110 FERC ¶ 61,336
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, and Joseph T. Kelliher.

San Diego Gas & Electric Co., Complainant	EL00-95-120 EL00-95-123
v.	
Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange, Respondents	
Investigation of Practices of the California Independent System Operator and the California Power Exchange	EL00-98-107 EL00-98-110

ORDER ON REHEARING

(Issued March 24, 2005)

1. In this order, the Commission addresses requests for rehearing of the November 23 Order on Rehearing.[1] The instant order benefits customers by providing clarification of the method for calculating refunds for electricity purchases made in the organized spot markets in California during the period from October 2, 2000 through June 20, 2001 (the Refund Period).

[1] *See San Diego Gas & Electric Company, et al.*, 109 FERC ¶ 61,218 (2004) (the November 23 Order).

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I. Background and Pleadings on Rehearing

2. In the November 23 Order, the Commission addressed numerous requests for rehearing and/or clarification of the May 12 Order[2] in these proceedings. In turn, the May 12 Order addressed requests for rehearing and/or clarification of the October 16 Main Order.[3] The November 23 Order: (1) denied rehearing in part, granted rehearing in part and provided certain requested clarifications of the May 12 Order; (2) accepted the California Independent System Operator Corporation's (the CAISO/ CAISO) May 24 compliance filing;[4] (3) accepted compliance filings from Automated Power Exchange, Inc. (APX), the California Power Exchange Corporation (CalPX), the Western Area Power Administration (Western), and the Northern California Power Agency (NCPA); (4) directed the CalPX to file a proposed methodology and supporting documentation for allocating the CalPX interest shortfall[5] to participants; (5) accepted the June 1 Report of Arizona Electric Power Cooperative, Inc. (AEPCO); (6) granted a request to re-intervene by the Allegheny Energy Supply Company, LLC (AE Supply); (7) directed the CAISO to provide an explanation, as part of its December 2004 status report on the Refund Proceeding, of how it will incorporate the adjustments required for the multiple global settlements; (8) directed the CalPX to file its compliance filing no later than two weeks after the date that the CAISO's compliance filing is accepted by the Commission; and (9) directed APX to file its compliance filing no later than sixty days after the date that the CAISO's compliance filing is accepted by the Commission.

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[2] *See San Diego Gas & Electric Company, et al.*, 107 FERC ¶ 61,165 (2004) (the May 12 Order).

[3] *See San Diego Gas & Electric Company, et al.*, 105 FERC ¶ 61,066 (2003) (the October 16 Main Order).

[4] The May 12 Order directed the CAISO to provide a full explanation of the form and content of the emissions and fuel cost data it needs to complete its rerun process. On May 24, CAISO filed a report indicating the steps it intends to take to perform the recalculations that are required to implement the Commission's decision to allow recovery of emissions costs only for mitigated sales.

[5] The shortfall is the difference between the interest rate required by the Commission's regulations and the interest rate actually earned by the CalPX on monies held in the CalPX Settlement Trust Account.

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3. The Commission received nine timely requests for rehearing and/or clarification from the following: APX; the City of Los Angeles Department of Water and Power (LADWP); the City of Redding, California (Redding); Pacific Gas and Electric Company (PG&E); PPL Montana, LLC and PPL EnergyPlus, LLC (collectively PPL); the Public Utility District No. 2 of Grant County, Washington (Grant County); Puget Sound Energy, Inc. (Puget); Sempra Energy Trading Corp. (Sempra); and Turlock Irrigation District (Turlock).

4. The requests for rehearing and/or clarification focused mainly on the Commission's jurisdiction over transactions by Grant County, Turlock and other entities asserting that they are similarly situated. PG&E's request for rehearing largely tracks its comments on the CalPX filing made in compliance with the November 23 Order and will be discussed in the context of the Commission's determination on the compliance filing and the interest issues raised by commenters on the compliance filing. Finally, this order will address requests for rehearing and/or clarification that raise implementation or company-specific issues.

II. <u>The CalPX Compliance Filing and Pleadings</u>

5. The November 23 Order (Ordering Paragraph D) directed the CalPX to file, within fifteen days, its proposed methodology for allocating the CalPX interest shortfall among its participants. The CalPX submitted its compliance filing on December 8, 2004. The filing was noticed on January 18, 2005,[6] in Docket Nos. EL00-95-123 and EL00-98-110.

6. The following parties filed timely motions to intervene and comments:[7] the California Parties;[8] the City of Seattle, Washington (Seattle); NCPA; PG&E; Powerex; Reliant Energy Power Generation, Inc. and Reliant Energy Services, Inc. (collectively Reliant) and; Portland General Electric Company (Portland).

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[6] The filing was first noticed on January 14, 2005, in Docket Nos. EL00-95-000 and EL00-98-000. An errata notice was subsequently issued on January 18, 2005 in Docket Nos. EL00-95-123 and EL00-98-110.

[7] The City of Seattle, Washington (Seattle) filed a motion to intervene with no comments.

[8] The California Parties comprise the following: the People of the State of California *ex rel.* Bill Lockyer, Attorney General (the California Attorney General); the California Electricity Oversight Board (CEOB); the California Public Utilities Commission (CPUC); Southern California Edison Company (Edison); and PG&E.

