171 FERC ¶ 61,109
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick, Bernard L. McNamee,
and James P. Danly.

California Independent System Operator Corporation	Docket Nos. ER04-835-011
Pacific Gas and Electric Company	EL04-103-006 (Consolidated)
v.	
California Independent System Operator Corporation	
The Alliance for Retail Energy Markets Shell Energy North America (US), L.P.	EL14-67-002
v.	
California Independent System Operator Corporation	

ORDER DENYING REHEARING

(Issued May 8, 2020)

1. The Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California (collectively, Six Cities); Powerex Corp. (Powerex); and Shell Energy North America (US), L.P. and the Alliance for Retail Energy Markets (collectively, the Coalition) seek rehearing of the Commission's August 28, 2019 order[1] that grants rehearing, in part, dismisses rehearing, in part, and denies clarification of the Commission's earlier order on rehearing and clarification.[2] The October 2016 Order rejected an informational refund report (Refund Report) filed in Docket Nos. ER04-835-

[1] *Cal. Indep. Sys. Operator Corp.*, 168 FERC ¶ 61,127 (2019) (August 2019 Order).

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

000 and EL04-103-000 that dealt with market resettlements the California Independent System Operator Corporation (CAISO) intended to administer as a result of the Commission's orders accepting Amendment No. 60, CAISO's proposed cost allocation for its must-offer generation requirement under its open access transmission tariff (Tariff).[3] In the August 2019 Order, the Commission accepted the Refund Report and ordered that interest be applied to the resettlements. In this order, we deny rehearing.

I. Background

A. Amendment No. 60

2. The origins of this proceeding date back to CAISO's May 2004 filing of Amendment No. 60, which proposed, among other changes, to allocate must-offer generation costs using a "bucket" rate design. This method was intended to reflect cost causation principles more closely by allocating minimum load compensation costs to one of three buckets based on whether CAISO committed generation primarily to satisfy local, zonal, or system reliability requirements.[4] The Commission accepted CAISO's filing subject to refund,[5] and following an evidentiary hearing on the proposed cost allocation provisions (which was consolidated with a complaint filed by Pacific Gas and Electric Company regarding the allocation of must-offer generation costs under CAISO's then-effective Tariff provisions), the presiding judge accepted the cost allocation provisions, subject to certain exceptions.[6] The Commission largely affirmed the presiding judge's Initial Decision in December 2006.[7] In a November 2007 rehearing order,[8] however, the Commission reversed its initial finding with respect to the classification of one transmission path, granting rehearing to find that the South of Lugo

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

[4] *See* October 2016 Order, 157 FERC ¶ 61,033 at P 2.

[5] *Cal. Indep. Sys. Operator Corp.*, 108 FERC ¶ 61,022 (2004) (2004 Order).

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

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

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

path was more appropriately classified as a zonal, rather than a local, constraint due to its operational characteristics.[9]

3. In 2009, while rehearing of the 2007 Rehearing Order was pending, CAISO's new Market Redesign and Technology Upgrade regime superseded the existing must-offer regime. The Commission denied rehearing of the 2007 Rehearing Order in September 2011,[10] and the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) ultimately affirmed the Commission's reclassification of South of Lugo in November 2013.[11]

4. The following month, CAISO filed the Refund Report "to provide transparency to interested parties" regarding resettlements it intended to make in compliance with the orders in this proceeding.[12] The Coalition protested the Refund Report on the basis that the Commission had not ordered refunds and that the resettlements included impermissible retroactive surcharges. The Coalition and Six Cities also protested CAISO's application of interest to the resettlements.

B. October 2016 Order

5. In the October 2016 Order, the Commission rejected the Refund Report as "procedurally deficient," finding that it had not directed CAISO to pay refunds or to file a refund report for the period from July 2004 through December 2007, i.e., the period from the effective date established for the consolidated Amendment No. 60 filing and complaint proceeding until the time CAISO began implementing the revised cost allocation directed by the Commission, including the South of Lugo classification established in the 2007 Rehearing Order.[13] The Commission explained that declining to order refunds in this proceeding was "consistent with its general policy of not requiring

[9] *Id*. PP 21, 25.

