UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

POWEREX CORP.
REQUEST FOR REHEARING

Pursuant to Section 313(a) of the Federal Power Act ("FPA"),[1] and Rule 713[2] of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission"), Powerex Corp. ("Powerex") hereby requests rehearing of the Commission's August 28, 2019 Order on Rehearing and Clarification.[3]

I. INTRODUCTION AND BACKGROUND

A. Introduction

The August 2019 Order represents a fundamental reversal in course in the

[1] 16 U.S.C. § 825l(a).

[2] 18 C.F.R. § 385.713.

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

Commission's rulings in this fifteen-year proceeding. Having twice determined that the Commission never directed CAISO to assess refunds, the Commission has established no sound basis to now belatedly ratify CAISO's resettlement process.

Powerex submits this request for rehearing because it is concerned by the precedent set in the August 2019 Order. The August 2019 Order is notable for its articulation of a vision of the Commission's authority that is largely unconstrained by the plain language of the FPA and long-recognized limits on the Commission's authority. It sets aside the Commission's specific determination in 2016 that the imposition of refunds in this proceeding would be inequitable. It articulates a view of the Commission's authority that is inconsistent with prior Commission orders and the long-standing application of the filed rate doctrine. It represents a willingness to exercise regulatory authority in a manner that ignores the record evidence in this proceeding and that discounts, without examination or explanation, the injustice the Commission had recognized would be associated with the retroactive imposition of surcharges on market participants in this case.

While the Commission suggests that its full reversal of its prior determination is compelled by recent court cases interpreting the scope of the Commission's authority, the Commission's decision overlooks contrary precedent and key facts from the fifteen-year history of this proceeding. As discussed further below, the Commission does not have the authority to order CAISO to assess retroactive surcharges to its market participants and, even if it did, there is no basis for finding that doing so would be equitable in this case. Additionally, the August 2019 Order directs CAISO to engage in yet another round of resettlements to

collect interest from Powerex and other parties years after their payment of retroactive surcharges, and without providing refunding parties any opportunity to review or challenge the basis for the underlying charges the Commission's previous orders had rejected.

Powerex respectfully requests that the Commission promptly grant rehearing of the August 2019 Order and direct CAISO to immediately issue refunds to those parties that were assessed retroactive surcharges as part of CAISO's resettlement process. If the Commission does not grant rehearing of its August 2019 decision to accept the refund report, the Commission should grant rehearing of its decision to further require the collection of interest. Requiring CAISO to engage in yet another resettlement process will serve only to further penalize market participants that were assessed retroactive surcharges over five years ago.

B. Background

1. Amendment 60

The Commission's August 2019 Order represents the most recent action in a long and protracted proceeding surrounding CAISO's Amendment 60 Filing, which set out a proposed methodology for the allocation of must-offer minimum load compensation costs. In a 2004 order, the Commission accepted Amendment No. 60, subject to refund, and set for hearing a Pacific Gas & Electric complaint regarding the allocation of must-offer costs, with a refund effective date of July 17, 2004.[4] For the next two years, while Amendment 60 proceedings continued before the Commission and in keeping with the Commission's 2004 order, CAISO applied

[4] *Cal. Indep. Sys. Operator Corp.,* 108 FERC ¶ 61,017 (2004).

its proposed Amendment 60 tariff provisions and cost allocation methodology to market participants.

In a series of orders issued over the course of 2006 and 2007, the Commission approved a portion of the Amendment 60 cost allocation methodology, but also ordered a set of discrete and fundamental modifications.[5] In September 2011, over four years after the submission of CAISO compliance filings and a multitude of rehearing requests, the Commission issued orders accepting CAISO's compliance filings and denying all requests for rehearing.[6] In November 2013, the U.S. Court of Appeals for the District of Columbia Circuit denied petitions for appeal of the Commission's orders, and the Commission's September 2011 orders became final.[7]

2. CAISO Refund Report and Resettlement

In December 2013, CAISO filed a refund report informing the Commission that it planned to reallocate approximately $198 million among market participants in order to retroactively apply the modified cost allocation methodology set out in the Commission's 2006 and 2007 orders and affirmed by the D.C. Circuit.[8] CAISO filed a revised version of its refund report some five months later, in May 2014, to

[5] *Cal. Indep. Sys. Operator Corp.,* 117 FERC ¶ 61,348 (2006), *order on reh'g,* 121 FERC ¶ 61,193 (2007).

[6] *Cal. Indep. Sys. Operator Corp*., 136 FERC ¶ 61,198 (2011); *Cal. Indep. Sys. Operator Corp.*, 136 FERC ¶ 61,197 (2011).

[7] *City of Anaheim v. Fed. Energy Reg. Comm'n,* 540 F. App'x 13 (D.C. Cir. 2013).

