168 FERC ¶ 61,127
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur and Richard Glick.

California Independent System Operator Corporation	Docket Nos. ER04-835-010
Pacific Gas and Electric Company	EL04-103-005 (Consolidated)
v.	
California Independent System Operator Corporation	
The Alliance for Retail Energy Markets Shell Energy North America (US), L.P.	EL14-67-001
v.	
California Independent System Operator Corporation	

ORDER ON REHEARING AND CLARIFICATION

(Issued August 28, 2019)

1. On October 20, 2016, the Commission issued an order rejecting an informational refund report (Refund Report)[1] in Docket Nos. ER04-835-000 and EL04-103-000 regarding market resettlements the California Independent System Operator Corporation (CAISO) intends to administer as a result of the Commission's final orders on

[1] CAISO, Informational Refund Report, Docket No. ER04-835-000 *et al.*, (filed Dec. 20, 2013). CAISO filed a second informational refund report on May 12, 2014 to correct errors in the initial Refund Report.

Amendment No. 60, CAISO's proposed cost allocation for its must-offer generation requirement.[2] In light of its rejection of the Refund Report, the Commission also dismissed as moot a complaint filed on June 16, 2014 by the Alliance for Retail Energy Markets and Shell Energy North America (US), L.P. (together, the Coalition) in Docket No. EL14-67-000 concerning CAISO's intent to administer the resettlements set forth in the Refund Report (Complaint).[3]

2. In this order, we grant rehearing in part and dismiss rehearing in part, deny clarification of the October 2016 Order, and direct a compliance filing.

I. Background

A. Amendment No. 60

3. The origins of this proceeding date back more than a decade to CAISO's May 2004 filing of Amendment No. 60, which proposed, among other changes, to allocate must-offer generation costs using a "bucket" rate design. This method was intended to more closely reflect cost causation principles by allocating minimum load compensation costs to one of three buckets based on whether CAISO committed generation primarily to satisfy local, zonal, or system reliability requirements.[4] Following an evidentiary hearing on the proposed cost allocation provisions consolidated with a complaint filed by Pacific Gas and Electric Company (PG&E) regarding the allocation of must-offer generation costs under CAISO's then-effective tariff provisions, the presiding judge accepted the cost allocation provisions, subject to certain exceptions.[5] The Commission then mostly affirmed the presiding judge's Initial Decision in December 2006 in Opinion No. 492.[6] In a November 2007 rehearing order,[7] however,

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[2] *Cal. Indep. Sys. Operator Corp.*, 157 FERC ¶ 61,033 (2016) (October 2016 Order).

[3] October 2016 Order, 157 FERC ¶ 61,033 at P 44.

[4] *See id*. P 2.

[5] *Cal. Indep. Sys. Operator Corp.*, 113 FERC ¶ 63,017, at PP 60-62 (2005) (Initial Decision).

[6] *Cal. Indep. Sys. Operator Corp.*, Opinion No. 492, 117 FERC ¶ 61,348, at P 39 (2006).

[7] *Cal. Indep. Sys. Operator Corp.*, 121 FERC ¶ 61,193 (2007) (2007 Rehearing Order).

the Commission reversed its initial finding with respect to the classification of one transmission path, granting rehearing to find that the South of Lugo path was more appropriately classified as a zonal constraint.[8] While rehearing of the 2007 Rehearing Order was pending, the existing must-offer regime was superseded in 2009 by CAISO's new Market Redesign and Technology Upgrade regime. Rehearing of the 2007 Rehearing Order was denied in September 2011,[9] and the Commission's reclassification of South of Lugo was ultimately affirmed by the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in November 2013.[10]

4. The following month, CAISO filed the Refund Report in Docket Nos. ER04-835-000 and EL04-104-000 "to provide transparency to interested parties" regarding resettlements it intended to make in compliance with the orders in this proceeding.[11] The Coalition protested the Refund Report on the basis that the Commission had not ordered refunds and that the resettlements included impermissible retroactive surcharges, and submitted its Complaint making largely the same allegations a few months later in June 2014. The Coalition and the Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California (collectively, Six Cities) also protested CAISO's application of interest to the resettlements.

B. October 2016 Order

5. In the October 2016 Order, the Commission rejected the Refund Report and thus dismissed the Complaint as moot.[12] The Commission found that CAISO had not been directed to pay refunds or file a refund report for July 2004 through December 2007 (i.e., the period from the effective date established for the consolidated Amendment No. 60 filing and complaint proceeding until the time CAISO began implementing the revised cost allocation directed by the Commission, including the South of Lugo classification

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[8] *Id.* P 25.