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

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

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

[13] October 2016 Order, 157 FERC ¶ 61,033 at PP 27-28.

refunds in cost allocation cases."[14] In light of these findings, the Commission dismissed arguments related to whether interest should be applied to the resettlements as moot.[15]

C. August 2019 Order

6. In the August 2019 Order, the Commission granted rehearing of the October 2016 Order, in part, and reversed its prior rejection of the Refund Report. The Commission continued to find that it had not ordered refunds, although it stated that past orders in this proceeding contained language that it "acknowledged . . . could reasonably have been read to create the expectation that refunds would be rewarded."[16] However, the Commission disagreed that it had "expressly directed refunds."[17]

7. The Commission went on to find that it was appropriate for CAISO to administer market resettlements as a result of the Commission's final orders on Amendment No. 60. The Commission stated that in light of the equities involved, CAISO reasonably determined that it would be fundamentally unfair for a single load-serving entity (LSE) to bear full responsibility for costs that should have been allocated zonally and that, as a not-for-profit entity, CAISO has authority to collect refunds from parties that should have paid the amounts in question if the just and reasonable methodology had been in effect from the start.[18]

8. The Commission found that the particular facts in this proceeding, considered as a whole, support CAISO's issuance of refunds of must-offer generation costs to customers who paid too much under the cost allocation method found to be unjust and unreasonable, even if it was necessary that those refunds were implemented through surcharges on customers who paid too little. The Commission explained that it had declined to order refunds in the October 2016 Order because it was concerned about its legal authority to authorize CAISO, as a not-for-profit corporation, to obtain those funds through surcharges on those customers who received too large an allocation of credits.[19] However, the Commission found that, in light of recent court decisions, refunds and

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[14] *Id*. P 28.

[15] *Id.* P 33.

[16] August 2019 Order, 168 FERC ¶ 61,127 at P 24.

[17] *Id*.

[18] *Id.* P 12.

[19] *Id.* P 19 (citing October 2016 Order, 157 FERC ¶ 61,033 at PP 29-30 (citing *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 155 FERC ¶ 61,120, at P 25 (2016) (Entergy Remand Order)).

surcharges were appropriate under the circumstances.[20] The Commission stated that refunds here did not raise the two primary concerns that underlie the Commission's general policy of not ordering refunds in cost allocation and rate design cases, i.e., (1) "the unfairness that results from retroactive implementation of a new rate for both utilities and customers who cannot alter their past action in light of that new rate;" and (2) "the potential for under-recovery."[21]

9. The Commission also found that the relief it was approving was necessary to redress the inequitable treatment caused by its legal error in accepting an unjust and unreasonable cost allocation.[22] Finally, the Commission found that interest should be applied to the resettlements.[23]

D. Requests for Rehearing

10. The Coalition, Powerex, and Six Cities all argue that the Commission lacks jurisdiction to authorize the refunds it approved in the August 2019 Order because in doing so, the Commission reopened and fundamentally altered a final Commission order that was upheld on judicial review. They state that section 313(b) of the Federal Power Act[24] (FPA) provides that once a petition for review of a final Commission order and the Commission's record of the proceeding is filed at the court of appeals, the court obtains exclusive jurisdiction over the matter. The court's decision becomes final, subject only to review by the Supreme Court. The Coalition, Powerex, and Six Cities assert that because the Commission stated that it did not award refunds in the 2007 Rehearing Order or the 2011 Rehearing Order, and because these orders became unreviewable when the court denied Six Cities' petition for review and affirmed these orders without remand in *City of Anaheim*, the Commission lost all jurisdiction to modify these orders and authorize refunds.[25] The Coalition, Powerex, and Six Cities cite the D.C. Circuit's decision in *Hirschey v. FERC*[26] as support for their argument.

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[20] *Id.* P 19 (citing *Verso Corp. v. FERC*, 898 F.3d 1 (D.C. Cir. 2018) (*Verso*)).

[21] *Id.* P 20 (quoting Entergy Remand Order, 155 FERC ¶ 61,120 at P 30).

[22] *Id.* P 23.

[23] *Id.* P 29.

[24] 16 U.S.C. § 313(b) (2018).

[25] Coalition Rehearing Request at 9-11; Powerex Rehearing Request at 10-11; Six Cities Rehearing Request at 8-9.

[26] 701 F.2d 215 (D.C. Cir. 1983) (*Hirschey*).