[8] *Cal. Indep. Sys. Operator Corp.*, Informational Refund Report of the California Independent System Operator Corp. at 1-3, Docket No. ER04-835-000 (filed on Dec. 20, 2013).

correct a $23 million error it discovered it had made in calculating resettlements.[9] Numerous parties, including Powerex, responded to CAISO's initial and amended refund report filings with protests, comments, motions, and a complaint asking the Commission to direct CAISO not to resettle its markets. Powerex and other parties noted that the Commission's orders, while making modifications to CAISO's proposed allocation methodology, had not directed CAISO to make refunds, and they argued that CAISO was prohibited from imposing retroactive rate increases on market participants under the FPA. Powerex and other parties also noted that the CAISO had not provided market participants with information necessary to evaluate the basis for these charges or to verify their accuracy.

Although a number of parties urged the Commission to direct CAISO not to take any action until the Commission issued an order addressing the refund reports, in the interim and prior to Commission action, the CAISO moved forward with its resettlement process while party protests and motions remained pending.

3. October 2016 Order

In an October 2016 Order, some two years after Powerex and other market participants paid surcharges as directed by CAISO, the Commission unqualifiedly rejected the CAISO's refund report, on grounds that the Commission had ***never directed CAISO to make refunds***:[10]

> We reject the Refund Report. CAISO's filing of the Refund Report is not tied to any Commission compliance directive in this proceeding.

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[9] *Cal. Indep. Sys. Operator Corp.,* Informational Report of the California Independent System Operator Corporation Concerning Status of Settlement Adjustments, Docket No. ER04-835-000 (filed on May 12, 2014).

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

> While the Commission initially accepted CAISO's filing subject to refund, at no point did the Commission direct CAISO to make refunds or file a refund report. In Opinion No. 492, the Commission did not order CAISO to pay refunds or to file a refund report for the period in which Amendment No. 60 had already taken effect. Moreover, when the Commission ordered further modification of the methodology in the 2007 Rehearing Order, it did not order CAISO to file a refund report.[11]

The Commission further explained that a decision ***not*** to order refunds was consistent with the Commission's practice of not requiring refunds in cost allocation cases. The Commission reasoned that it would be "inequitable to impose additional charges on customers, who were not responsible for the cost allocation the Commission initially accepted, but later modified on rehearing."[12]

4. August 2019 Order

On August 28, 2019—more than fifteen years after CAISO's original filing to modify its tariff and almost six years after CAISO filed its initial refund report—the Commission issued an order granting rehearing and accepting the CAISO's refund reports. While the Commission once again confirms that it never directed CAISO to make refunds, the Commission now approves CAISO's decision to move forward with a retroactive resettlement and refund process on the grounds that *CAISO itself* "reasonably determined" that its prior allocation of costs under its initially-proposed Amendment 60 tariff revisions was unfair.[13] The Commission further states that while it previously rejected the refund report based on concerns regarding its authority to permit the imposition of retroactive surcharges under the

[11] *Id.* at P 27 (internal citations omitted).

[12] *Id.* at P 31.

[13] August 2019 Order at P 12.

FPA, it now believes that the combination of Sections 206 and 309 of the FPA give the Commission discretion to authorize CAISO's 2014 assessment of surcharges to the extent necessary to effectuate the refund process CAISO initiated *sua sponte* in 2013.[14] Compounding the inequitable result the Commission had specifically rejected in its 2016 Order, the August 2019 Order further directs CAISO to now calculate and collect interest from market participants on the surcharges that were collected.[15]

II. STATEMENT OF ISSUES AND SPECIFICATIONS OF ERRORS

In accordance with Rule 713(c) of the Commission's Rules of Practice and Procedure,[16] Powerex specifies the following issues and errors with respect to which it seeks rehearing:

1. The Commission erred in accepting the refund report. The Commission has repeatedly acknowledged that it did not direct CAISO to engage in a resettlement process and there is no basis for finding that resettling the market was permissible under the CAISO Tariff. *Cal. Indep. Sys. Operator Corp.,* 137 FERC ¶ 61,180 (2011); *Southwest Power Pool, Inc*., 155 FERC ¶ 61,308 (2016); *Cal. Indep. Sys. Operator Corp.,* 137 FERC ¶ 61,180, 61,928 (2011). The Commission cannot retroactively modify its prior orders in order to provide CAISO with the requisite authorization. 16 U.S.C. § 825l(a).
2. The Commission erred in determining that Sections 206 and 309 of the FPA give it the authority to order retroactive surcharges. The Commission's decision is inconsistent with prior court cases recognizing limits on the scope of the Commission's authority and the plain language of the FPA. *See, e.g., Niagara Mohawk Power Corp*., 379 F.2d 153, 158 (D.C. Cir. 1967); *Boston Edison Co. v. Fed. Energy Reg. Comm'*n, 856 F.2d 361, 370 (1st. Cir. 1988); *New England Power Co. v. Fed. Energy Reg. Comm'n*, 467 F.2d 425, 430 (D.C. Cir. 1972).