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III. Interest Issues

A. Whether the Commission erred in determining that the CalPX interest shortfall (the difference between the interest rate required by the Commission's regulations and the interest rate actually earned by the CalPX on monies held in the CalPX Settlement Trust Account) should be allocated *pro rata* to all market participants.

Background

24. In the March 26 Refund Order,[9] the Commission adopted the presiding judge's Proposed Finding that interest on refunds as well as on unpaid balances would be calculated in the manner set out in section 35.19a of the Commission's regulations (the Commission's rate).[10] On rehearing, the California Parties sought clarification that buyers will not, under any circumstances, be required to pay greater interest than the Commission's interest rate. The Commission's October 16 Main Order granted this clarification.[11]

25. Subsequently, the May 12 Order determined that the CalPX's actual interest rate, which was lower than the Commission's rate, that applies to the CalPX Settlement Trust Account would comply with the Commission's regulations, specifically the Commission's rate. The Commission reasoned that the CalPX was no longer in operation and had only the CalPX Settlement Trust Account to pay its remaining obligations.[12] On rehearing, the California Generators,[13] the Competitive Supplier Group,[14] and El Paso

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[9] *See San Diego Gas & Electric Company, et al.* 101 FERC ¶ 61,317 (2003) (the March 26 Refund Order).

[10] 18 C.F.R. § 35.19a (2002). The Commission's interest rate is an average of the prime rate for each quarter. The quarterly interest rates are posted on the Commission's website at www.ferc.gov/gas/interest.htm.

[11] October 16 Main Order at P 109.

[12] May 12 Order at P 34.

[13] The California Generators comprise the following: Duke Energy North America, LLC, Duke Energy Trading and Marketing L.L.C. (collectively Duke); Dynegy Power Marketing, Inc. (Dynegy); El Segundo Power (El Segundo), LLC; Long Beach Generation, LLC (Long Beach); Cabrillo Power I LLC (Cabrillo I); Cabrillo Power II, LLC (Cabrillo ii); Reliant; Williams Power Company, Inc.; and Mirant Americas Energy Marketing, LP and Mirant California LLC (collectively Mirant).

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Merchant Energy L.P. sought clarification/rehearing asserting that the May 12 Order allocated the entire shortfall to the sellers, and that shortfalls resulting from the difference between the Commission's interest rate and the CalPX's Settlement Trust Account earned rate should be allocated fairly (*i.e.*, on a *pro rata* basis). The November 23 Order granted these requests. The Commission determined that the shortfall was attributable to the CalPX's actions (it did not earn the Commission's required rate), not primarily attributable to the buyers or sellers. Therefore, the Commission determined that both buyers and sellers should share the burden of the shortfall equally. The Commission reasoned that this treatment is similar to what the Commission required in the CAISO market, where the Commission found that both creditors and debtors alike should share the burden of the shortfalls when they occur for structural reasons that are not primarily attributable to either the creditors (those that the CAISO owes) or the debtors (those that owe the CAISO).[15] Additionally, the Commission required the CalPX to submit, within fifteen days, a methodology for allocating the interest shortfall equally among its participants.[16]

Comments

26. PG&E contends that the Commission should grant rehearing of the November 23 Order and require the CalPX to compute interest on refunds based upon the rate of interest that the CalPX actually earns in its escrow account.[17] It contends that: (1) the shortfall exists because the CalPX cannot earn the Commission's required rate on its escrow balances;[18] (2) allocating any of the shortfall to purchasers would violate the filed rate doctrine and the rule against retroactive ratemaking;[19] (3) the shortfall should be

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[14] The Competitive Supplier Group comprise the following: Avista Energy, Inc.; Constellation Power Source, Inc.; Coral Power, L.L.C.; Exelon Corp.; IDACORP Energy LP; PPL; LLC; Portland; Powerex Corp.; Puget; Sempra; TransAlta Energy Marketing (CA) Inc. and TransAlta Energy (US) Inc.; and Tucson Electric Power Company.

[15] The October 16 Main Order at P 105.

[16] The November 23 Order at P 34.

[17] PG&E at 5.

[18] *Id*. at 6.

[19] *Id*. at 7.

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allocated solely to net sellers; and,[20] (4) PG&E should be exempt from any shortfall allocation because it has not placed any funds into the CalPX escrow account on which any interest shortfall could accrue.[21]

27. PG&E disagrees with the Commission's assertion in the November 23 Order that the shortfall is attributable to the CalPX's actions. It argues that the shortfall exists because there is a difference between the interest rate the CalPX can earn on static account balances and the higher rate required by the Commission's regulations. PG&E contends that the CalPX could have taken no other action.[22]

28. PG&E also contends that the Commission's November 23 Order requires purchasers to pay a surcharge to fund the CalPX's interest shortfall. It argues that the surcharge is a retroactive tax assessed to purchasers simply because they were purchasers in the CalPX markets during the period of time to which the refunds relate. Therefore, the surcharge violates the filed rate doctrine and the rule against retroactive ratemaking.[23] PG&E further contends[24] that this surcharge is based upon past service and is analogous to the type of charge that the D.C. Circuit Court of Appeals recently decided upon in *Pacific Gas & Electric Co.*[25]

29. PG&E asserts that the entire shortfall should be borne by net sellers. It argues that assessing the shortfall solely to net sellers would not create the same legal infirmities that an allocation to consumers would raise. PG&E submits that the legal basis for allocating the entire shortfall to net sellers is that the Commission has recognized that the sellers bore most of the responsibility for the circumstances that led to these balances being held in trust by the CalPX.[26]

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[20] *Id*. at 8.

