Nos. 08-74834, 09-71961, 10-71708, 12-70406,12-70407
Consolidated with Nos. 01-71934 et al.
MMCP/Fuel Allowance/Cost Offset Cases

In the United States Court of Appeals for the Ninth Circuit

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for Review of Orders of the Federal Energy Regulatory Commission

JOINT PETITIONER BRIEF OF THE CALIFORNIA PARTIES

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CORPORATE DISCLOSURE STATEMENT OF PACIFIC GAS AND ELECTRIC COMPANY

Pursuant to Rule 26.l of the Federal Rules of Appellate Procedure, Pacific Gas and Electric Company ("PG&E") submits the following disclosure statement.

PG&E is a subsidiary of PG&E Corporation, and is a corporation organized and existing under the laws of the State of California. PG&E Corporation has a 10% or greater ownership interest in PG&E. PG&E's principal place of business is 77 Beale Street, San Francisco, California, 94105. PG&E is engaged in the generation and distribution of electricity to ultimate customers within the State of California. PG&E is also engaged in the business of transmitting electricity in interstate commerce, and in selling and purchasing such energy at wholesale in interstate commerce within the jurisdiction of the Federal Energy Regulatory Commission.

September 12, 2016

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT OF SOUTHERN CALIFORNIA EDISON COMPANY

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Southern California Edison Company ("SCE") hereby discloses the following:

SCE is a California corporation having its principal place of business at 2244 Walnut Grove Avenue (Post Office Box 800), Rosemead, California, 91770. SCE is an investor-owned public utility primarily engaged in the business of purchasing, generating, transmitting, distributing, and selling electric energy at wholesale and retail in the State of California. SCE has issued equity or debt securities to the public and its preferred and preference stock is held by public investors.

SCE is a subsidiary of Edison International, a California corporation and holding company that owns all of the common stock of SCE. Edison International has issued equity or debt securities to the public.

September 12, 2016

Respectfully submitted,

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GLOSSARY OF TERMS

ALJ	Administrative Law Judge.
Ancillary Services	Services necessary to support the transmission of electric power from seller to purchaser, given the obligations of control areas and transmitting utilities within those control areas, to maintain reliable operations of the interconnected transmission system. Ancillary Services in the ISO include spinning and non-spinning reserves and replacement reserves, consisting of reserve generation that is available for dispatch by the ISO.
APA	Administrative Procedures Act, Public Law 89-554 (1966), 5 U.S.C. §§ 101, *et seq.* (2015).
BPA	Bonneville Power Administration, a federal power marketing agency.
California Markets	Markets for energy and Ancillary Services operated by the PX and ISO during the Energy Crisis.
California Parties	The Public Utilities Commission of the State of California, the People of the State of California *ex rel.* Kamala D. Harris, Attorney General, Pacific Gas and Electric Company, and Southern California Edison Company. The California Electricity Oversight Board, a California State Agency, also joined in the proceedings and was a California Party. The California legislature has since de-funded the California Electricity Oversight Board and it no longer is active in Energy Crisis litigation. *See* AB-1457, 2011-2012 Regular Session (Ca. 2011), *codified at* Cal. Pub. Utils. Code §§ 334, *et seq.* (2015) (eliminating statutory functions of Electricity Oversight Board and transferring authority to settle Energy Crisis litigation to Attorney General).

CERS	The California Energy Resource Scheduling division of the California Department of Water Resources. CERS purchased power on behalf of California utilities during much of the first half of 2001. *See, e.g.*, *Pub. Utils. Comm'n of Cal. v. FERC*, 462 F.3d 1027, 1042 (9th Cir. 2006).
Cost Offsets	A reduction in refund liabilities, intended to avoid confiscatory rates to suppliers. Cost offsets were based on a supplier's cost of providing energy and Ancillary Services into the California Markets.
Cost Offset Filings	Sellers' filings with FERC pursuant to the *August 8, 2005 Order*, and subsequent orders, of information and documentation of sellers' costs in serving the California Markets.
Day-Ahead	Energy transactions in which product delivery occurs during the following trading day or, in the case of weekends, two or three days following the trading day.
D.C. Circuit	The United States Court of Appeals for the District of Columbia Circuit.
Energy Crisis	The period from May 1, 2000 through June 20, 2001, during which California's electricity markets experienced sustained high prices as the result of market power, market manipulation, and tariff violations by multiple sellers.
False Load Scheduling	A tariff violation in which a seller acquired electricity and then submitted to the ISO a schedule falsely stating that the power would be sold to the seller's own customers. The seller, in fact, then sold the power in the Real-Time market, allowing the seller to obtain the higher Real-Time prices. *See, e.g.*, *Opinion No. 536* at PP 170-172.
FERC	The Federal Energy Regulatory Commission.
FPA	The Federal Power Act, 16 U.S.C. §§ 791a, *et seq.* (2015).

Hafslund	Hafslund Energy Trading LLC, a participant in the California Markets that has been found to have engaged in tariff violations.
ISO	The California Independent System Operator Corporation, the regional transmission organization that operated Real-Time markets in California.
ISO Tariff	The FERC-approved tariff containing the terms and conditions under which the ISO operates. Relevant excerpts of the ISO Tariff in effect during the Energy Crisis are included at CPER00623-43.
MMCP	Mitigated Market Clearing Price. FERC adopted this methodology in its *July 25, 2001 Order*, as subsequently modified, to establish maximum just and reasonable prices for all sales in the ISO and PX markets in place of unjust and unreasonable prices that were charged.
PG&E	Pacific Gas and Electric Co. PG&E is one of the investor owned electric utilities responsible for serving millions of customers in California and is one of the California Parties.
Phantom Ancillary Services	The sale of Ancillary Services that are not backed up with capacity resources.
PX	The California Power Exchange Corporation, a California public benefit corporation that operated Day-Ahead and other markets during the Energy Crisis.
PX Settlement Clearing Account	An escrow account established and maintained by the PX for payment of market participants' Energy Crisis.
PX Tariff	The FERC-approved tariff containing the terms and conditions under which the PX operated its markets. Relevant excerpts of the PX Tariff in effect during the Energy Crisis are included at CPER00644-45.
PX Wind-Up Charge Settlement	A settlement establishing the allocation of ongoing and historical costs of the PX incurred in winding up market accounts.

Real-Time	The period after the close of the Day-Ahead energy market. Energy sales shortly before the time of delivery are referred to as having been made in Real-Time. Real-Time energy is generally purchased as last-minute energy to balance the grid.
Refund Period	October 2, 2000 through June 20, 2001.
SCE	Southern California Edison Co. SCE is one of the investor owned electric utilities responsible for serving millions of customers in California and is one of the California Parties.
Scheduling Coordinator	An entity certified by the ISO for the purpose of undertaking the functions specified in Section 2.2.6 of the ISO Tariff, including submitting schedules for energy for the market participants for which the entity serves as Scheduling Coordinator.
SDG&E	San Diego Gas & Electric Co. SDG&E is one of the investor owned electric utilities responsible for serving millions of customers in California. SDG&E filed the initial complaint in this proceeding.
Shell	Shell Energy North America (US), L.P., the successor to Coral Power, L.L.C., a participant in the California Markets that has been found to have engaged in tariff violations.
Show Cause Proceedings	FERC investigations of illegal gaming practices initiated in 2003. *Am. Elec. Power Serv. Corp.*, 103 FERC ¶ 61,345 (2003), *op. corrected*, *Am. Merchs. Servs., Inc.*, 104 FERC ¶ 61,222 (2003).
Summer Period	May 1, 2000 through October 1, 2000.
WAPA	Western Area Power Authority, a federal power marketing agency.

WSCC	Western Systems Coordinating Council, a regional entity that was responsible for creating, monitoring and enforcing electric reliability standards in the western United States and Canada during the Energy Crisis. WSCC also refers generally to the regional energy markets in the western United States and Canada. In 2002, the Western Electricity Coordinating Council replaced the WSCC.

GLOSSARY OF FERC AND COURT ORDERS

1. Judicial Decisions

State Farm	*Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).
PG&E v. FERC	*Pac. Gas & Elec. Co. v. FERC*, 373 F.3d 1315 (D.C. Cir. 2004).
Bonneville	*Bonneville Power Admin. v. FERC*, 422 F.3d 908 (9th Cir. 2006), *cert. denied*, 552 U.S. 1076 (2007).
CPUC v. FERC	*Pub. Utils. Comm'n of Cal. v. FERC*, 462 F.3d 1027 (9th Cir. 2006), *reh'g denied*, Panel Order, Nos. 01-71051, *et al*. (9th Cir. Apr. 6, 2009).
Harris	*Cal. ex rel. Harris v. FERC*, 784 F.3d 1267 (9th Cir. 2015) (decision on appeal after remand in *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004).
Port of Seattle	*Port of Seattle v. FERC*, 499 F.3d 1016 (9th Circ. 2007).
MPS Merchant	*MPS Merch. Servs., Inc. v. FERC*, ___ F.3d ___, No. 15-73803, *et al.*, Slip Op., 2016 WL 4698302, (9th Cir., Sept. 8, 2016).

2. FERC Decisions

June 19, 2001 Order	*San Diego Gas & Elec. Co.*, 95 FERC ¶ 61,418 (2001).
July 25, 2001 Order	*San Diego Gas & Elec. Co.*, 96 FERC ¶ 61,120 (2001).
December 19, 2001 Order	*San Diego Gas & Elec. Co.*, 97 FERC ¶ 61,275 (2001).

Order No. 2001	*Revised Pub. Utility Filing Requirements*, Docket No. RM01-8-000, Final Rule, Order No. 2001 (Apr. 25, 2002).
August 8, 2005 Order	*San Diego Gas & Elec. Co.*, 112 FERC ¶ 61,176 (2005), *decision clarified*, 112 FERC ¶ 61,249, *reh'g denied*, 121 FERC ¶ 61,184 (2007).
August 25, 2005 Order	*San Diego Gas & Elec. Co.*, 112 FERC ¶ 61,222 (2005), *reh'g denied*, 121 FERC ¶ 61,184 (2007).
January 26, 2006 Order	*San Diego Gas & Elec. Co.*, 114 FERC ¶ 61,070 (2006).
May 12, 2006 Order	*San Diego Gas & Elec. Co.*, 115 FERC ¶ 61,171 (2006), *reh'g denied*, 127 FERC ¶ 61,250 (2009).
October 19, 2007 Order	*San Diego Gas & Elec. Co.*, 121 FERC ¶ 61,067 (2007), *order clarified*, 121 FERC ¶ 61,188 (2007), *reh'g granted in part*, 125 FERC ¶ 61, 214 (2008).
November 19, 2007 Order	*San Diego Gas & Elec. Co.*, 121 FERC ¶ 61,184 (2007), *reh'g denied*, 127 FERC ¶ 61,251 (2009).
November 20, 2008 Order	*San Diego Gas & Elec. Co.*, 125 FERC ¶ 61,214 (2008), *reh'g denied*, 138 FERC ¶ 61,091 (2012).
June 18, 2009 Order	*San Diego Gas & Elec. Co.*, 127 FERC ¶ 61,269 (2009), *clarified on reh'g*, 131 FERC ¶ 61,144 (2010).
May 18, 2010 Order	*San Diego Gas & Elec. Co.*, 131 FERC ¶ 61,144 (2010).
July 15, 2011 Order	*San Diego Gas & Elec. Co.*, 136 FERC ¶ 61,036 (2011), *reh'g denied*, 138 FERC ¶ 61,092 (2012).
February 3, 2012 Order I	*San Diego Gas & Elec. Co.*, 138 FERC ¶ 61,091 (2012).
February 3, 2012 Order II	*San Diego Gas & Elec. Co.*, 138 FERC ¶ 61,092 (2012).