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[14] *Id.* at PP 13-17.

[15] *Id.* at PP 26-29.

[16] 18 C.F.R. § 385.713(c).

3. The Commission erred in determining that granting refunds is necessary to ensure equity. The Commission's decision is arbitrary and capricious because it failed to meaningfully consider or evaluate the equities in this case. *Towns of Concord, et al. v. Fed. Energy Reg. Comm'n,* 955 F.2d 67, 76 (D.C. Cir. 1992). The Commission's conclusion that imposing surcharges on Powerex and other market participants is equitable mischaracterizes and ignores record evidence and is contrary to law. *See, e.g., Boston Edison Co. v. Fed. Energy Reg. Comm'n*, 856 F.2d 361 (1988); *Trans Alaska Pipeline System*, 81 FERC ¶ 61,319 (1997); *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Price Formation in Energy and Ancillary Services Markets Operated by Regional Transmission Organizations and Independent System Operators*, 153 FERC ¶ 61,221 (2015); *Port of Seattle, Wash. v. FERC*, 499 F.3d 1016, 1035 (9th Cir. 2007).
4. The Commission erred in failing to address substantive concerns raised by parties regarding the accuracy and transparency of CAISO's resettlement process. *See, e.g., PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005).
5. The Commission erred in failing to provide a reasoned basis for requiring the payment of interest on surcharges that were collected without Commission authorization, and it ignored record evidence demonstrating that the payment of interest in this case is inequitable.

III. REQUEST FOR REHEARING

A. The Commission Erred In Accepting The Refund Report

Throughout this proceeding, numerous parties have consistently argued that the Commission had not directed CAISO to issue refunds and, as a result, there was no legal basis for resettling the market. Twice the Commission has agreed; yet the Commission now claims that equity requires it to reverse course and ratify CAISO's retroactive resettlement process.

The Commission previously has found that a regional transmission organization ("RTO") may not resettle its market without Commission authorization except where resettlement is expressly authorized by the RTO's tariff or when necessary to prevent administrative errors, such as data input or software issues,

from leading to a deviation from the filed rate.[17] In this case, there is no basis for finding that the resettlement at issue falls within the scope of CAISO's authority under its tariff or constitutes the type of error that can be corrected under the filed rate doctrine. Given the Commission's repeated recognition that it never directed CAISO to issue refunds, the resettlement process was unauthorized and should be unwound.

In the August 2019 Order, the Commission attempts to set aside the key fact that it never authorized CAISO to make refunds by implying that CAISO had the authority, in the absence of Commission order or tariff provision, to unilaterally resettle its market once CAISO determined that the allocation of must-offer costs was "fundamentally unfair."[18] The Commission's suggestion that CAISO has the unilateral right to resettle its markets when it deems it appropriate to do so is inconsistent with the protections afforded to market participants by the FPA[19] and constitutes an unexplained departure from Commission precedent recognizing the limited resettlement authority afforded to RTOs and other public utilities absent Commission authorization.[20]

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[17] *See, e.g., Cal. Indep. Sys. Operator Corp.,* 137 FERC ¶ 61,180 at PP 21-27 (2011) ("This action is beyond the general automatic resettlement authority under the filed rate doctrine and requires a filing with the Commission before CAISO conducts any resettlements.").

[18] August 2019 Order at P 12.

[19] *Arkansas La. Gas Co. v. Hall,* 453 U.S. 571, 578 (1981) (explaining that 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 gas [or electricity] already sold").

[20] *Southwest Power Pool, Inc.,* 155 FERC ¶ 61,308 (2016) (finding that "in the absence of Commission approval, [Southwest Power Pool, Inc.] lacked the authority to make resettlements" because it involved more than the correction of computational errors or other minor, isolated incidents.); *Cal. Indep. Sys. Operator Corp.,* 137 FERC ¶ 61,180,

Nor does the fact that CAISO may have been confused about whether the Commission had directed it to issue refunds provide a basis for finding that the resettlement process was authorized. While Powerex recognizes the complexity of this proceeding and the difficulty that CAISO may have had in determining the appropriate course of action in this case, the fact remains that the Commission did not direct the payment of refunds in this proceeding.

Nor can the Commission retroactively rewrite or modify its earlier orders in this proceeding to give CAISO the authority necessary to resettle its markets. Indeed, the reversal of those prior orders to ratify refunds now is beyond the Commission's authority; it cannot now undo or modify the underlying orders, which became final nearly a decade ago. Under Section 313(a) of the FPA, FERC may only modify its findings and orders in a proceeding until the record in a proceeding has been filed in a court of appeals.[21] Thus to the extent that the Commission wished to modify its earlier orders to provide for the payment of refunds/assessment of surcharges, it was required to do so prior to when the record of this proceeding was filed with the D.C. Circuit in connection with the

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61,928 (2011) ("When a party reinterprets its publicized methodology and certain resettlements or refunds are required, it is required to seek authority from the Commission for such a resettlement of market payments.").