[21] *Id*. at 10.

[22] *Id*. at 6.

[23] *Id*. at 8.

[24] PG&E at 7-8.

[25] *Pacific Gas and Electric Co. v. FERC*, 373 F.3d 1315, 1320 (D.C. Cir. 2004) (*PG&E)*.

[26] PG&E at 8.

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30. Finally, PG&E states that it has placed approximately $1.6 billion, less amounts withdrawn pursuant to FERC-approved settlements, into a PG&E escrow account that is separate from the CalPX escrow account. PG&E contends that it will pay the Commission's rate on the funds in the PG&E escrow account, and thus, no shortfall will accrue on any portion of its funds. Therefore, PG&E submits that it should be excluded from any shortfall allocation relating to the CalPX escrow account. PG&E further contends that, if it had paid the balance of the funds it is holding in its escrow account to the CalPX, the shortfall in the CalPX to be spread among other parties would have been dramatically higher than the shortfall that will actually exist.

Commission Determination

31. With respect to PG&E's argument as to how the CalPX interest shortfall was created, the Commission's regulations require a specific rate of interest to be paid to participants for amounts owed, and the CalPX has not earned that rate on the participants' funds it is holding. The Commission is not questioning the prudence of CalPX's actions; rather, it is simply finding that the CalPX was in control of the funds, not the participants. For the time the CalPX has held the participants funds, it has not earned the Commission's required rate. No further clarification is needed.

32. PG&E relies on the D.C. Circuit Court's decision in *PG&E* to support its contention that allocating a portion of the CalPX interest shortfall to purchasers will violate the filed rate doctrine and rule against retroactive ratemaking. Its interpretation of the court's ruling in *PG&E* and its assertion that *PG&E* serves as precedent for the Commission's actions in the instant proceeding are incorrect. The facts in that case clearly are distinguishable from the instant case. In *PG&E*, the Commission had allocated CalPX's administrative wind-up costs based on balances PG&E incurred for previous transactions. The filed-rate doctrine "bars a regulated seller … from collecting a rate other than the one filed with the Commission and prevents the Commission itself from imposing a rate increase for [power] already sold."[27] The D.C. Circuit Court found that the wind-up charges amounted to a new charge to cover CalPX's new administrative costs based on prior transactions. In the instant case, the allocation of interest shortfalls is not a new charge but is the result of CalPX's failure to earn the Commission's required interest rate on monies held in escrow to provide compensation for services or power that have been rendered or provided but not paid for.

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[27] *PG&E* at 1319, *citing Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 (1981).

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33. Moreover, even assuming one could argue that the interest shortfall amounted to a new charge, the CAISO and CalPX participants have been on notice that rates were subject to change since August 23, 2000.[28] The Commission stated that the justness and reasonableness of the rates, charges, and practices of public utility sellers of wholesale power into the CAISO and CalPX markets, as well as the CAISO and CalPX tariffs, agreements and institutions were being set for hearing.[29] Furthermore, in the March 26 Order,[30] the Commission pointed out that it had reserved for itself the right to determine at a later date what to do regarding shortfalls resulting from applying section 35.19a interest[31] and explicitly stated that it was overriding both the CAISO and CalPX tariffs with regard to interest calculations on unpaid balances and refunds.[32]

34. PG&E's argument that allocating the entire shortfall to sellers would avoid raising the same legal infirmities that an allocation to purchasers would raise is not persuasive. Because the Commission has determined above that an allocation of the shortfall to all CalPX participants is appropriate and does not violate the filed rate doctrine or the rule against retroactive ratemaking, PG&E's argument has no merit.

35. PG&E's argument that the sellers were largely responsible for the circumstances that led to the CalPX holding balances in trust overlooks that fact that certain participants, such as PG&E, also contributed to those same circumstances by not paying the CalPX for invoiced services. At any rate, the Commission finds that the question of who contributed to the CalPX's bankruptcy and the participants' balances being held in trust by the CalPX is unrelated to the issues of how the interest shortfall was created and how it will be allocated.

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[28] *San Diego Gas & Electric Company*, 92 FERC ¶ 61,172 (Order initiating hearing proceedings to investigate justness and reasonableness of rates of public utility sellers in CAISO and CalPX markets and to investigate CAISO and CalPX tariffs, contracts, institutional structures and bylaws; and providing further guidance to California entities) (2000).

[29] *San Diego Gas & Electric Company*, 92 FERC ¶ 61,172 at Ordering Paragraph B.