11. The Coalition and Powerex argue that CAISO has no authority under its Tariff to make refunds where the Commission has not ordered them but concludes that it is reasonable to do so.[27] The Coalition notes that when the Commission orders refunds, its normal practice is to specify that the refunds be made within a specific time, which the Commission did not do here. The Coalition also argues that the Commission does not explain how the Refund Report could go from being procedurally deficient and untied to any compliance directive to being acceptable.[28]

12. Powerex states that the Commission incorrectly asserted in the August 2019 Order that it is not engaging in retroactive ratemaking here and that the Commission misread the precedent it relied on in making this assertion, i.e. *Verso*.[29] Powerex states the Commission incorrectly focused only on the revenue requirement of generators that were dispatched out-of-market, and it ignored the rates that market participants paid. Powerex states that it was assessed substantial amounts in the resettlement process based on its transactions in CAISO markets, and this was a retroactive rate increase. Powerex argues that *Verso* does not support the Commission's action because, in *Verso*, individual market participants were not assessed refunds and surcharges based on individual transactions. Instead, the reallocation in *Verso* was based on benefits that LSEs received from a System Support Resource relative to the benefits other LSEs received within the market.[30]

13. The Coalition disputes the Commission's finding that it erred in accepting an unjust and unreasonable cost allocation, which resulted in inequitable treatment that justified both refunds and surcharges. The Coalition maintains that all the Commission did was to permit rates to become effective subject to refund, and this is not legal error. The Coalition argues that absent legal error, the Commission's finding in the October 2016 Order that it was inequitable to impose additional charges on customers who were not responsible for the unjust and unreasonable cost allocation that the Commission initially accepted, and then later modified, should continue to apply.[31]

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[27] Coalition Rehearing Request at 13-15; Powerex Rehearing Request at 8-9.

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

[29] Powerex Rehearing Request at 13.

[30] *Id.* at 13-14.

[31] Coalition Rehearing Request at 12-13 (citing October 2016 Order, 157 FERC ¶ 61,033 at P 31).

14. Powerex states that acceptance of the Refund Report exceeds the Commission's authority under FPA section 206[32] to award refunds because it exceeds the maximum 15-month refund period that section 206 authorizes. Powerex states that even if the Commission has power to direct retroactive surcharges, any directive to resettle markets must be limited to 15 months.[33] The Coalition also argues that any refunds are limited by statute to a period of 15 months from the refund effective date established under section 206.[34]

15. Powerex states that the Commission erred in finding that refunds are necessary to ensure equity because the Commission failed to consider or evaluate meaningfully the equities involved. Powerex disputes the equitable factors that the Commission relied on, i.e., the reliance interests of the parties and the potential for under-recovery. Powerex disagrees with the Commission that neither CAISO nor any market participant made economic decisions based on the allocation of must-offer generation costs. Powerex states that the Commission's assertion that market participants do not consider the allocation of uplift payments when transacting in the CAISO markets lacks factual support, and the Commission has repeatedly recognized that the opposite is true.[35]

16. Powerex also disputes the Commission's finding that there is no potential for under-recovery on the grounds that the Commission simply assumes that market participants assessed surcharges were able to pass the costs to their customers. Powerex also disputes that the limited number of market participants involved supported the conclusion that there was no risk of under-recovery. Powerex states that contrary to the Commission's assertion, the resettlement process was not limited to reallocating costs between LSEs in a single zone within CAISO because non-LSEs were also assessed surcharges.[36]

17. Powerex states that the Commission failed in the August 2019 Order to address substantive concerns about the accuracy and transparency of CAISO's resettlement process. Powerex states that if the resettlement process is upheld, market participants must receive the information needed to verify that the amounts they have been assessed are correct, and they must have a reasonable opportunity to dispute the accuracy of these

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[32] 16 U.S.C. § 824e (2018).

[33] Powerex Rehearing Request at 14-15.

[34] Coalition Rehearing Request at 11-12.

[35] Powerex Rehearing Request at 16-17.