[21] 16 U.S.C. § 825l(a) ("Until the record in a proceeding shall have been filed in a court of appeals . . . the Commission may at any time . . . modify or set aside, in whole or in part, any findings or order made or issued by it under the provisions of this chapter."). *See also Hirschey v. Fed. Energy Reg. Comm'n,* 701 F.2d 215 (D.C. Cir. 1983) (recognizing that the Commission only has power to correct an order until such time as the record on appeal has been filed with a court of appeals). The mandate rule further limits the ability of the Commission to modify its prior determinations. *See, e.g., Indep. Petroleum Ass'n of America v. Babbitt,* 235 F.3d 588, 597-98 (2001) (acknowledging that mandate rule prevents reconsideration of issues that have already been decided in the same case).

appeal of the Commission's orders in this proceeding or, alternatively, to seek a remand back to the Commission.

B. The Commission Erred In Determining That It Has Authority To Direct Retroactive Surcharges

In the August 2019 Order, the Commission attempts to justify the resettlement process by claiming that it has "expansive remedial authority" under Sections 206 and 309 of the FPA to authorize the imposition of retroactive surcharges on market participants in 2013.[22] Contrary to what the Commission suggests, however, the Commission's remedial authority is not unfettered.

While the courts have supported the Commission's broad discretion to fashion remedies as a general matter, the courts have nonetheless consistently recognized that the FPA establishes clear limits on the Commission's authority to grant refunds. In particular, the courts have recognized that the filed rate doctrine prohibits the Commission from imposing after-the-fact increases, such as surcharges, for products or services that were provided in past periods.[23] With respect to Section 206, in particular, the courts have explained that Section 206(b) "authorizes only retroactive refunds (rate decreases), not retroactive rate increases."[24] Consistent with these limitations, the Commission and the courts

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[22] August 2019 Order at P 14.

[23] *See, e.g., City of Anaheim, Cal. v. Fed. Energy Reg. Comm'n,* 558 F.3d 521, 524 (D.C. Cir. 2009); *Pac. Gas & Elec. Co. v. Fed. Energy Reg. Comm'n,* 373 F.3d 1315 (D.C. Cir. 2004); *Arkansas Louisiana Gas Co. v. Hall,* 453 U.S. 571 (1981); *Pub. Serv. Co. v. Fed. Energy Reg. Comm'n,* 600 F.2d 944 (D.C. Cir. 1978).

[24] *See, e.g., id*.; *see also Verso Corp. v. Fed. Energy Reg. Comm'n*, 898 F.3d 1 (D.C. Cir. 2018) ("Section 206(b) permits FERC to order refunds where the previous rate was unfairly high. . .[h]owever, no concomitant authority exists to retroactively correct rates that were too low.") (internal citations omitted).

repeatedly have required that changes to the rates, terms, and conditions of jurisdictional service be implemented prospectively in cases involving rate designs and cost allocation.[25]

In the August 2019 Order, the Commission claims that Section 309 of the FPA allows it to disregard these long-recognized limitations on the Commission's authority. Contrary to what the Commission suggests, the courts have recognized that Section 309 does not constitute "an unbounded grant of remedial authority."[26] Instead, Section 309 "merely augment[s] existing powers conferred upon the agency by Congress" and "do[es] not confer independent authority to act."[27] Indeed, the courts have emphasized that Section 309 does not grant the Commission authority to engage in acts that it would be otherwise prohibited from doing under provisions of the FPA, such as authorizing retroactive surcharges.[28]

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[25] *Occidental Chemical Corp. v. PJM Interconnection, L.L.C.*, 110 FERC ¶ 61,378, at P 10 (2005) (stating that the "Commission's long-standing policy is that when a Commission action under Section 206 of the FPA requires only a cost allocation change, or a rate design change, the Commission's order will take effect prospectively"); *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 578 (1981) (interpreting Natural Gas Act language similar to the FPA and stating, "[w]hen the Commission finds a rate unreasonable, it 'shall determine the just and reasonable rate . . . to be *thereafter* observed and in force.'") (footnote, citations, and internal quotation marks omitted) (emphasis in original); *Towns of Concord, Norwood & Wellesley, Massachusetts v. FERC*, 955 F.2d 67, 72 (D.C. Cir. 1992) (explaining that §206(a) ''allows the Commission to fix rates and charges, but only prospectively.'').

[26] *Boston Edison Co. v. Fed. Energy Reg. Comm'n*, 856 F.2d 361, 370 (1st Cir. 1988).

[27] *New England Power Co. v. Fed. Energy Reg. Comm'n*, 467 F.2d 425, 430 (D.C. Cir. 1972).