[30] *San Diego Gas & Electric Company, et al.*, 102 FERC ¶ 61,317 (2003) (Order on Proposed Findings on Refund Liability) (the March 26 Order).

[31] *Id.* at P 136.

[32] *Id.* at P 142.

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36. Likewise, the Commission finds unavailing PG&E's argument that it should be exempted from the CalPX shortfall allocation because it has not yet paid any funds to the CalPX on which a shortfall may accrue but that it will eventually pay the CalPX at the Commission's rate. We find it is not a redundant charge. The Commission has determined that no participant will be excluded from funding the shortfall merely because it has withheld payment, but will eventually pay what it owes at the Commission's rate. Our orders have required that all participants will pay what they owe at the Commission's rate. In addition, PG&E will be allocated a share of the shortfall, as will all buyers and sellers. Accordingly, PG&E's request is denied.

B. CalPX Compliance Filing

37. In compliance with the November 23 Order, the CalPX submitted four methods for allocating the CalPX interest shortfall among its participants. The CalPX stated that all CalPX participants, except four, had both buy and sell transactions in the refund period. Therefore, in order to allocate the shortfall between buyers and sellers, as specified in the November 23 Order,[33] CalPX was required to devise methods of classification to define the parameters by which a party would be classified as either a buyer or a seller. The CalPX submitted the following methods:

A) a classification of buyers/sellers based on gross trading activity,
B) a classification of buyers/sellers based on net trading activity,
C) a classification of buyers/sellers based on final net interest position and,
D) a pooled allocation based on final net interest position.

38. Under Method A, a classification based upon gross trading activity, each participant's buy/sell trades from the refund period would be placed into one of two non-mutually exclusive categories, either the *buy* or the *sell* transaction category. Next, the total amount of the interest shortfall would be divided equally between the *buy* and *sell* transaction categories and then allocated to individual participants within each category based upon the absolute value of each participant's interest position.

39. Under Method B, a classification based upon net trading activity, all participants would be classified as either buyers or sellers based upon their final net megawatt hours trading and scheduling during the Refund Period. Each participant's buy/sell trades are netted and the participant is placed into the mutually exclusive category of either a net buyer or net seller. The interest shortfall would be divided equally between these two

[33] The November 23 Order at P 32.

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categories and then allocated to participants within each category, based upon the absolute value of each participant's net interest position.

40. Under Method C, a classification of buyers/sellers based upon final net interest position, buyers and sellers would essentially represent the final debtors (those that owe the CalPX) and creditors (those that are owed by the CalPX) with respect to the Settlement Clearing Account. A debtor that owes funds into the Settlement Account would be designated a buyer, and a creditor that is owed funds from the Settlement Account would be designated a seller. The interest shortfall would be divided equally between these two categories and then allocated based upon each participant's net interest position.

41. Under Method D, a pooled allocation based upon final net interest position, a share fraction would be derived based upon the absolute value of each participant's interest for its final account balances in relation to the total amount of the interest shortfall. The interest shortfall would then be allocated according to each participant's share fraction.

42. The CalPX states that methods A and B require classifications based upon trading activity, which is not necessarily related to the financial nature of interest.[34] In addition, Method C may result in inequities if a participant with a small balance is grouped with few other participants.[35] This would result in the small balance participant bearing responsibility for a substantial and potentially disproportionate share of the interest shortfall. The CalPX submits that Method D appears to be the most appropriate method of allocating the interest shortfall, because the interest is tied to the financial balances, it does not require classifying participants as either buyers or sellers, it provides balanced treatment for the participants, and it is simple to apply.[36]

43. In addition, the CalPX compliance filing provided the following information: (1) principal amounts owed to and from participants in the CalPX market during the refund period must be determined to calculate the interest amounts;[37] (2) these principal amounts must be paid to or from the Settlement Clearing Account in order to establish a

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[34] CalPX at 11.

[35] *Id.* at 8.

[36] *Id.* at 11.

[37] *Id.* at 2.

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date on which interest ceases to accrue, thus, the end of the financial phase of the Refund Proceeding is the appropriate time for the calculations of the interest to occur; and,[38] 3) CAISO balances will be included in the allocations.[39]

Comments

44. Generally, the commenting parties do not support either of the methods that are based upon trading activity (methods A and B), insisting that megawatt hours bought and sold have no relationship to the manner in which interest is calculated. In addition, some of the commenting parties contend that the two allocations based upon megawatt hours attempt to classify arbitrarily, in different ways, each market participant as either a buyer or a seller. No party supports using a classification based upon gross trading activity (Method A). Only Portland supports using a classification based upon net trading activity (Method B), but notes however, that the Commission recently rejected the concept of netting megawatt hours in allocating the generator fuel cost allowance claims.[40]

45. Portland submits that a classification of buyers and sellers based upon final net interest position (Method C), most closely resembles the CalPX's underlying market structure where interest actually accrues on invoiced account balances.[41] Reliant also prefers this third method; however, it asserts that payments in the CalPX were made by market,[42] and therefore, allocations should be performed for each market as well.[43]

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[38] *Id.* at 3.

[39] *Id.* at 3.