[36] *Id.* at 18-20.

charges.[37] The Coalition states that the Commission has failed to ensure that the Refund Report is accurate, and the Commission has failed to address multiple filings that contested the Refund Report when it was filed.[38]

18. Powerex states that the Commission did not provide a reasoned basis for requiring interest on surcharges, and it ignored evidence demonstrating that the payment of interest is inequitable here. Powerex states that collecting interest is inequitable when market participants are unable to verify the accuracy of the initial charges assessed and when they are not responsible for the significant delays in the proceeding. Powerex also states that the Commission's statement that interest is simply a way of ensuring full compensation is not a satisfactory basis for awarding interest, and the cases the Commission cites do not support that position.[39]

19. The Coalition states that the Commission ignored its argument that the CAISO Tariff does not provide for interest in resettlements of the type at issue here. It also states that the Commission ignored its arguments demonstrating that CAISO's delay in resettling the market and billing the resulting reallocations makes awarding interest inequitable.[40] Six Cities also state that delays in implementing refunds and surcharges are an equitable basis for denying interest.[41]

20. Six Cities state that the 2007 Rehearing Order does not mention interest, and parties cannot seek interest after the 2007 and 2011 Rehearing Orders have become final and unreviewable.[42] Six Cities also state that if parties that believed interest should be paid, they could have requested rehearing and/or clarification, making it unfair to grant interest at this point. According to Six Cities, requests for interest at this point constitute impermissible late rehearing requests.[43]

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[37] *Id.* 21-22.

[38] Coalition Rehearing Request at 16-17.

[39] Powerex Rehearing Request at 23-24.

[40] Coalition Rehearing Request at 19-21.

[41] Six Cities Rehearing Request at 14-15.

[42] *Id.* at 12-13.

[43] *Id.*

II. Commission Determination

A. Refunds

21. We deny rehearing. All parties seeking rehearing maintain that once the Commission filed the record of this proceeding with the D.C. Circuit, it lost jurisdiction to order relief differing from that awarded in the 2007 and 2011 Rehearing Orders. But, as discussed below, the relief directed in the 2007 and 2011 Rehearing Orders is the relief that we affirm in this order. Consequently, the relief we affirm in this order was part of the record that the Commission filed at the D.C. Circuit. However, the Commission acknowledges that its reading of the 2007 and 2011 Rehearing Orders in the interim, i.e., in the October 2016 and the August 2019 Orders, does not properly reflect that fact. In reevaluating the August 2019 Order, we acknowledge that the Commission did not provide a correct reading of the 2007 Rehearing Order in the October 2016 and August 2019 Orders. As discussed more fully below, a correct reading of the 2007 Rehearing Order indicates that the Commission did in fact order refunds. Although the August 2019 Order misread the 2007 Order, it ultimately ordered the same relief, i.e., refunds to correct the misallocation of must-offer costs as found in the 2007 Rehearing Order and affirmed in the 2011 Rehearing Order. In this order, we correct the August 2019 Order's erroneous statement concerning the 2007 Rehearing Order, but we ultimately affirm the August 2019 Order's decision to require that refunds be paid—again, the same relief ordered in the 2007 Rehearing Order. Thus, while the August 2019 Order incorrectly reads the 2007 Rehearing Order, the relief approved there is within the Commission's jurisdiction.

22. The Commission acknowledged in the August 2019 Order "that certain statements in this proceeding could reasonably have been read to create the expectation that refunds would be ordered."[44] A closer reading of these statements by the Commission from earlier orders in this proceeding demonstrates that this expectation has a clear factual basis because, in substance, the statements show that the Commission ordered refunds. This conclusion emerges from a brief recounting of statements in the Commission orders.

23. The Commission stated in the 2007 Rehearing Order that "the question before us now is not the date that was earlier established as the refund effective date from which the Commission *could* order refunds, but rather what *should* be ordered (i.e., when refunds should begin)."[45] In that closing parenthetical, the Commission made clear that the question it was considering was what refunds to order, not whether to order refunds at all. The Commission ultimately found that the starting date for all refunds should be

[44] August 2019 Order, 168 FERC ¶ 61,127 at P 24.

[45] 2007 Rehearing Order, 121 FERC ¶ 61,193 at P 79 (emphasis in original).

July 17, 2004.[46] The Commission went on to state in the 2007 Rehearing Order that "[w]e continue to find that refunds for the proposed allocation of must-offer related charges under Amendment No. 60 should be ordered beginning July 17, 2004."[47] The Commission also stated that the same date should apply to refunds of the net incremental cost of local charges, and it stated that "*we . . . order refunds* from July 17, 2004 for the net incremental cost of local methodology and direct the CAISO to use its proposed proxy incremental cost of local methodology from July 17, 2004 through September 30, 2004."[48] In short, we conclude that the correct interpretation of these statements is that the Commission in fact *ordered* refunds and do not merely create a possible expectation that refunds would be ordered. No party sought rehearing on the Commission's findings regarding refunds in the 2007 Rehearing Order, and those findings were thus affirmed in the 2011 Rehearing Order.

