involve only one transaction and thus will have no impact on the current refund allocation among the net buyers. Exelon has failed to present any reasons to justify its request for additional refund reruns. The fact that the CalPX may still be engaged in rerun calculations does not make the refund rerun less cumbersome. Accordingly, we deny Exelon's request for rehearing.

III. Rehearing of Order Affirming Partial Initial Decision

181. On rehearing, CARE asks the Commission to explain "what CARE did wrong in its amended October 30, 2000 complaint under Docket EL01-2 that precluded its claims against [the] California Parties[,] PG&E[,] and SCE from being considered as CARE's formal claims brought in October 30, 2000." Additionally, CARE appears to challenge a March 22, 2012 order that CARE claims was issued in the instant proceeding. Specifically, CARE requests the Commission to explain "why Summer Period Tariff Violations Practices and Behaviors That Constitute a Violation that this investigation and analysis does not include violations by California Parties; PG&E, and SCE, and enforcement by CPUC of PURPA rights for small QFs like CARE represents in its 2000 complaints."[407]

182. The California Parties seek rehearing of the Commission's decision to deny any relief from the Dismissed Respondents.[408] In addition, the California Parties ask the Commission to clarify that the Order Affirming Partial Initial Decision applies only to

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[405] *See* Ex. CEI-1; Ex. CEI-7; Ex. CEI-14. *See also* Rehearing Order, 135 FERC ¶ 61,183 at n.40.

[406] *See* Opinion No. 536, 149 FERC ¶ 61,116 at P 237.

[407] CARE at 2.

[408] The Dismissed Respondents are Avista Corporation D/B/A/ Avista Utilities, Mieco, Inc., and Shell Martinez Refining Company.

these parties and does not constitute a finding with respect to other Respondents in the proceeding.[409]

183. The California Parties allege that the Commission violated the Ninth Circuit's instruction by refusing to consider whether a market-wide remedy should be applied in this proceeding.[410] The California Parties argue that the Commission peremptorily eliminated the prospect of market-wide relief with respect to the Dismissed Respondents without considering evidence that they received unlawful rates.[411] The California Parties assert that the Commission's ruling erroneously permits violations of FPA section 205 and the filed rate doctrine, which requires that sellers receive only the tariff rate duly filed and accepted for filing under FPA section 205.[412] The California Parties argue that, in the single-price auction markets that CAISO and the CalPX operated, whenever any seller violated tariff provisions, all sellers received an unlawful price which is subject to refund.[413] The California Parties assert that any seller that receives a higher rate than the rate permitted by the tariff collects an unlawful rate and there is no unfairness, "guilt by association," or "vicarious liability" involved in requiring each seller to refund amounts that that individual seller received above the filed rate.[414]

184. The California Parties also assert that the Commission erred in its interpretation of FPA sections 205, 206, and 309 when it held that "imposing refund liability on sellers that were in compliance with the existing tariffs would be inconsistent with the section 206 notice requirements."[415] The California Parties argue section 206 does not apply to the Summer Period, which is about enforcing the existing rate, and not about setting new rates, and that the ruling ignores the Ninth Circuit's holding that the notice requirements

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[409] California Parties' Partial Initial Decision Rehearing Request at 7.

[410] *Id*.

[411] *Id*. at 7-8.

[412] *Id*. at 8, 12.

[413] *Id*. at 9-10, 22.

[414] *Id*. at 26-27.

[415] *Id*. at 9 (citing Order Affirming Partial Initial Decision, 141 FERC ¶ 61,088 at P 25).

of FPA section 206 do not apply to the California Parties' claims pursuant to FPA section 309.[416]

185. The California Parties allege that the Commission confused the notice requirements for sections 205 and 206 and applied the wrong notice standard to the Summer Period. The California Parties state that FPA sections 205 and 206 have different notice requirements. According to the California Parties, FPA section 205 requires sellers to give notice to the Commission before they may change their rates, while FPA section 206 requires the Commission to give notice to sellers before it changes their rates. The California Parties argue that it is section 205 that applies to the Dismissed Respondents, and thus a market-wide remedy is possible.[417]