[40] Portland's December 23, 2004 filing at 2. Portland subsequently re-filed its comments on February 14, 2005 after the Commission issued a notice of the CalPX compliance filing.

[41] *Id.* at 2.

[42] Reliant does not provide specifics on this point, but it would appear to be referring to, for example, the day-ahead and real-time markets.

[43] Reliant's December 22, 2004 filing at 3. Reliant subsequently re-filed its comments on January 28, 2005 after the Commission issued a notice of the CalPX compliance filing.

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46. The California Parties agree with the CalPX that Method C could lead to inequitable results if a participant with a small balance is placed in a category that has only a few other participants.[44] In addition, California Parties assert that Method C arbitrarily classifies market participants as either a buyer or seller based upon their status as either a creditor or debtor. They argue that being a buyer does not necessarily correlate with being a debtor, nor does being a seller necessarily correlate to being a creditor.[45] In addition, Powerex contends that Method C is unacceptable because the account balances are not directly related to net amounts owed or owing after mitigation.[46]

47. The California Parties and NCPA agree with the CalPX that Method D, a pooled allocation based on final net interest position, appears to be the most equitable method of allocating the interest shortfall. This is because Method D recognizes that most participants were both buyers and sellers and it would avoid artificial classifications into mutually exclusive categories. In addition, they support Method D because it includes the CAISO's balances,[47] it is transparent for market participants and the Commission, and will minimize confusion and continued litigation at the compliance stage.[48]

48. Portland contends that Method D is inconsistent with the structure of the California market design and would assign payments and liabilities from the CalPX market based upon account activity in the CAISO market.[49] In addition, Reliant argues that this method would also disproportionately allocate a larger share of the interest shortfall to those market participants that are owed money by the CalPX because fewer participants owe money to the CalPX than are owed by the CalPX.[50] Powerex contends that this method is unacceptable because the account balances are not directly related to net amounts owed or owing after mitigation.

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[44] California Parties at 7.

[45] *Id.* at 7.

[46] Powerex at 4.

[47] California Parties *citing Pacific Gas and Electric Co. v. FERC*, 373 F.3d 1315, 1320 (D.C. Cir. 2004).

[48] California Parties at 3.

[49] Portland's December 23, 2004 filing at 3.

[50] Reliant's December 22, 2004 comments at 3.

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49. Powerex opposes all of the proposed allocation methods for the reasons outlined above. Instead, it advocates a methodology based upon the actual cash position of the market participants. Powerex proposes that the CalPX perform an allocation on a daily basis for the entire time period from which a default occurred until the date of the final financial settlement. In addition, Powerex and Portland assert that the Commission should hold a technical conference to allow parties to develop an allocation methodology for the CalPX interest shortfall given the level of complexity of the issue and the magnitude of funds at stake. [51]

50. In its comments on the CalPX compliance filing, PG&E once again asserts that it should receive special consideration given its unique situation, an argument also raised in its request for rehearing. PG&E asserts that it should be excluded from the allocation completely or receive a credit equal to the shortfall that has been avoided because PG&E is holding these funds separately from the CalPX account and will eventually pay what it owes the CalPX in full at the Commission's rate.

51. The California Parties and Reliant request more information detailing exactly when the interest shortfall allocation will occur. The California Parties specifically request that the Commission require the CalPX to clarify whether the interest shortfall allocation would occur before or after the emissions credits and fuel cost allowance offsets occur, how interest will be calculated with respect to settlement distributions from the CalPX that have already occurred, what impact that arises with respect to portfolio based cost filings, and requests more detailed examples with regard to the actual implementation of the CalPX's proposed methods.[52]

Commission Determination

52. The CalPX proposed to allocate the shortfall using four possible methods, two of which were based upon megawatt hours traded. The Commission agrees with the commenting parties and the CalPX that megawatt hours traded does not necessarily correlate to the manner in which interest is calculated, and therefore, the method of classifying participants as either buyers or sellers is somewhat arbitrary. Accordingly, the Commission will not adopt either of these methods.

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[51] The CalPX estimates that the shortfall is about $138 million. CalPX at 2.

[52] California Parties at 8.

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53. With respect to Method C, the Commission agrees with the California Parties that this method is arbitrary in that it classifies parties as either buyers or sellers based upon their status as creditors and debtors, and that the manner in which these classifications correlate to the debtor/creditor status is uncertain. Additionally, the potential exists for a participant with a small account balance to be placed in a category with few other participants leading to a disproportionate allocation of the interest shortfall. Accordingly, the Commission will not adopt this method.

54. With respect to Method D and Portland's contention that applying this method would alter the markets by intermingling account activities between the CalPX and CAISO markets, the Commission disagrees. The CAISO is both a creditor and a debtor in the CalPX market, and therefore, should be treated similarly to the other creditors and debtors. Accordingly, the CAISO's account balances will be included in the interest shortfall allocation.

55. The Commission acknowledges Reliant's assertion that utilizing Method D will result in a larger share of the interest shortfall being allocated to those participants that are owed money from the CalPX. There is no way to ensure absolutely a perfectly equal allocation. Nevertheless, the shortfall will be allocated in such a way as to treat all parties equally to the greatest extent possible.