[9] *Cal. Indep. Sys. Operator Corp.*, 136 FERC ¶ 61,197 (2011).

[10] *City of Anaheim v. FERC*, 540 F. App'x 13 (D.C. Cir. 2013).

[11] CAISO December 20, 2013 Informational Refund Report at 1.

[12] *See* October 2016 Order, 157 FERC ¶ 61,033 at P 1. The Commission also accepted a May 2012 informational filing regarding information sought from CAISO by Southern California Edison Company (SoCal Edison) regarding the calculation of the incremental cost of local component of the minimum load compensation costs. *Id.* P 54.

established in the 2007 Rehearing Order).[13] The Commission further explained that declining to order refunds in this proceeding was "consistent with the Commission's general policy of not requiring refunds in cost allocation cases,"[14] citing *Louisiana Public Service Commission v. Entergy Corp.* (Entergy Remand Order).[15] In light of these findings, the Commission dismissed arguments related to whether interest should be applied to the resettlements as moot.[16]

C. Requests for Rehearing and Clarification

6. On November 21, 2016, CAISO submitted a request for clarification or, in the alternative, rehearing of the October 2016 Order, PG&E and SoCal Edison (together, Joint Parties) filed a joint request for rehearing, the Coalition filed a request for clarification and rehearing, and Six Cities filed a request for clarification of the October 2016 Order.

7. CAISO and Joint Parties seek rehearing of the Commission's decision not to order refunds,[17] arguing that the Commission directed refunds in prior orders in this proceeding,[18] and that granting refunds comports with Commission policy and precedent.[19] According to Joint Parties, CAISO already has processed the refunds, and undoing the resettlements could leave parties like SoCal Edison unable to recover

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[13] *Id*. P 27

[14] *Id*. P 28.

[15] §¶ 61,120 (2016). The D.C. Circuit affirmed the Entergy Remand Order on March 6, 2018. *Louisiana Pub. Serv. Comm'n v. FERC*, 883 F.3d 929 (D.C. Cir. 2018) (*LPSC*).

[16] October 2016 Order, 157 FERC ¶ 61,033 at P 33.

[17] CAISO seeks clarification that the Commission did not intend the October 2016 Order to negate the directive from prior orders for CAISO to provide refunds in this proceeding effective July 17, 2004 or, in the alternative, requests rehearing to permit the refunds. *See* CAISO Clarification and Rehearing Request at 2.

[18] *Id*. at 2, 5, 6-9; Joint Parties Rehearing Request at 2-5, 6-9, 12-13.

[19] CAISO Clarification and Rehearing Request at 5-6, 9-17; Joint Parties Rehearing Request at 3-5, 10-12.

amounts already refunded to their transmission customers.[20] CAISO also argues that the Commission's directive requiring resettlements cannot be changed now that the orders have been affirmed by the D.C. Circuit.[21]

8. With respect to the Commission's refund policy, CAISO contends that the Commission erred in failing to conclude, as it did in *Public Service Commission of Wisconsin v. Midcontinent Independent System Operator, Inc.* (*MISO*),[22] that refunds were justified in this proceeding in spite of the Commission's general policy of denying refunds in cost allocation and rate design cases.[23] According to CAISO, the circumstances in this proceeding more closely mirror *MISO* than the Entergy Remand Order, because there is no evidence that parties made any particular decisions in reliance on the previous cost allocation methodology and there was no under-recovery.[24] CAISO and Joint Parties further argue that this proceeding is distinguishable from cases like the Entergy Remand Order because parties were on notice that refunds and surcharges might be required due to the filing of PG&E's complaint and the establishment of a refund effective date for the Amendment No. 60 filing.[25] Moreover, Joint Parties assert that directing CAISO to refund overcharges to customers after determining on rehearing that South of Lugo should be classified as a zonal constraint was consistent with the Commission's authority to remedy its legal errors.[26]

9. Conversely, the Coalition seeks clarification that the October 2016 Order did not authorize CAISO to keep in place the surcharges imposed on market participants by CAISO in connection with implementing the resettlements in the Refund Report, and

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[20] Joint Parties Rehearing Request at 2, 6, 8.

[21] CAISO Clarification and Rehearing Request at 8-9.