[28] *Id*. at 430 (explaining that Section 309 "authorize[s] an agency to use means of regulation not spelled out in detail, provided the agency's action conforms with the purposes and policies of Congress *and does not contravene any terms of the Act*"); *Niagara Mohawk Power Corp.*, 379 F.2d 153, 158 (D.C. Cir. 1967) (stating that Section 309 authorizes an agency to "use means of regulation not spelled out in detail, provided the agency's action conforms with the purposes and policies of Congress and does not contravene any terms of the Act").

While the Commission claims that this case does not involve a retroactive rate increase, the Commission's reasoning improperly focuses only on the revenue requirement charged by the generators that were dispatched out-of-market and ignores the rates that were paid by Powerex and other market participants. As the courts have recognized, "rate" for purposes of the FPA means "an amount paid or charged for a good or service."[29] In this case, record evidence demonstrates that the resettlement process resulted in Powerex being retroactively assessed hundreds of thousands of dollars in additional charges based on its transactions in the CAISO markets.[30] Thus, while the revenues received by generators that were committed to address system constraints may not have changed, it is clear that the amount that Powerex and other market participants paid for receiving Commission-jurisdictional service from the CAISO was retroactively *increased*. Such retroactive rate increases are expressly prohibited by the FPA and cannot be rehabilitated or otherwise authorized under Section 309.

While the Commission claims that the court's decision in *Verso* supports the conclusion that this case does not involve a retroactive rate increase, the Commission's reliance on that case for this proposition is misplaced. Notably, the refunds and surcharges at issue in *Verso* were not assessed to individual market participants based on their individual transactions; instead, the reallocation was based on the benefits received by a load-serving entity ("LSE") from a System

[29] *Fed. Energy Reg. Comm'n v. Elec. Power Supply Ass'*n, 136 S. Ct. 760, 777 (2016).

[30] *See Cal. Indep. Sys. Operator Corp.*, Informational Refund Report of the California Independent System Operator Corp. at 6, Docket No. ER04-835-000 (filed on Dec. 20, 2013).

Support Resource relative to the benefits received by other LSEs within the market.[31] In this case, Powerex and other market participants were assessed surcharges based on their Commission-jurisdictional service—that is, their individual transactions in the CAISO markets.[32] Thus, there is no basis to support a conclusion that this case involves anything other than a retroactive rate increase.

The Commission's decision to reverse course and accept the CAISO's refund report is also inconsistent with the express temporal limitations set out in Section 206 of the FPA. As noted above, the August 2019 Order contends that the combination of Sections 206 and 309 of the FPA gives the Commission broad authority to accept the refund report in this case. Importantly, as a number of parties have pointed out,[33] FERC's refund authority under Section 206 of the FPA is limited to a fifteen month period except in limited circumstances not applicable here:

> At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, *for the period subsequent to the refund effective date through a date fifteen months after such refund effective date*, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility*, the Commission may order refunds of any or all amounts paid

[31] *See, e.g., Midcontinent Indep. Sys. Operator, Inc.,* White Pine Unit No. 2 Related SSR Cost Allocation Filing, Docket No. ER15-767-002, Tab A (filed June 2, 2016).

[32] *See Cal. Indep. Sys. Operator Corp.*, Informational Refund Report of the California Independent System Operator Corp. at 6, Docket No. ER04-835-000 (filed on Dec. 20, 2013).

[33] Motion to Reply and Reply of the Alliance for Retail Energy Markets and Shell Energy North America (US), L.P., Docket No. EL14-64-000 at 9 (filed July 18, 2014).

> for the period subsequent to the refund effective date and prior to the conclusion of the proceeding.[34]

Thus, even if Section 309 provides a basis for allowing CAISO to assess retroactive surcharges—which it does not—any directive to resettle the markets must be limited to a fifteen month period to avoid conflict with the express terms of Section 206 of the FPA.

C. The Commission's Determination That Granting Refunds Is Necessary To Ensure Equity Is Arbitrary and Capricious And Contrary to Law

Even if Sections 206 and 309 of the FPA gave the Commission the discretion to authorize retroactive rate increases, the Commission fails to meaningfully weigh the equities in this case. As the courts have explained, in exercising its remedial authority, the Commission must demonstrate that it "considered relevant factors and struck a reasonable accommodation among them, and that its order granting or denying refunds was equitable in the circumstances of th[e] litigation."[35] Moreover, "[t]o the extent the Commission relies upon factual findings to support its exercise of discretion, its findings must be supported by substantial evidence."[36]

None of the factors that the Commission cites supports a finding that imposing surcharges is equitable here. Other than making passing reference to the interest of Powerex and other parties that have been assessed retroactive surcharges, the Commission largely discounts the interests of these parties.

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[34] 16 U.S.C. § 824e(b).

[35] *Towns of Concord, et al. v. Fed. Energy Reg. Comm'n,* 955 F.2d 67, 76.