186. In addition, the California Parties contend that section 309 utilizes section 205's notice requirement, that is, where the sellers must give notice before changing their rates. They argue that the Ninth Circuit explained that the Commission was not limited by the "prior notice" or "temporal" requirements of section 206, and that section 309 allows the Commission to order refunds if it finds violations of the filed tariff without temporal limitations.[418]

187. The California Parties thus assert that the Commission violated the Ninth Circuit's directive in *CPUC Decision*, where the Ninth Circuit specifically rejected the argument that FPA section 206 impacts relief for the Summer Period, and determined that FPA section 309 gives the Commission the authority to order market-wide refunds.[419] The California Parties assert that they sought a market-wide remedy under section 309, and that the Ninth Circuit had required the Commission to adjudicate that request.[420]

188. Finally, the California Parties also allege that the Commission erred because it violated the California Parties' rights to due process, to an order based upon substantial evidence, and to an order based upon reasoned decision-making.[421] The California

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[416] *Id*. (citing *CPUC Decision* 462 F.3d at 1051).

[417] *Id*. at 11-12, 18-19.

[418] *Id*. at 13 -15.

[419] *Id*. at 15 (citing *CPUC Decision*, 462 F.3d at 1051).

[420] *Id*. at 16 (citing *CPUC Decision*, 462 F.3d at 1051).

[421] *Id*. at 10, 28.

Parties contend the Commission ruled on the Partial Initial Decision without evidence being presented, or considering the extensive examination related to that evidence, or the Presiding Judge's findings of fact.[422]

Commission Determination

189. CARE's request for rehearing appears to challenge Commission orders that were issued outside this proceeding and fails to specifically set forth any alleged error in Opinion No. 536. We therefore dismiss CARE's request for rehearing as beyond the scope of this proceeding and for failure to state concisely the alleged error in Opinion No. 536. Moreover, CARE has failed to include in its filing a statement of issues as required by Rule 713(c) of the Commission's Rules of Practice and Procedure.[423]

190. We deny the California Parties' requests for rehearing. As an initial matter, we address the California Parties' contention that the Order Affirming Partial Initial Decision denied their rights to due process. We note that in its brief on exceptions, the California Parties did not challenge the Presiding Judge's finding that the Dismissed Respondents did not commit any tariff violations. Instead, they disagreed, based on their contention that the market-wide remedy is warranted in this proceeding, that all claims against the Dismissed Respondents should be released. The Commission deferred to the Presiding Judge's findings of fact that the Dismissed Respondents did not commit any tariff violations, and chose not to address them in detail in the Order Affirming Partial Initial Decision, as they were not challenged on exceptions.

191. With regard to the California Parties' claim that the Ninth Circuit required a market-wide remedy, the California Parties fail to consider the rest of the paragraph they quote. In it, the Ninth Circuit continued, "[i]f an aggrieved party tenders sufficient evidence that tariffs have been violated, then it is entitled to have FERC adjudicate whether the tariff has been violated *and what relief is appropriate*."[424] In addition, the Ninth Circuit explicitly stated that it does not "prejudge how FERC should address the merits or fashion a remedy if appropriate."[425] Thus, the Ninth Circuit did not require a market-wide remedy, but rather left the question of remedy to the Commission's discretion.

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[422] *Id*. at 28.

[423] 18 C.F.R. § 385.713(c) (2015).

[424] *CPUC Decision*, 462 F.3d at 1051 (emphasis added).

[425] *Id*.