[22] 156 FERC ¶ 61,205 (2016), *aff'd sub nom. Verso Corp. v. FERC*, 898 F.3d 1 (D.C. Cir. 2018) (*Verso*).

[23] CAISO Clarification and Rehearing Request at 5-6, 9-17.

[24] *Id*. at 9-12.

[25] *Id*. at 13, 14-16; Joint Parties Rehearing Request at 10-12.

[26] Joint Parties Rehearing Request at 8-10 (citing *Tenn. Valley Mun. Gas Ass'n v. FPC*, 470 F.2d 446 (D.C. Cir. 1972); *Exxon Co. v. U.S.A.*, 182 F.3d 30, 49 (D.C. Cir. 1999)).

that all such amounts must be returned.[27] The Coalition asserts that, "[w]hether the Commission ordered refunds or not," it lacks authority to impose retroactive surcharges.[28] To the extent that the October 2016 Order implies that CAISO's billing dispute process would be sufficient to provide redress to market participants who paid improper surcharges (rather than CAISO reimbursing customers for any refunds paid), the Coalition requests rehearing of this determination.[29]

10. The rehearing and clarification requests also raise the issue of whether interest should be applied to refunds made in connection with this proceeding, a question which the Commission found to be moot in the October 2016 Order given the determination to deny refunds.[30] In the Refund Report, CAISO proposed to apply interest pursuant to section 35.19a of the Commission's regulations.[31] CAISO notes in its request for rehearing that it has not yet invoiced interest for the refunds and is waiting for the Commission to resolve this issue.[32] Joint Parties contend that the Commission erred in effectively denying SoCal Edison's request for interest on the refunds, and argue that interest is required under the Commission's regulations whenever rates are suspended and refunds ordered.[33] Joint Parties assert that the reasons for requiring interest only apply more strongly when there has been a delay between the injury and the relief.[34] By contrast, Six Cities seek clarification that interest should *not* be applied to any resettlements made pursuant to this proceeding, asserting that the application of interest

[27] Coalition Clarification and Rehearing Request at 7-9, 11.

[28] *Id*. at 9.

[29] *Id*. at 9-12.

[30] October 2016 Order, 157 FERC ¶ 61,033 at P 33.

[31] *See* CAISO December 20, 2013 Informational Refund Report at 8-10.

[32] CAISO Clarification and Rehearing Request at 7 n.19.

[33] Joint Parties Rehearing Request at 4-5, 13-15.

[34] *Id*. at 14-15 (citing *Anadarko Petroleum Corp. v. FERC*, 196 F.3d 1264, 1267 (D.C. Cir. 1999) (*Anadarko*), *vacated in part on rehearing on other grounds*, 200 F.3d 867 (D.C. Cir. 2000); *Entergy Servs., Inc.*, 145 FERC ¶ 61,046 (2013), *aff'd in relevant part*, *Louisiana Pub. Serv. Comm'n v. FERC*, 606 F. App'x 1, 6 (D.C. Cir. 2015)).

to refunds and surcharges is discretionary and that interest should not be applied where the Commission has not expressly ordered it and no party sought rehearing.[35]

II. Commission Determination

A. Procedural Matters

11. On December 14, 2016, the Coalition submitted a motion to answer and answer to the requests for rehearing filed by CAISO and Joint Parties. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2019), prohibits an answer to a request for rehearing. Accordingly, the Commission rejects the Coalition's answer.

B. Substantive Matters

12. Upon further consideration of the relevant case law and recent Commission precedent, we reverse our prior rejection of the Refund Report and find that it was appropriate for CAISO to administer market resettlements as a result of the Commission's final orders on Amendment No. 60. Having weighed the equities, we find that CAISO reasonably determined that it would be fundamentally unfair for a single load-serving entity (LSE) to bear full responsibility for costs that should have been allocated zonally, and that, as a not-for-profit entity, CAISO has authority to collect such refunds from the parties that should have paid if the just and reasonable methodology had been in effect from the start. Accordingly, we grant CAISO's and Joint Parties' requests for rehearing, accept the Refund Report, and deny the Complaint. In light of these determinations, we find the Coalition's request for rehearing regarding whether CAISO's billing dispute processes would be sufficient to return any refunds previously paid to be moot. With respect to interest, we find that interest should be applied to the resettlements.

[35] Six Cities Clarification Request at 3-9 (citing *New England Power Pool*, 95 FERC ¶ 61,449, *order denying reh'g*, 96 FERC ¶ 61,227 (2001) and *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 124 FERC ¶ 61,275 (2008)). While the Coalition does not expressly address the application of interest to the refunds, it does request that any surcharges imposed on market participants be returned with interest. Coalition Clarification and Rehearing Request at 9 (citing 18 C.F.R. § 35.19a (2019).