24. In the October 2016 Order, the Commission rejected the Refund Report as "procedurally deficient" on the grounds that it "is not tied to any Commission compliance directive in this proceeding."[49] In other words, the Commission rejected the Refund Report because the Commission's 2007 and 2011 Rehearing Orders did not include formal directives to CAISO on refunds or the filing of a refund report.[50] The Coalition is

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[46] In Opinion No. 492, which was issued on December 27, 2006, the Commission approved CAISO's Amendment No. 60 methodology, with modifications, effective July 17, 2004, the refund effective date established for the Complaint. This effective date was based on Stipulation No. 3 filed during the hearing held in this matter. Stipulation No. 3 states that the parties "agree that as of July 17, 2004, it was no longer just and reasonable to allocate the entirety of Minimum Load Cost Compensation . . . to control area gross load and demand served by exports from the California ISO Control Area to other control areas within California." Stipulation No. 3 filed in Docket Nos. ER04-835 et al. on July 29, 2005 at 1. The Commission found in Opinion No. 492 that "the July 17, 2004 stipulated effective date for the proposed allocation of must-offer related charges under Amendment No. 60 is just and reasonable." Opinion No. 492, 117 FERC ¶ 61,348 at P 123.

[47] 2007 Rehearing Order, 121 FERC ¶ 61,193 at PP 79-80.

[48] *Id.* P 82 (emphasis supplied). The Commission had identified the net incremental cost of local methodology as a potential exception to its finding that refunds should be ordered from July 17, 2004 because of past data problems that could interfere with the implementation of Amendment No. 60 on July 17, 2004, but it found in the 2007 Rehearing Order that there was no evidence of continuing data problems. *Id.* PP 81-82.

[49] October 2016 Order, 157 FERC ¶ 61,033 at PP 27-28.

[50] *Id.* P 27.

correct that the Commission's typical practice when ordering refunds is to specify that they be made within a specific time and that a refund report be filed at a specified time.[51] However, we disagree with assertions that the absence of such a specific directive negates the Commission's substantive refund determinations or prevents the Commission from implementing them to carry out the Commission's statutory obligation to ensure that rates are just and reasonable. Given our reading of the 2007 Rehearing Order set forth above, the October 2016 Order incorrectly rejected the Refund Report.

25. Turning to the specific individual objections to refunds raised on rehearing, we find unconvincing the Coalition and Powerex's argument that the refunds improperly exceed the 15-month refund period specified in FPA section 206. The Coalition and Powerex overlook that the Commission accepted Amendment No. 60 under section FPA section 205, subject to refund,[52] and FPA section 205 does not contain a refund period or otherwise place a specific time limitation on the Commission's refund authority. The consolidation of this FPA section 205 proceeding with a complaint filed under FPA section 206 does not constrain the Commission's refund authority under FPA section 205.

26. While sections 205 and 206 are part of a general statutory scheme for ensuring that public utility rates are just and reasonable, each represents a distinct analytic framework. For instance, the Commission may suspend a rate increase under section 205, but there is no suspension authority under section 206. The Commission's refund authority under section 206 is for the most part limited to 15 months, but section 205 does not contain such a limit. Under section 205, refund protection can commence on the effective date of the change in rates, while under section 206 refund protection can commence only 60 days after the Commission publishes notice of its intent to initiate a section 206 proceeding. In addition, while the filing utility bears the burden of proof as to increases in rates under section 205, the Commission bears the burden of proof under section 206.[53] In short, the two sections present distinct criteria and offer different remedial possibilities. Most importantly here, the Coalition and Powerex do not cite, and we are unaware of, any instance where the 15-month refund limitation under section 206 restricted the Commission' refund authority under section 205.

27. We are also unpersuaded by Powerex's argument that the D.C. Circuit's opinion in *Verso* does not support the Commission's determination that the refunds here do not constitute retroactive ratemaking. According to Powerex, *Verso* does not apply here

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[51] Coalition Rehearing Request at 14.

[52] 2004 Order, 108 FERC ¶ 61,022 at P 63.