Opinion No. 536	*San Diego Gas & Elec. Co.*, 149 FERC ¶ 61,116 (2014), *aff'd in relevant part*, *MPS Merch. Servs., Inc. v. FERC*, ___ F.3d ___, No. 15-73803, *et al.*, Slip Op., 2016 WL 4698302, (9th Cir., Sept. 8, 2016).
Opinion No. 536-A	*San Diego Gas & Elec. Co.*, 153 FERC ¶ 61,144 (2015), *decision clarified*, 154 FERC ¶ 61,063 (2016), *aff'd in relevant part*, *MPS Merch. Servs., Inc. v. FERC*, ___ F.3d ___, No. 15-73803, *et al.*, Slip Op., 2016 WL 4698302, (9th Cir., Sept. 8, 2016).

INTRODUCTION

This appeal concerns three instances in which FERC erred by taking improper short cuts to avoid confronting important issues in this case. Each of these errors violated the procedural and substantive requirements of the APA, FPA, and Due Process, costs buyers millions of dollars, and rewarded sellers for the results of their market manipulation, and, therefore, should be reversed. These issues may be readily addressed on remand without unduly delaying the finality of these proceedings.

First, the Cost Offset process that FERC adopted to adjust the refunds that electricity sellers had to pay was both procedurally and substantively flawed. That process was designed to allow such sellers to prove that their costs were so high that it would be unfair if they paid refunds based on the MMCP methodology. *E.g.*, *January 26, 2006 Order* at P 3, CPER00427. But FERC both failed to provide buyers with a reasonable opportunity to respond to sellers' Cost Offset claims, *see* Section I.A., *infra*, and ultimately approved cost-offsets that allowed sellers to profit from their own fraudulent activities during the Energy Crisis, *see* I.B., *infra*. These decisions imposed tens of millions of dollars in unwarranted charges on consumers. *Id.*

Second, FERC erred in its treatment of the refund calculations for governmental entities that bought and sold electricity. After this Court's decision

in *Bonneville Power Administration v. FERC*, holding that FERC could not compel governmental entities to pay MMCP refunds, 422 F.3d 908, 926 (9th Cir. 2006), FERC needed to decide how to account for governmental entities that had acted as both buyers *and* sellers. The right answer was to "net" sales and purchases for each governmental entity over the course of the *entire* refund period, calculating refunds the same way that FERC calculated refunds for other parties. *See, e.g.*, *May 12, 2006 Order* at P 34. FERC adopted a compromise solution, which was to net sales and purchases for a governmental entity, but only when the sales and purchases occurred in the same hour. *See November 20, 2008 Order* at P 19, CPER00299. As a practical matter, the entities either bought or sold in a given hour, and hourly netting meant no netting. CPER00608, CPER00601-03.[1] The impact of this seemingly bland and technocratic choice is immense legal error: governmental entities that were large net sellers, and that FERC held to be manipulators that contributed to the Energy Crisis, *see San Diego Gas & Elec. Co.*, 142 FERC ¶ 63,011 at PP 33-35 (2013),[2] will nonetheless *receive* multi-million

[1] These compliance filings by the ISO and PX show that after *Bonneville* adjustments based on hourly netting, both BPA and WAPA become multi-million dollar refund recipients. For example, on CPER00601 it can be seen that $20,736,301.80 in refunds were owed by BPA in the PX Day-Ahead and Day-Of market, but an adjustment of negative ($26,892,431.42) resulted from the *Bonneville* decision, turning BPA from a party owing multi-million refunds on net, into a multi-million dollar refund recipient.

[2] In *Opinion No. 536*, FERC dismissed BPA and WAPA from the damages phase of the manipulation proceeding because it could not compel refunds from them, but

dollar refunds, which California buyers will pay. FERC's actions contravene the governing tariff, break from FERC's past practice, and discriminate against non-governmental entities. *See* Section II, *infra.*

Third, during the chaos of the Energy Crisis in 2001, the now-bankrupt PX, which had run some of the markets during the Energy Crisis, mistakenly retained and then spent $5 million that it was holding in trust for market participants. *See July 15, 2011 Order* at P 59, CPER00053-54. Because the PX has no funds of its own, FERC needed to decide how to allocate that $5 million cost among market participants. The D.C. Circuit had already squarely held in an analogous case that FERC had to allocate costs across the entire market. *See PG&E v. FERC*, 373 F.3d 1315, 1322 (D.C. Cir. 2004). FERC, however, repeated the same mistake the D.C. Circuit had previously corrected, deciding that buyers alone had to bear the entire $5 million cost. *July 15, 2011 Order* at P 59, CPER00053-54. FERC's action let sellers—consisting largely of the manipulators that caused the Energy Crisis—entirely off the hook. That decision was unlawful, arbitrary, and capricious. *See* Section III, *infra.*

The Court should grant the petitions for review.

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it refused to vacate the manipulation findings against those entities. *Opinion No. 536* at PP 19-23.

JURISDICTIONAL STATEMENT

Jurisdiction:

FERC had jurisdiction pursuant to 16 U.S.C. §§ 824, 825. This Court has jurisdiction pursuant to 16 U.S.C. § 825*l*(b).

Timeliness:

August 8, 2005 Order and August 25, 2005 Order: The California Parties sought rehearing of these orders on September 7, 2005. CPER07449-515. Rehearing was denied. *November 19, 2007 Order*. The California Parties timely petitioned for review on November 25, 2007. CPER00805-57.[3]

January 26, 2006 Order: The California Parties sought rehearing on February 8, 2006 and on February 27, 2006. CPER00890-906; CPER09184. Rehearing was denied. *June 18, 2009 Order*. The California Parties timely petitioned for review on June 24, 2009. CPER00705-12. The California Parties also sought rehearing on certain issues on July 20, 2009. CPER00677-704 . FERC

[3] PG&E and SCE filed petitions for review (case nos. 07-74652 and 07-74655) on a timely basis after issuance of the *November 19, 2007 Order*. Those petitions were not expressly consolidated with the petitions set for hearing in this appeal. However, the *June 18, 2009 Order* and the *May 18, 2010 Order* implement the methodology spelled out in the *August 8, 2005*, *August 25, 2005*, and *November 19, 2007 Order*. Petitions for review from those orders were consolidated into the current appeal, and identify the underlying *August 8, 2005*, *August 25, 2005*, and *November 19, 2007 Orders* as orders on review. The issues addressed on rehearing in the *November 19, 2007 Order* are squarely before the Court.

denied rehearing. *May 18, 2010 Order*. The California Parties timely petitioned for review on May 26, 2010. CPER00666-74.

October 19, 2007 Order: The California Parties timely sought rehearing. CPER 00858-89. Rehearing was denied. *November 20, 2008 Order*. The California Parties timely petitioned for review. CPER00799-804. The California Parties also timely sought rehearing on certain issues. CPER00713-98. Rehearing was denied. *February 3, 2012 Order I*. The California Parties timely petitioned for review on February 9, 2012. CPER00614-17.

July 15, 2011 Order: The California Parties sought rehearing on August 15, 2011. CPER00646-65. Rehearing was denied. *February 3, 2012 Order II*. The California Parties timely petitioned for review on February 9, 2012. CPER00618-22.

STATEMENT OF THE ISSUES

1. Whether FERC erred in its Cost Offset determination in the following respects:

   a. Declining to allow discovery or a fair process to resolve disputed factual issues;

   b. Permitting sellers to include costs incurred in manipulating markets as part of their Cost Offset claims;

c. Excluding consideration of sellers' actual costs and revenues in determining Cost Offsets.

2. Whether FERC erred when it permitted governmental entities that both bought and sold in the market but that FERC could not order to pay refunds to receive millions of dollars in refunds for their purchasing.

3. Whether FERC erred by allocating a $5 million shortfall arising from unauthorized PX expenditures only to buyers, rather than among all market participants.

STATUTORY ADDENDUM

The relevant statutory provisions are set forth in Petitioners' Addendum I.

STATEMENT OF THE CASE

The events of the Energy Crisis are well-documented. *See, e.g.*, *CPUC v. FERC*, 462 F.3d 1027, 1036-45 (9th Cir. 2006). Power suppliers in California manipulated energy markets through gaming, the exercise of market power, and other tariff violations. *See, e.g.*, *id.* at 1039-40; *MPS Merchant*, Slip Op. at 20-22, 26-31. Prices soared to unprecedented levels, and the California utilities and their customers suffered billions of dollars of losses. *See, e.g.*, *CPUC v.* FERC, 462 F.3d at 1040-43. Initial regulatory efforts to stem the Energy Crisis were largely fruitless, and the distorted prices in California spot markets continued from May 2000 to June 2001. *Id.* at 1040-45.

The California Parties have pursued the litigation for the past sixteen years, seeking initially to stop the Energy Crisis and then to recover, on behalf of customers, billions of dollars in sellers' overcharges. In its *July 25, 2001 Order*, FERC adopted the MMCP as a proxy of the just and reasonable rate that would have prevailed in the California Markets in each hour of the Refund Period absent market manipulation and other abuses. *July 25, 2001 Order* at 61,516-19. Refunds were to be based on the difference between the market clearing price and the MMCP. *Id.* Recognizing that the refund process raised issues of fact, FERC ordered an evidentiary hearing with discovery to implement the MMCP. *Id.* at 61,520-21. The California Parties have broadly supported the MMCP methodology, which this Court has already reviewed and upheld. *See CPUC v. FERC*, 462 F.3d at 1052.

A. Cost Offset Issues.

FERC adopted the Cost Offset to ensure that MMCP refunds for the Refund Period would not result in overall losses to a seller for all of that seller's sales in the west (often referred to as the "WSCC") during the period. *E.g.*, *July 25, 2001 Order* at 61,516-519 (allowing sellers to "file for cost-of-service rates covering all of their generating units in the WSCC for the duration of the mitigation period and including the refund period"); *December 19, 2001 Order* at 62,194 n.132 (extending Cost Offset opportunity to marketers based on "the impact on a

marketers' *entire* portfolio of transactions over the duration of the refund period") (emphasis added). Sellers that demonstrate overall losses for the Refund Period would receive an offset against refund liabilities. *Id.* The effect of a FERC-approved Cost Offset is that a seller will receive cost-based rates instead of the MMCP, and, in turn, buyers' refunds, based on the MMCP, are reduced or eliminated altogether. *See, e.g.*, *January 26, 2006 Order* at PP 3-5, CPER00427-28.

FERC allowed numerous Cost Offset reductions to refunds, but as a result of settlements, this appeal affects only two: Shell and Hafslund. The allowed Shell Cost Offset is approximately $40 million (after interest). The allowed Hafslund Cost Offset is approximately $20 million (after interest).[4] Both Shell and Hafslund generated little or no power of their own, instead buying power in the market and reselling it. CPER07441-43. Several Cost Offset orders are relevant here.