1. The Commission's Refund Policy

13. In its recent opinion affirming *MISO*, the D.C. Circuit affirmed that the Commission has the discretion under section 206(b) of the Federal Power Act (FPA)[36] to order refunds and surcharges after considering the specific facts and equities of each case.[37] In *MISO*, the Commission balanced the equities and found that refunds, implemented through surcharges, should be paid to LSEs who overpaid charges for compensating system support resource (SSR) units that the Commission determined should have been allocated to the LSEs causing the need for SSR operation rather than to all LSEs in the footprint.[38]

14. The D.C. Circuit upheld this determination in *Verso*. In particular, the court found that the reallocation of SSR costs, including through surcharges, was well within the Commission's expansive remedial authority under FPA section 309, in concert with its authority to grant refunds where rates are unfairly high under FPA section 206(b).[39] The court also rejected petitioners' arguments, based on *City of Anaheim v. FERC*,[40] that FPA section 206(b) only permits retroactive rate decreases, and not retroactive surcharges. The court distinguished *City of Anaheim*, which involved applying retroactive surcharges to implement a rate increase, from *MISO*, where the SSR rates stayed the same but were reallocated, confirming that *City of Anaheim* "stands for the unremarkable proposition that [the Commission] cannot order through surcharges what it could not otherwise accomplish directly."[41] The court concluded that, because the Commission's remedial authority allows for rate reallocation, the Commission's use of surcharges to effectuate the reallocation was squarely within its authority.

15. Having established that the Commission has the statutory authority to order a reallocation of SSR costs through refunds and surcharges, the D.C. Circuit next assessed

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[36] 16 U.S.C. § 824e(b) (2012).

[37] *Verso*, 898 F.3d 1.

[38] *MISO*, 156 FERC ¶ 61,205 at PP 48, 51.

[39] *Verso*, 898 F.3d at 10 (citing 16 U.S.C. § 824e(b) (2012); 16 U.S.C. § 825h (2012); *TNA Merchant Projects, Inc. v. FERC*, 857 F.3d 354, 359 (D.C. Cir. 2017) (*TNA*); *Xcel Energy Servs., Inc. v. FERC*, 815 F.3d 947, 954-956 (D.C. Cir. 2016) (*Xcel*)).

[40] *City of Anaheim v. FERC*, 558 F.3d 521, 524 (D.C. Cir. 2009).

[41] *Verso*, 898 F.3d at 11 (citing *MISO*, 156 FERC ¶ 61,205 at P 48).

whether the Commission appropriately exercised this discretion. The court found that the Commission's decision to order refunds paid for by surcharges was supported under the circumstances.[42] First, the court found no risk of under-recovery because MISO had a record of the SSR costs paid by each party and could calculate the exact amount of SSR costs that should be assessed to each party that underpaid in order to refund parties that overpaid based on the revised methodology.[43] The court also noted that MISO's pertinent customer population had not changed, so the calculation of over- and under-payments did not present any concern of inequitable recovery. Second, the court found that no challenger identified any particular decisions made in reliance on the previous SSR cost allocation methodology.[44] The court agreed with the Commission that SSR cost allocation is an out-of-market process, thus there is no undermining of those markets, nor is there previous market conduct that would have been adjusted to account for eventual refunds.[45] In other words, the court found, because the SSR costs cannot be avoided, changing rate design does not implicate market-reliance concerns.

16. Finally, the court in *Verso* found that the Commission's rationale for distinguishing the reallocation at issue was particularly compelling in light of the unique nature of the short-term, compulsory SSR agreements, and because MISO is a non-profit that itself lacks any funding to cover the costs of refunds to the parties that paid too much.[46] As a result, the court recognized that, without the ability to surcharge, the refund provision of FPA section 206(b) would not serve as protection for customers: "[t]he only way that [the Commission's] ordered refunds may be accomplished is by collecting the necessary funds from MISO's customers."[47]

17. The Commission recently applied this reasoning in *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*[48] In that proceeding, the Commission had initially found that PJM Interconnection, L.L.C. (PJM) improperly excluded certain financial marketers from the allocation of marginal line loss over-collections and directed refunds, but later

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[42] *Id.* at 12.

[43] *Id.* at 13.