[53] *Northern States Power Co.* (*Minnesota*), 51 FERC ¶ 61,027, at n.20 (1990); *see also Arkansas Elec. Coop. Corp. v. ALLETE, Inc*. 156 FERC ¶ 61,061, at P 18 (2016).

because in *Verso* the costs at issue were reallocated based on the benefits an LSE received from a System Support Resource relative to the benefits received by other LSEs within the market. On the other hand, Powerex submits that market participants in this proceeding "were assessed surcharges based on their Commission-jurisdictional service—that is, their individual transactions in the CAISO markets."[54] According to Powerex, this means that the surcharges represent a retroactive rate increase here, but this argument overlooks the court's essential finding on this point in *Verso*.

28. We disagree. In *Verso*, the court found that the surcharges assessed to effectuate the reallocation did not represent a rate increase because "the aggregate rate remained the same, divided differently among the constituent ratepayers."[55] This is what is occurring here, as evidenced by the fact that CAISO did not have to re-run any markets to implement the resettlements, but rather simply reallocated as zonal the costs for certain commitments originally assigned as local must-offer costs.[56] As was the case in *Verso*, the aggregate amount collected by CAISO did not change. Powerex maintains there is a difference in this context between reallocation based on benefits received and reallocation based on Commission-jurisdictional service, i.e., individual transactions. But individual transactions are the basis for establishing the benefits received from the facilities whose costs are being allocated, as those transactions provide a quantitative measure of use and thus benefits. Both here and in *Verso*, surcharges are simply a means of reallocating costs to ensure that charges correspond to benefits received. The fact that individual transactions are the starting point for calculating surcharges here, whereas the starting point in *Verso* was charges established based on the relative load of the LSEs involved, is not a material difference. In both cases the surcharge represents a charge for benefits received. Powerex thus fails to support its claim that surcharges here are distinguishable from those in *Verso* and result in impermissible retroactive ratemaking.

29. Powerex's argument that the Commission erred in finding that market participants did not make economic decisions based on the allocation of must-offer generation costs fails to address the specific facts presented here. Powerex states that the Commission's finding lacks factual support, and it cites two Commission orders that make the point that market participants do take the allocation of uplift payments into account when transacting in organized markets.[57] However, the cited cases address situations where

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[54] Powerex Rehearing Request at 13-14.

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

[56] August 2019 Order, 168 FERC ¶ 61,127 at P 21.

[57] Specifically, Powerex cites *Price Formation in Energy & Ancillary Servs. Mkts. Operated by Reg'l Transmission Orgs. & Indep. Sys. Operators*, 153 FERC ¶ 61,221, at P 6 (2015). There, the Commission explained that "[a]llocation of uplift costs to market participants whose transactions contribute to uplift could improve the incentive to those

market participants would be able to take the allocation into account and act on it. As the Commission explained in the August 2019 Order, this was not the situation here. Rather, the costs involved in this proceeding were after-the-fact payments for must-offer resources that CAISO committed to meet reliability requirements irrespective of how the costs were later allocated amongst market participants.[58] Powerex does not address how this process could have affected economic decisions by market participants, or offer any evidence to suggest that it did affect economic decisions. On the contrary, as the Commission explained in the August 2019 Order, the fact that CAISO did not have to re-run any markets to implement the resettlements, but rather simply reallocated as zonal costs the costs for certain commitments originally assigned as local must-offer costs, demonstrates that market participants did not take action in reliance on the potential allocation of must-offer generation costs,[59] a point that Powerex also does not address.

30. Powerex incorrectly interprets the Commission's concern about under-recovery when it argues that the Commission erred in finding that there is no potential for under-recovery here because CAISO was able to fund its refund obligation fully. Powerex states that the Commission simply assumes that market participants assessed surcharges were able to pass the costs on to their customers. But as the Commission explained in the August 2019 Order, in determining whether to direct refunds in cost allocation and rate design cases, the Commission considers whether, if a public utility ordered to make refunds cannot assess surcharges, it will not be able to recover all the costs that the Commission approved as recoverable.[60] Powerex's argument concerning under-recovery does not speak to that issue, as it does not involve the recovery of costs that the Commission specifically approved as recoverable. In any event, Powerex does not

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participants to change their bidding and operational behavior and potentially reduce uplift as a result. . . . A better understanding of the drivers of uplift could, itself, elicit a market response to address system needs when a price signal fails to do so." Powerex also cites *Cal. Indep. Sys. Operator Corp.*, 130 FERC ¶ 61,122, at P 54 (2010), where the Commission expressed concern about fee structure and credit requirements proposed by CAISO that would "implicitly limit the positions taken by individual market participants" and "prevent unfettered bidding and position accumulation by individual participants."