[36] *La. Pub. Serv. Comm'n,* 174 F.3d 218, 225 (D.C. Cir. 1999).

Rather than weighing the relative equities at issue, the Commission focuses solely on the impact that allocating costs associated with the South of Lugo constraint on a local basis would have on the affected California LSEs and simply assumes that this outweighs any unfairness to the market participants that were collectively assessed over $200 million in retroactive surcharges. The Commission fails to provide any explanation regarding how it came to this conclusion, how it weighed the interests at stake, and how the facts in this proceeding support the Commission's conclusion. The Commission's failure to fully explain the basis for its decision or to articulate a rational connection "between the facts found and the choices made," renders its order arbitrary and capricious.[37]

To the extent that the Commission purports to evaluate the interests of these parties, it focuses only on two factors—the reliance interests of the parties and the potential for under-recovery. As detailed below, however, the Commission's conclusions respecting these factors are unsupported by fact or law. Moreover, the Commission's decision to focus solely on these factors leads the Commission to ignore numerous other factors that make the retroactive imposition of surcharges inappropriate.

1. The Commission's Conclusion That Market Participants Did Not Rely On The Filed Rate Is Unsupported By Record Evidence And Contrary To Law

In the August 2019 Order, the Commission posits that requiring resettlement is equitable because neither CAISO nor any market participant made

[37] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co*., 463 U.S. 29, 43 (1983).

economic decisions based on the allocation of must-offer generation costs. At its core, the Commission's position is based on a factually unsupported assertion that market participants do not take into account the allocation of uplift payments when engaging in transactions in the CAISO markets. Yet the Commission repeatedly has recognized that the opposite is true: uplift payments have the ability to directly influence market participant behavior.[38] The Commission's assertion to the contrary represents an unexplained departure from prior Commission precedent, and is unsupported by record evidence.

Rather than articulating a rational basis for finding that the assessment of surcharges is equitable, the Commission attempts to shift the burden to Powerex and other market participants to identify specific past actions that were taken based on the prior allocation of costs. As an initial matter, it is unrealistic to expect market participants to demonstrate a connection between individual transactions undertaken more than a decade ago and the rate at issue, particularly when they have not been given information necessary to evaluate the underlying transaction-specific basis for the charges that were assessed against them. More importantly, the FPA does not require a market participant to demonstrate that it relied on the filed rate in order to avoid being subject to retroactive rate changes. To the contrary, both the Commission and the courts have long recognized that those

[38] *See, e.g., Price Formation in Energy and Ancillary Services Markets Operated by Regional Transmission Organizations and Independent System Operators*, 153 FERC ¶ 61,221 at P 6 (2015) (recognizing that the allocation of uplift to market participants can lead market participants to change their bidding and operational behavior and reduce uplift as a result); *Cal. Indep. Sys. Operator Corp*., 130 FERC ¶ 61,122 at P 54 (2010) (noting that exposure to uplift costs has potential to discourage market participants from accumulating substantial virtual position).

participating in FERC-jurisdictional markets have the right to rely on the filed rate until such time that it is changed prospectively by Commission order.[39] Indeed, the purpose of the filed rate doctrine and rule against retroactive ratemaking is to provide the requisite predictability to ensure that parties understand the consequences of their transactions at the time of execution. The Commission's reasoning contravenes these doctrines and is inconsistent with the protections afforded to customers by the FPA.

The Commission's assertion that "CAISO would have committed the requisite generation to meet those reliability requirements irrespective of how the costs were later allocated amongst market participants" serves to cloud the issues in this proceeding.[40] The Commission's task in evaluating whether it is equitable to order refunds/surcharges is to weigh the equities between those parties that will be paid refunds and those parties that will be assessed surcharges.

2. The Commission Erred In Determining That There Is No Potential For Under-Recovery

The Commission's conclusion that there is no potential for under-recovery is also unfounded. As an initial matter, the Commission's reasoning improperly conflates whether CAISO was able to collect surcharges from market participants with the issue of whether there was under-recovery. Importantly, in evaluating whether there is a risk of under-recovery, the relevant inquiry is whether the *utilities*

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[39] *Boston Edison Co. v. Fed. Energy Reg. Comm'n,* 856 F.2d 361 (stating that petitioner had right to rely on filed rate); *Trans Alaska Pipeline System,* 81 FERC ¶ 61,319 at 62,467 (1997) (noting that any rate changes "are subject to the filed rate doctrine, which permits both shippers and carriers to rely on the filed rates until they are formally changed");

[40] August 2019 Order at P 21.

assessed surcharges would be able to pass through these costs to their customers.[41] In this case, however, the Commission simply assumes that those market participants assessed surcharges were able to pass these costs through to their customers because CAISO was able to fully fund its refund obligation. The Commission has cited no record evidence that would provide a reasoned basis for the Commission's conclusion.[42]