[44] *Id.* (citing *MISO*, 156 FERC ¶ 61,205 at P 45).

[45] *Id.* (citing *MISO*, 156 FERC ¶ 61,205 at P 46).

[46] *Id.*

[47] *Id.*

[48] 167 FERC ¶ 61,250 (2019) (*Black Oak*).

reversed its determination that PJM should pay refunds, finding that refunds should not be paid under FPA section 206(b)[49] in rate design or cost allocation cases where the company did not over-collect revenue.[50] On voluntary remand from the D.C. Circuit, the Commission considered whether it had erred in directing PJM to pay refunds, and whether the financial marketers who received the refunds from PJM should be required to repay them. The Commission found that it has an obligation under FPA section 206(b)[51] "to weigh the equities and provide refunds when appropriate to restore the just and reasonable rate in cost allocation and rate design cases."[52] Exercising the statutory authority affirmed in *Verso*, the Commission found that requiring PJM to pay refunds to the improperly excluded parties and permitting the financial marketers to retain the amount of refunds they are due was the most equitable result.[53] The Commission reasoned that the proceeding was "not a case in which ordering refunds would 'pull the economic rug out from under' firms 'that had made operational decisions in reliance on one set of rates [and that] would be unable to undo those transactions retroactively in light of the new, corrected rates.'"[54] The Commission explained that because "no party could count on receiving a specific amount of line loss credit from a particular transaction . . . [,] no party could have made an operational decision based on the expectation of receiving a specific marginal line loss allocation."[55] In addition, the Commission observed that, because line loss credits are an out-of-market process, the payment of

[49] 16 U.S.C. § 824e(b) (2012).

[50] *See Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,262, at PP 33-35 (2009); *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 136 FERC ¶ 61,040, at P 25 (2011). The D.C. Circuit remanded the case to the Commission for an explanation of why the Commission should direct an equitable recovery of refunds that already had been paid to the financial marketers, and the Commission found recoupment to be appropriate and affirmed its denial of refunds, consistent with its interpretation of Commission policy as prohibiting refunds in cost allocation and rate design proceedings. *See Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,231 (2015), *reh'g denied* 155 FERC ¶ 61,013 (2016).

[51] 16 U.S.C. § 825h (2012).

[52] *Black Oak*, 167 FERC ¶ 61,250 at P 27.

[53] *Id*. PP 28-29.

[54] *Id.* P 30 (quoting *LPSC*, 883 F.3d at 933).

[55] *Id.*

refunds and surcharges would not affect market prices, and providing refunds would not require PJM to re-run the market and change the prices on which all customers rely.[56] The Commission also noted that the filing of a complaint under FPA section 206 put the exporters on notice that they might lose a proportionate share of their marginal line losses.[57]

2. Equitable Considerations Warrant Refunds

18. We find that the particular factual circumstances in this proceeding, when considered as a whole, support CAISO's issuance of refunds of must-offer generation costs to customers who paid too much under the cost allocation method found to be unjust and unreasonable, even to the extent that those refunds were implemented through surcharges to those who paid too little under that rate design.

19. In the October 2016 Order, the Commission declined to order refunds because it was concerned about its legal authority to authorize CAISO, as a not-for-profit corporation, to obtain those funds through surcharges to those customers who received too large an allocation of credits.[58] In light of recent court decisions, and upon further consideration, however, we agree with CAISO and Joint Parties that the circumstances of this proceeding, and the equities to be considered, align more closely with *MISO*, as affirmed in *Verso*, than with the Entergy Remand Order.

20. In the Entergy Remand Order, the Commission cited two primary concerns in determining not to order refunds: (1) "the unfairness that results from retroactive implementation of a new rate for both utilities and customers who cannot alter their past action in light of that new rate;" and (2) "the potential for under-recovery."[59] The

[56] *Id*. (footnotes omitted).

[57] *Id.* P 32.

[58] *See* October 2016 Order, 157 FERC ¶ 61,033 at PP 29-30 (citing Entergy Remand Order, 155 FERC ¶ 61,120 at P 25).

[59] Entergy Remand Order, 155 FERC ¶ 61,120 at P 30; *see id*. PP 31-35 (finding both the potential for under-recovery and that companies made decisions that could not now be undone in reliance on the incentives in the System Agreement).