[58] August 2019 Order, 168 FERC ¶ 61,127 at P 21.

[59] *Id.*

[60] *See*, *e.g.*, *Black Oak Energy, L.L.C v. PJM Interconnection, L.L.C.*, 136 FERC ¶ 61040, at P 28 (2011), *order denying reh'g*, 139 FERC ¶ 61,111 (2012) ("Were the Commission to require refunds without such surcharges, PJM would suffer a loss of revenue and an under-recovery of legitimate costs.").

explain or offer any evidence to suggest that market participants assessed surcharges will not be able to pass the costs on to their customers.

31. We will not address here arguments regarding the accuracy and transparency of CAISO's resettlement process. These matters will be addressed separately in connection with the Commission's review of CAISO's compliance filings.[61]

32. Finally, we agree with the Coalition that the Commission did not err in permitting Amendment No. 60 to become effective subject to refund. This, however, has no effect on our conclusions here in light of our finding that the Commission in fact ordered refunds in the 2007 Rehearing Order on the grounds that it was just and reasonable to do so.[62]

B. Interest

33. Six Cities' argument that interest cannot be sought after the 2007 and 2011 Rehearing Orders became final and unreviewable misconstrues *Hirschey* and the statutory provision at issue there. In *Hirschey*, the court held that the Commission could not vacate a hydroelectric power developer's exemption from licensing requirements under the FPA once the deadline for seeking judicial review of the Commission order granting the exemption had passed.[63] The statutory basis for this holding is FPA section 313(a), which provides that "[u]ntil the record in a proceeding shall have been filed in a court of appeals . . . the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order" issued under the FPA.[64] The question thus becomes whether in requiring interest in the August 2019 Order, the Commission has modified the 2007 Rehearing Order, the 2011 Rehearing Order, or any finding in either of them. We find that it did not.

34. As the Commission explained in the August 2019 Order, "interest is simply a way of ensuring full compensation."[65] As the Commission also noted in the August 2019 Order, it has previously explained that "including interest on refunds 'would make

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[61] *See Cal. Indep. Sys. Operator Corp.*, 170 FERC ¶ 61,094, at P 11 (2020); *Cal. Indep. Sys. Operator Corp.*, 171 FERC ¶ 61,011, at P 15 (2020).

[62] 2007 Rehearing Order, 121 FERC ¶ 61,193 at P 82.

[63] *Hirschey*, 701 F.2d at 217-18 (citing *Pan American Petroleum Corp. v. FPC*, 322 F.2d 999 (D.C. Cir.), *cert. denied*, 375 U.S. 941 (1963)).

[64] 16 U.S.C. § 825*l*(a) (2018).

[65] August 2019 Order, 168 FERC ¶ 61,127 at P 28 (quoting *Anadarko Petroleum Corp. v. FERC*, 196 F.3d 1264, 1267 (D.C. Cir. 1999) (*Anadarko*)).

customers whole for the time value of money they otherwise would not have paid."[66] Consequently, in requiring interest, the Commission is not modifying any earlier finding or order; it is simply taking a step that will ensure that the refunds ordered in the 2007 Rehearing Order are made in full.

35. Nor do we agree with the Coalition and Six Cities that the considerable passage of time involved in this proceeding makes interest inequitable. Interest not only makes customers whole by accounting for the time value of money they would not have paid had the appropriate allocation been in place; it also prevents windfalls that would accrue to other parties from the retention and use of money they otherwise would have paid.[67] This two-fold relevance of the time value of money explains why interest is equitable when there has been considerable passage of time, as it points to both the benefits and the burdens that have arisen because of the passage of time and explains how they are equitably balanced and remedied. Indeed, "delay between the time of the customers' injury and the granting of relief is a reason for awarding interest, not for denying it, at least when the delay cannot be laid at the feet" of the parties that receive the interest.[68] For these reasons, we find the arguments that the Coalition advanced in 2014 and reiterates on rehearing regarding the passage of time to be unconvincing. The Coalition

[66] *Id.* n.88 (quoting *Sw. Power Pool, Inc.*, 149 FERC ¶ 61,050, at P 30 n.45 (2014)).