August 8, 2005 Order and rehearings. FERC discussed the concept of the Cost Offset in its 2001 orders, but not the details. *See, e.g.*, *July 25, 2001 Order* at 61,518; *June 19, 2001 Order* at 62,564. It provided the details in its *August 8, 2005 Order*. FERC held that the Cost Offset would be based solely on an assessment of a seller's costs for its sales into the ISO and PX markets

[4] *See* CPER00601-03; CPER608-13. (The compliance filings by the ISO and PX show the cost offset amounts in each market for Shell (identified as Coral) and Hafslund, and associated interest.)

(abandoning the WSCC-wide approach it directed in the 2001 orders). *August 8, 2005 Order* at P 37, CPER00572. Under this approach, marketers that bought power from third parties and then resold power to the ISO and PX were required to determine the cost of their sales to the ISO and PX by matching their ISO/PX sales to the transactions in which they initially purchased that power. *Id.* at P 65, CPER00579. Costs for sales that could not be matched would be based on the average cost of the seller's overall portfolio of short-term purchases relating to the hour of the sale. *Id*. at P 68, CPER00580.

FERC determined that the format of Cost Offset Filings would be discussed in a technical conference held at FERC on August 25, 2005. *Id.* at P 116, CPER00595. The California Parties asked for a transcription of the conference, but FERC ordered that no transcription would be permitted. *August 25, 2005 Order* at PP 1, 3, CPER00553-54. At the technical conference, the Commission Staff determined that no discovery would be permitted, and set an abbreviated twenty-seven-day deadline for responding to sellers' Cost Offset Filings, as reflected in "Staff's Suggested Template." CPER07516.[5]

The California Parties sought rehearing of the *August 8, 2005 Order* and *August 25, 2005 Order*, challenging FERC's exclusion of broad categories of

[5] There is no order reflecting the results of the conference—just the "Staff's Suggested Template" that appeared in the record the next day. The discussion at the conference is summarized in the California Parties' rehearing request. CPER00371-72.

revenue from the Cost Offset calculation, challenging many specifics of the calculation approach, and arguing that the paper hearing process, with no discovery or opportunity for cross-examination, was inadequate to address contested factual disputes about tens of millions of dollars in contested costs. CPER07496-502. The California Parties also argued that the technical conference should have been transcribed to permit informed review. CPER07499 n.119. FERC denied rehearing. *November 19, 2007 Order*.

January 26, 2006 Order and rehearings. Proceeding under FERC's restrictive process, multiple sellers (including Shell and Hafslund) submitted Cost Offset filings on September 14, 2005. *January 26, 2006 Order* at P 16, CPER00424. The California Parties had less than a month to respond. CPER07516. Without the benefit of discovery, they filed comments challenging those Cost Offset Filings on October 11, 2005. CPER00907-78.

FERC's *January 26, 2006 Order* addressed the Cost Offset Filings. FERC rejected the California Parties' requests for discovery and a hearing with cross-examination, and ruled that the paper hearing process was adequate. *January 26, 2006 Order* at P 31, CPER00438. FERC summarily rejected all of the California Parties' challenges to Shell's Cost Offset Filing, aside from a data mismatch that FERC ordered Shell to correct through a subsequent submission to the ISO. *Id.* at P 57, App. B, CPER00449 & CPER00544-46. FERC likewise rejected most of the

California Parties' challenges to Hafslund's Cost Offset Filing. *Id.* at P 237, CPER00501.

The California Parties timely sought rehearing of the *January 26, 2006 Order*. CPER00890-906; CPER09184. FERC denied rehearing in its *June 18, 2009 Order*. The California Parties sought further rehearing of the *June 18, 2009 Order*, arguing that FERC's refusal to at least consider sellers' market manipulation was inconsistent with this Court's ruling in *CPUC v. FERC*. CPER00677-704. FERC denied rehearing. *May 18, 2010 Order*.

B. Allocation of Refund Shortfalls Resulting from the *Bonneville* Decision.

FERC initially held that all sellers, including governmental entities, must refund amounts above the MMCP. *See, e.g.*, *City of Redding v. FERC*, 693 F.3d 828, 831 (9th Cir. 2012); *July 25, 2001 Order* at 61,511. Recognizing that most market participants both bought and sold through the ISO and PX, FERC ordered the ISO and PX to calculate refunds by netting all of a market participant's purchases and sales over the entire Refund Period. *See, e.g.*, *May 12, 2006 Order* at P 34. Those that were net sellers would ultimately pay refunds and those that were net buyers would ultimately receive refunds. *See July 25, 2001 Order* at 61,519 ("Once the ISO has calculated the hourly market clearing prices for the [R]efund [P]eriod, this data should be used by the ISO and PX to rerun their settlement/billing processes and all penalties."); *see also CPUC v. FERC*, 462 F.3d

at 1052 ("The MMCP was the benchmark for determining the amount of refunds that sellers had to pay—FERC simply looked at their transactions during the [R]efund [P]eriod and then ordered them to pay the difference between the rate and the MMCP.").

This Court approved FERC's use of the MMCP, *CPUC v. FERC*, 462 F.3d at 1052, but held that FERC lacked authority to order governmental entities to pay refunds. *Bonneville*, 422 F.3d at 926. On remand, FERC vacated its earlier orders to the extent that they compelled governmental entities to pay refunds. *See generally October 19, 2007 Order*; *November 20, 2008 Order*. FERC explained that, because it could not order governmental entity sellers to pay refunds for their sales, there would be a refund shortfall that would need to be allocated among refund recipients. *November 20, 2008 Order* at P 10, CPER00295.[6]

This left open the question of how to deal with government entities that both bought and sold in the market. Consider, for example, a governmental entity that would have owed $50 million in MMCP refunds to the market for its sales considered in isolation and was owed $10 million for its purchases considered in

[6] Some of the California Parties are pursuing breach of contract actions outside of FERC to obtain refunds from the governmental entities. That litigation is ongoing against BPA and WAPA, the only governmental entity net sellers that have not yet settled with the California Parties. FERC ordered that it would not wait for the outcome of that litigation, but would instead proceed based on its lack of authority to compel those entities to pay refunds. *See, e.g.*, *October 19, 2007 Order* at P 68, CPER00418.

isolation. There were at least two choices: allowing the governmental entity to receive $10 million in refunds, with a $50 million shortfall to be allocated among buyers, or requiring that the purchase and sale amounts be netted, resulting in zero refunds flowing to the governmental entity, and a $40 million shortfall allocated to buyers.

The California Parties argued that the only result consistent with the tariffs and FERC precedent was to net the amounts, resulting in a shortfall of just $40 million in the above example, with no payments owed to the governmental entity. CPER00863-75. FERC disagreed. FERC mistakenly held in its *November 20, 2008 Order* that "netting the refunds over the entire Refund Period" would be contrary to the ISO Tariff and "could have the indirect effect of requiring governmental entities to pay refunds." *November 20, 2008 Order* at P 16, CPER00298. But that ruling was premised on a misreading of the ISO Tariff to require the ISO to net "sales and purchases over hourly intervals." *Id.* at P 18, CPER00298-99. As a result, FERC directed the ISO (and, later, in its *July 15, 2011 Order* the PX, as well) to calculate refund amounts for governmental entities by netting purchases and sales on an hourly basis only and not over the entire Refund Period. *Id.* at P 19, CPER00299. In a given hour, the governmental entities typically bought, or sold, but not both; so hourly netting meant, as a practical matter, that governmental entities would receive multi-million-dollar

refunds, even if they were large net sellers, because the vast majority of their sales would be disregarded in the netting process. CPER00608, CPER00601-03.

The California Parties sought rehearing, arguing that neither *Bonneville* nor the tariffs required the hourly netting, that it was inconsistent with FERC's other orders in the proceeding and its treatment of other parties, and that it would lead to unjust windfalls for net sellers. CPER00735-36. On rehearing, FERC acknowledged that the ISO Tariff did not provide for netting on an hourly basis only, effectively admitting that the tariff netted various periods together in order to produce a monthly statement that netted all purchases and sales. *February 3, 2012 Order I* at P 17, CPER00008. But FERC nonetheless adhered to its hourly netting approach. *Id.*; *February 3, 2012 Order II* at PP 18-23, CPER00025-27. FERC relied on the argument that no reading of the tariffs alone could explain netting over the entire nine-month Refund Period, but failed to address the California Parties' explanation that FERC's refund orders, left in place as to all other market participants, required netting over the entire Refund Period. *February 3, 2012 Order I* at PP 18-19, CPER00008-9.

C. PX Shortfall Allocation.

Shortly after the PX markets were halted in January 2001, the PX went into bankruptcy. *See CPUC v. FERC*, 462 F.3d at 1042. The PX has since emerged from bankruptcy, but its sole function now is to assist with billing/data issues

relating to the closure of its markets, and to act as trustee for funds that will be allocated as the result of the ongoing proceedings relating to the Energy Crisis. *See PG&E v. FERC*, 373 F.3d at 1317-18.

In 2002, the PX submitted a rate case at FERC to devise a method to pay for its ongoing expenses. *See Cal. Power Exch. Corp.*, 100 FERC ¶ 61,178 (2002). The rates allocated PX costs to those with outstanding unpaid balances in the PX markets, basically the buyers that were driven into insolvency and could not pay their bills while the Energy Crisis unfolded. *Id.* at PP 24-25. On appeal, the D.C. Circuit rejected the PX rate allocation because it did not comport with cost causation—each market participant benefited from the PX's continued operation, whether or not it had an unpaid bill. *PG&E v. FERC*, 373 F.3d at 1321. On remand, a revised allocation was established, splitting costs evenly between buyers and sellers. *See Cal. Power Exch. Corp.*, 113 FERC ¶ 61,017 (2005); *Cal. Power Exch. Corp.*, 112 FERC ¶ 63,032 (2005).

In 2009, the PX advised FERC that it had, in 2001, mistakenly taken an extra $5 million from the Settlement Clearing Account it held in trust for market participants. *See* CPER00675-76. The PX explained it had charged the $5 million to certain customers for "subscription fees," but then determined that they were inapplicable. *See id.* Because the PX took these funds for itself from trust accounts that it held for the benefit of market participants, and because the PX did

so without filing any rate case to recover the funds, the charges were unlawful and unauthorized. *See* FPA § 205. The PX has no shareholders who could reimburse the cost of the unauthorized expenditure, and funds in the PX Settlement Clearing Account are needed to pay amounts still owed from the Energy Crisis. Therefore, the PX's unauthorized expenditure created a $5 million shortfall. *See July 15, 2011* at P 52, CPER00051; CPER00675-76. The PX requested guidance from FERC. CPER00675-76.

FERC determined it would "allocate the shortfall among all net refund recipients in proportion to their final refund." *July 15, 2011 Order* at P 59, CPER00053-54. "Net refund recipients" means buyers—participants in the market that were owed refunds period-wide after the MMCP methodology was applied. It excluded sellers—participants that will owe refunds to the market under the MMCP methodology, including the many sellers found to have engaged in the market manipulation that caused the Energy Crisis. *Id.* The California Parties challenged the allocation of the missing $5 million to buyers alone, arguing that it was flatly inconsistent with cost causation, as the D.C. Circuit had recognized years before, *PG&E v FERC*, 373 F.3d at 1321, and was otherwise unlawful. CPER00675-76. FERC denied rehearing. *February 3, 2012 Order II* at PP 9-13, CPER00020-23 .