D.C. Circuit reviewed these considerations in affirming the Entergy Remand Order,[60] finding that the Commission had succeeded on remand in "identif[ying] definite evidence of at least a non-trivial risk of under-recovery" and supporting its conclusion that customers had made economic decisions in reliance on the cost allocation that cannot now be revisited.[61]

21. The circumstances in this proceeding, however, do not raise these concerns.[62] First, the record does not indicate that participants in CAISO took any actions in reliance on the potential allocation of must-offer generation costs. In *MISO* and *Black Oak*, the Commission found that the out-of-market nature of the SSR costs and line loss credits, respectively, helped ensure that changing their allocation would not affect market prices on which all customers rely.[63] Similar to the SSR costs in *MISO*, the costs involved in this proceeding were after-the-fact payments for must-offer resources. Specifically, this case involves the allocation of minimum load compensation costs when CAISO committed must-offer generation to satisfy local, regional, or system reliability requirements. Because CAISO would have committed the requisite generation to meet those reliability requirements irrespective of how the costs were later allocated amongst market participants, our traditional concern over upsetting prior decision-making by ordering refunds is not present here.[64] Indeed, CAISO notes that it did not have to re-run any markets to implement the resettlements, but simply reallocated as zonal the costs for

[60] *See LPSC*, 883 F.3d at 933 ("First, it would be difficult for the utility to recover its costs fully. . . . Second, customer firms that had made operational decisions in reliance on one set of rates would be unable to 'undo' those transactions retroactively in light of the new, corrected rates . . . .").

[61] *Id.* at 934.

[62] *Verso*, 898 F.3d at 13 (finding that no challenger identified any past actions taken in reliance on the prior cost allocation method, and that there was no potential for under-recovery because MISO could calculate the exact amount of SSR costs that should be assessed to each LSE that underpaid).

[63] *See Verso*, 898 F.3d at 13; *MISO*, 156 FERC ¶ 61,205 at PP 45-46, 54; *Black Oak*, 167 FERC ¶ 61,250 at P 29.

[64] *See Verso*, 898 F.3d at 13 ("In other words, because the SSR costs cannot be avoided, changing rate design does not implicate market-reliance concerns.").

certain commitments originally assigned as local must-offer costs.[65] Accordingly, as the record does not show that generators or load made determinations based on the potential allocation of must-offer costs,[66] it is not unfair to require refunds implementing the just and reasonable cost allocation.

22. Second, CAISO has already implemented the refunds and represents that there was no under-recovery.[67] As in *MISO*, only a limited number of market participants are affected by the resettlements, which reduces the potential for overcollection.[68] The majority of the costs involved in the resettlements—almost $100 million[69]—pertain to the recategorization of South of Lugo as a zonal, rather than local, constraint. These costs were initially allocated to only one LSE, SoCal Edison, until the Commission found on rehearing that South of Lugo provided regional reliability benefits.[70] Because this

[65] CAISO Clarification and Rehearing Request at 11. *See MISO*, 156 FERC ¶ 61,205 at P 54 (noting that granting refunds would not require any markets to be re-run).

[66] *See* CAISO Clarification and Rehearing Request at 10 ("It was the CAISO, and the CAISO alone, that decided which must-offer resources were needed to meet reliability requirements on any given day. The particular allocation of must-offer costs had no effect on the CAISO's decisions to commit must-offer generators."); *id*. at 11 ("Unlike the circumstances in the Entergy Remand Order, a changed allocation would not have caused different decision by the CAISO or generators and, thus, refunds do not result in any unfairness to generators.").

[67] *Id*. at 12.

[68] This discrete set of affected entities also reduces the additional risk, noted by the D.C. Circuit in *LPSC*, of a mismatch between the parties who paid less than they should have under the old cost allocation and the parties who will have to pay surcharges to ensure that the parties who paid more than they should have are refunded. *See LPSC*, 883 F.3d at 934-35.

[69] *See* CAISO December 20, 2013 Informational Refund Report at 8.