[67] *See Anadarko*, 196 F.3d at 1267 (quoting *Natural Gas Policy and Procedures*, Order No. 44, FERC Stats. & Regs., Regs. ¶ 30,083 (1979) (cross-referenced at 8 FERC ¶ 61,197), *aff'd United Gas Pipe Line Co. v. FERC*, 657 F.2d 790, 794-96 (5th Cir.1981) (one purpose of the policy of requiring interest on overcharges is to "reflect the benefits which were available to companies which collected excessive rates")). We note that while Powerex argues that this principle does not apply here because the parties paying interest did not collect excessive rates, both situations involve benefits that accrue from the possession of funds during some period of time for reasons found not to be just and reasonable. *See* Powerex Rehearing Request at 24. This justification of interest is thus the same in both instances.

[68] *Anadarko*, 196 F.3d at 1268.

maintains that what it characterizes as extensive delay by CAISO is a compelling reason to deny interest here,[69] whereas the passage of time is a reason to require it.[70]

36. Similarly, we do not find convincing Six Cities' argument that interest is barred here because the requests for interest must, under Commission precedent, be rejected as untimely rehearing requests. Six Cities do not point to, and we are unable to identify, any pleading in this proceeding that can be construed as an untimely rehearing request. Six Cities states that the term "interest" does not appear in either the November 2007 or the September 2011 Rehearing Orders, and parties claiming that interest should apply could have requested clarification or rehearing of those orders but failed to do so.[71] For this argument to have merit, it would be necessary first to show that there is a presumption against interest, or that an invocation of interest is necessary to create an expectation to receive it, and therefore that parties favoring it therefore were aggrieved by the absence of mention of interest.[72] In fact, as the Commission explained in the August 2019 Order, interest on refunds is the rule, not the exception.[73] In the Refund Report, CAISO proposed to apply interest pursuant to section 35.19a of the Commission's regulations and stated that it had not invoiced interest pending Commission resolution of the issue.[74]

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[69] Coalition Rehearing Request at 19-21 (quoting Shell Energy North America (US), L.P. and the Alliance for Retail Energy Markets, Motion to Intervene and Protest, Docket Nos. ER04-835-000 and EL04-103-000, at 12-14 (filed Jan. 10, 2014)).

[70] *Anadarko*, 196 F.3d at 1267; *PJM Interconnection, L.L.C.*, 162 FERC ¶ 61,254, P 10 & n.3 (2018); *Southwestern Pub. Serv. Co.*, 165 FERC ¶ 61,246, at PP 16-17 (2018).

[71] Six Cities Rehearing Request at 11-12.

[72] *See* 16 U.S.C. § 825*l*(a) (a party to a proceeding "aggrieved by an order issued by the Commission in [the] proceeding . . . may apply for a rehearing within thirty days after the issuance of such order").

[73] August 2019 Order, 168 FERC ¶ 61,127 at P 28 n.87 (citing *Anadarko*, 196 F.3d at 1267 ("The Commission's general policy, in effect for many years, requires interest to be paid on various kinds of overcharges."); *Southeastern Mich. Gas Co. v. FERC*, 133 F.3d 34, 43-44 (D.C. Cir. 1998) (reversing decision to exempt shippers from paying interest on refunds for failure to explain departure from Commission regulations); *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 155 FERC ¶ 61,013, at PP 38-40 (2016) (explaining that the Commission may only waive interest on refunds in "exceptional circumstances" and noting that "the courts have rejected Commission efforts to exclude interest from refunds or to truncate refund payments due merely to delay")).

[74] *Id.* P 10.

The parties that favored interest simply expressed support for CAISO's action; they did not seek rehearing of any Commission determination. By endorsing the inclusion of interest, the Commission was simply implementing its decision in the 2007 Rehearing Order in accordance with section 35.19a of its regulations and its settled practice.

37. Finally, we disagree with the Coalition that the absence of a provision in the CAISO Tariff providing for interest in resettlements of the type at issue here prevents the Commission from requiring interest. The Commission's authority to require interest arises under the FPA,[75] and the Commission is afforded broad discretion in exercising it, as noted above. This broad authority is not preempted because the CAISO Tariff does not contemplate interest in a specific situation.

The Commission orders:

The requests for rehearing are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[75] 16 U.S.C. §§ 823d(e), 824e(b).