192. We disagree with the California Parties' argument that the Commission can order retroactive refunds in this case pursuant to section 205 of the FPA.[426] First, we note that this proceeding was established pursuant to a section 206 complaint and therefore the refund effective date is the date the complaint was filed.[427] Under section 205, the Commission may accept rate case filings by utilities and suspend those filings and make them effective subject to refund. In this proceeding, the Commission is not reviewing rates proposed by a public utility under section 205; the Ninth Circuit directed the Commission to examine whether tariffs were violated, and if so, what relief is appropriate.[428]

193. Section 206 of the FPA provides for establishment of a refund effective date and for relief thereafter, and this precludes refunds prior to that date, unless the sellers were found to have violated the tariff.[429] The fact that alleged tariff violations committed prior to the October 2, 2000 refund effective date established in this proceeding are being examined pursuant to section 309 of the FPA does not require a different result. Section 309 grants the Commission no additional substantive authority but instead merely provides the Commission the practical ability to carry out other substantive provisions of the FPA, such as section 206.[430] We therefore reaffirm the Commission's prior holding that the market-wide remedy applicable to both those who engaged in tariff violations and those who did not would not be appropriate in this proceeding because FPA section 206 provides for refunds on a prospective basis only.

194. Alternatively, we find that imposing refund liability on those sellers that were in compliance with the then-existing tariffs would be inequitable. Sellers that engaged in

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[426] 16 U.S.C. § 824d (2012).

[427] 16 U.S.C. § 824e(b) (2012).

[428] *CPUC Decision*, 462 F.3d at 1051.

[429] *Id.* at 1048-49. *See also, e.g., Washington Water Power Co.*, 83 FERC ¶ 61,282 (1998)).

[430] 16 U.S.C. § 825h (2012). Section 309 authorizes the Commission "to use means of regulation not spelled out in detail, provided the agency's action conforms with the purposes and policies of Congress and does not contravene any terms of the [Federal Power] Act." *See Niagara Mohawk Power Corp. v. FERC*, 379 F.2d 153, 158 (D.C. Cir. 1967) (citing *Pub. Serv. Comm'n of State of New York v. FPC*, 327 F.2d 893, 896-97 (D.C. Cir. 1964)).

tariff violations were on notice that their transactions would be subject to refund, restitution, disgorgement of profits or other remedy. Sellers that, in contrast, complied with then-existing tariffs had no notice that the price at which they transacted could later be changed due to uncovered tariff violations by other market participants.[431]

195. Furthermore, we disagree with the California Parties that the Commission is required to order market-wide refunds. There is no statutory command mandating refunds when the rate charged exceeds that filed rate.[432] We note that the Commission's authority to order refunds under the FPA is discretionary. The use of this discretion is guided by equitable principles. The courts have held that:

> Customer refunds are a form of equitable relief, akin to restitution, and the general rule is that agencies should order restitution only when money was obtained in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it.[433]

196. As discussed above, we find that equity in this case requires that the excess payments and overcharges received as the result of tariff violations must be disgorged. We, however, do not find any grounds for re-running the market for the Summer Period and imposing refund liability on the sellers that did not violate then-effective tariffs. We also note that the California Parties have entered into settlement agreements with many of the sellers that sold power in California's organized markets during the Summer Period. Accordingly, we reaffirm our decision in regard to the Dismissed Respondents and will not impose the refund liability on the sellers that were not shown to have engaged in tariff violations.

197. Finally, we grant the California Parties' request for clarification that the Order on Partial Initial Decision applies only to the Dismissed Respondents and does not constitute a finding with respect to other Respondents remaining in this proceeding.

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[431] Order Affirming Partial Initial Decision, 141 FERC ¶ 61,088 at P 25.

[432] *Towns of Concord, Norwood, & Wellesley, Mass. v. FERC*, 955 F.3d 67, 72 (D.C. Cir. 1992)

[433] *Id.* at 75 (internal quotations and citations omitted).

The Commission orders:

(A) Rehearing requests of Opinion No. 536 are hereby denied for the reasons discussed in the body of this order.

(B) The California Parties' request for clarification is hereby granted and Opinion No. 536 is hereby clarified, as discussed in the body of this order.

(C) The compliance filings submitted in Docket No. EL00-95-281 are hereby dismissed as moot, as discussed in the body of this order

(D) The Respondents, except for APX, are hereby directed to submit new compliance filings within 60 days of the date of issuance of the order.

(E) The California Parties' request for rehearing and clarification of the Order Affirming Partial Initial Decision is hereby denied, as discussed in the body of this order.

(F) CARE's request for rehearing of the Order Affirming Partial Initial Decision is hereby dismissed, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.