56. The Commission agrees with the assessment by the California Parties, CalPX, and NCPA that Method D is the most equitable method for calculating the shortfall. It recognizes that most participants were both buyers and sellers, and this method avoids the artificial classifications inherent in the other options suggested by CalPX. In addition, the method is transparent, simple to apply, and therefore, its application should reduce further litigation. Accordingly, the Commission adopts Method D.

57. The Commission is not persuaded to adopt Powerex's proposal to have cash balances calculated for each participant, on a daily basis, for the entire refund period. This would add an unnecessary level of complexity to an already complex proceeding resulting in further litigation. In addition, Powerex has not shown that this proposed methodology would result in equitable treatment for all parties. Accordingly, this request is denied.

58. Powerex and Portland have requested that the Commission hold a technical conference to explore allocation methodologies; however, they have not presented any substantive information that would lead us to believe the conference would be productive. Accordingly, the Commission denies this request. While we are denying the request for a technical conference to develop further allocation methodologies, we do encourage parties to continue seeking mutually satisfactory methodologies in

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negotiations among themselves. In essence, we are suggesting that a settlement, rather than a Commission order, may yield the best methodology, for allocating the shortfall.

59. PG&E's request in its comments on the CalPX compliance filing to receive a credit equivalent to the amount of the avoided shortfall[53] is the only request raised and not addressed above.[54] In essence, PG&E is asking the Commission to reward it for not paying its bills in a timely fashion. The Commission finds no merit in PG&E's request. Accordingly, PG&E's request is denied.

60. The Commission denies the requests by the California Parties and Reliant for further information from the CalPX concerning exactly when the shortfall allocation will occur. The CalPX clearly stated that it would occur at the end of the financial phase of the refund proceeding.[55] No further clarification is needed.

61. With respect to the California Parties' request that the Commission require the CalPX to clarify whether the interest shortfall allocation would occur prior to, or after the emissions credits and fuel cost allowance offsets occur, the Commission has previously found that the fuel cost allowance and emissions credits would be offset against participants' refund liability.[56] Consistent with that, the CalPX compliance filing also indicated that all amounts owed to and from participants in the CalPX market during the refund period must be determined prior to calculating the associated interest amounts and the corresponding shortfall.[57] Therefore, the interest allocation will occur after the fuel cost allowance and the emissions offsets have been included in the participants' balances.

62. With respect to the California Parties' requests that: (1) the CalPX clarify how

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[53] PG&E defines this as the amount of interest that would have accrued on PG&E's balances if it had actually paid the CalPX.

[54] The majority of PG&E's arguments concerning the shortfall were addressed above in the context of its rehearing request. Accordingly, the Commission will not address them here.

[55] CalPX at 3.

[56] October 16 Order at P 180.

[57] CalPX at 2.

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interest will be calculated with regard to settlement distributions; (2) the CalPX address what impact may arise as a result of portfolio-based cost filings; and, (3) the CalPX provide more detailed examples of the its proposed allocation methods, the Commission denies these requests. How interest will be calculated on settlement distributions is a separate issue from how the interest shortfall will be allocated. Impacts that may arise because of portfolio-based cost filings are also a separate issue from how the shortfall is allocated. Also, the California Parties' request for more detailed examples is vague. They have not specified what "more" they are looking for, nor have they justified the request. Accordingly, those requests are denied.

IV. Jurisdictional Status of Transactions by Grant County and Turlock

A. Whether the Grant County/Turlock transactions were bilateral transactions and therefore not subject to mitigation or were OOM transactions and thus subject to mitigation.

63. Grant County and Turlock continue to assert that their transactions with the CAISO during the Refund Period were individually negotiated bilateral transactions, and not OOM transactions.[58] Therefore, both parties assert that their transactions are not subject to mitigation. Grant County and Turlock also continue to press the position that neither was on notice that their transactions were under the CAISO Tariff or would be considered jurisdictional,[59] and Turlock asserts that it did not agree to be bound by the CAISO Tariff or Operating Procedure S-318.[60]

64. Other governmental entities echo the jurisdictional challenges proffered by Grant County and Turlock.[61] Likewise, Sempra, PPL and Puget take the same position with respect to their transactions with the CAISO. Several commenters allege that the Commission has either broadened the definition of what constitutes an OOM transaction[62] or has adopted a new definition of the term.[63] Another challenge to the

[58] Grant County at 2-6; Turlock at 16-17.

[59] Grant County at 5-6; Turlock at 18.

[60] Turlock at 9, 12, 16, 17.

[61] LADWP at 5; Redding at 5.

[62] Grant County at 4-5.