STANDARD OF REVIEW

The Court must set aside FERC action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. APA, 5 U.S.C. § 706(2); *see, e.g., CPUC v. FERC*, 462 F.3d at 1045. FERC has the burden to demonstrate that it has engaged in reasoned decision-making, which requires, among other things, that the agency "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *See, e.g., Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)); *Harris*, 784 F.3d 1267, 1275 (9th Cir. 2015). Findings of fact must be supported with substantial evidence, which is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *CPUC v. FERC*, 462 F.3d at 1045 (quoting *Eichler v. S.E.C.*, 757 F.2d 1066, 1069 (9th Cir. 1985)).

SUMMARY OF ARGUMENT

Cost Offsets. FERC established an abbreviated for-this-case-only procedure in which buyers were given no discovery, no opportunity for cross-examination, and only twenty-seven days to challenge hundreds of thousands of purported transactions and cost items relating to hundreds of millions of dollars in alleged costs. This process violated due process as well the APA and the FPA. The

substance was as deficient as the process. FERC permitted sellers to rely on costs that were incurred to perpetrate fraudulent transactions, and disregarded the real data on seller profits and costs, ultimately determining a measure of cost that bears no relation to sellers' actual costs. The Cost Offset findings do not meet FERC's obligation to engage in reasoned decision-making and did not result in just and reasonable rates.

Governmental Entity Refunds. In multiple orders, FERC has addressed the issue of market participants that both bought and sold in the markets, finding that they will pay or receive refunds based on a netting of their purchase and sale activity over the whole Refund Period. For governmental entities, FERC reached a different result—refusing to allow period-wide netting, and instead creating a situation where governmental entities that predominantly sold into the markets, some of which have been found guilty of manipulating the markets, will receive multi-million dollar refunds, which buyers will pay. FERC's decision contravenes the governing tariffs, breaks from FERC's past practice, and discriminates against non-governmental entities—all for no rational reason.

PX Shortfall. The D.C. Circuit already addressed the issue of how costs that the PX incurred after its closure should be allocated—finding that those costs should be spread across all market participants because all participants benefit from the PX's continued activity to support wrap-up of its market. FERC's

decision that $5 million taken for PX costs should be charged to buyers alone violates basic principles of cost causation as the D.C. Circuit found in the earlier nearly identical case. The result arbitrarily forces buyers to fund the PX, while manipulative sellers pay none of the cost imposed as a result of their destruction of the market.

ARGUMENT

I. FERC'S COST OFFSET DECISIONS VIOLATED THE FPA, THE APA, AND DUE PROCESS.

FERC implemented a Cost Offset process that fails to meet the requirements of reasoned decision-making and due process. Disregarding its own longstanding procedures for resolving cost-based rate cases, FERC created a one-off procedure—applicable only to Energy Crisis cost-based rate cases—that lets sellers determine what buyers must pay and denies buyers any meaningful chance to be heard. Unsurprisingly, these procedural shortcomings infected the merits as well. FERC compounded its error by arbitrarily granting sellers favorable rates based on what the agency knew or should have known were fraudulent activities and by irrationally excluding from the rate calculations transactions that manifestly affected the electricity supply. While FERC's desire to conclude these proceedings is understandable, the FPA, the APA, and the Constitution's Due Process Clause forbid the agency from throwing the California Parties' procedural protections and substantive accuracy overboard in pursuit of administrative ease.

A. FERC's Cost Offset Process Violated the APA and Due Process.

The first problem with FERC's Cost Offset proceedings was the process—or lack thereof—that the agency employed. Hornbook administrative law requires agencies to use procedures reasonably designed to gather accurate data and to give interested parties an opportunity to be heard. An agency acts arbitrarily when it relies on data submitted by a party with no means to verify the data. *See, e.g.*, *City of New Orleans v. SEC*, 969 F.2d 1163, 1167 (D.C. Cir. 1992). An agency violates due process when it fails to provide an opportunity to be heard. *See, e.g.*, *Cal. ex rel. Lockyer v. FERC*, 329 F.3d 700, 709 (9th Cir. 2003) ("*Lockyer 2003*"). FERC violated both of these protections.

1. The APA.

The APA problems were twofold: (1) FERC departed from its own longstanding practice for no good reason, and (2) FERC did not and could not have examined the relevant data underlying the Cost Offset Filings.

As for the first, FERC understands the importance of carefully considering the facts and data at issue, because it has in place longstanding procedures designed to safeguard such practices by gathering accurate data for ratemaking and giving regulated parties an opportunity to be heard. *See* 18 C.F.R. §§ 385.401 *et seq.*, 385.501 *et seq.* Typically, FERC employs hearings before an ALJ to resolve disputed factual issues in cost-based rate filings, even when the amounts at stake

are only a few million dollars. *See, e.g.*, *S. Ind. Gas & Elec. Co.*, 95 FERC ¶ 61,462 (2001) (setting hearing for $3 million rate increase); *Am. Transmission Co.*, 95 FERC ¶ 61,324 (2001) (setting hearing for $4 million rate increase). To resolve disputed factual questions concerning rates, FERC permits discovery similar to that provided in the Federal Rules of Civil Procedure (including interrogatories, depositions, and requests for production) and a hearing with cross-examination before an ALJ. *See* 18 C.F.R. §§ 401 *et seq.* Under FERC's procedural time standards, the ALJ must resolve a simple case within 29.5 weeks from the order designating the presiding judge, whereas an exceptionally complex case must be resolved within 63 weeks. *See FERC Procedural Time Standards for Hearing Cases*.[7]

Here, by contrast, FERC made no secret of its desire to finalize Cost Offsets as rapidly as possible, even if that meant reaching an inaccurate result. FERC explained that the Cost Offsets were the final step in determining refunds and that "the Commission intends to resolve the refund proceeding as expeditiously as possible." *January 26, 2006 Order* at P 2, CPER00425; *see also August 8, 2005 Order* at P 1, CPER00555-56.

[7] Available at http://www.ferc.gov/legal/admin-lit/time-sum.asp, last updated Jun. 28, 2010. These time standards have been in effect since at least 1999. *See, e.g.*, *Pac. Gas & Elec. Co*, 91 FERC ¶ 63,008 (2000).

These decisions signaled a sharp break from FERC's usual procedural protections in cost-based rate cases. Hastening to end these proceedings, FERC created a new process that applies *only* to resolution of Cost Offsets related to the Energy Crisis. *See January 26, 2006 Order* at PP 42-45, CPER00443-45; *see also August 8, 2005 Order* at PP 115-16, CPER00594-96. FERC's new Energy Crisis-specific process allowed only twenty-seven days to review data on hundreds of thousands of transactions that dozens of sellers submitted to justify the costs they claimed. CPER00979-7448; CPER07516. The process forbade buyers from seeking *any* discovery from sellers. *See, e.g., January 26, 2006 Order* at P 42, CPER00443. And it provided no opportunity to examine witnesses. *Id.* FERC thus left buyers at the mercy of sellers. Sellers could—and did—claim costs that buyers were simply unable to challenge effectively.

That was improper. This Court has recognized that an agency's unexplained departure from its past position violates the APA, *see, e.g.*, *Cal. Trout v. FERC*, 572 F.3d 1003, 1022-23 (9th Cir. 2009), which FERC did when it departed from ordinary processes, setting rates based almost entirely on sellers' submissions and compressing proceedings into the span of a few weeks. *See generally January 26, 2006* Order. And FERC's explanation was illogical: it claimed that the need for rapid resolution justified departing from its longstanding procedures, *January 26, 2006 Order* at P 2, CPER00425; *August 8, 2005 Order* at P 1, CPER00555-56, but

it never explained why speed was more important here than in the countless other rate cases to which FERC's ordinary procedures apply. If anything, the extraordinarily large amounts of money at stake—$60 million for the two unsettled sellers with Cost Offsets, and far more before other sellers settled—should have warranted *more* thorough adjudication than in a run-of-the-mill proceeding.

FERC's decision led to a further violation of one of the APA's core protections. An agency must "examine the relevant data and articulate a satisfactory explanation for its action," *State Farm*, 463 U.S. at 43, and cannot rely on party-provided data with no means of verifying that data. *City of New Orleans*, 969 F.2d at 1167. Yet that is precisely what FERC did here. By depriving buyers of any effective means of challenging the data that sellers submitted, FERC eliminated the check on data accuracy that FERC's normal adversarial process provides, *see* 18 C.F.R. §§ 385.410 *et seq.*, 385.501 *et seq.*, and left the agency with millions of pages of unverifiable data on which to base its decisions. CPER00979-7448; CPER07516. By failing to "examine the relevant data" in any meaningful way, FERC acted arbitrarily and capriciously. *State Farm*, 463 U.S. at 43.

None of FERC's justifications for this course of action withstands scrutiny. The decision to forego a hearing and other procedures could be permissible only if FERC considered all of the relevant facts. *See, e.g.*, *Cajun Elec. Power Coop. v.*

FERC, 28 F.3d 173, 177 (D.C. Cir. 1994); *Pac. Gas & Elec. Co. v. FERC*, 746 F.2d 1383, 1386 (9th Cir. 1984). It did not. While acknowledging that FERC need not conduct a hearing if disputed issues of fact can be resolved on the record, the *Cajun* court determined that FERC's denial of a hearing amounted to an abuse of discretion where "[t]he petitioners proffered several facts that raise serious doubts . . . that FERC has not adequately addressed and upon which an evidentiary hearing may shed light." 28 F.3d at 177. Here too, the California Parties raised several factual issues that call into question FERC's decision. *See, e.g.*, CPER00907-31. Those issues could not be "resolved on the written record," *Cajun*, 28 F.3d at 177 (citation omitted), because they call into question the accuracy of the record itself.

FERC claimed that the California Parties failed to submit evidence warranting a hearing. *January 26, 2006 Order* at P 32, CPER00438-39; *see also June 18, 2009 Order* at P 98, CPER00150. But with FERC having denied the California Parties the right to conduct discovery, FERC's claim of inadequate contrary evidence is nothing more than a *post hoc* rationalization of the procedural flaws in the Cost Offset process. Even absent discovery and, thus, with one hand tied behind their backs, the California Parties offered expert declarations identifying flaws and missing information in the Cost Offset Filings, such as inclusion of costs relating to manipulative fraudulent transactions. CPER00940-78. That evidence created disputed issues of material fact. The California Parties

were due more process under the APA, and FERC violated the statute by denying it.

2. Due Process.

FERC's dramatically abbreviated process also violated the Constitution. The hallmark of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The Due Process Clause "forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 289 n.4 (1974). Courts consider three factors in assessing whether an agency provided an adequate opportunity to be heard: the private interests at stake; the risk of erroneous action; and the nature of the governmental interest. *Lockyer 2003*, 329 F.3d at 710.

All three factors tilt decisively in favor of buyers, such as the California Parties, that FERC deprived of a meaningful chance to be heard in the Cost Offset proceedings. As for private interests, millions of dollars in private ratepayer funds are at stake. CPER07496-504. Next, without any meaningful check on the accuracy of the data that sellers submitted, the risk of erroneous action is enormous: sellers were permitted to—and did—submit data that is clearly in error and even fraudulent. *See infra* at Section I.B. And finally, FERC's interest in

expediting these proceedings is illusory because the Cost Offsets have taken more than a decade to resolve after initiation of the process, despite FERC's shortcuts.