[70] *See* 2007 Rehearing Order, 121 FERC ¶ 61,193 at PP 25-26.

reallocation did not involve the entire system, but only LSEs in one zone, we do not see a material risk for under-recovery.[71]

23. While the Commission suggested in the October 2016 Order that it would be inequitable to impose additional charges on customers who were not responsible for the unjust and unreasonable cost allocation the Commission initially accepted and then later modified,[72] we find upon further consideration that under the circumstances of this proceeding the Commission must redress the inequitable treatment caused by its legal error in accepting an unjust and unreasonable cost allocation. Contrary to the Coalition's suggestion,[73] the filed rate doctrine does not prohibit this relief. As the court explained in *Verso*, in keeping with the Commission's "broad remedial authority," it is within our authority under FPA sections 206(b) and section 309 to fashion remedies that may include both refunds and surcharges, as appropriate.[74] Although, as in *Verso*, providing refunds to the customers who overpaid will result in other customers paying more for past services than they were charged originally, "that cost increase to a subgroup of ratepayers is not a 'retroactive rate increase' as such: the aggregate rate remained the same, divided differently among the constituent payers."[75] Moreover, the Commission's institution of FPA section 206 hearing proceedings with respect to CAISO's Amendment No. 60 filing[76] as well as PG&E's filing of a complaint regarding the then-effective tariff

[71] *See Verso*, 898 F.3d at 13 (affirming the Commission's finding that there was no risk of under-recovery because MISO could calculate the amount of SSR costs that should be assessed to each LSE that underpaid accurately).

[72] October 2016 Order, 157 FERC ¶ 61,033 at P 31.

[73] Coalition Clarification and Rehearing Request at 3 n.8, 9.

[74] *Verso*, 898 F.3d at 4, 10-12; *see also TNA*, 857 F.3d at 361; *Xcel*, 815 F.3d at 954-955.

[75] *Verso*, 898 F.3d at 11.

[76] *Cal. Indep. Sys. Operator Corp.*, 108 FERC ¶ 61,022, at P 63 and Ordering Para. (E) (2004) (accepting the cost allocation method subject to refund and setting it for hearing).

provisions[77] put the parties on notice that their allocations of must-offer generation costs were subject to change.[78]

24. In light of the above considerations, we find that the resettlements reflected in CAISO's Refund Report render the most fair and equitable outcome under the circumstances of this proceeding. Permitting one LSE to bear significant must-offer costs under a cost allocation that was later determined to be unjust and unreasonable, while permitting other LSEs to escape cost responsibility that they would have incurred under the just and reasonable allocation, comports with neither cost causation nor general principles of equity. Moreover, while we continue to disagree with CAISO's and Joint Parties' assertions that the Commission expressly directed refunds,[79] we acknowledge that certain statements in this proceeding could reasonably have been read to create the expectation that refunds would be ordered.[80] Therefore, on balance, we find that implementing refunds is the appropriate course of action in this proceeding. Accordingly, while we deny CAISO's request to "clarify" that the October 2016 Order was not intended to negate what it deemed to be a refund directive in the 2007 Rehearing Order, we grant its and Joint Parties' requests for rehearing and reverse the determination that refunds should not be ordered. For the same reasons, we deny the Coalition's request for refunded amounts to be returned.

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[77] Complaint of Pacific Gas and Electric Company, Docket No. EL04-103-000 (filed May 18, 2004).

[78] *See MISO*, 156 FERC ¶ 61,205 at P 48 ("In these proceedings, the filing of the complaint under section 206 put the parties on notice that refunds, and therefore also surcharges, may be awarded."); *Black Oak*, 167 FERC ¶ 61,250 at P 32.

[79] *See* CAISO Clarification and Rehearing Request at 6-7; Joint Parties Rehearing Request at 9.

[80] *See* 2007 Rehearing Order, 121 FERC ¶ 61,193 at P 79 ("The question before us now is not the date that was earlier established as the refund effective date from which the Commission *could* order refunds, but rather what *should* be ordered (i.e., when refunds should begin).") (emphasis in original); *id.* P 80 ("We continue to find that refunds for the proposed allocation of must-offer related charges under Amendment No. 60 should be ordered beginning July 17, 2004, except for the net incremental cost of local methodology.").

25. In light of the determination that refunds were properly issued, we dismiss as moot the Coalition's request for rehearing regarding the sufficiency of CAISO's billing dispute processes to recoup refund payments.[81]

3. Interest Should Apply to Refunds

26. In the October 2016 Order, the Commission declined to address the issue of whether interest should apply to any refunds. The issue is now squarely before us, with the parties presenting directly conflicting views. According to Joint Parties, interest should apply automatically whenever refunds are ordered.[82] Six Cities, on the other hand, maintain that interest is discretionary and should not apply "[w]hen the Commission is silent with respect to interest, and no party has sought rehearing on the issue of interest."[83]

27. As an initial matter, we do not find Joint Parties to be procedurally barred from raising this issue due to not having requested rehearing of the prior orders on the question of interest. While, as noted above, language in the earlier orders created a reasonable expectation that refunds would be directed, the Commission had not actually ordered refunds prior to CAISO's submission of the Refund Report, a determination that we now find to have been in error. Accordingly, the circumstances are not similar to the cases cited by Six Cities, where orders directing refunds were silent on whether interest should be applied and parties failed to timely seek rehearing.[84]

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[81] *See* Coalition Clarification and Rehearing Request at 9-12.