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November 23 Order is that the Commission's "new" definition of OOM results in a retroactive amendment of the CAISO Tariff in violation of the filed rate doctrine.[64]

65. Puget asserts that the Commission erred in determining that Grant County's transactions with the CAISO could not have been governed by the Western System Power Pool Agreement, as Grant County has previously asserted,[65] because the CAISO was not a member.[66] Although Grant County does not concede that its transactions took place under the CAISO Tariff,[67] it does not pursue this position on rehearing. As if to prove that the Grant County transactions did take place under the Western System Power Pool Agreement, Puget asserts that "it has long been recognized that the WSPP Agreement is available for use by members and non-members alike."[68] Puget cites a series of changes to the Western System Power Pool Agreement pending Commission approval in Docket No. ER05-284-000 as further support that one does not have to be a member for transactions to take place under the Western System Power Pool Agreement.[69]

Commission Determination

66. The Commission finds the arguments raised on rehearing unavailing. The

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[63] PPL at 3; Redding at 5; Sempra at 3-4; Turlock at 6-7.

[64] LADWP at 7.

[65] Grant County made this assertion in the Direct Testimony of Tim Culbertson on Phase 2 Issues, Exh. No. GPC-1 at 5:16-17. Grant County did not pursue this assertion in its brief in response to the May 12 Order or on rehearing of that order or the November 23 Order.

[66] November 23 Order at n.96.

[67] Grant County at 4 n.1.

[68] Puget at 3.

[69] *Id.*

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Commission's November 23 Order did not adopt a "new" definition of OOM. Rather, the Commission examined briefs filed by the parties, evidence from the hearing transcripts, and evidence previously ordered stricken from the record of the hearing by the administrative law judge, to determine that the transactions were appropriately classified as OOM transactions, subject to mitigation and refund liability. The transactions at issue were OOM transactions; *i.e.*, they were spot transactions made outside the CAISO organized markets with non-Participating Generator Agreement generators pursuant to CAISO Tariff section 2.3.5.1.5 to support the reliability of the grid.

67. Arguments that the parties had no notice that their transactions might be considered OOM transactions thereby resulting in refund liability are similarly unpersuasive. Considerable debate over the characterization of these transactions permeates the record of this proceeding. It is simply disingenuous to assert, as did Turlock, that "the Commission did not give any notice of its intent to assert FPA § 206 refund jurisdiction over such sales until the November 23rd Order."[70] Nor does the Commission's determination that these transactions are subject to mitigation and refund liability constitute an amendment to the CAISO Tariff, resulting in retroactive ratemaking and a violation of the filed rate doctrine. Rather, the Commission's determination is founded on its conclusion that the Grant County transactions were made pursuant to the specific terms of the CAISO Tariff.

68. Finally, Puget seeks to support its argument that the transactions at issue were made under the Western System Power Pool Agreement by referring to proposed amendments to that Agreement pending in Docket No. ER05-284-000. While the Commission will not address the merits of that proposal, we question as to whether Puget's reference to that proceeding supports its argument. If the purpose of those proposed amendments is to make it clear that one does not have to be a member for transactions to be covered by the Agreement, then the language of the Agreement may not be as clear as Puget asserts. Accordingly, while the Commission takes no position on the merits of matters pending in Docket No. ER05-284-000, Puget's reliance on that proceeding appears to be misplaced in the context of the instant proceeding.

69. For the reasons set forth above, the Commission denies rehearing and finds that the transactions at issue are properly classified as OOM transactions.

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[70] Turlock at 18.

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B. Whether the obligation to pay for OOM transactions rests with the Scheduling Coordinators or with the CAISO.

70. Grant County and Turlock seek rehearing of the Commission's determination concerning with whom the obligation to pay for OOM transactions rests.[71] The November 23 Order determined that the CAISO Tariff authorizes but does not require the CAISO to seek payment from recalcitrant Scheduling Coordinators on behalf of sellers of energy.[72] On rehearing, Grant County and Turlock complain that the Commission's determination on this issue will result in their not being compensated for their transactions. According to Turlock, the November 23 Order determined "that the [CA]ISO has no responsibility for compensating sellers for the energy it procures for its market."[73]

Commission Determination

71. The Commission's determination in the November 23 Order addressed only whether the CAISO *was obligated* by its tariff to seek payment from Scheduling Coordinators *on behalf of* entities such as Grant County and Turlock. The Commission did not address, nor did it believe it was being asked to address, whether Grant County and Turlock *would be* compensated for their transactions. Clearly, the obligation rests with the entities upon whose behalf the CAISO purchased power, and nothing in the Commission's November 23 Order alters this obligation. Therefore, the Commission will deny rehearing on this issue.

V. Implementation Issues Raised by AE Supply and APX

[71] Grant County at 6–12; Turlock at 19-21.

[72] November 23 Order at P 72.

[73] Grant County at 6.

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A. Whether the November 23 Order provided sufficient clarification regarding APX's compliance filing.

72. APX asserts that the November 23 Order did not address its request for clarification that APX be directed to submit its compliance filing no later than 60 days after the Commission accepts the CalPX final compliance filing.[74]

Commission Determination

73. In response to a number of rehearing requests, including APX's, the November 23 Order directed CalPX to submit a compliance filing no later than two weeks after the Commission accepts the CAISO's compliance filing, and it directed APX to submit its compliance filing no later than 60 days following the Commission's acceptance of the CAISO's compliance filing. APX asserted that it requires time to evaluate the CalPX compliance filing in order to make its own compliance filing. On rehearing, APX asks that the Commission require it to submit its compliance filing a full 60 days after the Commission accepts the CalPX compliance filing. The Commission agrees that APX may have the additional time it is seeking and therefore directs that APX submit its compliance filing no later than 60 days after the Commission accepts the CalPX compliance filing.