FERC's alleged justifications are baseless. FERC claimed that discovery was unnecessary because FERC could readily compare seller data against ISO and PX data. *January 26, 2006 Order* at PP 38-39, CPER00441; *see also June 18, 2009 Order* at P 99, CPER00150-51. This misses the point. The ISO and PX could provide data on which sales each seller made into the ISO and PX market. *See January 26, 2006 Order* at P 57, CPER00449 (directing use of ISO and PX final settlement data in certain Cost Offset Filings). Only the seller had information about its costs of obtaining the power it sold to the ISO and PX, and it is the seller's claimed costs that are in question. By refusing to allow discovery into those costs, or examination of witnesses concerning those costs, *e.g.*, *January 26, 2006 Order* at PP 31-39, CPER00438-41, FERC made it impossible to meaningfully evaluate whether the claimed amounts truly reflected sellers' actual costs. That deprived buyers of the opportunity, which the Due Process Clause guarantees, to be heard in a meaningful way.

B. FERC's Cost Offset Methodology Allowed Sellers to Profit From Illegal Activities.

Because procedural protections are designed to ensure a fair hearing on the merits, it is no surprise that the failure to provide those protections led to flaws in the merits of FERC's decisions. The first flaw was allowing sellers to profit from

illegal market manipulation—which FERC has found to have occurred pervasively during the Energy Crisis. *Opinion No. 536* at PP 3, 96, 174; *see also MPS Merchant*, Slip Op. at 20-34 (upholding FERC's findings of pervasive manipulation). Just as bank robbers do not get to deduct the cost of a getaway car when returning robbery proceeds, neither should sellers get to deduct costs incurred when committing fraud.

This Court has repeatedly rejected FERC decisions that disregarded manipulation in the ratemaking context. *See Harris*, 784 F.3d at 1272-74; *Port of Seattle*, 499 F.3d at 1035; *CPUC v. FERC*, 462 F.3d at 1060. Consistent with this Court's recognition that just and reasonable rates cannot be premised on fraudulent transactions, the California Parties requested that FERC bar sellers from recovering costs incurred in the course of manipulative and fraudulent transactions. *See, e.g.*, CPER00924. FERC rejected the requests, relying on a shifting series of rationales that have only one thing in common: FERC's desire to shortcut these proceedings rather than take time to sort manipulative from legitimate transactions. *See January 26, 2006 Order* at PP 31-39, CPER00438-41; *see also June 18, 2009 Order* at PP 96-99, CPER00148-51. Each of FERC's rationales fails to withstand scrutiny; FERC's decision allowing recovery for costs incurred in pursuit of manipulation and fraud is thus arbitrary and capricious.

As this Court has emphasized, FERC has a "duty under the Federal Power Act to ensure just and reasonable rates." *See CPUC v. FERC*, 462 F.3d at 1060; *see also* 16 U.S.C. §§ 824d(a), 824e(a) (2000). This duty prohibits FERC from "immuniz[ing] those who overcharge and manipulate markets in violation of the FPA." *CPUC v. FERC*, 462 F.3d at 1060. In particular, FERC may not simply stay its hand from correcting an unjust or unreasonable rate even if analyzing and correcting the rate would be administratively difficult. *Id.* at 1060-61. Thus, in *CPUC v. FERC*, this Court found arbitrary and capricious FERC's decision not to determine whether Refund Period energy exchanges created an unjust or unreasonable rate because analyzing the transactions would be difficult. *Id.*

By awarding offsets for costs incurred in pursuit of manipulative or fraudulent transactions, FERC has failed to exercise its duty to ensure just and reasonable rates. *See CPUC v. FERC*, 462 F.3d at 1060; *see also* 16 U.S.C. §§ 824d(a), 824e(a) (2000). FERC's challenged orders permit sellers to reduce their refunds to buyers by the amount of the costs incurred in manipulating the markets. *See, e.g.*, *January 26, 2006 Order* at P 109, CPER00466-67; *June 18, 2009 Order* at PP 134-139, CPER00167-69. In other words, the end result of FERC's orders is that buyers are left holding the bill for sellers' manipulative practices. Plainly, a rate is unjust and unreasonable when it extracts from a buyer

financial support for a seller's unlawful activities. FERC's decision to let such rates stand is thus arbitrary and capricious. *See id.*

Millions of dollars of Cost Offsets are attributable directly to manipulative and fraudulent transactions. For instance, Shell submitted a Refund Period Cost Offset largely composed of fraudulent transactions. CPER00949-70. As the California Parties' witness testified, Shell's Cost Offset Filing included millions of dollars in False Load Scheduling transactions, and millions of dollars in Phantom Ancillary Services transactions in which Shell sold reserves to the ISO when Shell had no such reserves to sell. CPER00954-60.[8] The California Parties' witness also explained that it was impossible to determine the true origin of the power Shell imported into the ISO from its data. CPER00964, CPER00945-48. From other cases where discovery was permitted, we now understand that the power was not really imported at all; that Shell was a major participant in the False Export strategy. *See Opinion No. 536* at PP 130-31; *Pub. Utils. Comm'n of Cal.*, 155 FERC ¶ 63,004 at PP 108-109, & FF104, FF112 (2016) (Initial Decision voiding Shell's long-term energy supply contracts negotiated during Refund Period and

[8] The fraudulent sale of Phantom Ancillary Services were not shown in the Summer Period proceedings to increase prices paid to the entire market, but they were a fraud in which the particular seller obtained fraudulent payouts from buyers. FERC concluded that such sales were unlawful and in violation of the ISO Tariff. *See, e.g.*, *Opinion No. 536-A* at 114-20. No party sought review or rehearing of the findings in *Opinion No. 536-A* concerning Phantom Ancillary Services, and thus those findings are final.

finding Shell committed False Export in Refund Period); *Puget Sound Energy, Inc.*, 154 FERC ¶ 63,004 at PP 30-33 (2016) (Initial Decision finding Shell manipulation in Pacific Northwest power markets during Refund Period); *see also MPS Merchant*, Slip Op. at 28 ("Substantial evidence supports FERC's finding that . . . Shell engaged in False Export.").

That manipulation directly affected the Cost Offset. CPER00679-84. As noted above, for instance, FERC required sellers that submit Cost Offsets, if possible, to match purchases and sales when a purchase was made for a specific sale into the ISO or PX markets. *August 8, 2005 Order* at P 65, CPER00579. A large portion of Shell's Cost Offset Filing consisted of claimed matched purchases from outside of the ISO, matched to sales to the ISO. CPER00960-61. As FERC has found, False Exports often involve bogus sales of power to an entity outside of the ISO that would "park" the power, and then a pre-arranged repurchase of the power to sell it back to the ISO. *See, e.g.*, *Opinion No. 536* at PP 120-123. Because the purchase and sale are pre-arranged, the pricing of the two legs is arbitrary—the only real amount is the difference, which amounts to the fee that Shell paid to the parking party. *Id.*

Allowing a party that engaged in False Export to rely on allegedly matched transactions, without further inquiry, gives that party the full benefit of its fraud. Shell's Cost Offset basically consists of using the arbitrary and bogus return leg

purchases as justification for the high price of the later sales to the ISO. By permitting Shell to match False Export transactions, FERC permitted Shell to impose the costs of its manipulation on buyers in the form of higher rates, in violation of FERC's duties under the FPA and this Court's decision in *CPUC v. FERC*, 462 F.3d at 1060-61.

Significantly, in a later hearing on remand from *Port of Seattle*, 499 F.3d at 1035-36, Shell attempted to justify its transactions using essentially the same "matching" claim it made here, arguing that its False Exports did not arise from California exports but were the product of back-to-back purchases from outside California. *See Puget Sound Energy, Inc.*, 146 FERC ¶ 63,028 at PP 199, 210 (2014). After a trial on these issues, the ALJ concluded that Shell's "[back-to-back] analysis simply reflects the last stage of a strategy on [Shell]'s part to take energy out of California, often from Glendale, move it north, sleeve it through a Pacific Northwest entity for a fee, and sell it back to CERS, misrepresented as coming from the Pacific Northwest." *Id.* at P 1412. Put simply, when the matching was put to the test at a hearing (as it should have been when the Cost Offsets were considered), it was shown instead to be manipulative False Export transactions.

Similarly, as FERC has found, Shell often tried to cover up its short Phantom Ancillary Services sales (where no actual reserves were sold) by buying

back reserves in the hour-ahead markets, when the demand for reserves had typically decreased so that prices were reduced. *See Opinion No. 536-A*, 153 FERC ¶ 61,144 at PP 113-19 (2015). The "buy-back" costs that Shell incurred to cover up its bogus short sale to the ISO is simply not an "actual cost" of providing services to the ISO, but is rather the cost of covering up a fraud. CPER00966-68; *Opinion No. 536-A* at P 117. (The real cost of providing non-existent reserves is zero, of course.) FERC's allowance of such unjust and unreasonable rates here is arbitrary and capricious.

Likewise, a large portion of Hafslund's transactions were False Load Scheduling transactions. CPER00920-25. Indeed, in the declaration accompanying its Cost Offset Filing, Hafslund explained: "Hafslund purchased hour-ahead and day-ahead energy from PX and resold the energy into []ISO, without corresponding load . . ." CPER07430. Such sales to the ISO, which were scheduled to serve its load even though there was no "corresponding load," are exactly what FERC found to be unlawful False Load Scheduling violations. *Opinion No. 536* at PP 170-72, 184. Hafslund's Cost Offset is nothing but the costs of effectuating its unlawful False Load Scheduling scheme.

FERC's decision to allow recovery of costs incurred pursuing manipulation also violates the APA because FERC's justifications for that decision are foreclosed as a matter of fact and law. *See, e.g.*, *State Farm*, 463 U.S. at 53-55

(finding agency decision arbitrary where agency's asserted justification failed scrutiny).

FERC's first rationale, presented in its *January 26, 2006 Order*, was that proceedings in 2004 had resolved the manipulation claims at issue. *January 26, 2006 Order* at P 109, CPER00466-67. But those prior proceedings looked only at Summer Period False Exports and refused to consider False Load Scheduling at all and thus did not address the Refund Period manipulation at issue here. *Am. Elec. Power Serv. Corp.*, 103 FERC ¶ 61,345 n.55 (2003), *op. corrected*, *Am. Merchs. Servs., Inc.*, 104 FERC ¶ 61,222 (2003). More than that, this Court already rejected precisely the same argument in *CPUC v FERC*. There, FERC initially declined to rule on the California Parties' request for relief for Summer Period violations, arguing that it was considering the same issues in its investigative proceedings. *See CPUC v. FERC*, 462 F.3d at 1045-51. This Court flatly rejected FERC's attempt to exclude relevant issues from the case, holding that "[t]he fact that FERC may be seeking similar remedies against specific companies in its § 1b investigations does not justify its denial of the California Parties' request for § 309 relief." *id.* at 1051; *see also Harris*, 784 F.3d at 1275-76. The same result is warranted in this case.

FERC's second rationale, presented in its *June 18, 2009 Order* denying the California Parties' request for rehearing offered new explanations for not

considering manipulation as part of the Cost Offset process. *June 18, 2009 Order* at PP 134-139, CPER00167-69. None of those explanations passes scrutiny.

For instance, FERC argued that "effects of manipulative or 'gaming' behavior have effectively been eliminated through application of the MMCP." *Id.* at P 135, CPER00168. This justification is utterly irrational. The very purpose of the Cost Offsets is to allow sellers to achieve a rate more favorable than the MMCP. *See, e.g.*, *January 26, 2006 Order* at P 3, CPER00427. Even if the MMCP rate "effectively . . . eliminate[s]" manipulation for parties governed by the MMCP, it cannot do so for parties that are not subject to that rate. *June 18, 2009 Order* at P 135, CPER00168.