Nor does the Commission's assumption that the resettlements involve a "limited number of market participants" serve as a basis to support the Commission's conclusion that there is no risk of under-recovery. Notably, the Commission mischaracterizes the scope of market participants affected by CAISO's resettlements, claiming that the resettlement process was limited to reallocating costs between LSEs in a single zone within CAISO. The Commission's statements ignore, however, that non-LSEs were assessed surcharges as a result of CAISO's resettlement process. The Commission's failure to acknowledge or take into account the full scope of the CAISO's resettlement process renders the Commission's determination arbitrary and capricious.[43]

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[41] *See, e.g., Louisiana Pub. Serv. Comm'n v. Fed. Energy Reg. Comm'n,* 883 F.3d 929 (D.C. Cir. 2018).

[42] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (*quoting Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168 (1962)) (stating that the Commission's orders must be the product of reasoned decision-making and "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'") (internal citations omitted).

[43] *Port of Seattle, Wash. v. FERC*, 499 F.3d 1016, 1035 (9th Cir. 2007) ("an agency must account for evidence in the record that may dispute the agency's findings") (citing *Universal Camera Corp. v. Nat'l Labor Relations Bd.*, 340 U.S. 474, 488 (1951)).

The Commission's reliance on the size of the resettlements related to the South of Lugo constraint to demonstrate that there is no risk of under-recovery is similarly misplaced. In the August 2019 Order, the Commission claims that that there is no material risk of under-recovery because "[t]he majority of the costs involved in the resettlements—almost $100 million—pertain to the recategorization of South of Lugo as a zonal, rather than, a local, constraint."[44] The Commission overlooks, however, that there were approximately $99 million reallocated through its unauthorized resettlement process that were unrelated to the classification of the South of Lugo constraint. The Commission fails to explain why the reallocation of these amounts does not present a risk of under-recovery. The Commission's decision to ignore record evidence renders the Commission's decision arbitrary and capricious.

3. The Commission Ignores Record Evidence Demonstrating That Ordering Refunds Is Inequitable

The Commission's focus on parties' reliance on the previous rate and the risk of under-recovery leads the Commission to ignore key factors that make the assessment of retroactive surcharges inequitable in this case:

- As the Commission observed, "it would be inequitable to impose additional charges on customers, who were not responsible for the cost allocation the Commission initially accepted, but later modified on rehearing;"[45]
- The Commission never directed CAISO to make refunds or assess surcharges;
- Parties that have been assessed surcharges have been denied an opportunity to verify that the amounts charged are accurate; and

[44] August 2019 Order at P 22.

[45] October 2016 Order at P 31.

- The parties that have been assessed surcharges have not attempted to prolong or slow the progress of this case.

If the Commission continues to believe that it is equitable to direct refunds, then the Commission must explain how it took these factors into account and why it is still equitable to direct refunds notwithstanding these facts. The failure to do so renders the Commission's determination arbitrary and capricious.

D. The Commission's Decision To Accept The Refund Report Is Arbitrary and Capricious Because It Fails To Address Substantive Arguments And Evidence Contained In The Record

In response to CAISO's decision to proceed with its unauthorized resettlement process, Powerex and numerous other parties raised concerns about the transparency and accuracy of the resettlement process. For instance, Powerex explained that it had filed two disputes regarding CAISO's assessment of surcharges and that CAISO had repeatedly failed to provide Powerex with information to independently verify that the charges were correct.[46] Other parties similarly expressed concern that the information that had been provided to them was insufficient to allow them to determine whether the charges assessed against them were accurate.[47]

The August 2019 Order neither meaningfully acknowledges nor responds to these concerns. The Commission's failure to provide any meaningful response to the substantive concerns raised by Powerex and other commenters renders the Commission's decision arbitrary and capricious.

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[46] Motion of Powerex Corp. to Intervene and Submit Comments, Docket No. EL14-67-000 (filed July 7, 2014).

[47] Motion to Intervene and Comments in Support of Complaint of Morgan Stanley Capital Group, Inc., Docket No. EL14-67-000 at 2-3 (filed June 24, 2014).

If CAISO's resettlement process is allowed to stand, then market participants must be given the information necessary to verify that the amounts assessed against them are correct and a reasonable opportunity to raise any disputes concerning the accuracy of these charges. As Powerex explained in its earlier comments,

> [M]arket participants' ability to verify the accuracy of these specific charges is . . . important considering the (1) size of the market reallocation as a whole; (2) size of charges to some market participants such as Powerex; (3) length of time that has passed since the activities upon which the charges are based occurred; and (4) the CAISO's own admission of a $22.9 million error in its initial calculations of the market reallocation.[48]

E. The Commission Should Grant Rehearing Of Its Directive To CAISO To Require The Payment Of Interest

More than a decade after the close of the purported refund period at issue in this proceeding, the Commission has now determined that Powerex and other market participants must pay interest on the surcharges that it previously held were wrongly assessed to them in the first place. Assuming that market participants will be required to pay interest through the date that additional surcharges are collected, the result will be that Powerex and other market participants may be required to pay interest *for more than a 15 year period*.