B. Whether the Commission erred in describing APX as a Jurisdictional Scheduling Coordinator

74. APX takes issue with the Commission's description of APX as a "jurisdictional Scheduling Coordinator."[75] APX states that this phrase could be interpreted to support a finding that APX is a "public utility." APX states that "if the phrase is intended to convey that APX is subject to the Commission's jurisdiction under the FPA in its role as a Scheduling Coordinator, which is separate and distinct from APX's role as an operator of a power exchange, then APX seeks rehearing.[76] In response, AE Supply asserts that

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[74] APX at 2-3. APX correctly notes that the Commission did not list its request for rehearing when listing those who filed request for rehearing of the Commission's May 12 Order. However, the Commission's discussion of the timing of APX's compliance filing acknowledges APX's timely-filed rehearing request and addresses the issues raised by APX on rehearing.

[75] APX at 4.

[76] *Id*.

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the Commission's characterization of APX as a jurisdictional Scheduling Coordinator is correct[77] and that, in fact, APX is a "public utility," because it has filed with the Commission contracts and tariff provisions applicable to its Scheduling Coordinator services.[78]

Commission Determination

75. The Commission has previously determined that the provision of Scheduling Coordinator services is a jurisdictional activity, a determination recently reaffirmed in a December 30, 2004 order in *Pacific Gas and Electric Company*.[79] APX's concern with the phrase "jurisdictional Scheduling Coordinator" is therefore moot, and the Commission will deny its request for rehearing on this issue.

C. Whether the Commission erred in allowing AE Supply to re-intervene and whether the scope of AE Supply's re-intervention requires for the limited purposes outlined in the November 23 Order requires intervention.

76. The November 23 Order granted AE Supply's request that it be allowed to re-intervene in these proceedings, despite the fact that AE Supply previously had withdrawn from the proceedings following the ALJ's initial decision. On rehearing, APX seeks clarification that AE Supply's re-intervention is solely for the purpose of participating in settlement discussions.[80] AE Supply filed an answer to APX's rehearing request, asserting that the limitation to its participation advocated by APX would put it in the position of being a "mere spectator" in settlement discussions. Without the ability to reject a settlement and seek judicial review of a liability determination, there would be no point in AE Supply's participation in settlement discussions.[81]

Commission Determination

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[77] AE Supply at 4.

[78] *Id.* at 5.

[79] 109 FERC ¶ 61,392, at P 56 (2004).

[80] APX at 3.

[81] AE Supply at 3.

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77. The Commission's November 23 Order clearly outlined the extent to which AE Supply is being allowed to re-intervene, based on its determination that there is merit to allowing AE Supply to participate in ongoing settlement discussions.[82] In no way did the Commission intend that AE Supply's prospective participation would involve re-litigation of its refund liability, which the Commission has established already. AE Supply must accept the record as it stands, including the Commission's refund liability determinations. AE Supply may legitimately dispute the *amount* of that refund liability, but it may not dispute the issue of *whether* it is liable for refunds.

D. Whether the Commission should clarify the manner in which disputes over the CalPX's data in its refund calculations will be resolved.

78. APX's request for rehearing asks that the Commission address the issue of how disputes over data from the CalPX refund calculations that APX forwards to the market participants behind APX will be resolved, either under the APX contract or under by the Commission in the context of comments on the APX compliance filing.[83] APX asserts that it sought rehearing of the May 12 Order on this issue, but that the November 23 Order did not address its rehearing request. Specifically, APX is concerned that disputes over data will be required to be resolved under the APX contract, which has a dispute resolution process that may take longer than the 60 days allotted for APX to review and disseminate to its participants data from the CalPX compliance filing, resolve any disputes with its 37 market participants, and file its compliance report with the Commission.

Commission Determination

79. The Commission's November 23 Order addressed the reconciliation and dispute resolution process Scheduling Coordinators will employ following the Commission's acceptance of the CAISO's compliance filing. The November 23 Order found that two weeks was sufficient time for Scheduling Coordinators to complete reconciliation and dispute resolution before making their own compliance filings with the Commission.[84] Thus, the Commission expects that Scheduling Coordinators will work within their own dispute resolution processes within the timeframe allotted and meet the two-week filing

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[82] November 23 Order at P 102.

[83] APX at 5-6.

[84] *Id.*at P 88.

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deadline. The November 23 Order did not, however, address this process issue with respect to the CalPX compliance filing, which is an essential source of data for APX and its market participants. Therefore, the Commission clarifies that APX's reconciliation and dispute resolution process should be employed in such a manner as to ensure that APX will be able to file its compliance filing with the Commission within 60 days of the Commission's acceptance of the CalPX compliance filing.

The Commission orders:

(A) The Commission hereby denies rehearing as discussed in the body of this order.

(B) The Commission provides clarifications as discussed in the body of this order.

(C) The Commission accepts the CalPX's December 8 compliance filing and adopts Method D, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.