FERC also claimed that it need not consider manipulation because manipulation was being addressed in other pending proceedings. *Id.* at P 134, CPER00167-68. This time, however, FERC cited different proceedings than those it cited in the *January 26, 2006 Order* as an excuse for inaction. *Compare January 26, 2006 Order* at P 109, CPER00466-67, with *June 18, 2009 Order* at P 134, CPER00167-68. In particular, FERC cited to its decision in this Court's remand from *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004)("*Lockyer 2004*"). *June 18, 2009 Order* at P 134, CPER00167-68. However, as the Court knows, FERC had ruled that it would not consider market manipulation in the *Lockyer 2004* remand proceedings then pending at FERC. *Harris*, 784 F.3d at

1275-76. Of course, on appeal from the *Lockyer 2004* remand, in 2015, this Court found FERC's disregard of manipulation unlawful. *Id*. at 1275-76. FERC's rationale that manipulation need not be addressed in the Cost Offset process because it was being dealt with in *Lockyer 2004* was illusory, representing a shell game, where relief is always available in some proceeding other than the one at hand. *See, e.g.*, *id.* at 1275.

Finally, FERC asserted that it had taken care of any manipulation issues through the Cost Offset process. *June 18, 2009 Order* at PP 135-38, CPER00168-69. FERC correctly found that it must "ensure that costs associated with manipulative or gaming conduct do not re-enter the offset calculation" and that FERC must "prevent recovery of unjustly inflated costs." *Id.* at P 136, CPER00168. But FERC concluded that consideration of fraud and manipulation was unnecessary because it had included "mechanisms" in the Cost Offset process. *Id.* These "mechanisms," however, provide no protection at all. The MMCP itself offers no such protection because sellers receiving a Cost Offset were not being paid the MMCP. *Supra* at 7-11. Nor do any other "mechanisms" that FERC cited. Excluding affiliate transactions and barring use of indices tainted by manipulation are appropriate, but do not protect against costs associated with fraudulent transactions, such as the cost of "buy-back" transactions to cover up the sale of non-existent Phantom Ancillary Services.

The California Parties sought rehearing, arguing that, under *CPUC v. FERC*, FERC could not avoid addressing market manipulation in this proceeding. CPER00678. FERC then advanced a third rationale—namely, that *CPUC v. FERC* required consideration only of Summer Period manipulation, but that the Cost Offsets did not relate to Summer Period manipulation, and thus the reasoning in *CPUC v. FERC* was simply irrelevant. *See May 18, 2010 Order* at P 22, CPER00069. This rationale was no better than the others because the reasoning of *CPUC v. FERC* was not limited to the Summer Period. Rather, this Court held more generally that "[a] party's valid request for relief cannot be denied purely on the basis that the agency is considering its own enforcement action." 462 F.3d at 1051; *see also Harris*, 784 F.3d at 1275-76.

FERC also claimed that much of the manipulation at issue appeared to relate to "overscheduling"—another name for False Load Scheduling. *See May 18, 2010 Order* at P 26, CPER00072. Relying on its determination in its investigative proceedings that it would not punish "overscheduling," FERC found that there was no need to adjust the Cost Offsets to account for such manipulation. *Id.* at PP 26-27, CPER00071-72. FERC no longer holds to that view on "overscheduling." *See, e.g.*, *Opinion No. 536* at PP 170-72. After the hearing on remand from *CPUC v. FERC*, FERC reversed course, finding False Load Scheduling to be a serious tariff violation that relied on sellers' fraudulent statements and that required a substantial

remedy. *Id.* This Court affirmed that determination, recognizing that False Load Scheduling is a serious tariff violation. *MPS Merchant*, Slip Op. at 21. FERC's earlier rejection of relief for Refund Period False Load Scheduling is flatly inconsistent with FERC's more recent findings and cannot justify FERC's inclusion of manipulation-related costs in the Cost Offset calculation. Indeed, nothing can, and the decision to include those costs was arbitrary and capricious.

C. FERC Irrationally Distinguished Among Similar Transactions in Calculating Cost Offsets.

"A fundamental norm of administrative procedure requires an agency to treat like cases like." *Westar Energy, Inc. v. FERC*, 473 F.3d 1239, 1241 (D.C. Cir. 2007). "Where an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation . . . , its action is arbitrary and capricious and cannot be upheld." *Burlington N. & Santa Fe R.R. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005).

FERC, however, ignored this "fundamental norm" of administrative law, thus compounding the problems with its Cost Offset determinations. *Cf. Westar*, 473 F.3d at 1241. Rather than include in Cost Offset calculations all transactions that affected sellers' costs in the California Markets during the Energy Crisis—a choice that was essential to accurately calculating the Cost Offsets—FERC arbitrarily distinguished among transactions, accounting for some but excluding

others that had just as significant an effect on costs. *See, e.g.*, *August 8, 2005 Order* at P 63, CPER00579; *January 26, 2006 Order* at P 235, CPER00501; *November 19, 2007 Order* at P 152, CPER00376.

1. West-wide profits.

FERC irrationally distinguished between transactions in California and those in the west or WSCC. When prices rose in California, they rose throughout the WSCC. *See December 19, 2001 Order* at 62,249-50; *June 19, 2001 Order* at 62,547. Indeed, FERC found that "the California market is integrated with those of other states in the WSCC" and found that "prices in California tend to draw supplies from, and increase prices in, other parts of the WSCC." *December 19, 2001 Order* at 62,249-50. Recognizing that reality, FERC initially determined that Cost Offsets would be calculated based on profits earned on all sales throughout the WSCC for the entire Energy Crisis. *See, e.g.*, *December 19, 2001 Order* at 62,205 (affirming the option of "cost-based rates covering all of [a seller's] units in the WSCC"), 62,214; *July 25, 2001 Order* at 62,564. FERC explained that sellers (particularly marketers in volatile commodity markets) were not guaranteed to make profits but were guaranteed only "an opportunity to make a profit." *December 19, 2001 Order* at 62,194. Sometimes, and on some transactions, marketers that bought power speculatively in hopes of making a profit would lose money instead. Given FERC's finding that Energy Crisis prices affected

transactions and supply throughout the WSCC, FERC was correct to hold, as it did in 2001, that it would look not just at losses sustained on a subset of a marketer's sales to determine if it had sustained a loss, but instead look broadly at whether the supplier sustained a loss on all sales in the markets in which prices were affected by the Energy Crisis and for the entire period to see if the seller had truly sustained a loss. *Id.* at 62,194.

The *August 8, 2005 Order* changed that. Without explaining the departure from prior decisions, FERC held that sellers' Cost Offset Filings would factor in sales to the ISO and PX, but no other western revenues. *August 8, 2005 Order* at P 63, CPER00579. On rehearing, FERC essentially conceded that it had changed course, explaining that it had "re-opened the issue of the scope of eligible transactions" and that it had decided to limit the showing to losses for sales in the ISO and PX only. *November 19, 2007 Order* at P 28, CPER00330-31. FERC justified its about-face only with the truism that the proceeding at issue was about sales in the ISO and PX. *Id.* at PP 28-31, CPER00330-33. But, as FERC had explained in its earlier orders, sellers were never guaranteed a profit for sales just to the ISO and PX. *December 19, 2001 Order* at 62,194. No rational relationship exists between FERC's goal of protecting sellers against confiscatory rates and excluding a significant portion of sellers' revenues in determining whether they

suffered a loss. The agency's abrupt and unjustified abandonment of its prior position violates the APA. *See, e.g.*, *Cal. Trout*, 572 F.3d at 1022-23.

Evidence in the record confirms FERC's misstep and demonstrates that sellers, in fact, reaped large profits from their sales throughout the *entire* west, not just in California. CPER09308-13. When prices were high in California, they tended to be high elsewhere, *see June 19, 2001 Order* at 61,547, allowing sellers to generate huge profits. Indeed, the evidence shows that sales outside of the ISO and PX allowed sellers to profit to the extent that Cost Offsets would not be needed for most (if not all) sellers if those profits were factored in. CPER09314-17. Under FERC's Cost Offset methodology, however, those profits are ignored. *August 8, 2005 Order* at P 63, CPER00579. FERC had it right the first time—all of a seller's profits in the WSCC should be included in evaluating whether the MMCP drove the seller to a loss. Its complete reversal was arbitrary and capricious.

2. Book-out transactions.

In a similar vein, FERC erroneously permitted Hafslund to exclude numerous so-called "book-out" transactions from its revenue calculations. *January 26, 2006 Order* at P 235, CPER00501. In these transactions, Hafslund sold energy to a counterparty and then purchased power back from the same counterparty. CPER00926-27; CPER00911-12. Although the quantities of electricity bought and sold offset each other, the prices often did not. CPER00927;

CPER00911-12. Where quantity offsets occurred, Hafslund would cancel out the physical aspect of the purchase/sale rather than scheduling two offsetting power flows, but would then record the financial difference between the transactions on its books. CPER00911-12. While Hafslund may not have actually sent power in these transactions, the dollars associated with the transactions were undeniably profits, and any measure of Hafslund's costs that excludes consideration of the profits from those offsetting transactions thus yields a false picture of Hafslund's costs. *Id.*[9] Indeed, FERC has previously recognized as much, explaining that book-out transactions are "the offsetting of opposing buy-sell transactions." *Order No. 2001* at P 279. "[S]uch transactions in the marketplace," FERC has said, "plainly affect or relate to [physical sales and transmission] and the prices paid for power sales that go to delivery." *Id.* at P 285.

Here, however, after the California Parties raised the omission of Hafslund's book-out transactions, CPER00926-27, FERC dismissed the California Parties' objections with one sentence: "We also find that the book-outs did not involve energy that was available for sales into the California markets, and that Hafslund properly excluded such book-out transactions from its average cost calculation." *January 26, 2006 Order* at P 235, CPER00501. On rehearing, FERC elaborated

[9] Because discovery was not permitted, we can only guess whether Shell similarly excluded book-out transactions. We know of Hafslund's book-outs only because it mentioned them in its Cost Offset Filing. CPER07432.

with another sentence: "Because these transactions were not used to serve the []ISO and PX markets during the Refund Period, they fell outside of the scope of transactions to be included in the Cost Offset filings." *June 18, 2009 Order* at P 321, CPER00253-54.

These cursory statements do not provide a reasoned basis for excluding these transactions from Cost Offset calculations. Hafslund based its Cost Offset Filing on its average portfolio cost of power purchasing. CPER00926. Regardless of whether some of its trades involved offsetting quantities that did not have to be scheduled, those trades affected its average overall cost. CPER00911-12. FERC was right in *Order No. 2001*: whether or not power flowed as a result of offsetting quantities in opposite directions, the financial consequences of these transactions are real. *Order No. 2001* at P 285.

Because the object of the Cost Offset Filings was to determine the actual costs that sellers incurred, *e.g.*, *January 26, 2006 Order* at P 3, CPER00427, exclusion of these transactions leads to a false picture of those costs. FERC's exclusion of book-out transactions is thus arbitrary and capricious, both because FERC has offered no reasoned basis to permit Hafslund to exclude offsetting financial transactions from its cost calculations, and because FERC failed to justify departing from its earlier position on this issue. *See, e.g.*, *Cal. Trout*, 572 F.3d at 1022-23.