There is no requirement that the Commission order the payment of interest. As the courts have recognized, whether to require the payment of interest is a matter of equitable discretion.[49] Indeed, both the Commission and the courts have

[48] Powerex Comments at 9.

[49] *Estate of French v. Fed. Energy Reg. Comm'n,* 603 F.2d 1158 (5th Cir. 1979).

waived the payment of interest where warranted given the circumstances of the case at issue.[50]

The Commission's directive to CAISO to require the collection of interest—particularly when market participants have been unable to verify the accuracy of the initial charges assessed against them-—is inequitable. As the Commission specifically acknowledged in its 2016 Order, those market participants that were assessed surcharges "were not responsible for the unjust and unreasonable cost allocation the Commission initially accepted and then later modified."[51] Similarly, these market participants are not responsible for the significant delays that have been experienced in this proceeding. Subjecting these market participants to additional surcharges in these circumstances is highly inequitable.

Nor has the Commission articulated a satisfactory basis for concluding otherwise. The Commission merely asserts that "it is appropriate in this case to require interest" and that "interest is simply a way of ensuring full compensation."[52] Other than these conclusory statements, however, the Commission does not explain why requiring the payment of interest is equitable in these circumstances. If the Commission believes that requiring the payment of interest is equitable in these circumstances, then it must "fully articulate the basis for its decision" and explain how it weighed the relative equities between the parties when coming to this decision. The Commission's reference to its purported "general policy" of

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[50] *See, e.g., New England Power Pool,* 95 FERC ¶ 61,449 (2001); *Panhandle Eastern Pipe Line Company*, 69 FERC ¶ 61,048 (Oct. 14, 1994); *Transcontinental Gas Pipe Line Co.*, 71 FERC ¶ 61,108 at 61,362 (1995).

[51] August 2019 Order at P 23.

[52] *Id.* at P 28.

requiring the payment of interest does not relieve the Commission of its obligation to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[53]

Moreover, none of the cases cited by the Commission provide a basis for finding that equity requires the payment of interest in this case. Notably, the cases cited by the Commission in which the court or the Commission determined that the payment of interest was required[54] involved circumstances where record evidence demonstrated the entities required to pay interest had overcharged their customers[55] or had received money in error.[56] Requiring the payment of interest in those cases supports the principal purpose of charging interest, to "reflect the benefits which were available to companies which collected excessive rates."[57] In this case, however, the record evidence fails to support any such conclusion.

The Commission seems to suggest that the only factor weighing in favor of waiving any interest obligation is the slow pace of this proceeding. Yet, the Commission fails to address any of the numerous other factors that support

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[53] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168 (1962)); *Port of Seattle*, 499 F.3d 1016, 1035 (9th Cir. 2007) ("an agency must account for evidence in the record that may dispute the agency's findings") (citing *Universal Camera Corp. v. Nat'l Labor Relations Bd.*, 340 U.S. 474, 488 (1951)).

[54] The Commission also cites *Southeastern Mich. Gas. Co. v. Fed. Energy Reg. Comm'n,* 133 F.3d 34, 43-44 (D.C. Cir. 1998). Notably, however, in that case the court did not determine the payment of interest was appropriate. It merely found that the Commission had failed to explain why it had declined to order interest. *Id.* at 43-44.

[55] *Anadarko Petroleum Corp. v. FERC*, 196 F.3d 1264, 1267 (D.C. Cir. 1999) (affirming Commission decision requiring payment of interest on overcharges by producers).

[56] *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 155 FERC ¶ 61,013 (2016).

[57] *Anadarko,* 196 F.3d at 1267.

waiving the payment of interest, including: this case does not involve overcharges; the Commission never ordered the payment of interest; and no party sought rehearing of the Commission's earlier orders on this issue.[58]

If the Commission does not grant rehearing and direct CAISO to immediately return the retroactive surcharges that were assessed to Powerex and other market participants, then it should, at a minimum, grant rehearing of its decision to require the payment of interest. Requiring CAISO to assess interest on the amounts already paid will only result in a further unnecessary resettlement process and will only serve to prolong an already complicated and protracted proceeding.

[58] The equitable factors noted in Section C.3 above equally apply to the decision whether to require the payment of interest.

IV. CONCLUSION

WHEREFORE, Powerex requests that the Commission grant rehearing of the August 2019 Order, as set forth above.

Respectfully submitted,

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On Behalf of Powerex Corp.

September 27, 2019

CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Commission's Rules of Practice and Procedure, I hereby certify that I have this day served a copy of the foregoing on all persons designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC this 27th day of September, 2019.

Stephen J. Hug
Stephen J. Hug

Document Content(s)