[82] Joint Parties Rehearing Request at 4-5, 13-15.

[83] Six Cities Clarification Request at 4.

[84] *Id*. at 4-5 (citing *New England Power Pool*, 95 FERC ¶ 61,449, *reh'g denied*, 96 FERC ¶ 61,227 (2001) (rejecting request for clarification seeking to apply interest to retroactive System Restoration and Planning Service payments where interest was not addressed in the initial order and timely rehearing was not sought); *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 124 FERC ¶ 61,275 (2008) (denying motion to require interest as an untimely request for rehearing)).

28. While Six Cities assert that the application of interest to refunds and surcharges is not mandatory,[85] they fail to show why interest should not be applied to the resettlements.[86] In the cases cited by Six Cities, the Commission found that the request for interest was late-filed and not preserved on rehearing. Because interest reflects the time value of money, courts have found that the Commission's equitable authority to waive interest is narrow and should be exercised only in exceptional circumstances.[87] We find that it is appropriate in this case to require interest. As the D.C. Circuit has explained, the payment of interest is not a penalty; rather "interest is simply a way of ensuring full compensation. This is why the delay between the time of the customers' injury and the granting of relief is a reason for awarding interest, not for denying it, at least where the delay cannot be laid at the feet of the customers."[88]

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[85] Six Cities Clarification Request at 5-8.

[86] Six Cities also argue that CAISO was mistaken in stating in the Refund Report that it would have to collect the interest paid on refunds from the market as a whole instead of the customers who benefitted from the uncollected charges should interest be denied. *Id*. at 8-9. Because Six Cities has failed to show that interest should not be applied under 18 C.F.R. § 35.19a (2019), we do not reach this question.

[87] *See, e.g.*, *Anadarko*, 196 F.3d at 1267 ("The Commission's general policy, in effect for many years, requires interest to be paid on various kinds of overcharges."); *Southeastern Mich. Gas Co. v. FERC*, 133 F.3d 34, 43-44 (D.C. Cir. 1998) (reversing decision to exempt shippers from paying interest on refunds for failure to explain departure from Commission regulations); *see also Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 155 FERC ¶ 61,013 , at PP 38-40 (2016) (explaining that the Commission may only waive interest on refunds in "exceptional circumstances" and that noting that "the courts have rejected Commission efforts to exclude interest from refunds or to truncate refund payments due merely to delay").

[88] *Anadarko*, 196 F.3d at 1268 (citations omitted); *see also Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 146 FERC ¶ 61,152, at P 42 (directing interest, even though the Commission had indicated in a prior order that interest would not be required for bandwidth payments, to ensure full compensation "due to the length of time that has passed" and consistent with "our general policy"); *Southwest Power Pool, Inc.*, 149 FERC ¶ 61,050 P 30 n.45 (2014) (noting that including interest on refunds "would make customers whole for the time value of money they otherwise would not have paid"), *remanded on other grounds sub nom. Xcel Energy Servs., Inc. v. FERC*, 815 F.3d 947 (D.C. Cir. 2016); *PPL Wallingford Energy LLC and PPL EnergyPlus LLC*, 116 FERC ¶ 61,089, at P 31 (2006) (finding it appropriate to exercise discretion to include

29. Accordingly, we find that it is appropriate to apply interest from July 17, 2004, consistent with section 35.19a of the Commission's regulations,[89] and therefore grant Joint Parties' request for rehearing on this issue and deny Six Cities' clarification request. We direct CAISO to submit a compliance filing within 60 days of the date of this order reflecting the invoices it plans to distribute for interest amounts.

The Commission orders:

(A) The requests for rehearing are hereby granted in part and dismissed in part, as discussed in the body of this order.

(B) The requests for clarification are hereby denied, as discussed in the body of this order.

(C) CAISO is hereby directed to submit a compliance filing in this docket within 60 days of the date of issuance of this order, as discussed in the body of the order.

By the Commission. Commissioner McNamee is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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interest given the "significant amount of time that has passed," i.e., three years, since the refund effective date).

[89] 18 C.F.R. § 35.19a (2019).

Document Content(s)