3. Hedges and other financial transactions.

FERC also refused to consider financial transactions such as hedges and swaps. *November 19, 2007 Order* at P 152, CPER00376. Hedges, swaps, and similar financial transactions directly affect costs and revenues. For example, in a typical energy industry "fixed for floating" swap, a seller agrees to give a counterparty the fluctuating market revenues the seller receives for the electricity it sells (based on spot prices, or some index) in return for a fixed price from the counterparty for each hour of electricity sold. *See, e.g., Barclays Bank PLC*, 141 FERC ¶ 61,084, at 61,423-25 (2012) (Enforcement Staff Report and Recommendations). The result of such a swap is that the actual cost that the seller experienced for the product is the fixed price of the swap, rather than the market price. The transactions are like book-outs in that physical power may not flow as part of the transaction, but dollars do flow, and the transaction thus influences sellers' actual costs. *See generally id.*; *see also* FERC Guide to Market Oversight Glossary.[10]

The record on this issue is incomplete because it was first directly addressed in the un-transcribed August 25, 2005 Technical Conference. *See* CPER00371-72. At that conference, FERC staff denied the request that sellers provide hedging data, and refused to include hedging information in the "suggested template" for

[10] Available at http://www.ferc.gov/market-oversight/guide/glossary.asp, last updated Mar. 15, 2016.

Cost Offset Filings that FERC staff issued on August 26, 2005. CPER00371-72, 374. FERC denied any discovery, *January 26, 2006 Order* at P 42, CPER00443, so the California Parties were unable to obtain hedging data.

On rehearing, FERC finally agreed that hedging transactions should be included in a Cost Offset Filing "if they are in connection with, and affect the actual cost of, energy purchases included in the cost filing." *November 19, 2007 Order* at P 152, CPER00376. But by the time that rehearing issued, FERC had already ruled on the Cost Offsets based on templates that did not include hedging information, and it stood by its decision to deny discovery or further review of those under-inclusive Cost Offsets. *Id.* at P 143, CPER00372. In short, therefore, FERC has conceded that hedges affect seller actual costs and should have been included, *id.*, but, as of today, buyers are responsible for paying rates that exclude consideration of hedging. That is arbitrary and capricious. *See, e.g.*, *Nat'l Parks Conservation Ass'n v. EPA*, 788 F.3d 1134, 1141 (9th Cir. 2015) (internally inconsistent agency action is arbitrary and capricious).

II. FERC'S DETERMINATION TO CALCULATE GOVERNMENTAL ENTITY REFUNDS DIFFERENTLY FROM ALL OTHER REFUNDS VIOLATED THE FPA AND IS ARBITRARY AND CAPRICIOUS.

In *Bonneville*, this Court held that FERC lacked authority to compel governmental entities to pay refunds. 422 F.3d at 926. But because many governmental entities are both buyers *and* sellers, *Bonneville* left to FERC the task

of determining how to address amounts owed or owing given that interplay of offsetting purchases and sales. *See id.* at 926. The California Parties urged FERC to net sales and purchases for each governmental entity over the course of the entire Refund Period. *February 3, 2012 Order I* at P 13, CPER00006-7. FERC rejected this sensible view, holding that "netting the refunds over the entire Refund Period" would be contrary to the ISO Tariff and "could have the indirect effect of requiring governmental entities to pay refunds" in contravention of *Bonneville*. *November 20, 2008 Order* at P 16, CPER00298. Instead, FERC directed the ISO (and, later, in its *July 15, 2011 Order*, the PX, as well) to calculate refund amounts for governmental entities by netting purchases and sales on an hourly basis only and not over the entire Refund Period. *November 20, 2008 Order* at P 19, CPER00299. As a practical matter, this meant that governmental entities that both bought and sold power would receive multi-million dollar refunds, even if they were net sellers, because the vast majority of their sales would be disregarded in the netting process. CPER00597-603.

Consider a simple example: a governmental entity sold electricity during the Energy Crisis for nine out of ten hours (at a profit of $10,000 per hour) but bought electricity for one hour (at a cost of $10,000 for that hour). The governmental entity profited handsomely, netting a total of $80,000 in profits. Under this Court's holding in *Bonneville*, FERC cannot order the governmental entity—unlike

a private entity—to refund any of that $80,000. *Bonneville*, 422 F.3d at 926. But FERC's approach to netting grants the governmental entity a windfall: it entitles the governmental entity to a refund of part of the $10,000 it paid for the one hour of electricity it bought, even though it need not repay any of the money it earned when the tables were turned and the governmental entity was the seller, not the buyer.

The unjustness of that windfall here is enhanced by the findings of the 2012 manipulation trial, in which it was determined that BPA and WAPA—the remaining governmental entity sellers for which this netting is at issue—were themselves market manipulators that share in blame for the Energy Crisis. *San Diego Gas & Elec. Co.*, 142 FERC ¶ 63,011 at PP 33-35, 79. The end result of FERC's decision is that BPA and WAPA, though large net sellers to the market, and acknowledged manipulators, will receive millions of dollars of unjustified refunds. *See supra* at 2 & n.1.

The law does not sanction arbitrary and illogical bonuses for some market participants at the expense of others. Nothing in *Bonneville* requires that result, and FERC's interpretation contradicts the plain text of the governing tariff and FERC's own past precedents.

A. FERC's Determination to Net Governmental Entity Sales on an Hourly Basis Was Based on a Misreading of the ISO Tariff.

FPA Section 313(b), 16 U.S.C. § 825*l*(b) (2012), vests this Court with authority to review FERC's interpretation of a tariff. *See, e.g.*, *PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203, 207-08 (D.C. Cir. 2011). That interpretation is subject to a *Chevron*-style review, which means that courts do not defer to FERC when the tariff language is unambiguous. *See, e.g.*, *Consol. Edison Co. of N.Y. v. FERC*, 347 F.3d 964, 972 (D.C. Cir. 2003). Here, the applicable tariffs unambiguously require the ISO and PX to net for the entire Refund Period, but FERC netted purchases and sales for governmental entities on an hourly basis. *November 20, 2008 Order* at P 19, CPER00299. The Court should reject FERC's interpretation.

The ISO Tariff, in the ordinary course, nets cumulatively from the time a charge is incurred until the end of the month—in other words, netting ordinarily occurs on a monthly basis.[11] CPER00727-31. Settlement and initial netting is done on the smallest temporal interval applicable to the charge-type in question and continues to produce, as relevant, a daily net figure for each charge type. CPER00639-40. Those figures are netted to produce a monthly net figure.

[11] For convenience, we refer here to the ISO Tariff. The PX Tariff has similar provisions, and FERC explained that its analysis applied "with equal force to CalPX." *February 3, 2012 Order I* at P 9 n.25, CPER00004-5. As described *infra*, the PX Tariff, like the ISO Tariff, was amended to provide for walled off billing for the entire Refund Period.

CPER00638. By the time the ISO actually renders its monthly bill, each charge type is netted over the entire month so that the Scheduling Coordinator receives a single positive or negative charge for each charge type. In fact, the ISO so testified. CPER00728-30; *see also* CPER07526, 07540-41 (net "credits themselves do not represent property of any market participant until the [ISO's] netting function has been completed, and net debits have been collected from ISO debtors"); CPER00730.

ISO Tariff Amendment 51 and PX Tariff Amendment 23, which FERC ignored, further modify the tariffs for the Refund Period, and clarify that period wide netting is required for the Refund Period. These amendments, passed in response to the Energy Crisis, provided for the creation of walled-off settlements for the Refund Period and required the ISO and PX to calculate MMCP refunds for the overall Refund Period. *Cal. Power Exch. Corp.*, 105 FERC ¶ 61,273 (2003); *see, e.g.*, *Cal. Indep. Sys. Operator Corp.*, 105 FERC ¶ 61,203 at PP 1, 3, 6, 37 (2003) (accepting tariff provisions that allow for the "separation of invoices (walling off) of the [refund calculations] from the [ISO's other] market activities"). When FERC approved those amendments, it revised the ISO and PX Tariffs to require, for all market participants, period-wide netting of purchases and sales for the entire nine months of the Refund Period. *See, e.g.*, *Cal. Power Exch. Corp.*,

105 FERC ¶ 61,273 (2003) (adopting conforming revisions to the PX Tariff); *Cal. Indep. Sys. Operator Corp*., 105 FERC ¶ 61,203 at PP 1, 3, 6, 37.

Rather than considering these portions of the tariff, FERC focused with tunnel vision on a single definition (of a "Settlement Period") to justify netting on an hourly basis. *February 3, 2012 Order I* at P 17, CPER00008. But FERC's view of that definition was wrong, as was FERC's decision to focus on it at the expense of the rest of the tariff.

As for the definition, FERC focused in on language that provided that the ISO would calculate each charge for each Settlement Period of the trading day and on the definition of "Settlement Period" as beginning at the start of, and ending at the end of, an hour. *Id.* But that definition's use of an hour-long interval was by no means a reflection of how the ISO Tariff nets charges more broadly. To the contrary, as the California Parties explained in their request for rehearing, the ISO Tariff nets charges over intervals as small as ten minutes, then nets those charges on a daily basis, and then nets daily charges on a monthly basis, so that each Scheduling Coordinator actually receives a monthly statement that either pays or bills the Scheduling Coordinator, depending upon the results of the *monthly*

netting. CPER07526, 07540-41. By focusing entirely on hourly netting, FERC ignored this important aspect of the ISO Tariff.[12]

Giving dispositive weight to the definition of "Settlement Period," defined in the ISO Tariff as an hour, ignores other relevant and critical ISO Tariff provisions that are not hourly. In fact, the ISO nets many major categories of energy on a ten-minute interval. Section 11.2.4.1, for example, entitled "Net Settlements for Uninstructed Energy," states that uninstructed imbalance energy (a major source of the charges at issue with respect to governmental entities), "shall be deemed to be sold or purchased, as the case may be, by the ISO, and charges or payments . . . shall be settled by debiting or crediting, as the case may be, the Scheduling Coordinator with an amount for each BEEP Interval of each Settlement Period." CPER00630. A "BEEP Interval" is defined elsewhere in the ISO Tariff as ten minutes. CPER00641-42. Likewise, instructed imbalance energy (another major source of the charges at issue with respect to governmental entities), originally settles on a ten-minute interval basis. CPER00629 (Settlement for instructed imbalance energy). On the other end of the spectrum, some charges are levied on periods longer than an hour, like the Grid Management Charge, which is monthly. CPER00629. Thus, the tariff does not call exclusively for hourly netting.

[12] As noted above, the monthly billing process that is ordinarily applied under the ISO Tariff was modified in ISO Tariff Amendment 51, so that there is actually a period-wide calculation under the ISO Tariff for the Refund Period.

Nor does section 3.2.1 support FERC's view. That provision states that the ISO "will calculate for each charge the amounts payable . . . for each charge for each Settlement Period." CPER00624-28. That means simply than an amount payable for each charge type will be calculated for each Settlement Period to arrive at the net payable for the trading day. It cannot reasonably be construed as overriding other sections of the tariff to prohibit netting of charge types *within* the hourly Settlement Period when calculating the amount payable for the Settlement Period.

In sum, FERC's decision to net on an hourly basis is based on an interpretation of the tariff that the tariff's plain text forecloses. It should be rejected. *PSEG*, 665 F.3d at 207-08 (FERC must give effect to unambiguous tariff provision).

B. FERC's Determination to Net Governmental Entity Sales on an Hourly Basis Departed from Prior Orders Without Explanation.

In addition to contradicting the tariff that FERC purported to be applying, FERC offered no reasonable explanation for its decision to depart from past practices and treat governmental entities differently by netting their sales every hour. FERC's decision should be overturned for these reasons as well.

First, FERC deviated from its precedent without a reasoned explanation for its departure "from precedent or treating similar situations differently." *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995). FERC must provide a

"reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 17 (D.C. Cir. 2014) (citation omitted). When FERC fails to do so, its orders should be vacated as "arbitrary and capricious." *Id*.

That FERC departed from past orders is clear. FERC has long held that MMCP refunds for the Refund Period were to be calculated by netting each Scheduling Coordinator's purchases and sales over the entire Refund Period. *See, e.g.*, *May 12, 2006 Order* at P 34. So did FERC's other orders in connection with the Refund Proceeding. *See, e.g.*, *San Diego Gas & Elec. Co*., 105 FERC ¶ 61,066 at P 180 (2003) ("[I]t is also a settled matter that amounts owed both by and to parties, as determined in this proceeding, will be offset against each other and only the net result of this offset will flow to or from parties."); *see alsoCal. Indep. Sys. Operator Corp*., 105 FERC ¶ 61,203 (addressing ISO Amendment 51 discussed *supra*)*; Cal. Power Exch. Corp*., 105 FERC ¶ 61,273 at PP 1, 3, 6, 37 (addressing PX Amendment 23 discussed *supra*). Those orders noted, for instance, that FERC had rejected efforts to allocate Cost Offsets separately to "separate markets, scheduling intervals, or time periods," holding that Cost Offset allocation should be period-wide and market wide and, thus, follow the Cost Offset calculation. *See May 12, 2006 Order* at PP 34, 45. Similarly, when two governmental entities sought to determine refunds separately for their sales and purchases in various

markets, FERC told them that it was "a settled matter that amounts owed both by and to parties, as determined in this proceeding, will be offset against each other and only the net result of this offset will flow to or from parties." *San Diego Gas & Elec. Co*., 105 FERC ¶ 61,066 at P 180 (2003).

FERC did not really dispute that its prior refund orders required period-wide netting. Its entire discussion of its prior orders consisted of two sentences:

> The May 12, 2006 Order simply does not address the time period over which the refunds should be netted. Thus, the California Parties' argument that the Bonneville Remand Rehearing Order is inconsistent with previous refund orders misreads those orders.

February 3, 2012 Order I at P 19, CPER00009. FERC's decision to net hourly rather than over the entire Refund Period cannot be squared with the language in the *May 12, 2006 Order* that FERC cites. In that order, FERC allowed sellers to submit evidence showing that the MMCP "results in an *overall*" revenue shortfall for sales "during the Refund Period." *Id*. at P 3 (emphasis added). And, FERC said, it had "[d]irected sellers to calculate their cost offsets by netting all revenues with all associated costs, including netting across all markets, scheduling intervals, and time periods." *Id*. at P 45. Netting was, in all instances, supposed to be a period-wide calculation.

FERC's turnaround with respect to governmental entity refunds requires a reasoned explanation. But FERC did not even try to justify or explain its sudden

change in course. FERC's complete failure to supply any analysis—let alone a reasoned one—for its change means that its order was arbitrary and capricious. *See, e.g.*, *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 690 (9th Cir. 2007) (failure of agency to supply reasoned explanation for departure from past precedent was arbitrary and capricious).

C. FERC's Determination to Net Governmental Entity Sales on an Hourly Basis was Unduly Discriminatory.

FERC likewise offered no explanation for its decision to treat governmental entities differently when it came to netting refunds. FPA Section 205 prohibits "any unreasonable difference in rates." 16 U.S.C. § 824d(b) (2000). FPA Section 206 provides that, when FERC finds any rate to be "unduly discriminatory or preferential," it shall determine the just and reasonable rate and fix the same by order. 16 U.S.C. § 824e(a) (2000). When FERC treats parties differently, therefore, it must provide a reasoned explanation for doing so. *See, e.g.*, *W. Deptford Energy*, 766 F.3d at 20. FERC's "reasoned analysis" must "rest[] on articulated objective, nondiscriminatory, and evenhanded criteria, that would justify treating [one party] differently from" other, similarly situated parties. *Id.* at 21 (citation omitted). Without that, any action "treating similar situations differently" is arbitrary and capricious. *Id*.

Here, FERC set up a clear, but unjustified, difference in rates and offered no reasonable explanation why. Specifically, while every non-governmental entity

has refunds calculated by netting purchases and sales over the entire Refund Period, *see, e.g.*, *May 12, 2006 Order* at P 34, *only* governmental entities have their refunds calculated by netting purchases and sales on an hourly basis, *November 20, 2008 Order* at P 19, CPER00299. Governmental entities, however, were exactly the same as all other market participants: they all paid unjust and unreasonable rates for their purchases, and they all sold some power that should be netted against their purchases in exactly the same manner in order to arrive at a proper refund payment. *See, e.g.*, *May 12, 2006 Order* at P 34.

FERC's governmental-entity-only rate process disregards these similarities and results in a large and unfair surcharge upon all net buyers and an unjustified windfall for governmental entity sellers. CPER00608-13(cols. 5a & 8, rows "BPA," "WAPA," & "WAPA – Redding"). That is, governmental entities that are net sellers—and thus, like all other net sellers, have no right to receive refunds—will now receive millions of dollars of refunds on their gross purchases so long as their sales and purchases happened to occur on different sides of an hour-long interval. *Id.* Net buyers that suffered during the Energy Crisis, rather than other sellers, will pay the cost of those refunds, thereby further compounding the inequities. CPER00608-13(cols. 5a & 8). Worse yet, BPA and WAPA are the remaining governmental entity sellers and FERC found them to be manipulators, *San Diego Gas & Elec. Co.*, 142 FERC at PP 33-35, but now buyers must pay

refunds to them. *Bonneville* certainly did not require this discriminatory treatment that arbitrarily varies depending upon when a governmental entity bought and sold power. FERC has provided no reason why governmental entity sellers—and no one else—should receive such refunds.

III. FERC ERRED IN CHARGING BUYERS ALONE FOR $5 MILLION IN MISAPPLIED FUNDS.

The final error at issue in this appeal is straightforward: the PX kept and spent an extra $5 million in 2001, and FERC decided that buyers only, rather than the entire market, should have to bear the cost of the PX's mistake. *July 15, 2011 Order* at P 59. FERC's reasoning was arbitrary and capricious and the D.C. Circuit has already squarely rejected it. *PG&E v. FERC*, 373 F.3d at 1322. This Court should do the same.

In March 2001, the PX erroneously transferred $5 million from the PX Settlement Clearing Account for use as PX operating expenses. *See July 15, 2011 Order* at P 52, CPER00051. As a result, the PX carries a shortfall in the PX Settlement Clearing Account that has not been resolved. *Id.* FERC ruled that the shortfall would be allocated *pro rata* among net refund recipients based on their respective net refunds amounts. *Id.* at P 59, CPER00053-54. Net refund recipients are the buyers. Thus, FERC effectively decided that buyers alone must pay for these 2001 PX operating expenses.

The D.C. Circuit rejected a nearly identical allocation scheme for PX costs more than a decade ago. *PG&E v. FERC*, 373 F.3d at 1322. That case addressed FERC's order for the PX to allocate ongoing operating costs for the period from 2002 forward based on unpaid balances in the PX. *Cal. Power Exch. Corp.*, 100 FERC ¶ 61,178, at *61,673 (2002). Any market participant that had an outstanding balance with the PX for transactions while the markets were still operating would be allocated a percentage share of the PX's ongoing operating costs, which, as a practical matter, allocated the costs mostly to buyers. *See PG&E v. FERC*, 373 F.3d at 1318. The D.C. Circuit struck down FERC's methodology. *Id.* at 1320-21. It concluded that cost causation requirements for FERC rates required that the cost be borne by those who benefit from the continued operation of the PX, that *all* market participants benefitted from the continuing operation of the PX, and so *all* market participants should share in its continued cost of operation. *Id.* Requiring only some participants to foot the bill was unlawful. *Id.*

The same is true here. FERC's decision to allocate the $5 million purely to buyers based on past purchases has no relation to the benefits market participants receive from the PX's ongoing activities, because buyers and sellers *both* benefit from the PX's continuing operation to address remaining issues associated with the closing of its markets. *Cal. Power Exch. Corp.*, 155 FERC ¶ 61,218 at P 25 (2016). Indeed, sellers' market manipulation caused the price increases that

wracked California during the Energy Crisis. *E.g.*, *Opinion No. 536* at PP 2-3; *see also MPS Merchant*, Slip Op. at 29-31. If anyone should be asked to bear the costs of continued PX activity alone, it should be sellers and not buyers. Even if FERC's allocation methodology was "a mathematically simple way to allocate costs," that is not a sufficient justification for the allocation methodology. *PG&E v. FERC*, 373 F.3d at 1321.

On the contrary, the PX Tariff provides, in the event of a shortfall in the PX Settlement Clearing Account, "the PX will allocate the shortage to the PX participants" through a methodology that allocates costs "to all current PX Participants." CPER00645. That is what the California Parties asked for, CPER07453-58, and FERC ignored it. *See February 3, 2012 Order II* (order denying rehearing of *July 15, 2011* Order).

FERC's other statements were similarly puzzling. In one instance, for example, FERC noted that when shortfalls have arisen because of the actions of the PX, "FERC determined that the most equitable manner of addressing the shortfall was to allocate it on a *pro rata* basis *among all market participants.*" *July 15, 2011 Order* at P 59, CPER00053-54 (emphasis added). Apparently realizing on rehearing that this statement contradicted FERC's decision to allocate to buyers alone, the agency sought to distinguish an earlier case announcing those allocation principles by claiming that here, unlike there, "only net refund recipients will be

affected by a reduction in the total amount of refunds available." *February 3, 2012 Order II* at PP 9, 25, CPER00020-21, 27-28. But that tautology makes no sense, as it effectively argues for allocation of the shortfall among buyers alone because FERC had ordered that buyers alone would bear the cost of the shortfall.

Instead of applying allocation principles that both FERC and the courts had applied before, FERC arbitrarily assigned responsibility for the $5 million in costs to buyers alone. *July 15, 2011 Order* at P 59, CPER00053-54. Its only reason for doing so was expediency. *Id.* That decision has no rational basis.

CONCLUSION

For the foregoing reasons, the Court should reverse and remand the determinations of FERC on the issues discussed above.

Respectfully submitted,

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RULE 25-5(f) ATTESTATION

In accordance with Circuit Rule 25-5(f), I hereby attest that all parties on whose behalf this brief is submitted concur in the brief's content.

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STATEMENT OF RELATED CASES

In accordance with Circuit Rule 28-2.6, joint petitioners state that there are a large number of Energy Crisis cases pending before this Court. These appeals are consolidated under lead Case No. 01-71934.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains 13,974 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 12, 2016. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that I have caused the foregoing to be electronically served by posting it to the FERC EL00-95 ListServ.

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STATUTORY ADDENDUM

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16 U.S.C. § 824d

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein

provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause" defined

(1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine--

(A) whether or not each such clause effectively provides incentives for

efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are--

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to--

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term "automatic adjustment clause" means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

16 U.S.C. § 824e

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date 60 days after the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the expiration of such 60-day period. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such

decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order the public utility to make refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided,* That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company" defined

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided,* That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended [15 U.S.C.A. § 79 et seq.].

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.